

**In the Supreme Court of
the State of Oklahoma**

No. 15851

WILLIAM REDFERN, *Plaintiff in Error.*,

vs.

AMERICAN CENTRAL INSURANCE COM-
PANY, a corporation, *Defendant in Error.*

Answer Brief of Defendant in Error

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This action grows out of a fire loss resulting from the "Tulsa Race Riot," which occurred in the City of Tulsa, Oklahoma, on the night of May 31st, and morning of June 1st, 1921. The Tulsa Race Riot fire, as shown by the record, destroyed practically all that part of the City of Tulsa, known as "Little Africa," which was inhabited by the negro population of Tulsa, and, located in the northeast part of said City, and north and east of the Frisco Depot. This section [2] constituted a negro city within the limits of Tulsa. They had their separate business district, mercantile stores, hotels, pool rooms, picture shows, cafes, drug stores, tailor shops, and other enterprises together with numerous office buildings occupied by negro lawyers, doctors, dentists and other professions.

On May 31st, 1921, a negro boy was arrested, and it became rumored that this negro boy would be lynched, that night. At about eight or eight thirty a large crowd of white people, men, women and children gathered about the court house, this crowd was estimated at several thousand. At about the same time the negro population in "Little Africa" assembled in, their business section on North Greenwood Avenue, and on Archer Street, armed with rifles and pistols, determined to prevent the lynching of the negro boy.

Some of the better negro citizens endeavored to stop the trouble and went to the court house, talked with the sheriff, and returned to their part of town and advised the armed negroes that there would be no lynching. William Redfern, plaintiff in this, action, a white man, closed his theater on North Greenwood Avenue at about nine o'clock [3] P. M., May 31st, 1921, and used his influence to prevent trouble, but without effect.

While the crowd was gathered at the court house, automobiles, filled with armed negroes, arrived there, and marched in squads to the court house, where Barney Cleaver, a negro, deputy, and the sheriff, induced them to return to the negro section. Several such groups of armed negroes arrived during the evening and finally, when the last were leaving, a gun was discharged and a white man was killed. The crowd dispersed and the negroes went back to "Little Africa". Hardware stores and pawn shops were broken into and guns and ammunition secured by the whites, who then started a war on the negro population of Tulsa. Shooting continued during the night and at about five o'clock A. M., on June 1st, 1921, at the sound of a whistle, a renewed attack was made on the negroes, which continued until about nine or nine thirty, A. M., June 1st, 1921.

The fire department was called out to extinguish certain fires in "Little Africa", at about two o'clock A. M., and two fire stations answered the alarms, one making two trips, and the other making three trips during the night, and both being stopped and ordered out of the negro section by [4] armed white men. The truck drivers from these fire stations estimated the number of armed white men at about one thousand, and stated that the streets were full and that guns were levelled on them and they were ordered out of that district. One testified that he was shot at and that the shot hit his truck. These truck drivers also testified that there was shooting between the whites and the blacks. One fireman testified that they put out three distinct fires at a hospital in the district, and that after daylight they were permitted to fight fire at a lumberyard and some coal cars that were burning.

After the shooting began, at about five o'clock A. M., June 1st, 1921, there was a general exodus of negroes towards the north limit of their district, and the properties of the negroes were set on fire, the first fires appearing on East Archer Street north and east of the Frisco Depot, and then fires would spring up in different places all over the negro district. During the afternoon of June 1st, 1921, some fifteen or twenty white men started up North Greenwood Avenue, from East Archer Street, and broke in the doors and windows of the buildings, and set the properties on fire. Prior to this, however, another band of armed white [5] men had visited each of the buildings and ordered out and taken out all of the negroes secreted therein, lined them up and marched them to the convention hall and the ball park.

Green E. Smith, a negro from Muskogee who had previously, built the Williams Theater on North Greenwood Avenue, had come to Tulsa to install or repair the ventilating system in the Williams Theater, and went to work that morning at five o'clock, and was at the Williams Theater when the attack started early in the morning, and remained in this theater until all the buildings on Greenwood Avenue, including the Williams Theater, had been set on fire, and testified that he watched armed white men break open the buildings on North Greenwood and that these men would enter the building and when they would come out that he would then see smoke, followed a little later by flames. He testified that there were fifteen or twenty white men that set these properties on

North Greenwood Avenue on fire and that he saw these white men break open the front end of the "Dixie Theater", one of the properties involved in this suit, and that he saw the men enter the building and that when they came out, the "Dixie Theater" was on fire. Then he saw these same [6] men break open and enter the "Red Wing Hotel" one of the properties involved in this suit, and that when they come out the building was

on fire. He testified that he saw these same men break and enter the "Williams Theatre" and set it on fire, and that after the "Williams Theater" was set on fire, he came out and that these men, fifteen or twenty, or more, were armed and that some of them had no police badges and sheriff's badges, and that they searched him and stole from him \$50.00 in cash and then turned him over to other men and he was taken to the convention hall, and that afternoon he went to Muskogee.

An examination of the photographs, at page 738, of the record, will give the court some idea as to how North Greenwood Avenue in "Little Africa" now appears, and will also show the court how it appeared immediately following the riot. The map at record page 714, shows (within the red line) the area, destroyed by the Tulsa Race Riot fire and the black lines show the location, on North Greenwood Avenue, of the properties of William Redfern, one the "Dixie Theatre" and the other "The Red Wing Hotel." The Williams Theater faced down Brady Street, and was located on Lot 8, Block 47.

[7]

Not, only was the property owned and occupied by negroes destroyed by fire, but many white men and negroes were killed during this riot, and we believe that the "Tulsa Race Riot" was the largest and most terrible riot this country has ever experienced, surpassing in number of deaths and amount of property destroyed by fire the "East St. Louis Race Riot." An examination of the record in this case will disclose in detail the facts as outlined herein.

This action was commenced on May 31st, 1922, by the plaintiff in error, William Redfern to recover \$19,000.00, the amount of three certain fire insurance policies, two of the policies totaling \$9,000.00, covering on the "Dixie Theater" and the third policy covering on the "Red Wing Hotel" to the amount of \$10,000.00. Each of the policies were the regular Oklahoma standard form policy, as required to be used by statute and the form of which is set out in Section No. 6767, *Compiled Oklahoma Statutes*, 1921, and no other form of policy can be used in covering buildings of this kind. These policies each provided as follows:

"American Central Insurance Company in consideration of the stipulations herein named, and of \$ ----- premium, does insure William Redfern for the term of -----[8] years against all direct loss or damage by fire * * * except as hereinafter provided * * *."

In the body of each of these policies, appears what is known as the "Riot Clause" which is as follows:

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

The plaintiff, William Redfern, alleged in his petition that he did not know the cause or origin of the fire and further alleged that the fire was not caused by any of the causes, exempted in the policies, (Rec. p. 2.) and attached to his petition, consisting of three separate causes of actions, a copy of each of the policies. Exhibit "A" policy No. 6112 for \$5000.00 on "Dixie Theater". Exhibit "B" policy No. 6205, for \$4000.00 on "Dixie Theater". And Exhibit "C" policy [9] No. 6122 for \$10,000.00 on "Red Wing Hotel". Each policy had attached a standard form mortgage clause making loss, if any, under the policy payable to "Farm and Home Savings and Loan Association" as mortgagee.

To this petition and each alleged cause of action the defendant (Rec. p. 58) filed its answer, wherein it set up the mortgage clause and asked that the mortgagee be brought into the case as a defendant and required to set up what interest it had or claimed in the suit. As to each policy and the property covered thereby the defendant further answered that the fire was caused, either directly or indirectly by the Tulsa Race Riot and alleged and set up the Riot clause of the policy. (Rec. pp. 58 to 75)

The plaintiff replied by general denial. (Rec. p. 76)

The defendant moved for judgment on the pleadings (Rec. p. 85) and objected to the introduction of any evidence for the reason that the petition failed to state a cause of action (Rec. p. 86). Both motion and objection were overruled and exceptions saved. This motion and the objection to the introduction of evidence was based upon the fact that each policy contained a [10] standard form mortgage clause and the mortgagee was not a party to the action. The contention being that under the standard form mortgage clause, loss, if any, was payable to the mortgagee, and therefore the mortgagee was not only a proper party but was a necessary party to the action, and under the terms of the policies and the mortgage clauses the plaintiff, William Redfern could not maintain the action in his own name without joining the mortgagee either as plaintiff or as defendant. J. A. Hamil the Tulsa representative of the mortgagee when asked (Rec. p. 165)

if the mortgagee claimed any interest in the suit, answered: “I don’t know, I can’t speak for the company”, and when asked if he had authority to make an assignment of these policies for the mortgage, he answered (Rec. p. 171) “as local agent I have no right to involve the company in any way.” Mr. Hamil also identified letters between Aby & Tucker, Attorneys for Redfern and the witness, also letters from mortgagee to witness, and at the close of plaintiff’s evidence a demurrer was interposed thereto by the defendant upon the theory that the liability, if any, under the, policies was to the mortgagee and not to Redfern and also upon the theory that the plaintiff had af-[11]firmatively shown by his testimony that the fire which destroyed his property was caused either directly or indirectly by the “Tulsa Race Riot” (Rec. p. 325) which demurrer to the evidence was overruled and exceptions allowed.

The defendant then introduced its evidence and testimony, showing in detail the facts and circumstance leading up to and during the riot, and proved that the specific properties covered by the three policies, and owned by Redfern, were set on fire by rioters on the morning of June 1, 1921. The testimony of all witnesses both for plaintiff and defendant, will be abstracted in this brief, which evidence and testimony clearly shows that the fire which destroyed the properties here involved was caused by the “Tulsa Race Riot.”

The plaintiff then offered evidence, as rebuttal, but such alleged rebuttal testimony only went to the time of the fire, and not to the cause or origin of the fire.

With the record in this condition—showing by all the evidence that the fire which destroyed the plaintiff’s property was caused by the “Tulsa Race Riot”, —and the plaintiff without offering any evidence to show an *intervening cause* or origin of the fire or in anywise raising an issue as to [12] the cause or origin of the fire, rested his case, whereupon the defendant moved the court for a directed verdict (Rec. p. 670 to 679) which motion was by the court sustained, and the jury instructed to return a verdict for the defendant which verdict was by the jury signed and returned into court. Exceptions were saved by the plaintiff.

Thereupon a short recess was taken after which the plaintiff by his counsel, Mr. Hayson, filed a motion for new trial (Rec. 681) and *requested* the court to overrule his motion for new trial, whereupon this record was made (Rec. p. 680).

MR. HAYSON:

“Let the record show motion for new trial filed, considered by the court and overruled:

THE COURT:

And the same is filed, and let the same be overruled.

MR. HAYSON:

To which the plaintiff excepts, etc., (notice of appeal and extension of time etc.)”

A Journal entry was thereafter prepared, signed by the trial judge, and filed in the case. (Rec. p. 778).

This action is brought to this court upon petition in error and case-made. The brief of the [13] plaintiff in error does not set forth the assignments of error relied upon and under the rules of this court and the decisions applicable thereto the appeal should be dismissed.

The appeal should also be dismissed for the reason that the plaintiff in error requested the court to overrule his motion for new trial and having requested such action of the court, is deemed to have consented thereto and cannot now be heard to complain of the action of the court in overruling the motion for new trial.

It is our contention that the trial court did not err in sustaining the motion of the defendant for a directed verdict and that under the evidence in this case reasonable men could not differ as to the cause and origin of the fire in question, and that all reasonable men would say, from the evidence in this cause, that the fire in question was caused directly or indirectly from the “Tulsa Race Riot.” It is our further contention that where the plaintiff in this case testified on direct examination that he did not know the cause of the fire, and on cross examination admitted that”the “Tulsa Race Riot was the cause and origin of this fire, and then the defendant established by positive evidence that the fire resulted, directly or indirectly, from the [pages 14 -15 missing]

[16]BRIEF AND ARGUMENT OF DEFENDANT IN ERROR

The plaintiff in error, at page 26 of his brief, sets forth his first proposition as follows:

“The court erre d in sustaining the motion of the defendant in error for a directed verdict.”

This proposition of necessity requires a review of the testimony in the case. and as we cannot agree with counsel for plaintiff in error as to their abstract of the testimony and statement of fact, we submit the following as a true and correct abstract of the evidence and testimony as shown by the record, which of necessity will be of great length.

Counsel at page 93 of their brief make the statement, “No witness in the entire case testifies that they know how the plaintiff Is buildings caught fire; the inference that they caught fire by reason of the

disturbance being purely of a circumstantial character.” The testimony of Green E. Smith, a negro, (Rec. pp. 435 to 450) is positive to the effect that he saw 15 or 20 armed white men set the two buildings on fire. His testimony [17] will be abstracted in detail, in the order as given at the trial.

Only two witnesses testified for the plaintiff, in chief, these were, William Redfern, the plaintiff, and A. J. Hamil, local agent for the mortgagee.

Counsel for plaintiff in their opening statement to the jury, (Rec. p. 82), made this statement clearly showing their contention, to-wit:

“That since these policies were in force and since the destruction was by *fire of unknown origin*, that he (meaning plaintiff) is entitled to recover the face of the policies on this loss.”

It is our desire that the court keep in mind at all times that plaintiff contended throughout the trial that the fire was *of unknown origin*, and never suggested or offered any proof as to the origin of the fire but contented himself by saying that he, plaintiff, did not know the origin of the fire, but admitted on cross-examination that the origin thereof was the riot.

WILLIAM REDFERN

The plaintiff testified in his own behalf substantially as follows, direct examination;— (Rec. P. 87 to 321)

“That his name was William Redfern, [18] that he lived at 416 S. Madison, Tulsa, Oklahoma, and had resided in Tulsa since 1907. That he owned the ‘Dixie Theater’ on lot one block 46 on north Greenwood Ave., in Tulsa; he identified exhibit ‘A’ as a \$5000.00 insurance policy issued by defendant and covering on this property, No. 6112; he identified exhibit ‘B’ as a \$400000 insurance policy issued by defendant and covering on the same property, No. 6205; the policies were offered in evidence, (Rec. p. 88) and each was an Oklahoma Standard Form Policy and each contained the Riot clause.

The witness then identified a map or Blue print—exhibit ‘C’—as a map of the colored district, which was offered and received in evidence at page 89 and is incorporated in the record at page 714.

He then identified exhibit ‘D’ as a policy for \$10,00000 issued by defendant and covering on the ‘Red Wing Hotel I No. 61.22, which was later offered and received in evidence. This policy also contained the Riot clause.

The witness marked on the map, exhibit ‘C’, the ‘Dixie Theater’ and the ‘Red Wing Hotel’, both located on north Greenwood in the negro district.

He stated that the policies were, delivered to the loan company at his request; that he paid the premiums; that the policies were in full force on June 1, 1921; he testified that, the theatre had a seating capacity of 1000, further detailed the construction and size of that building; that this building, the 'Dixie Theatre' was destroyed by fire on June 1, 1921, at about 10:30 or 11:00 o'clock A. M., [19] that there was some salvage brick, but that the brick had no value; that he had rebuilt the 'Dixie Theater' as a three story building and different from the one destroyed; over defendants objections he testified the building was worth between \$35,000.00 and \$40,000.00 (Objections. Exceptions. Rec. p. 96) (on pages 98-99 the witness showed himself not qualified to place a value on the building, and we again objected and saved our exceptions) He testified that he made proof of loss which we admitted (Rec. p. 100.) He testified that he had not been paid anything by reason of the fire but stated (Rec. p. 100) that the defendant had tendered him his unearned premium.

He then described the 'Red Wing Hotel' and its construction, and over our objections testified that the value of that building was \$40,000.00, and of brick and stone construction; that he had paid the premium on the policy covering the hotel No. 6122; that at his request this policy was delivered to the mortgagee, Farm and Home Savings and Loan Association; that the policy was in force June 1, 1921; that he owned the property; and that the Hotel was destroyed by fire about 11:45 or 12:00 o'clock on the morning of June 1, 1921.

He testified (Rec. p. 100) that he saw the properties burn; that he did not know how they caught fire.

That he demanded payment of all policies and proved up his loss, but had not received any money under the policies. That the build [20] ings were total loss; that he had rebuilt the Hotel of solid brick.

He testified (Rec. p. 105) that the policies came into his possession at the time he re-financed his loan, and gave the same mortgagee a new mortgage, and that Mr. Hamil delivered the policies to him at that time; that the properties as rebuilt are covered by a mortgage. He testified that the old mortgages had been discharged."

Cross-Examination

(Rec. p. 108)

Q. "Where is the release?"

A. I have got the policies.

Q. Where is the release of the mortgage?"

A. I don't know.

Q. You never got one at all, did you?"

A. I did not."

He testified that in refinancing the loan the amount due under the mortgage described in the mortgage clause was included in the new mortgage to the same company, and that, he owed the mortgagee more at the time of the trial than he did on June 1, 1921; he stated that he did not know of ever receiving an assignment of the policies from the mortgagee, Farm & Home Saving & Loan Association, but stated that he might have one at home and agreed to produce the assignment, if he had one, and if he didn't have one to produce A. J. Hamil the local agent of the [21] mortgagee. The local agent Hamil was produced but no assignment of these policies by the mortgagee to Redfern was ever produced or proven to exist. Redfern testified that the mortgage held by the mortgagee at the time of the trial was being foreclosed, and that the amount due on June 1, 1921 was included in the foreclosure suit. (Rec. p. 111112) During plaintiff's examination A. J. Hamil was called as a witness, after which Redfern further testified."

A. J. HAMIL, Agent Mortgagee

Rec. p. 165.

"Mr. A. J. Hamil local agent of the mortgagee, Farm & Home Savings and Loan Association, was called as a witness for the plaintiff, Rec. p. 165, during the cross-examination of

plaintiff, and as his testimony went only to the conditions and existence of mortgage, we desire to incorporate the abstract of his testimony as this point.

He testified that his name was A. J. Hamil; that he lived at Tulsa; that he was the representative of the Farm & Home Savings & Loan Association and had been such agent for eleven years; that he recalled a business transaction with William Redfern, the plaintiff relative to mortgages on his property on Greenwood Street. He then identified a letter of May 21, 1922, from Aby & Tucker attorneys for Redfern which was offered and received in evidence as exhibit 'E', and is found at page 732 of the record, and is as follows: [22]

"Tulsa, Oklahoma,
May 20, 1922.

A. J. Hamel, Esquire,
City.

Gentlemen:

Our client, Mr. William Redfern contemplates instituting suit against the several insurance companies having policies on his property in that part of Tulsa which was destroyed by fire on June 1st last.

Inasmuch as the Farm & Home Savings & Loan Association was assignee of the beneficial interest under said policies it would be highly desirable that they be joined as parties plaintiff with Mr. Redfern, since by our Statutes it is provided that an action must be maintained by the real parties in interest, and we desire the consent of your company to make them parties plaintiff. Of course any costs will be borne by Mr. Redfern, which naturally, being plaintiff, he will find it necessary to pay as the case proceeds, and the loan company could in no way be involved in any difficulty by being a party.

Since these actions must be instituted before the close of this month, we would thank you to advise us at as early a date as possible that the loan company authorizes us to make them parties plaintiff in the actions, without any obligation on their part for costs or attorneys' fees.

Yours truly,
Aby & Tucker,
W. F. Tucker."

[23]

He then identified a letter of May 25, 1922, from the mortgagee to Mr. A. J. Hamil as agent, Exhibit "F" found at page 734 of the record, and which letter is as follows:

"Nevada, Mo.

May 25, 1922.

Mr. A. J. Hamel,
Tulsa, Okla.,

Dear Sir:

With reference to the suit which Mr. William Redfern contemplates instituting against the insurance company having policies on his property in that part of Tulsa, which was destroyed by fire last June, we cannot see wherein the Farm and Home has any interest in the property, nor in the suit.

The loan which Mr. Redfern had on the property at that time has been paid off, which releases any interest which we may have had. We will be glad to assign to Mr. Redfern our interest in the policies, and to any proceeds that may be derived from any suit instituted to collect on same. We believe that such would be sufficient for purposes of suit and if Mr. Tucker agrees, he may send us an assignment and we will execute and return same at once.

We are returning herewith for your files, Mr. Tucker's letter which you forwarded to us.

Yours truly,
Boyd Ewing,
Attorney.

[24]

He then identified a letter of Nov. 23, 1921Y as exhibit "G" from the mortgagee to Tulsa Security Company, which letter is as follows (Rec. p. 735)

"Nevada, Mo., November 23rd, 1921.

Tulsa Security Company,
Tulsa, Oklahoma.

Gentlemen:

Herewith check No. 27486 in favor of Wm. Redfern and Waite and Hamel, Agents for \$4,805.19, being the balance due on \$17,000.00 of loan to Mr. Redfern under our certificate No. 81081-2 with pass book showing November and December payments credited and abstract returned for you to show the payment of all taxes against this property at the time of closing the loan. This remittance is made in line with agreements with Mr. Levens that we pay \$5,000.00 out on the loan at the time of closing and the balance when convenient, this leaving an even \$5,000.00 yet due on the loan. We have deducted \$12,194.81 covering the repayment of the old loan as per statement enclosed and hand you herewith the old mortgage and note with release deed for same, which, release please have filed of record and shown on the abstract when it is returned to us.

With early return of completed abstracts, please furnish the enclosed receipt for proceeds of loan, recorded mortgage and receipts in full for labor and material. Please also look after the matter of insurance, the insurance in the [25] old loan having been returned to you in connection with fire loss.

Yours truly,

Farm and Home S. & L. Association.

By A. W. Ferney.”

‘The witness then identified exhibit “H” a receipt from Redfern to him for the three insurance policies, and stated that be delivered to Redfern the policies: He was asked (Rec. p. 168) if he had delivered the policies to Redfern at the request of the company, and he answered, “At the request of Mr. Redfern, as far as I know”.

That he had negotiated the new loan and had taken out new insurance.

He was then asked this question, (Rec. p. 168).

Q. “Do you or your company claim any right, title or interest in these policies which are sued on in this suit, and referred to in this correspondence?

A. I don’t know, I can’t speak for my company.”

He testified that he still represented the mortgagee as local agent.

Cross-Examination of MR. HAMEL

The witness testified, (Rec. P. 170)

Q. “ The company has never executed an as-[26] signment of these policies to Mr. Redfern has it?

A. I couldn’t say, the letter stated that they would, but whether they did or not I do not know.

* * * *

Q. Are you authorized to make an assignment?

A. No, I couldn’t assign the policies.

Q. And you don’t know whether there ever .has been an assignment or not?

A. *As local agent I have no right to involve the company in any way.*”

Thereupon and at Rec. p. 171 we moved the court to strike the exhibit “E”, “F”, “G” & “H” which motion was overruled and exceptions allowed, and again at Rec. p. 172, we moved to exclude two letters.

The witness testified on redirect that he operated as Tulsa Security Company.

From this testimony it appears that there was a renewal of the old mortgage and that no assignments of the policies had been made, and hence the title to, the policies remained in the Farm & Home Savings & Loan Association and Redfern could not maintain this action in his own name. It appears that he requested authority [27] from the mortgagee to join it in the action but it did not grant its consent. It further appears that the mortgagee wrote its local agent, Hamil, that it would be willing to execute an assignment if Aby & Tucker would prepare same. There is no evidence that the contents of this letter was ever communicated to Redfern or his attorney and there is no proof that this offer to assign was ever accepted by Redfern.

The letters amount only to this, a request to join the mortgagee as a party plaintiff, a refusal so to do by the mortgagee, and a letter to Hamil, the local agent that the association was willing to assign the policies, and no acceptance by Redfern thereof, not even knowledge of such offer on the part of Redfern.

“WILLIAM REDFERN
Resumed Rec. p. 112

The plaintiff further testified on cross examination, (Rec. p. 112), as follows:

Exhibit “C” was handed to witness, which is, a map of the negro section of Tulsa, known as “Little Africa” and appears at page 714. The witness, Redfern, then located on the map, the “Dixie Theatre” in block 46, facing on Greenwood and the Red Wing Hotel in block 23, cornering on Greenwood and Brady, and the map, Exhibit “C” was marked in lead pencil showing the location of these two proper-[28]ties. The witness testifying that the interurban railroad passed the Red Wing Hotel, cutting the corner at Greenwood and Brady.

“The witness testified that immediately south of the theatre was Earl Sneed’s property and immediately south of that was O. W. Gurley and immediately south of O. W. Gurley was Dr. Bryant’s property and on the corner south of Dr. Bryant’s property was the Williams confectionery and that on the north side of the Dixie Theatre was the W. H. Smith building and that north of that on the corner was the Bill Martin property, a two story brick building and that across the street north of the Martin property was the Red Wing Hotel. That immediately opposite the Red Wing Hotel and across North Greenwood Avenue there was a one-story frame house. That immediately north of the frame house was the Stratford Hotel on the corner. That immediately south, going back toward Archer Street from this frame house was the Williams Theatre, owned by Lula Williams and that this theatre faced north Brady Street. Considerable testimony was then given relative to the exact distance that the Williams theatre was south of the Red Wing Hotel. Witness testifying that that distance was about sixty feet, but on the opposite side of the street, and that the Williams theatre was about 175 or 200 feet north of the Dixie Theatre but on the opposite side of the street.”

after ter adjournment on April 17, 1924 (R. 121) cross-examination of William Redfern. was con-[29]tinued, at which time he testified in substance as follows:

“Exhibit 1 was identified by the witness as a photograph and offered and received in evidence, showing the condition of North Greenwood looking north from Archer Street. The present Williams Theatre is located with figure ‘1.’ The Dixie Theatre is located with the figure ‘2’ and the Red Wing Hotel is located with the figure ‘3’. These buildings were rebuilt after the ‘Tulsa race riot fire.’ Mr. Redfern (R. 122) testified that they were erected on the site of the old buildings which were destroyed on June 1, 1921.

Exhibit 2 a photograph, was admitted in evidence (R. 124) after identification by Mr. Redfern, showing the conditions on North Cincinnati Avenue immediately following the fire and total destruction of the property on that street.

Exhibit 3 (R. 125) was handed to the witness and this question asked:

Q. “Mr. Redfern, I now hand you photograph marked Exhibit 3, showing the conditions, purporting to show the conditions at the corner of Archer and Greenwood immediately

after the riot, and will ask you to state if that is a true representation of the conditions as they then existed?

A. Ask that question again.

Q. Read the question to him. (Question read by reporter.)

A. *How soon after the riot?*

[30]

Q. A few days after the riot?

(The trial court then stated: The last part of your question is perhaps assuming something. You say I 'after the riot?')

Q. All right, we will say a few days following June 1st, 1921?

A. You want to know if that is a fair representation?

Q. Yes, sir.

A. So far as the territory it covers and the manner that it covers it.

Q. It is, is it?

A. Yes, sir.”

Thereupon Exhibit 3 was offered and received in evidence.”

We have set forth the above questions and answers in order that the Court may know that the plaintiff in this action, William Redfern, knew and termed the fire of June 1st, 1921 at Tulsa as a “riot.”

“The witness was then handed Exhibit 4 (R. 127), a photograph showing conditions at the corner of Archer and Greenwood, which was received in evidence. (R. 128.)

Exhibits 5, 6 and 7 were handed to the witness and upon statement that he was not familiar with that locality they were not offered in evidence.

Exhibit 8 (R. 134) showing conditions as they existed on the west side of Greenwood [31]Street at Archer immediately following the Tulsa race riot was offered in evidence and being identified by the plaintiff was received by the court.

Exhibit 9 (R. 136) being identified by the plaintiff was offered in evidence and received by the court. This showed the conditions of the Tulsa Star building immediately following the Tulsa, race riot.

Exhibit 10 (R. 138), showing the conditions on the west side of Greenwood as they existed a few days following the Tulsa race riot, was offered and received in evidence, though the plaintiff at first did not identify this exhibit as a true representation because he was unable to locate where Brady Street came into Greenwood, yet later in the testimony he identified the exhibit as a true representation of the conditions and which embraced the Dixie Theatre and Red Wing Hotel, as they were immediately following the Tulsa race riot.

Considerable testimony is given as to the identification of Exhibit 10, which it is unnecessary to set forth herein, that exhibit being received in evidence Record page 173.

At Record page 155 the witness testified that the building with the sign ‘Dixie Theatre’ was in fact the Star Building. The Dixie Theatre being 65 feet south of that building, and the Red Wing Hotel 60 feet north of the Star building.

The plaintiff, William Redfern, further testified (R. 158) that he was operating the Dixie Theatre in the negro section of Tulsa on June 1st, 1921; that he had his office upstairs over the Dixie Theatre and had been running the Dixie Theatre and had had his [32] his office there for a period of three years. That he never operated the Red Wing Hotel, was the owner of the building, but not the furniture; that on the night of May 31st, 1921, he was operating the theatre and closed the theatre about nine o'clock or nine thirty that night, and at page 160 was asked this question:

Q. "Why did you close it?"

A. Because there was a colored girl come into the theatre and she was going from one person to another telling them something, I don't know what she was saying, and I opened the door and looked out in the street and seen there was several men in the street.

Q. What were they doing?

A. They was just in the street, part of them, talking and bunched up, and I asked someone what was wrong and they said there was going to be a lynching, or that that was the reason they came over there.

Q. Then what, did you do?

A. I closed the theatre, put the people out of the house, and drove to the Police Station.

Q. What did you do over there?

A. Didn't do anything.

Q. Where did you go from there?

A. From there to the Court House.

Q. What did you do at the Court House?

A. Seen Barney Cleaver standing there on the steps; he asked me if I wouldn't drive [33] back over to the colored section and try to prevent those people from coming up town.

Q. Did you do that?

A. I did.

Q. Were you able to prevent them from coming up town?

A. I don't think so.

Q. At the Station, Police Station, did you see any crowds of men there?

A. Well, there was a bunch of men standing out in front of the station, standing across the street.

Q. About how many did you see?

A. Well, I don't know anything I would be able to judge, it would be merely a guess, because I don't know.

Q. Give us an estimate on it.

A.. Oh, that would be hard to do.

Q. Was there a hundred?

A. I don't know.

Q. Two hundred?

A. I don't know.

Q. There was a big crowd there, wasn't there?

A. That would depend on what was on both, sides of the street, but I would say there, was possibly fifty or sixty men out in front of the Police Station.

Q. They were all armed, weren't they?

[34]

A I didn't see anybody armed.

Q. The negroes were armed?"

(No answer.)

At page 174, after the testimony of Mr. Hamil, the witness identified Exhibit 10, which was offered and received in evidence and all locations were again discussed in the testimony.

At page 175 he was asked these questions:

Q. "The negroes that were out in front of the Dixie Theatre when you went out there were armed, were they not?"

A. On the night of May 31st?

Q. Yes.

A. Yes, sir, part of them were.

Q. And the white men that you saw at the Police Station when you left the negro section and came up there on that same night, they were also armed, or part of them, were they not?

A. I did not see that.

Q. You didn't see any that were armed?

A. No, Sir.

Q. After you left the Police Station that morning; the Central Police Station, wasn't it?

A. Yes, Sir, down here on Third Street, or Second Street rather.

Q. You went to the Court House then, didn't you?

[35]

A. Yes, Sir.

Q. And were there any people gathered there around the Court House at that time?

A. Yes, Sir, there was quite a few people around here at that time.

Q. About how many would you say in your judgment?

A. Well, I don't know, possibly one hundred or possibly two hundred; that is up and down the streets and in that block on Boulder.

Q. Were you at the Court House when any negroes came up here, armed negroes came up here?

A. No sir, I think I was there prior to that time; in fact, I know I was, there might have been some came up ahead of me but I didn't see those.

Q. And what did you do when you got here at the Court House?

A. I seen Barney Cleaver standing there on the steps of the Court House there, him and O. W. Gurley and Ed Howard. I went up and spoke to Barney and he asked me if I wouldn't drive back over to Greenwood and try to prevent those negroes from coming up town.

Q. Did you drive back?

A. I did.

[36]

Q. And in going back what course did you take?

A. I don't remember where, I don't remember what street I took from the Court House to Archer, but I went on out Archer and I don't remember whether I went down Main Street to Archer or whether I went down Cincinnati Street to Archer.

Q. And in going back did you meet any colored men coming toward, the white section of town, armed?

A. Oh, I seen some—I didn't see any colored men coming towards town.

Q. They hadn't left the negro section yet?

A. I didn't see none.

Q. And when you got back to the negro section, what did you do when you got down there?

A. When I got back to the negro section the street was full of people there.

Q. Negroes?

A. Yes, sir.

Q. And were they armed?

A. A number of them.

Q. And what were they doing?

A. Well, they didn't seem to, be doing anything in particular, only standing in groups talking and seemed to be considerable excitement.

Q. What did you do?

[37]

A. I advised them not to go up to the Court House.

Q. Who did you give that advice to?

A. To the bunch in general.

Q. You talked to all of them?

A. None in particular.

Q. And were those that you talked to armed?

A. I don't know whether they were or not. I was talking in a general conversation to all of them.

Q. Some of them were armed and some were not?

A. Yes, sir, that is correct.

Q. Were they in automobiles, any of them?

A. Well, I think some of them were, and there was automobiles along there along the street and no doubt there was some of them in automobiles.

Q. And did you prevail upon them not to come to the Court House?

A. I told them that they had better not go up to the Court House, that we had the assurance from the people up there that there was not going to be any lynching.

Q. What did they say to that?

A. I don't remember what they did say to it, but they didn't go on home.

Q. They didn't listen to you, did they?

A. No sir.

[38]

Q. And they did come on up to the Court House, didn't they?

A. I presume they did, I didn't go back to the Court House after that.

Q. Did any of them leave the negro section about the time you left there?

A. Well, I don't know, *I was pretty busy leaving myself*, I wasn't paying much attention to those fellows.

Q. They didn't listen to you and you got out of there, didn't you?

A. I don't know whether they listened to me or not.

Q. You didn't like their attitude as you talked to them, so you left?

A. They didn't disperse and go home.

Q. I say, you didn't like their attitude so you got out of there, didn't you?

A. *I certainly did.*

Q. And as you got out * * * withdrawn. You got out of there for your own safety, didn't you, Mr. Redfern?

A. I did not feel that I had any particular business there after I had closed my business.

Q. And it was because of the desire to put yourself in a place of safety that you left, wasn't it?

A. No, I wasn't afraid, if I had been I wouldn't have driven back over there.

[39]

Q. You didn't care to stay there, did you?

A. I didn't have any further business there, the business was closed.

Q. They were all angry, weren't they?

A. No, I couldn't say that.

Q. Excited?

A. I could say they were excited.

Q. And they were armed to come to the court house, weren't they?

A. I couldn't say that, I don't know what they were armed to do.

Q. Well, you talked to them, didn't you?

A. I just drove up there and advised them not to come up, that there wasn't going to be any lynching; *I didn't carry on a prolonged conversation with any of them.*

[40]

- Q. You just went down there and told them that and turned around and got out?
- A. Just after I did that I drove down and turned around and drove up in front of the Baker Drug Store on Main Street.
- Q. And when you got back up town did you notice any more white men gathering around, as you were in front of the Baker Drug Store?
- A. I didn't see any more white men on the street than usual.
- Q. Did you go past the station again?
- A. No, I drove up in front of the Baker Drug Store, which is just around the corner from the station, on Main.
- Q. You didn't come to the Court House again after that?
- A. No, sir.
- Q. You don't know what happened up at the Court House?
- A. I do not.
- Q. Except from what you read about it and people told you?
- A. That is all, I don't know that because I didn't see it.
- Q. You know that but you didn't see it?
- A. I know that but I didn't see it.
- Q. You heard the shooting that took place up around the Court House here?
- A. I heard some shots fired, several shots while I was standing in front of the Baker Drug Store.
- Q. Where did they appear to you?
- A. They were apparently in the direction of the Court House.
- Q. How long was that after you had left the negro section?
- A. That was possibly twenty or twenty-five minutes, might have been a little bit longer.

- Q. Did you see any negroes leaving the dis-[41] trict about the time you left, or immediately before?
- A. Well, I couldn't say that I did or did not, I don't know whether I did or didn't.
- Q. Were there any cars filled with negroes followed you out of the district?
- A. No, there was none following me at all.
- Q. You came up Archer, did you?
- A. Came up Archer, I had my son in the car.
- Q. And came up Archer?
- A. Came up Archer, I don't remember whether I came up Cincinnati or whether I came up Main Street from Archer.
- Q. After you heard that shooting which apparently was over at, the Court House, where did you go?
- A. After I heard that shooting which was over at the Court House, I went directly home.
- Q. And where did you live?
- A. 416 South Madison.
- Q. And how far is that in blocks f rom the colored section of town?
- A. Oh, that is quite a ways, it is on the corner of Fifth and Madison Streets, East.
- Q. Just approximately how far would it be?
- A. Well, it is, I don't know in blocks, but [42] I would judge that it was three quarters of a mile.
- Q. Three quarters of a mile?
- A. Right around that, it might be a little farther.
- Q. And in leaving the Baker Drug Store and going home, did you pass the Court House?
- A. No, sir.

Q. In going home from the Baker Drug Store, did you pass any white men that were armed or any negroes that were armed?

A. No, sir, if I did I don't know it.

Q. And did you remain at home all night?

A. Yes, sir.

Q. And during the night you heard the shooting that was going on, didn't you?

A. No, sir, I didn't hear any shooting, not that night after I went home.

Q. Didn't hear any shooting after you went home?

A. Not after I went home.

Q. And you were only three quarters of a mile from the negro section?

A. That is about all.

Q. And heard no shooting whatever?

A. Absolutely not.

[43]

Q. Did you know what was going on that night?

A. From my own personal knowledge I did not.

Q. What was your supposition about it?

(Objection sustained—exceptions.)

Q. When you were down there in the negro district and when you came to the Court House, you were endeavoring to keep the negroes from causing trouble, wasn't you?

A. I was endeavoring to keep the negroes from coming up—

Q. All right, you were trying to get the negroes to keep from causing any trouble, weren't you?

A. I was acting on the suggestion of Mr. —of Barney Cleaver, who at that time, as I understood it, was a Deputy Sheriff, in order to help keep the peace.

Q. And you know at that time that the niggers were coming to the Court House armed, didn't you?

A. No, I didn't know they were coming there.

Q. You knew they were talking about coming here, didn't you?

A. I didn't know where they were going.

Q. But you knew there was some trouble didn't you?

A. I knew there was some excitement over a supposed lynching that was going to happen.

[44]

Q. You knew that the niggers were gathering on Greenwood and arming themselves, didn't you?

A. What I seen was armed when I seen them, I don't know whether they were arming themselves or not.

Q. They were already armed when you saw them?

A. A part of them, not all of them.

Q. And you tried to keep them from coming up to the Court House?

A. I advised them not to come.

Q. And that was because you realized there would be trouble if they did?

A. I didn't realize that.

Q. You knew there would?

A. No, I didn't know.

Q. You anticipated it, didn't you?

A. I did.

Q. And the thing you anticipated happened, didn't it, Mr. Redfern?
(Objection sustained—exceptions.)

Q. The thing you anticipated did happen?
(Objection sustained—exceptions.)

Q. And the reason you came to the Court House and went back into the negro district and tried to prevent them from coming to the Court House, was in order to protect the property that you had in the nigger district, wasn't it?

[45]

A. At that time I did not give the property a thought.

Q. You were just thinking of the welfare of the citizens, were you?

A. I just acted on the spur of the moment, to try to prevent trouble.

Q. And you were unable to prevent it, weren't you?

A.. I did what I could to do

Q. And they did have trouble, didn't they?

A. So I understand.

Q. And that was a riot, wasn't it?

A. I don't know that.

Q. Didn't you testify before the Fire Marshal as to the cause of the riot?

A. I made a statement before—

THE COURT:

He asked if you testified, answer yes or not..

A. Yes.

Q. And in that statement you told him that there was a riot in Tulsa at that time, didn't you?

(Objections were made to the form of the question insisting that the witness should be asked the question and told the answer made by him before the Fire Marshal, which was accordingly done.) (R. 203)

Q. In your testimony before the Fire Mar-[46]shal, I will ask you if you were not asked this question and made this answer 'Q. State your name, age and residence' and you answered 'William Redfern, age 48, residence 416 South Madison.'?

A. Yes, sir.

Q. You were asked this question 'How long have you lived in Tulsa' and you answered 'Since 1907'?

A. Yes, sir.

Q. You were asked this question 'Were you a property owner in that part of Tulsa known as 'Little Africa' and you answered 'Yes, sir'?

A. I did.

Q. And you were asked this question, 'What was the extent of your property in that part of Tulsa and how long had you been interested in that part of town,' and you answered 'I have owned property in that part of town for about five or six years. I own the Red Wing Hotel, 202-204-206-8 and 10 North Greenwood, comprising five store rooms and fifty rooms overhead, brick and stone construction; the Dixie Theatre sixty by a hundred and forty, seating capacity of one thousand, located on lot one (1), Block forty-six (46). I own other property there and have the brick and the stone on the ground for building.' Were you asked that question and did you give that answer?

[47]

A. I did.

Q. And you were asked this question and gave the answer: 'During the time that you have owned property in this part of town and been interested there, have you become acquainted with the sentiment and feeling of the negro, population of that part of Tulsa towards the white people of Tulsa' and you answered 'I have'. Were you asked that question and did you give that answer?

A. Yes, sir.

Q. You were asked this question, 'Will you kindly explain fully their feeling and sentiment' and you said 'The feeling towards white people to a very large degree was anything but good. There was an organization of colored people that termed themselves 'Race Men'. I have been informed by some of the better class of negroes that the prime object was the 'hatred of white men', and was for the purpose of boycotting white business interests. Being in business in that part of the city myself I was discriminated against, due to the fact that I was white. People passing my door would interfere with other people attempting to patronize my place of business, by the remark that 'that business belonged to a white man, don't go in there.' Merchants in that, (colored merchants) part of the city raised objections and protested against colored citizens spending their money up town with white business men, [48] claiming that they should patronize their race. The race proposition in my opinion was

carried into the churches, lodges and schools. *In my opinion one of the causes of the present race riot, was due to the lack of interest shown by the white people in the negro district. This being a segregated district, policed by negro officers, murder was almost of a daily occurrence and in the majority of cases, these murders were unpunished the greatest number of arrests in that part of the city made by the colored officers were for petty offenses, such as choc selling, gambling and prostitution. Few thieves were apprehended. One I. H. Spears, a negro lawyer, in a barber shop on the west side of Greenwood made the following statement: 'Every time he heard of a lynching it made him want to purchase more ammunition.'* On another occasion (I do not recall at this time what caused the excitement) but this fellow Spears appeared upon the scene with a Winchester rifle fully loaded. Officer John Smitherman, colored, took the gun, took the shells out and handed it back to him; no arrest was made. Spears is still in the community or was today.'
Were you asked that question and did you make that answer?

A. I was asked that—

Q. Answer yes, or no.

A. I did make that statement on the third of June and part of that was an assump- [49]tion, and not from facts that I actually know.

Q. But you made the statement?

A. Yes, sir, I made the statement.

Q. And you were asked this question and you made this answer, 'Were you present when the fire occurred that 'destroyed that part of town' and you said 'No, sir— you mean the beginning of the fire?' Were you asked that question and did you make that answer?

A. Yes, sir.

Q. Were you asked this question 'At any time during the fire' and you said 'Yes, sir, I was'?

A. Yes, sir.

Q. And then you were asked this question 'Just tell what, you saw and heard, giving the time you got there and if that happened while you were there I and you said, in answer to that question 'When I arrived at the scene, along about eight or nine o'clock Wednesday A M. the east and west side of Greenwood street was burning. I saw fellows looting, that's about all there was to see. I heard considerable shooting, I didn't see anyone or recognize anyone who was doing the shooting, but there were plenty of them with guns. The fire was reaching almost along the entire west side of the block on Greenwood between Archer and Cameron Streets, and was half way down [50] the block on Greenwood on the east side

of the street between Archer, and Cameron. I remained there until the fire had reached the Red Wing Hotel and it was in flames; I left before this building was totally destroyed or had collapsed.' Were you asked that question and did you give that answer?

A. I gave that answer on the 3rd day of June and I was more or less confused at that time.

Q. That was immediately following the riot, wasn't it?

A. That was immediately following that fire.

Q. And that trouble that they had here?

A. Whatever it was.

Q. You knew there was trouble between the whites and the blacks, did you not?

A. I understand there was.

Q. And you understand it was the worst riot that ever happened in history?

A. No, I don't understand that because I did not see it.

Q. But you heard it, didn't you, heard it through the columns of the papers and you heard the shooting, didn't you?

A. I am not positive about hearing the shooting or not.

Q. You said on the third day of June that you heard the shooting.

[51]

A. I know I said that at that time, but I was more or less confused at that time, and I was worried about my losses over there.

Q. But the matter at that time was right fresh in your mind, wasn't it?

A. It wasn't so fresh as that; it was fresh all right.

Q. It was fresher than it is now?

A. I can't say that it was.

Q. You think it is fresher now in , your mind?

A. No, I don't think it is fresher, but I do think that I was confused at that time.

- Q. You want to change it and say now that you didn't hear shooting that morning?
- A. I want to say I didn't hear considerable shooting over there that morning, and there is a question in my mind as to whether I heard any of it on that morning, and that the only shooting I remember of hearing was in the direction of the Court House.
- Q. The night before?
- A. Yes, sir.
- Q. You didn't hear any shooting during the night?
- A. No sir.
- Q. You don't now remember hearing the [52] shooting you told the fire marshal about on the 3rd of June?
- A. I don't remember.
- Q. You have forgotten that part of it?
- A. I don't know whether I have or not, I don't think I ever heard it.
- Q. But at that time you said you heard it?
- A. The question was asked—there was a question in my mind about whether he meant the 31st or the 1st; I was confused and I didn't say June the 1st or May the 31st.
- Q. I will ask you if this wasn't the question then 'Just tell what you saw and heard, giving the time when you got there and what happened while you were there.' There wasn't anything confusing about that, was there?
- A. I was trying or attempting to cover the entire thing in a general way that happened on May 31st and June the 1st, in my statement to the Are marshal; I was trying to cover the entire thing in a general manner and a general way.
- Q. You want to amend that statement now?
- A. I was confused in that statement.
- Q. But you did make the statement?
- A. Yes, sir, I made it.

Q. And you were asked this question: 'With reference to the Gurley Building, where did the fire in your best judgment origin-[53] ate or commence' and you answered 'In my opinion it originated in Williams Confectionery or Dr. Bryant's Drug Store, (Dr. Bryant's Drug Store is adjacent to the Gurley Building.) Were you asked that question and did you make that answer?

A. (R. 214) I gave that as an opinion, on that side of the street.

Q. That is the side of the street your property was on, wasn't it?

A. Yes, sir.

Q. Do you want to change your opinion on that now?

A. I would like to state what I based my opinion on.

Q. You were down there standing on the Katy tracks about eight o'clock that morning, weren't you?

A. I think it was later than eight o'clock.

Q. Between eight and nine?

A. Yes, sir, around eight or nine.

Q. And when you got down there I will ask you if it isn't a fact that all of Archer had been burned or was burning?

A. I didn't pay any attention to Archer.

Q. Well, you could see where the fire was or had been, couldn't you, on Archer?

A. I wasn't paying any attention to that. I was interested in Greenwood.

[54]

Q. Did you come down Archer when you came from your home that morning?

A.. I did not.

Q. What street did you come down?

A. I didn't come down any street, I came up the track; I come across down Madison to the track and came up the Katy track.

Q. And with reference to Greenwood, where were you standing on the track?

- A. I was standing at different points along the Katy tracks; I was standing at the intersection of Archer and Greenwood, and farther on up the Katy there, up as far as the intersection of the Sand Springs, on the Katy tracks.
- Q. And then you were at the corner of Archer & Greenwood?
- A. I was at the corner of Archer and Greenwood, yes, sir.
- Q. What was the condition of the buildings on Archer?
- A. The condition of the buildings on Archer, I don't remember on Archer.
- Q. Were they burning, or had they been burning?
- A. I don't believe—what building on Archer, which direction?
- Q. Toward the Brady Hotel?
- A. Well, I don't know there was only one [55] building, brick building, close there that I seen there now, that was Mrs. Partee's building.
- Q. That was burning, wasn't it?
- A. I don't remember.
- Q. And you knew where Bessie Sanders ran her boarding house, didn't' you?
- A. Yes, sir.
- Q. That was burning, wasn't it?
- A. I don't remember.
- Q. You don't remember?
- A. No, sir.
- Q. I will ask you if you remember hearing the shooting that morning along between five and six o'clock in the morning it started?
- A. No, I didn't hear that.
- Q. And when you got up next morning what caused you to be attracted to that part of town?

- A. I had my buildings over there and my business was over there; I was attracted there every day.
- Q. You didn't know there was anything going on over there?
- A. *I knew there was some excitement going on all right, I don't know what you would call it.*
- Q. And you got up next morning and you [56] wanted to find out?
- A. I did.
- Q. And you got there and heard the shooting?
- A. I didn't hear any shooting.
- Q. When you walked down to the negro section you heard the shooting, didn't you?
- A. No, I didn't.
- Q. But there was shooting down there, wasn't there?
- A. I don't know.
- Q. You told the fire marshal two or three days after the fire that there was shooting there in plenty?
- A. No I didn't tell him two or three days after the fire.
- Q. Two or three days after the fire you told him there was plenty of shooting at the time of the fire, didn't you?
- A. How's that?
- Q. You told him three days after the fire, according to your statement, that at the time of the fire there was plenty of shooting going on down there that you heard?
- A. On the morning of June 3rd I made that statement to him, but it was at a time when I was confused as to whether it was the night of May 31st or June 1st, because I was trying to cover to [57] the fire marshal in a general way the entire proceeding as best I could.
- Q. I am going to read this question and ask you where the confusion comes[sic] in 'Just tell what you saw and heard—' withdrawn. I will ask you the question just preceding that 'Were you present when the fire occurred that destroyed that part of town' and you answered 'No, sir—you mean the beginning of the fire?' 'Q. At any time during the fire'

and you answered 'Yes, sir, I was' Were you asked those questions and did you make those answers?

A. Yes, sir.

Q. Then you were asked this question 'Just tell what you saw and heard, giving the time when you got there and what happened while you were there' and you answered 'When I arrived at the scene, along about eight or nine o'clock Wednesday A. M., the east and west side of Greenwood street was burning. I saw fellows looting—that's about all there was to see. I heard considerable shooting; I didn't see anyone or recognize anyone who was doing the shooting, but there were plenty of them with guns.'

(Objection by Mr. Hayson. By Mr. Rittenhouse: I am not through yet.)

Q. 'The fire was reaching almost along the entire west side of the block on Greenwood between Archer and Cameron Streets and was about half way down the [58] block on Greenwood on the east side of the street between Archer and Cameron. I remained there until the fire reached the Red Wing Hotel and it was in flames: I left before this building was totally destroyed or had collapsed.'

(Objection overruled—exceptions.)

Q. Were you asked that question and made that answer?

A. I did.

Q. Point out just where there was any confusion as to the time, in those questions?

A. Well, the confusion was in regard to the shooting, I was trying to cover all of it; the shooting I heard was the night before when I was standing in front of the Baker Drug Store, in the direction of the Court House. *And I was not represented by counsel at that statement and I was attempting to cover the entire procedure from beginning to end.*

Q. Didn't you remember then that the time that you got there was eight o'clock Wednesday morning?

A. He asked me what time I got there, and that was about when I arrived there."

Then follows pages 223, 224 and 225, testimony relative to the statement made to the fire marshal concerning the shooting which has already been covered. At page 226 he was asked this question:

[59]

Q. “What ones were on fire when you got down there at eight o’clock in the morning.

A. Well, I figured there were about three or four buildings on the west side of the street on fire; there was some vacant stuff in there. Those three or four buildings would take in Woods’ building, the Phillips property; Woods was 50 feet and the Phillips was 75 feet, and Cherry had a little place in there of twelve or fifteen feet. I think that that was on fire at the west side of the street, but that would cover the greater part of the buildings on that side of the street in that block.

Q. You saw the Dixie Theatre when it started on fire, didn’t you?

A. I seen it when it was on fire, but it was not on fire when I arrived there, but a considerable time after that.

Q. And you saw the hotel when it caught on fire, didn’t you?

A. That was around twelve o’clock, yes, sir.”

At page 228 witness was asked these questions:

Q. “And you were also asked this question ‘Would you say that there was as many as 100’ and you answered ‘I would figure two or three times that number.’ I will ask— Were you asked that question and did you make that answer?

A. I made that statement.

Q. I will ask you if you were asked this ques-[60] tion and if you made this answer: ‘If there is anything else you desire to state do so,’ and you said ‘There has been newspapers and literature circulated and sold in that part of the city pertaining to supposed outrages committed in other states upon negroes by the whites, which only had a tendency to fan the flame of race hatred already existing in that part of the city. Such papers as “The Freeman” published in Indianapolis, Indiana; “Chicago Defendant” published in Chicago and another pamphlet called “The Crisis.” Would suggest that several copies of these papers be procured and offered as evidence.’ I will ask you this question: Did you make that answer?

A. I made that answer, or suggestion rather.

Q. I will hand you that and ask you if that is your signature (indicating) I will ask you if. that is the statement you made at that time shown on the page where your signature appears on the two preceding pages.

A. How is that?

Q. Read the question to him. (Question read by reporter.)

A. You mean that this is the statement—

Q. This stuff right here (indicating), I want to know if that is your signature on this page and the two preceding pages.

A. You want to know if that is—

Q. Mr. Redfern I will hand you this copy which you have had in your possession [61] some time and I will ask you if that is a copy of the statement you made to the fire marshal?

A. That is the copy.”

Thereupon the statement as a whole was offered in evidence at Record page 230, as Exhibit 11, which the witness testified (R. 231) to contain all of the questions and answers that were asked and made before the fire marshal on June 3, 1921. Exhibit 11 appears commencing at page 745.

“The witness then testified that the negro section of Tulsa was known as ‘Little Africa’ and was a segregated district. That the white section of the town joined right up to the negro section. Testimony immediately following, Record pages 232 to 252, inclusive, covers the location and boundary of the negro section of Tulsa, the burned area of which is shown on Exhibit C within the red lines.

The witness then testified relative to the conditions in this section of Tulsa immediately following the fire and described the burned area, R. 252 to 306, which shows all of the property destroyed south of the brick plant as outlined on the map Exhibit C within the red lines. He also testified that these properties were destroyed by fire on June 1st, 1921.

At page 307 this question was asked:

Q. “All that property you have attempted to describe burned between the time you saw it the night of May 31st, 1921, and when you [62] came back and looked around over there on June the 2nd, 1921?

A. Yes, sir, but I didn’t cover all that territory, only just from looking over it, I didn’t drive over the district.”

And at page 108 he was asked this question:

Q. “And did you—you allege in your petition ‘that on the 1st day of June, 1921, and while such policy was still in force, the said theatre and store buildings were totally destroyed by fire, which did not happen from any of the causes excepted in the policy.’ You made that allegation in your petition, didn’t, you?

A. I would have to read it myself to refresh my memory on that.

Q. I wish you would, I don't want to mislead you in any manner.

Q. You recollect that is an allegation of your petition, do you not?

A. Yes, it is in there.

He also testified that he knew at that time that his policies contained this clause:

“This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority.”

At pages 311, 312 and 313 he testified relative [63] to the arrival of the soldiers and the regulations concerning the negroes and that he understood that the militia has taken charge of the situation and those soldiers arrived on June 1st, 1921. And at page 316 he stated it was his understanding that martial law had been declared in Tulsa.

At page 317 he was asked this question:

Q. “I now hand you defendant's Exhibit 12 and ask you to state if that is the petition you filed, the original petition that you filed, in this case through your attorney, Fred Ptak, of Oklahoma City, entitled William Redfern against the City of Tulsa and others?”

(Mr. Ptak: I will admit that it is.)

Q. You filed that petition, as shown by the record, on May 31st, 1923, did you not?

A.. I don't remember the date.

Q. The property described in this petition is the same property described in the suit we are now trying, is it not?

A. Yes, sir.

Q. And the fire referred to in this petition is the same fire that destroyed this property that you are suing about, is it not?

A. I would have to look that over.

[64]

Q. You only had one fire down there?

A. That is all that I ever knew of.

Q. That is what you are suing the city of Tulsa for in this suit that I just read the petition, isn't it?

A. I just don't know about that petition.

Q. You didn't have any other fire but this one, did you?

A. I don't know whether we are suing the city of Tulsa for that fire or for permitting it to burn.

Q. I am not asking you that.

A. I am not a lawyer.

Q. And you employed Mr. Patk[sic] to bring this suit against the city, didn't you?

A. Yes, sir."

Exhibit 12 was offered and received in evidence R. 318, and is incorporated in the record commencing at page 749, and which is in part as follows:

“Caption. William Redfern v. City of Tulsa: et al. (the mayor of Tulsa, city commissioners, the sheriff of Tulsa county, the county commissioners, the chief of police of Tulsa, the National Surety Company, the United States Fidelity & Guaranty Company and Lion Bonding & Surety Company). At page 751 in that petition the plaintiff alleges that he is the owner of lot 2 in block 23 and lots 1 and 2 in block 46 of the original town of Tulsa, and describes the property on lot 2 in block 23 as a 3-story brick building used [65] as a hotel, and describes the property located on lots 1 and 2 in block 46 as a 2-story brick construction theatre building and offices.”

Commencing at the bottom of page 751 in said petition it is alleged:

“That on or about May 30th, 1921, the defendants above named and each of them and the City of Tulsa acting through its legally elected and qualified commissioners and officers and through its agents and employees and through its lawfully organized police forces, did wrongfully conspire, acquiesce in and assist certain person and persons to this plaintiff unknown, in the wrongful and felonious endeavors to burn, pillage and destroy certain property in the vicinity of the property thereof or described belonging to *this plaintiff* and that said persons acting under the general plan of destruction did carry out said attacks and unlawfully destroy said properties and improvements on the real estate hereinbefore described, said property belonging to this plaintiff.

And at page 754 the following is contained in said petition:

“Plaintiff further alleges, that said wrongful acts were committed by the person or persons with the full knowledge, connivance, consent and conspiracy of these defendants with their full knowledge, cognizance and acquiescence of each of said defendant, and to further carry out said purpose and plans the said defendants so conspired that the said fire de- [66] partment of the City of Tulsa were not allowed to combat said fires until after the complete destruction of all of the property within the confines of certain quarters of the City of Tulsa had been effected, resulting in the damage to this plaintiff as alleged in the sum of \$85,618.85.”

After court recessed examination was continued (R. 320).

Witness then testified that he did not see any dead bodies in the burned district, but that in the afternoon or the next morning he did see some dead bodies at Stanley & McCune’s undertaking establishment. That the bodies he saw were of negroes and he did not think that he had seen any dead white men. That there looked to be eight or nine piled up at the garage connected with the morgue and that he did not see anyone killed.

Re-Direct Examination By Mr. Ptak.

The witness on further re-direct examination testified as to the location of the Red Wing Hotel with reference to Brady Street and Greenwood Avenue and its distance from the curbing and the location of the Williams (Dreamland) Theatre with reference to the hotel and at page 323 he was asked this question by Mr. Ptak:

Q. “Mr. Redfern, in regard to this petition which was introduced as defendant’s exhibit 12, I believe, will you please state who you employed to draw that petition, as your attorney?”

[67]

A. Employed Mr. Ptak.

Q. You didn’t draw that petition yourself?

A. No, sir.

Q. And you don’t know whether—or do you know whether the allegations contained in that petition can be proven or not?”

(Objections overruled—exceptions allowed.)

Re-cross Examination By Rittenhouse.

The witness testified, R. 324, that he expected to prove all of the allegations in the petition against the City of Tulsa and others and was asked this question:

Q. “ That is what you expect to prove in that case?

A. *I expect to prove anything that will tend to reimburse me for my losses.*

Q. *It don't make any difference what that is?*

A. No, sir.

The plaintiff thereupon rested his case. (R. 324). The jury was excused, and (R. 325) the defendant interposed a demurrer to the evidence as follows:

MR. RITTENHOUSE:

“Now, comes the defendant and demurs to the evidence offered by the plaintiff and for grounds of said demurrer, states that [68]said evidence shows—rub that out. First, that said evidence does not prove facts sufficient to constitute a cause of action in favor of the plaintiff and against this defendant; second, that said evidence affirmatively shows that the policies sued on contain what is known as the riot clause, which says that the company shall not be liable for loss caused directly or indirectly by riot, insurrection and so forth, and said evidence of the plaintiff affirmatively shows that there was a riot in Tulsa at the time of the fire and that this property was burned as a result thereof, either a direct result or an indirect result of said riot, and by reason thereof the plaintiff has wholly failed to prove a cause of action against this defendant under any of the three policies sued on. Now, if the Court please I want to be heard on that.”

Thereupon the demurrer to the. evidence was argued, both for the plaintiff and the defendant and the court (R. 326) overruled said demurrer to the evidence, to which exceptions were saved.

[69] **Demurrer to the Evidence**

We contended at the trial and do now contend that this demurrer to the evidence should have been sustained for the reasons stated in the demurrer. The evidence of the plaintiff, together with the opening statement of the counsel contained in record page 81 to 326 affirmatively show that the loss to the plaintiff's property was caused as either a direct or indirect result of the Tulsa race riot, which occurred in Tulsa on the night, of May 31, 1921 and on the 1st day of June, 1921. The opening statement of Mr. Ptak on behalf of the plaintiff (R. 81 and 82) sets forth plaintiff's theory of the case and is as follows:

“That this fire was of unknown origin and since he suffered a total loss and since those policies were in force and since the destruction was by *fire of unknown origin*, that he is entitled to recover the face of those policies on that loss.”

The evidence showed that the plaintiff was very active on the night of May 31st, 1921, in his endeavors, to prevent trouble between the white, and black citizens, of Tulsa. But that his efforts [70] were without avail. That he stood at the intersection of Archer and Greenwood and saw this district, and especially his own property consumed by fire on the morning of June 1st, 1921. That he stated to the fire marshal on the 3rd day of June, 1921, that there was a riot in the City of Tulsa, a conflict between the whites and the blacks and that this district was, destroyed and that the cause of the “Tulsa Riot” was due in his opinion to the lack of interest which the white people had taken in the negroes of Tulsa; that there was bitter feeling between the whites and the blacks and that practically the whole negro section of Tulsa was destroyed by fire during this conflict.

The evidence of Mr. Redfern shows that at the time he closed his theatre between 8 and 9 o'clock at night that there was considerable excitement in the negro section and in fact an uprising executed by reason of a rumor that a negro was to be lynched. That after closing his theatre, which he operated himself in the negro section, he drove to the police station where a white crowd was gathering, from there he went to the court house and at the suggestion of the negro deputy sheriff, Barney Cleaver, he returned to the negro section for the purpose of preventing trouble between the whites and the blacks and advised the negroes who had gathered on Greenwood avenue not to go to the court house; that he had been assured that there would be no lynching. He stated that the streets of the negro district were filled with negroes when he returned; that he talked to the crowd, but, having no further business there and they not paying any attention to him, he left the district hurriedly in order to avoid as it were, the wrath of the negroes. That he went from there to the Baker Drug Store and thence home, and the excitement continued. That he returned the next morning because he was interested in Greenwood and because there was excitement in that district.

His testimony before the fire marshal on the 3rd of June shows that there was a large crowd of white men in this district, fully armed, and shooting and burning and looting the negro section, and he says further that plenty of white men were carrying guns.

In addition to this he filed a petition against the City of Tulsa and all of its officers and against the sheriff of the county of Tulsa, as well as the bondsmen of the several officers, wherein he alleged that this

particular property was destroyed [72] by fire by reason of the officers failing to perform their duty in preventing this trouble and in fact he alleges that the officers assisted in the riot and also alleges therein that the fire department was prevented from extinguishing the fires until after the district had been consumed. In fact the whole testimony of the plaintiff shows that there was a riot in Tulsa and that the rioters destroyed all of the property that was burned in the negro district on, the morning of June 1st, 1921.

Each of the policies were Oklahoma Standard Form policies and contained what is known as the riot clause, which exempted the insurance company from loss caused either directly or indirectly by riot.

The demurrer to the evidence was, overruled, but after the defendants offered their testimony and proved conclusively that this fire was the result, of the Tulsa Race Riot and was caused thereby and the plaintiff failed to offer any testimony to show an *intervening cause*, the court sustained a motion for a directed verdict, which action of the court is complained of by the plaintiff.

We will now set forth in narrative form as nearly as possible, the testimony of each of the witnesses for the defendant and the rebuttal testimony of the plaintiff, showing conclusively that this fire which destroyed the Plaintiff's property was the result of the Tulsa Race Riot and that under the law no liability exists in this case and that the court properly sustained the motion for a directed verdict.

[74]

Defendants' Evidence

C. F. GABE, (R. 327)

“Witness testified that he was Columbus F. Gabe; that he lived at 422 East Easton, Tulsa, Oklahoma for the past fifteen years; that he was in Tulsa on the 31st day of May, 1921 and the 1st day of June, 1921 and when asked what occurred on that day answered:

‘Well, a riot, I call it.’

That at about 6:30 he was on the corner of Cameron and Frankford Streets about two blocks from where he lived, on the evening of May 31st; that he went up to Drummond's house and that he left there and went north on Frankfort past Ed Howard's house and that Ed Howard said to him: ‘C. F., they are going to lynch that boy, tonight’ ‘Let's see about it, let's go up there.’ To which the witness replied that he would go with him and at page 329 the witness described the conditions as he saw them and what happened, as follows:

A. “I told him I would go up there. At that time I was working for the city and of course I had a little gun on and I went home to my house on 422 East Easton and pulled off the gun I

had on and throwed it upon a shelf and I come to town, I got a car, I don't know whose it was, a Ford, and we went in a Ford and come to the [75] Court House. When I got to the Court House, well, I reckon there was seven or eight hundred people or more maybe, women and boys and children and everybody, scattered around Sixth Street and down Boulder Street.

Q. All right.

A. And I came on up the west side over there and when I came up on the west side, Barney Cleaver was standing over there agin the building at the north corner, I think him and Mr. Gurley. As I came on through the second floor down there I met Mr. McCullough coming up from down this steps down there coming upstairs, and somebody hollered to him 'You must be a nigger lover,' and he cursed and he said 'If you come up here I will show you' and he hollered to me 'Gabe get the niggers away from here.' And I started to go back to the step and I met George Blaine, at that time one of the members of the police force here and he says, - 'Gabe for God's sake why don't you get those niggers away from here?', and I went down.

Q. Down where?

A. Down the steps on Boulder where straight across the street was a carload of colored boys there.

Q. Were they armed or unarmed?

A. I will tell you how I know about it.

[76]

BY MR. WARD:

I didn't understand your answer, Gabe.

A. Gentlemen, then there came a drove of young men across the street from Sixth Street coming toward me and when they came toward me one fellow said 'You have got a gun' and I says, 'No I haven't' and I pulled up my coat and showed them I didn't have a gun, Well, he says, 'Go back home and fetch it' and I walked over to the car and somebody says 'Get the niggers away from here' and every body yelled out 'Get these niggers away from, here.' I got the boys to go and they drove on and I walked by the side of that car on down the street until they got to Boston, and when they got over to Boston, I think there was nine men on the car, you could see the shape of them but you couldn't tell who they was, and I was right agin the car and one of the boys had a gun upon his knee, and when I seed the gun upon his knee that was the first I had seen a gun, and then when I saw it, there was a drove of boys there they said 'Let's go to the Armory' and tore off down Sixth.

Q. Those were white or black?

A. White boys said 'Let's go to the Armory' and they tore up and went over down that way. And I went on Boston down back on Boston back again and gotten between Boston and First and Second on Boston, about half way of the block and when I got about half way of that block [77] I saw three carloads of black men coming. I got out in the street and throwed up my hands and told them to go back. I says, 'Go back boys, go back to the other side of town, go back where you belong, let's don't do that.' One man pointed his gun at me and told me to get out of the street, some of the boys in the car, I could see the gun, and I got out of the way and they went on. They went on and I went on down to Boston and Archer. Between Boston and the Frisco tracks there was five thousand folks, looked to me like five thousand so many I don't know, there could have been less and could have been more.

Q. Where were those colored folks?

A. They were in the street.

Q. What street?

A. On Boston and Archer. And at that time I hadn't heard a gun. Somebody came along and I got in a car and came back to the Court House, and I came back to the Court House and I went through the crowd and as I went down the steps a white fellow told me to get away from here, and I went on away and I got a car with somebody and went down about Third Street down there and when I got down there I got out of that car, it was a white man too I was with, I would know him if I would see him and I walked on down the street and when I got down Boston again I heard a shot fired, [78]and it wasn't more than a minute until somebody came down and said there was a man killed at the Court House, and then the shooting began. I could hear shooting in most places, but I came back to the Court House and when I came back to the Court House, I came through here (indicating) and met one of the young lawyers, Mr. James, I think and I was going down Sixth Street, going that way (indicating), and they came two fellows out of the alley, two colored fellows came up out of the alley coming from that way (indicating) and one of them was trying his best to get by and one of them was not certain and the other said to shoot and I said to them 'Don't shoot Mr. James here' and the boys turned and ran back the other way and I went on down the street until I got to Boulder—not Boulder the next street below, here, Cheyenne. When I got to Cheyenne I went around the street down there and saw a lot of folks down there and heard some one say there was a nigger dead there and then I turned around and come back and went on out this street (indicating) and went to Main and went on down and got down the street down there, and I met Mr. Jim Adkinson, then was Police Commissioner and he told me to get away from over here, I was going to get hurt, and I went on back and down on Detroit and I come on to meet with Smitherman, the deputy sheriff, that was here on Main, and Smitherman says to me 'Gabe, let's [79]stop this thing if we can and I got in the car and went out to Stratford's house on Greenwood and Archer, and I called Stratford's house and they asked what I wanted and I said I wanted Stratford and I says

'Let's go and get the boys back away from there.' Stratford was up in the office and he said 'Gabe, I ain't going up, if they want me, bring them down to me, I ain't going.' I turned around and come back down to Archer and Cincinnati and when I came back down to Archer and Cincinnati I could hear them breaking glass over on Main Street, I was right along about where the baggage car is now—not the baggage car, but the baggage room, and there was a fellow, colored fellow, come by me going towards Nichols Hardware and he said they was breaking into Dick Bardon's store and he said 'Let's go and get us some guns now.' I said, 'No, no, don't go there' and I begged the other fellows to go back, and then I went back but this other fellow kept going. At that time somebody fired a shot, we were on Cincinnati and they were over about in where them taxicabs stands there, they fired at this fellow and I think killed him, I know they shot him because he hollered, and when they done that I ran and there was a boiler down there, with one of those round box boilers, and the rest of the niggers ran and I ran and tried to get in that boiler but I couldn't get in, my head would go in but my [80] shoulders wouldn't, and I came out then and got around by the side of the boiler and the thing seemed to be going pretty well, and then the crowd from where I was shooting out the lights over at the Frisco depot. You could see one man from the depot run out and shoot and somebody from over in the colored crowd would shoot, and the ting come pretty of ten and every once in a while you could see somebody holler, see somebody pick up a man. And then I ran and tried to get over the other side of the tracks, and at that time a man came along, a white man and his wife, and the boys was scattering to let them pass, and the people let him pass and I got on the car and started back to town with him and he told me 'You better not go' you will get killed' and I turned around and went on home, I left for home right there.

Q. But what occurred about the fire?

A. I haven't got to that part of it. Before when I got out—

Q. All right, after you got out of the white man's car?

A. I got out of the white man's car and I came on back by the tailor that was down in close to me, named Cavers, and of course he was excited and so was I. I said to Cavers 'Let me in' and just at that moment Cavers came out * * * you see and I ran across the street and there was some white boys on Boston with a light in [81] their hands going toward the old shack that used to be down in there and somebody shot the first one that started and he did not get to the house. Then I ran up the street and right on the corner of Boston and Cincinnati on the east side in Boston and Cincinnati, I mean Archer and Cincinnati and on the east side of the street I got behind a telephone pole and then the people began firing, shooting, and I started over there and a guy came back toward me on the street, I don't recall the man's name, but he said, 'Let's go in this house and go up stairs, and won't be bothered,' and I saw them coming out with another torch and something happened to him before he got there and a third man came out and set the little house afire.

- Q. All right, after that?
- A. At that time it must have been about 11:30, may be nearly twelve and I went home and went to bed. I went home and got in bed and went to sleep, and that ended that for that night. Next morning—
- Q. That was all that happened that night?
- A. That is all that happened that night that I recall now.
- Q. What time did you get up the next morning?
- A. The next morning at five o'clock a whistle blowed and when the whistle blowed, may [82] be a few minutes after five—my mind ain't clear whether it was five or six but it was between there and a whistle blowed and when that whistle blowed you could hear shooting everywhere in town, firing boom, boom, boom, boom. My wife jumped up out of bed and told me there was trouble in town, and when my wife said that, in came some group of men beside my house and says, called me, says 'Gabe, get up' and he says, 'the white folks is killing all the niggers in town and burning all their houses'. And my wife she jumped up and looked out the door and saw fire burning away up high. I didn't get up I thought they was just talking, and after while I heard the shooting up on the hill—I live at the foot of the hill over on Easton and there was somebody up on the hill shooting towards my house, and they shot my piano, and when pieces of the piano began to fall, I stuck my head in the front room and when I stuck my head in the front room I just turned around and said to my wife and the two smaller children, I says 'You all get out' and I reached up and got my pistol to fight my way out if I had to do it, and when I found my pistol there wasn't but two bullets in it, I hadn't looked at it for a day or two and I just threw it over on the bed, inside the room, and I went to the door and when I stuck my head out of the door two gentlemen came toward my house.
- Q. White or black men?

[83]

- A. Two white gentlemen. One of them came up to my door and said, 'Come out,' and when he saw it was me he says 'That is Gabe, let him alone' says 'You go back and get behind the piano and get down in there, we ain't going to bother you, you are all right' and before I could turn around, these white men walked on up the street, just going east on Easton and got right by a telegraph pole and somebody shot these two men, shot both of them and both of them fell. And there came an airplane over, just looked like it was about fifty feet above our heads, and that airplane had some smoke and it seemed like it was all black all around me, I thought it was on the airplane, and some colored fellows across the street shot at the airplane and hit it, because you could see him, and when he hit the airplane it just

went right straight up. I turns around and started back in the house then and there was two fellows came across the street and told me to come on out in the street and make it snappy.

Q. Were they white or black?

A. They were two white fellows, and when they told me to come out I said 'Are you talking to me' and they said 'Hell, yes.' There was two of them and the smaller one says 'He is a God damn big nigger,' and says 'kill him' and the other fellow says, 'No, he hasn't got a gun, and you can't hurt him' and says 'Get on up with the crowd.' And I got up with the [84] crowd or the bunch and they drove me on up to Elgin and brought me down Elgin and there they had the line of niggers, lined up to bring to Convention Hall, and when they brought us to that hall, I got in that line and when I came— they drove me to the hall and I got to Convention Hall and from Convention Hall went to the Fair Grounds and from the Fair Grounds thence to McCullough's house and stayed there all night and the next morning I went back down home, and that is about all of what I know about it.

Q. When you got back down to the district the next morning, what was the condition of the property on Greenwood, on the west and east side of Greenwood in the business district?

A. It was burned down.

On cross examination he testified that he was taken to Convention Hall about nine o'clock on the morning of June 1st, 1921 and that the business district of the negro section on Greenwood was burning at that time, and that he was released later in the evening, about four o'clock.

On re-direct examination he testified to the killing of two white men , and two negroes, in his presence, and of seeing two dead bodies near Convention Hall.

[85]

On re-cross examination he said thta[sic] the Gurley property was in his judgment on fire at nine o'clock in the morning.

HENRY C. SOWDERS (R. 348.)

This witness, a white man, testified that he lived in Tulsa, Oklahoma; was a moving picture operator at the time of the Tulsa race riot; was employed at the Williams (Dreamland) Theatre on north Greenwood avenue, located in that part of Tulsa known as "Little Africa" and that he was working on the night of May 31st, 1921 in that theatre.

He testified that the Dixie Theatre was about two doors south and across the street from the Williams Theatre, and that the Red Wing Hotel was on the corner across the street to the north of the Williams Theatre.

He testified, that he had run the picture machine until the first vaudeville came on and during the vaudeville he had put a wind shield in his car and that occurred about 7:30 in the evening and after that he noticed negroes gathering in the street, and that he asked the ticket lady what was going on and she answered: "Well, they were going to have more business than any other holiday they had had," and after that [86] he went back to his work and got I on the second show about ten or ten thirty and during the second vaudeville he cut the outside lights off as was his custom and that Cotton, the local manager, came and asked to cut them back on and at that time Cotton was armed. Cotton was a black man. At page 352 this answer was made by the witness:

- A. "Cotton, he is the local manager there, Mrs. Williams' brother, I think, and I asked him what he was doing with that gun on him and he said well, he was protecting himself, looking out for number one, and I asked what the trouble was and he said there was a little excitement out there. I just thought there was some negroes fighting, I didn't know. So, when I put the flood on them for the act to go on the second show, I noticed a bunch of guns at the side door, and someone hollered for them to all come out and get their guns. Four or five men, I think, negroes, rushed in and hollered 'Quick, come out and get your guns', the house was full, I noticed that, and it holds about six or seven hundred people and it was empty in from three to five minutes. I grabbed my hat and I goes out to see what was going on and pushed through and crowded out to where my car was, and I got out to where Cotton was standing at the edge of the curb and I asked him what was going on and he said there [87] was fighting over there, and I just thought some niggers were fighting and I said 'Well, I better get out of here' and I noticed the car, mine was full of niggers, they had turned the top back, it was a right brand new car, never had the top back. They had the top thrown back and was standing up in the back seat with their feet, looked like about nine niggers in there. So I asked them for my car, and a big husky nigger, standing beside me picked me up and set me over on a little old Ford truck that they used to take the film down. The nigger janitor was around there and he was cranking the car and this nigger says to me 'Stay right there' and I says, 'What about my car though'?' and he said 'You just stay right there.' So I lay there, I didn't move, I didn't know what was up. He looked around to Will, the janitor, and he says, handed him a piece of money, I think either fifty cents or a dollar, I don't know the amount, and he says 'Hurry up and get Mr. Opp down to the station'—they called me Mr. Opp, I guess that is short for operator, I don't know what else. So Will got the car started and started around and got in and got turned around again—he says, 'If that ain't enough, say so and I will get some more money' and Will said

that was all right, and he got in and started and we had to just push through the crowd to get out there.

[88] Q. About how large a crowd was it?

A. I couldn't tell you, the street was just packed..

Q. With what?

A. Niggers.

Q. Were they armed?

A. Sure was armed, I never seen a soul that didn't have arms.

Q. Where did you go from the theatre? Which direction and up what street?

A. Went south to Archer and crossed the track there on Archer, and from that— I noticed when we crossed the track that Mr. Pack was holding back three niggers, he was an officer and he was holding those niggers back and the bunch was in the car behind and they hollered at him and asked him to go on, and Pack advised them they better stay down there, but they kept going, followed us right up, and as soon as we got out of the crowd, got across the track and got out of the crowd he stepped on the gas, and when we got to Cincinnati we turned on Cincinnati and I thought we turned on two wheels, he went around there so fast, and we nearly run over a big black negro standing in the middle of the street there and he kept jumping around and he was shooting, and we got around here and I noticed two others lying in the street, I don't know whether they were wounded or dead between there and the tracks. We went into the station up there and the [89] express office, and this nigger driver he jumped out of the car and run in without cutting his motor off even, and the express man hollered at him and made him come back and cut this motor off, and he looked like he was scared to death. I goes around then onto Main Street, goes around the express office round front to Dick Bardon's shop and I seen them get arms out of there, and I asked a fellow, I says 'What is going on' and he says, 'Well, you better get home to your family if you have got one and look after that, or get you some arms, for the thing is coming off'. I goes from there up to the station then and reported my car being lost and the Sergeant says 'Well, that is the sixth car the niggers had got that night.' Then I had a fellow to take me home and I stayed at home the rest of the night."

He testified that there were about forty or fifty men getting guns at Dick Bardon's place. That he did not get a gun and after that he went up to the police station and reported his car stolen and then went

home. That there were lots of men gathered around the police station, and that there was a great deal of shooting around Archer Street.

Cross-Examination

He testified on cross examination to practically the same thing that he testified to, on direct [90] examination and stated that he worked at the theatre about six or eight months; that he got home about one o'clock A. M. and that he did not go back to the colored section that night, but stayed home. He also located the Dixie Theatre with reference to the Williams (Dreamland) Theatre.

The witness was excused (R. 363) and recalled (R. 365) and testified in substance that Cotton and Stratford and five or six others had met (occasionally in the office of the Dreamland Theatre where he worked and that he had overheard their discussions wherein they insisted that they had equal rights with white people and that they must fight for their rights and stated that they had several discussions along that line in that office at different times.

BARNEY CLEAVER (R. 363)

A witness on behalf of the defendant testified substantially as follows:

“That he lived at 508 North Greenwood, Tulsa, Oklahoma, since 1908 and was living in Tulsa on the 31st of May, 1921 and the 1st of June, 1921 and at that time he was deputy: sheriff and that William McCullough was sheriff ; that he was in Tulsa on the night of May 31st, 1921 and that he remembered the disturbance that began on the night of May [91] 31st. He testified that when he first heard of the trouble he was on Greenwood avenue, (R. 371).

A. “I had been out to my place and coming back to Tulsa and there was a Doctor came to me and he told me to go to the Court House, they was fixing to lynch a boy up there, and I just asked him what about it and he said ‘Go up to the Court House and see about it at the Sheriff’s office.’ So I got in a car and came on up here about seven o’clock and stayed here. I asked the sheriff about it and he said there was nothing to it, and I told the boys that was with me I didn’t think there was anything to it. So I was here about half an hour, maybe.

Q. Do you know the name of that boy that was in question at that time?

A. I really can’t tell you his name.

Q. All right, go ahead.

A. Anyhow, in about thirty-five or forty minutes there was about twenty-five or thirty boys came up there.

Q. Were they white or black?

A. Colored boys.

Q. All right.

A. And someone in the office told Mr. McCullough, said there was some colored men out there, and he said 'Barney, go out and see them.' So I went out there and said, 'Boys, where are you going?'[92] They said they come over to see about the lynching. I says, 'Now this boy is upstairs and the cage is locked upstairs and there is no way anyone can get to him go back.' And they turned around and went back on Boulder. I came back in the Court House and we was all in there talking and so on, and pretty soon some lawyer came, I can't think who he was, I would know him when I seen him, and says, 'Here are a whole lot of niggers up here with guns.' Well, I come out on Boulder then again, me and the Sheriff, and there was a quite a few out there.

Q. Were there any white folks around the Court House at that time?

A. Quite a few.

Q. About how many, Barney?

A. Well, a good lot of them, there was women and children, men in their shirt sleeves and women on the street. I went out there and we tried to tell the boys to go on back, but we had them started back and going down to Boston, when a gun fired, seemed to me in the alley, someone shot his gun and when this shot went off, then they got their guns and began shooting over my head, the boys who was over on Boulder.

Q. Who had the guns?

A. The colored boys had the guns.

Q. All right, go ahead.

[93]

A. And when they began shooting, the people began to run, and I just ducked, and come right to the Court House, that is the last I heard of the boys that night.

Q. Didn't the crowd disperse at that time?

A. Yes, sir, the crowd dispersed.

Q. Where did you stay that night?

A. I stayed up in the Court House.”

The witness then testified that he left the court house about four o'clock in the morning and went back on Greenwood. His testimony at page 376 being as follows:

A. “I left the court house about four o'clock; I had Ed Howard and a fellow by the name of Wilson, and another fellow, let's see what his name was--some other fellow, there was three of us together, three other fellows with me that stayed here at the court house all night, and I taken them back on Greenwood. Quite a few cars run up to us, white people in the cars with guns, and some fellow there knew me and says, “That is Barney” and they run up to me with their guns and says ‘Where have you been, Barney’, and I told them ‘I had been up at the court house all night’ and he said ‘where are you going’ and I says ‘I am going home’ and he said to me the boys would kill me if I got out there and I says ‘I ain't in no danger of that’. And I went up to Green-[94]wood and when I got to Greenwood, the corner of Greenwood and Archer, I met about fifteen or twenty boys with guns, and they said ‘Uncle Barney, have they lynched that boy?’ and I says ‘No’ and I says ‘If I was you boys, I would go home and go to bed’ and he asked me what I knew,—well, I didn't know anything, but I thought they should go home and go to bed. So some of them made the remark that I was a white man lover and I said ‘What was that’ and they kept on away, and didn't have anything more to say. And as I went down the street I met two or three other boys, but the boys at the corner of Greenwood and Archer did have some guns but there was no shooting going on at that time. I went on up home, and about four thirty I got home and my wife was up in the hall, and these other women, my sister-in-law and two other women, and they seen me coming up the street and they came down and they were going to tell me about what went on. I told them the best thing they could do was to get into their clothes and get to my place, about a mile out of town, so she went upstairs and got her clothes, and I got what little money that I had here in the house, and some of the ladies had some money, my sister-in-law, and I sent them out there, and then after they left there was some boys in a yard,—

Q. White or black?

[95]

A. They was colored, and I told them boys to get out of the yard with the guns because I didn't want them shooting around where these women was, and they went on out of the yard and went up in my hall upstairs, and so my people went on out to their home.

Q. You had a place out on the road toward Sperry?

A. Yes, sir, about a mile from, town.

Q. Was that where your wife went?

A. Yes, sir.

Q. Go ahead and tell what happened.

A. I went up in the hall and about five o'clock the whistle blew, I think it was about five o'clock and I never heard such shooting in all my life; well, when they begin shooting, they begin shooting every way.

Q. Whites shooting?

A. I guess it were; yes, sir, white and black.

Q. Go ahead and tell what happened.

A. Well, it was not very long until those fellows begin shooting out of the hall Windows, and I hollered at them to stop shooting up there in that hall window.

Q. What kind of a hall was this, Barney?

A. It was just a hall for Masons and Odd Fellows and other people met there.

Q. All right.

[96]

A. And they were shooting pretty fast there and I seen one man shot out of the window.

Q. Where was the fellow you saw get shoot out of the window?

A. In the upstairs hall window, he fell on the sidewalk down below.

Q. All right.

A. Then the others ran up the street I believe to the corner of Greenwood and Haskell and there was some more white folks up there shooting, and they ducked back to the hall and they was all arrested right there. And by and by the officers come, a police officer and other men with guns and I came out in front and then they called me and said 'Come on out' and I went on out and the policeman says 'Barney, what are you going to do?' and I says 'I don't know what to do I hate for my place to get burned up', and he said 'I will help you take your stuff out, and we took all my stuff out and put it out on the street.

Q. All right, go ahead.

A. And I stayed there until it got so hot I had to leave, and come to the Court House and after I got to the Court House, Mr. McCullough got me and the crippled man who was a

Commissioner here, and he went away outside of town by the road house, and they was fighting, not fighting but was burning houses and things out [97] there, and we stayed out there until we got our way—and when I was coming back to town my house was burning, and I met two white women with my wife’s clothes under their arm, and I said ‘Mrs. what have you got there?’ and they says ‘Who wants to know’ and I says ‘Them is my wife’s clothes.’ And Mr. McCullough said ‘What are you doing’ and I says, ‘These people has got my wife’s clothes’ And she says ‘Yonder goes a man on a truck with the rest of the stuff.’ That is all I know about that.”

He testified that he left his house about nine o’clock in the morning of June 1st, 1921; that when he left fire was on the east and west sides of Greenwood, and extended over on Archer and that he saw this from the upstairs window. He described the fire on Greenwood and the section of the Red Wing Hotel and Dixie Theatre (R. 383), 98 follows:

A “Well, on the east side of the street, gentlemen, it seemed from Archer—of course I couldn’t see clean down Archer, but the buildings was afire just like this, and I got up in the middle of the street and looked down and you could see dogs and cats doubling over from the heat and fire right in the street; that was on Green wood.”

He testified that the fire was on both sides of the street at that time; that he saw no one killed other than the man who fell out of [98] the hall window. He testified that he saw nineteen dead bodies of which sixteen were colored and three were white; that he did not hear any shooting that morning until after the whistle blew and that the worst hard shooting lasted about thirty minutes.

Cross-Examination by Mr. Ward.

The witness testified that the most of the shooting was between five and six o’clock and that after six o’clock the shooting continued on north but ceased near the business section of the negro district; that he could not testify as to when the Redfern property was set on fire; he testified again to many things he testified to on direct examination; he testified that there was shooting around the properties of Mr. Redfern that morning.

Re-Direct Examination

He testified that the Red Wing Hotel and Dixie Theatre were burned between the time he came from the court house to his home between four and five o’clock on the morning of June 1st, 1921 and when he went back into the district in the afternoon of June 1st, 1921.

O. W. GURLEY (R. 390)

A witness called on behalf of the defendant, testified substantially as follows:

That his name was O. W. Gurley; that he was fifty-four years of age; that he remembered the occurrence of the trouble in Tulsa on the night of May 31st, 1921 and the morning of June 1st, 1921; that he was a prop- [99] erty owner in the colored district at that time and owned Lot 2 in Block 47, on which was located the Gurley Hotel; that the Dixie Theatre was 25 feet north of his building and that Bryant's Drug Store was about thirty feet south, that the Williams Confectionery Store was about one Hundred feet south of the Gurley Hotel and that it was a. three-story brick building on the corner; that he was at his home at the hotel on the night of May 31st, 1921 and that there was quite a commotion down there in the negro section, and at page 393 he testified as follows:

A. "I judge about between four and five o'clock, I don't know what day it was but on the day of May 31st, my attention was called by one Doctor Bryant that someone had told him, called him and told him they was trying to lynch a boy that was charged with some kind of an offense. Doctor Bryant called my attention to it, and I said 'Doctor, don't start that kind of a rumor', or something to that effect. 'I will see Barney Cleaver, Barney Cleaver will know, he is a Deputy Sheriff and ought to know about that. 'I think I got hold of Barney and Barney says 'I don't believe it, but I will go down and see what is going on.' And after that the rumor began to spread, and the crowd began gathering around and began talking and pushing.

Q. What time did the crowd begin to gather?

A. I judge about six or six thirty.

[100]

Q. All right, go ahead and tell what you did.

A. Well they were assembling in front of my place and in front of the Star office, and finally I got interested—

MR. WARD:

I can't understand you, Gurley.

A. I say, when the crowd began gathering and began talking a good deal, they suggested that someone come down here and see Mr. McCullough, the Sheriff, and Mr. Webb and myself came to the Court House and talked to the Sheriff in reference to the rumor about lynching the boy, we went into the Sheriff's office, and Mr. McCullough said to me 'Gurley, there won't be any lynching while I am Sheriff; if you keep your folks away from here, there won't be any trouble.' Then Mr. Webb and I went back and home and I was making a report to the crowd.

Q. Where did you make that report?

A. In front of my hotel.

Q. All right, go ahead.

A. I told what the Sheriff had told me, and in making this report there was quite a crowd had gathered, and one fellow said, 'You are a damn liar.'

Q. Said what?

A. Said I was a damn liar, said, 'They took a white man out of that jail a few weeks ago or month ago and they were going to take this nigger out.' And I said, 'Fel-[101] low you ought to be put in jail now.' When I made that report, he drew a Winchester on me. I presume he would have killed me, hadn't it been—

Q. Just tell what was done?

A. When he drew the Winchester, it was stopped by lawyer Spears. And I think I made another trip to the Court House after that.

Q. What happened on that trip?

A. When I got back to the Court House there was quite a crowd of folks here, probably five or six thousand, looked to me. Some one suggested—they was making a speech out on the steps, and suggested to the Chief of Police or to Mr. Adkinson to call the Fire Department and throw water on these people, knock their legs out from under them, and disperse the crowd. However, that order wasn't obeyed, and while some man said that he was from Texas—said 'the damn niggers wasn't worth anything, but they wasn't going to lynch no nigger here tonight.' A white fellow was making this kind of a speech, advised the. people to go home and take those niggers—he made this remark 'don't you see these God damn niggers riding around with high powered revolvers and guns riding around down town?' And his suggestion had some effect, the crowd some of them dispersed, but when they would go they would soon be back. And while this fel-[102] low was still speaking, I noticed some colored boys or men, they come from Main Street on—this is Sixth Street I guess not (indicating), the best I remember. When that machine was up here in front of this Court House, the white people that were south of this store (indicating) and those that were next to the Court House and those that was on the other side of Boulder, closed in on this bunch of men, and when they all got mixed up a pistol went off, and I don't know how many people was killed, I don't know whether there was any killed or not, but the crowd dispersed, and I went f rom here to home. I think when I got down to Second and Main, I think Mr. Redfern spoke to me and said 'Gurley, what is going on?' I said 'Hell has broke loose.' And I got on down to the Brady Hotel and turned east on Brady to home.

Q. You got down home. Were there any negroes down there?

A. Quite a few, yes, sir.

Q. About how many?

A. When I got back home, probably three or four hundred around on Greenwood.

Q. Were they armed or unarmed?

A. Some had guns, and some had sticks and some had brick bats and some had different things.

Q. What were they doing?

A. Just rearing around.”

[103]

Witness then testified that he went up stairs and stayed until the next morning and that during the night he saw negroes leaving in automobiles; he testified that when he reached Cincinnati and Archer that evening he met an automobile filled with armed negroes, one of whom was Ed. Howard a friend of his and that he stopped the car and talked with the men in the car and told them they had better go back that there was trouble up town and that he tried to persuade Ed Howard to get out of the car and go back with him, but that Ed refused to do so, that during the evening and before he retired he talked to several men in the negro section in an endeavor to keep down the trouble, but that he was unable to prevent the trouble and that after he went to the hotel he went from one place to another in the hotel talking to the different people; that he left the hotel the next morning about 8:30 and at page 400 of the record he was asked this question:

Q. “Why did you leave?

A. There was a building burning south of me, across Archer Street.

Q. Whose building was it?

A. Belonged to Mrs. Partee.

Q. Was there any other buildings burning over there?

[104]

A. Not at that time.

Q. All right, go ahead.

- A. I was watching this fire, trying to see whether my hotel was going to catch fire from this building, when this building was afire, and I talked to my wife, I said 'I guess we will escape, our building won't catch fire.' And at that time I felt the front of the building and went to the west end of the building, out next to the Katy Railroad, and diagonally across the railroad from my building Mr. Pyro owns some property, I think he had three twostory buildings on this property.
- Q. Go ahead and tell what you saw over at that other building.
- A. And while I was standing at the window or the door, I don't remember, or maybe out on the stairway—I had an iron stairway running up from the rear of my building to the second floor, I may have been standing on that iron platform, I don't know—but anyhow, on the west side of my building, and the Partee building had fallen in and they was three or four, as my memory serves me now, men came from the Pyro building across the railroad.
- Q. Were they white or black?
- A. Those were white men, they were wearing khaki suits, all of them, and they saw me standing there and they said 'You better get out of that hotel because we [105] are going to burn all this God damn stuff, better get all your guests out.' And they rattled on the lower doors of the pool hall and the restaurant, and the people began on the lower floor to get out, and I told the people in the hotel, I said 'I guess you better get out.' There was a deal of shooting going on from the elevator or the mill, somebody was over there with a machine gun and shooting down Greenwood Avenue, and the people got on the stairway going down to the street and they stampeded. My wife said to me, 'What are you going to do?' I said 'Well, we just have to get out, I guess.' She says, 'I want you to go get me my trunk' I says, 'The trunk is too big, I can't carry it.' However, she insisted and I attempted it.' And I carried, the trunk to the head of the stairway leading to Greenwood, and the people that was all on the stairway was afraid to go out. I had to desert the trunk and work my way down to the head of the people. I told them I was going out and all of them could follow me, I was going to take a. chance. I left the hotel and went south on Greenwood to Archer, my wife and I, and the other people that followed me went directly across Greenwood into the Phillips property. I don't know where they went. I was excited, and I went and turned east on Archer and when I turned east on Archer across Greenwood, two men ran out from behind Williams' property and shot; when they [106] shot my wife fell, and she said 'You get away' and I got away."

He later testified that his wife was not hurt and also described (R. 405) how he went from the corner of Greenwood and Archer to the school house and hid under the school house. He testified that the people were shooting from the Oklahoma Iron Works and the fellow that was with him was killed; that he remained in the basement of the school house probably two hours and that some men came over to the place where he had crawled under the school house and ordered him out and he did not come out and they shot through the hole in the foundation. That at that time he was lying close to the wall and that after those

fellows had shot two or three times they made the statement that he had gone on through and that then these white men went up stairs in the school building and shot their guns several times and that after they left the school house was on fire and after some time he came out from under the school house, at which time he was ordered to throw up his hands and he was taken into custody with about fifteen other negroes and marched to Convention Hall.

He testified that at the time the men came from the Pyro building that the Pyro building was burning. That he saw the fire a very few minutes after these men had ordered him out of the hotel. He also testified that his building was burned on June 1st, 1921 and that it was burning when he left and when he was released from Convention Hall he went [107] back to Greenwood and everything he had was destroyed by fire.

Cross-Examination by Mr. Ward.

On cross examination O. W. GURLEY testified that he lived in Los Angeles, California; that he was the owner of property in Tulsa, consisting of vacant lots; that he came back to Oklahoma at the request of Rittenhouse who wrote him a letter and asked him to come to Tulsa., agreeing to pay his expenses and per them and that he was advanced his transportation. Mr. Ward asked the witness several questions relative to receiving the amount of his insurance for coming from California and at page 411 stated in the record in the form of a question that Bailey Bell arranged to settle Gurley's claim pending the result of this case, to which the witness answered "No, sir."

On re-direct examination the witness testified:

Q. "Bailey Bell gave you a check for return premium did he not, Mr. Gurley?"

A. Yes, sir.

Q. Have you that check with you?

A. Yes, sir.

Q. I would like to have you produce it.

Q. How much is that check for?

A. This check is, for \$490.00, unearned premium.

Q. That represents the premium on policies, does it?

[108]

A. Yes, sir.

Q. And your attorney told you he had accepted the return premium and dismissed the case, didn't he?

A. Yes, sir.

Q. And he told you also that the reason he did was because the fire was caused by riot and he couldn't recover, didn't he?

A. Yes, sir.

And on re-cross examination by MR. WARD the witness testified:

Q. "You haven't cashed that check, have you?"

A. No, sir.

Q. You testified a while ago you had not been settled with, didn't you?

A. Yes, sir.

Q. And you don't regard that check as a settlement at all, do you?

A. No, sir.

BY MR. RITTENHOUSE

:

Q. You went down and tried to get the money on it and there wasn't any there?

A. Yes, sir.

Q. The I reason you don't regard that as settlement was because you haven't been able to get the money on the check?

A. The bank put a blue ticket on here, and it reads 'Insufficient'.

[109]

Q. The reason you say you haven't got the settlement yet is because you weren't able to cash Bailey Bell's check?

A. Yes, sir.

On re-direct examination (R. 414) the witness testified that the interest he had in coming back to Oklahoma was that his wife had sold some household goods for \$335.00 to a Mr. Hopp and he wanted to

come back to collect that money; that he had a mortgage on the property and had given it to a man to collect.

H. C. PACK (R. 416)

This witness was called on behalf of the defendant and testified substantially as follows:

That his name was H. C. Pack; that he lived at 603 East Archer; that he was 51 years of age and a colored man. That he had lived in Tulsa since 1916 and was an officer of the City of Tulsa on the 31st day of May, 1921; that he was on duty the night of May 31st and June 1st, 1921 as a police officer. That he went on duty about 7:30 or 8 o'clock the night of May 31st, 1921; that when he got up and went down on the streets he heard there was to be a lynching and that he went up to the police station; that at that time the colored men were gathering on Greenwood, standing in groups and talking; that when he got to the police station the chief directed him to go to the court house and on his way he met Mr. Adkinson, the police commissioner, who directed him to return to [110] Greenwood Avenue and take care of the colored people and on returning to the Frisco station he met two officers and they told him to report to the police station; that he went back to the police station and was then sent to the court house. When they got to the court house there were no colored people there, so they went on back to the police station and reported. He was then ordered to Boston Avenue and finding no one on Boston he returned to the Frisco station and when he got there he met a lot of colored people standing in groups and he said to them:

“Let’s go back to Greenwood and get off this railroad, there ain’t nothing going to happen.”

and after that he returned to Greenwood; that there was about twenty-five or thirty of them at the station; that after he got back to Greenwood the shooting seemed to cease and that he noticed a little house down on Boston on fire. That that was about ten o'clock at night; that things got a little quiet then and he fooled around up on Greenwood Avenue and that people were standing around and talking; that he was walking his beat; that there was some shooting over on Main Street and that he heard a sound like the breaking into a store and about that time some shooting began and that he got in behind a building on East Cincinnati. At page 422 the witness testified:

A. “Well, next morning—I was supposed to go off at seven o'clock, but the next morning I was going down to the Police Station and check out, it must have been between [111]four thirty and five o'clock—I was walking a beat from Greenwood to Main Street, and I figured about by the time I got to Main, fooling around it would be time to check out. But when I got to Archer and Elgin, some people commenced shooting from across over there on the Frisco track. I stopped, I checked up then and turned to come back to Greenwood, but just as I started back to Greenwood, I met a man by the name of Charlie Williams, and just about the time I looked, he got shot in the right arm; I turned to look at his arm and when I turned around and looked another follow got killed, and by that time the police bell began to ring. When I got there it was the chief and he asked me to see if I couldn't stop it, and I said I couldn't stay, the bullets was hitting all around. And I

went across on Greenwood, and when I got to Greenwood and Brady they kept shooting and I looked down the Sand Springs track then and I seen some houses burning about the Katy somewhere, and then I goes in behind the Methodist church by Mr. Stratford's hotel and then I looked up and seen a lot of women get out of Stratford's hotel, and I went on out Hartford."

That he went from Archer north to Easton and saw quite a fire which he said looked like the whole of Greenwood was afire. That he had seen a lot of white men on Archer street before the fire started; that he estimated the number at fifty or sixty, or maybe more; that these men were shooting into the crowd; that by [112] the time he got to Hartford it must have been about eight or eight thirty and that he did not get back to town until he was brought back by Mr. Dick and another man, then he came back to the police station about twelve o'clock and that he did not get back into the negro section for about two' days and that then the whole district was burned up. That he saw the district when it was burning and that it burned on June 1st, 1921; that the Red Wing Hotel and the Dixie Theatre, were burned at that time.

On cross-examination he testified that he lived at the Red Wing hotel and that he knew that the property was burned because he saw it burning; that the business section of Greenwood is about three hundred yards long; that he was changing his shift that night and was supposed to get off at three o'clock and sleep until eight.

The cross-examination covered practically the same things that were testified to on direct examination.

GREEN E. SMITH (R. 435)

This witness was called on behalf of the defendant, and testified substantially as follows:

That his name was Green U. Smith; that he was a colored man 47 years of age, living at Muskogee, and by occupation a carpenter; that he was in Tulsa on May 31st, 1921 and June 1st, 1921, and that he was installing a fan in the Williams Theatre; that the Williams Theatre was located on North Greenwood; that he had built this theatre building; that the kind of fan that he was installing was a cooling system; [113] that he was down in the negro section on the night of May 31st, 1921; that he went to his room about ten o'clock at night and heard people talking about a lynching; that there were quite a few negroes, on Greenwood, but he did not pay much attention to them. That he was staying at a rooming house on Archer Street next to the Williams garage; that he got up about five o'clock the next morning and went to the Williams Theatre, arriving there about five o'clock. That he went there to change the wheel on the fan. The fan was not running fast enough and he wanted to get a smaller wheel to put on it and that he was taking that wheel off so as to get ready to go to Muskogee on the nine o'clock train; that while he was at the Williams Theatre the whistle blew about five o'clock and "looked like the world was coming to an end with bullets." (R. 439) This whistle blew about the time he got to the theatre; that he stayed in the theatre and watched out of the window and heard lots of shooting and saw lots of fires and that the shooting was pretty heavy from five o'clock in the morning until 7:30 or 8:30 and that then the shooting slowed up and they begun shooting had again about 9:30 and he saw a gang going down the street knocking in the doors and setting the buildings afire; that these people were white men; that he

could see from Williams corner on Archer and Greenwood down to where he was; that he saw them knock in the front of the Williams confectionery at the corner of Greenwood and Archer; that the men went inside the building and a few minutes after they came out he could see smoke and a little while afterwards could see the flames and that they [114] went to the next building and did the same thing; that he saw them break open and enter the Dixie Theatre owned by Redfern and involved in this case and that when they came out he could see smoke and a little later the blaze; that he knew where the Red Wing Hotel was located and that when the men reached that place they knocked the doors in and half went upstairs and half in the drug store and that when they came out he could see smoke and fire. That when he saw these things he was in the Williams theatre. Part of the time he was upstairs and part of the time down in the theatre and that he saw these buildings burning and that he saw them a few days after that and that they were all burned up. That he stayed in the Williams theatre until that building was afire. That he saw them set the Williams theatre afire; that they set the curtains in the rear afire, right up in the fly loft and when that building was set on fire he went out and at the door was taken into custody by those white men, marched to Cameron Street out by the Stratford Hotel and out Frankfort to Archer and up Archer to the First Baptist Church and stayed there nearly an hour then was brought back from there down to the Midland Valley tracks and the Frisco and out by the Tulsa Hotel to the base ball park and was released about 4:30, and that after that he went to Muskogee.

Cross-Examination by Mr. Ward

On cross-examination witness testified that he came from Muskogee on the 31st of May and that was the morning of the day when the trouble started; that a colored fellow by the name [115] of Walker, also a carpenter, came with him and that Walker was living in Tulsa at the Palace rooms; that his purpose in coming to Tulsa was to install a fan; that he had begun the work, had started the week before and had not finished; that he had quite a deal of other adjustment to do, but was going to put this pulley on at that time, May 31st, 1921. He then testified as to the work he had been doing at this theatre and as to what was going on in the theatre on the day of May 31st, 1921; that he did not remember the kind of picture they were showing that afternoon; that he went to supper about five o'clock and from then until about ten o'clock he was standing around on the street talking; that he stayed at Mrs. Brown's rooming house on Archer and then testified that he went to the theatre about five o'clock the next morning; that he noticed some men on the street when he went to work; (R. 461) that he had heard some shooting during the night but did not know how many shots.

At page 463 he testified that he had been in the Williams Theatre not over two minutes when the whistle blew and the shooting began. He was then questioned as to what he saw and heard and did from five o'clock in the morning until the Williams Theatre was set on fire. He stated that there was a vaudeville man (colored) in the theatre that morning with him. That Walker had gone with him to the building that morning, but left when the shooting started. That the men he saw (R. 466) seemed to be special officers. And testified as follows:

Q. "There was just one police, was there, or two?"

- A. It was a bunch that had on what they call special police and deputy sheriff badges.
- Q. Now, you got close enough to them at five o'clock in the morning to see those police badges?
- A. They came and taken fifty dollars of my money, and I was looking right at them.
- Q. You said there was a bunch of them had them?
- A. Yes, sir, in that gang.
- Q. Did you get close enough to any more than one of the men to read the badge?
- A. Yes, sir, about ten or twelve of them. Some said special police, and others would be Deputy Sheriff .
- Q. What color were the badges or ribbons that they had?
- A. Some had ribbons and some of them had regular stars.
- Q. Did you know any of them?
- A. No, sir, I don't know an officer in town except the colored men."

Witness testified that when he saw them coming down the street breaking in the front doors of the buildings and setting fires that it was between eight and nine o'clock, (R. 467), and that he could see white people all around there through the district during the time he was in the theatre; that he saw these men coming down the street (Greenwood Avenue) knocking windows and doors in and setting [117] fires; that he could not say as to whether all had on police badges or not, and could not tell how many had on badges, that he saw these things through the windows. He then described the location of the buildings and was asked concerning the construction of the buildings. At page 470 he testified that he left the theatre about eleven o'clock on the morning of June 1st, 1921 and that the Williams theatre was burning when he left; he testified also (R. 470) that he had been convicted of a felony in Wagoner County on a charge of stealing and at page 471 he testified that he lived at Muskogee at the time of the trial and that he came to Tulsa at the request of the insurance company and that he was drawing expenses and per them and that that time ran from Wednesday of the week of the trial.

SUSAN WILLIAMS (R. 471)

This witness testified on behalf of the defendant substantially as follows:

That her name was Susan Williams; that she lived at 906 North Denver, Tulsa, Oklahoma, and had lived in Tulsa for six years and was living in Tulsa at the time of the trouble on May 31st

and June 1st, 1921. At that time she was living at 311 East Archer Street and was there when the trouble started on May 31st, 1921. At page 407 she testified that she saw people shooting and running and that they came to her house and made them come out; that they took her husband and carried him away and that when they all came out of the house that these men entered the house and searched it [118] and then went on and a little while afterwards another crowd of men came by and searched the house and then set it on fire and she attempted to put out the fire and was ordered out of the house and that the men said to her: "Come out here, we set that house to burn." That then they set the three houses next to this one on fire and that they all burned down. She stayed around there until about 10:30 and was then taken to Convention Hall; that the shooting started 'that morning about six or seven o'clock and that they were still shooting when, she was taken to Convention Hall; that most of the shooting was down near the midway and the Mexican joint. (This was on Archer and Greenwood). She also testified that there was some shooting near her place and that they shot through the window; that she saw one colored man killed and saw him when he fell; that that was about 7:30 in the morning; that the first group of white men that came down there consisted of fifteen or sixteen and that the next group of white men that came by and set the house on fire consisted of twenty or more men. That there was a crew (R. 479) consisting of about sixteen that did a lot of shooting that came by her house; that there was a great deal of shooting in the district but she could not tell who was doing it; that the first building that she saw burning was the midway and that she saw fires over the district; that she went back into the negro district about two days after the fire and that all of the houses and business buildings, were burned up, including everything on both sides of Greenwood.

The cross-examination covered some of the [119] things brought out on direct examination and is found at pages 483 and 484 of the record.

C. W. KERN (R. 485)

This witness was called and testified on behalf of the defendant substantially as follows:

That his name was C. W. Kern; that he was a white man; age 65 years; that he lived in Tulsa at 213 East Fairview and that his property was near Detroit Avenue on the west side. (Detroit Avenue divided the white section from the negro section.) That on the west side of Detroit white people lived and that on the east side of Detroit negroes lived. That he was living there and at home on May 31, 1921 and June 1st, 1921. At page 487 he testified as follows:

- A. "Well, there was a man come along and said there was something awful—and another man says 'What is the matter' and he says 'They are sure having a time down town.' I could hear shooting down there and later on there was considerable shooting going on in south of me or southeast, seemed to be more south and later on, it was probably between nine and ten o'clock, I heard some fellow over east of me and he seemed to be walking north and hollering 'Come on boys, come on, bring your guns, bring your guns.' Well, that kind of wakened me up a little so I made up my mind we would have no lights lit that night. I put the lights out and I stayed up all night. I laid down once a few minutes but I never took my clothes off. And I heard [120] more shooting down town and I got up again. Now, my house

is about I would judge about two hundred and ten feet—the one I am living in I have got another one' on the corner close to Detroit. The one I live in is about two hundred and ten feet from the front porches of those other buildings that face Detroit from the east, and the darkies, congregate there, or seemed like quite a bunch of them on Mrs. Hughes' porch.

Q. Was Hughes a colored man?

A. Yes, sir, he was superintendent of the schools, I think, and occasionally after they had been having fighting down town, or sounded like it was fighting, I could hear a car—but at the point of the hill now, that come's in from the stand pipe was shaded around so the electric lights throwed on the same side of the street; I couldn't see along there very good but I could hear them good.

Q. Yes.

A. And there would be a car coming up there and I could hear them, talking a little bit, and they seemed to be pretty much excitement, but I didn't see them, but I could hear, but I couldn't understand all they said, and I made up my mind that them people over there was advising them fellows what to do.

Q. You go ahead and tell what happened.

A. That is what happened. Somebody seemed to come up there, all the time come up [121] there and talk to them. That is the best way to tell it, there would be quite a little—

MR. WARD: Objection.

A. And that is about the extent of what happened during the night.

Q. What happened the next morning? (R. 489)

A. Well, the next morning it was just getting, I might say good clear daylight, I heard somebody hollering and I commenced looking out at my east window, and I am high, gentlemen, I am away up above these people, my building is, and pretty soon there was a tall man come and walking up on the east side of the street hollering 'Get out of here, make your get away and make it snappy.' Well, the next thing I heard, I heard a car on the street and I went to the front step and stepped out and almost in front of my house was a truck, loaded with men that looked a good deal like big sized busters, it was just good light, and they began jumping off there, and they all had guns.

Q. Were they white or black?

A. They was white men and they says, 'Get your family where they are safe' and I says 'My family is safe.' My lower story is sixteen inch stone and the upper story is brick and I got all of my people and some of my neighbors in there, and there was a good many in my house by this time, and I got them over on the west side and I told [122] them to stay there and I says 'Don't go past any opening, a bullet may come through the window.' And after I got my family so I felt like they were all safe, I walked out on the east and porch there and watched the performance.

Q. All right, tell us what you saw and heard?

A. Well, it wasn't but a short time until I heard a whistle blow, it was in south of me somewhere, might have been a little east, and almost at that time they commenced shooting, sounded like down toward the Frisco tracks, but they hadn't shot long before I could hear shooting all around in there on both sides, and then in a short time I could see smoke—probably that was half an hour and may be not so long; you know a man don't look at a clock very often in a case of that kind, but I seen smoke coming up around and in a little bit fire broke out a little further over where I could see the smoke beginning to come out of the buildings, and from time to time, along at intervals between I would see another smoke and pretty soon that would be in a blaze. That was the way the fire, what I seen, I didn't see anybody set any fire, but I seen buildings burning, seen smoke when it would commence coming out of the buildings, and neither was it caused from the first fire that was set but the fire was set from time to time, because this other fire—

(Objections.)

Q. After you saw these fires starting up from [123] time to time, what finally developed over there in the way of fire in the negro section?

A. Well, it finally developed that there wasn't much fire, there wasn't much but smoke left, it practically all burned.

Q. Were you over in the district after that cleared away?

A. Yes, sir, I was over at the district just as soon as I could get over there.

Q. What was the condition of the property over that belonged to negroes, were they burned or were they still standing?

A. About all that was left was foundations and bedsteads and gas pipes sticking up around, and a chimney occasionally.

Q. And on Greenwood, were the business houses over there destroyed by fire?

A. Well, they was."

Cross Examination by Mr. Ward.

Witness testified that it was pretty early in the morning, the sun was not up, when he heard the whistle; that the shooting got pretty quiet along about day light but there was shooting practically all night; that his house was northwest of the corner of Greenwood and Archer, a distance of about eight blocks. That he knew the location of the Dixie Theatre and the Red Wing Hotel and that these buildings were about eight blocks southeast of his place.

At page 494 he was asked:

[124]

Q. "You did not yourself see anybody set fire to any building, did you?"

A. No, I didn't see them set a fire, but I seen them after they come out of the house I seen smoke coming."

WESLEY BUSH (R. 494)

This witness was called and testified on behalf of the defendant substantially as follows:

That his name was Wesley Bush; that his residence was at 418 South Lansing, Tulsa, Oklahoma; that he had lived at that address for eight months, but had lived in the City of Tulsa for many years; that he was at the time of the trial of this cause the chief of the Tulsa fire department; that at the time of the Tulsa race riot in 1921 he was the fire marshal of the City of Tulsa, having been appointed to that position on May 2, 1920; that he was in Tulsa on the 31st day of May, 1921, and at page 495 he testified that the reason he went up town that evening from home was:

"I heard a neighbor lady' answer a telephone and said there was a riot. in town between the whites and blacks; I told my wife I believed I would come to town."

That he went up town to the central fire station at 15 West Second Street; that when he got there there were some white men hanging around the station and out in the street, bunched around all up and down the street; that the streets were practically full and it would be hard to estimate how many there were there and that all of those men were armed. He stated that the police seemed to be working [125] around trying to keep everybody quiet as they could, the best he could tell; that these men were out in squads and would come back, that they were going and coming most of the time. That he arrived at the central fire station about ten o'clock at night and that he stayed at the fire station and police station until morning.

At page 499 he was asked this question:

Q. "What was going on and what happened during the time you were at the fire station or the police station?"

A. You mean in the city?"

- Q. Yes, what was happening, what were they doing?
- A. Oh, there was rioting and fighting.
- Q. Just tell what they were doing, so the jury may draw their conclusions, what you saw and what you heard.
- A. Well I could see there was men running around in cars all the time, and I could hear shots fired.
- Q. How long did that last?
- A. That lasted until away up in the morning.
- Q. Was there anything taking place in the morning?
- A. Yes, sir.
- Q. What was that, describe what the men did and what you heard?
- A. In the morning there was shooting and fir- [126] ing and I think fires, fires and buildings burning.
- Q. Just tell all you did down there, what you know and what you heard.
- A. Well, I just saw the armed men and heard shooting and saw buildings burning.
- Q. How long did that last?
- A. Up until—I don't know what time the fire was put out and stopped burning, but it was up sometime in the day of June the 1st.
- Q. And where were those fires, in what part of the city?
- A. In the northeast part of town, in the negro section.
- Q. Do you know where Greenwood street is located?
- A. I do.
- Q. Do you know where the Dixie Theatre and the Red Wing Hotel were located prior to that time?
- A. I do.

Q. Did you afterwards go into that district?

A. Yes, sir.

Q. Did you see where those buildings had been?

A. I did.

Q. When did you go into the district?

A. I went in there the evening of June 1st, the first time.

[127]

Q. Did you drive down Greenwood?

A. Yes, sir.

Q. Did you pass the buildings I have mentioned?

A. I did.

Q. What was their condition when you were in there that evening?

A. Pretty badly dilapidated, burned and fallen down.

Q. What was the general condition in the negro section of Tulsa at the time you went down in there that afternoon?

A. Pretty well burned up.

Q. In reference to Greenwood, North Greenwood and the business section of Tulsa, were there any buildings left standing on either side of the street?

A. Did you say in the business section?

Q. Yes.

A. I don't think there was a whole building, there might have been a part of one.

Q. Is that on both sides of the street?

A. Yes, sir.

Q. You were fire marshal at that time?

A. Yes, sir.

Q. Did you examine the entire district?

A.. Yes, sir, I was over it several times.

Q. I wish you would tell the court and jury [128] the extent of the burned area by giving the street boundaries as near as you can.

A. The fires—the first fires was down on Boulder between the Frisco track and Archer, and then they went east.

Q. When you said that you meant the burned area, didn't you, burned buildings?

A. Yes, sir.

Q. Go ahead and tell the boundary of it.”

The witness described the burned area as shown in Exhibit C, which is a map of the negro section of Tulsa, as shown thereon within the red lines.

He testified that he saw the fire that burned this district and that he went down to the negro, section about day light on June 1st, 1921, and stayed the re until evening and saw the district while it was burning. That the west part of the district was burned first and that the north and east part was the last to burn.

At page 514 he testified as follows:

Q. “Now, what was the extent of. the shooting there that morning from the time you arrived on the scene until the properties were burned?

A. Oh, there was quite a bit of shooting down in there after I got down there.

Q. Just describe to the jury and the court so they will, know what was going on.

A. Well, you could hear quite a bit of shooting hi one direction and pretty soon it would be over in another; then it would [129] slow down for a few minutes and get started up again; at some times there was more shooting than others.

Q. And how long did that last while you were down there watching the fire?

A. Oh, possibly may have been two hours.”

At page 516 this question was asked:

Q. "I will ask you to state whether or not martial law was declared in Tulsa on June the 1st, 1921?"

Q. Answer the question.

A. It was.

Q. Where was the headquarters of the military officers?

A. In the police and fire commissioners office in the city hall at Fourth and Cincinnati.

Q. Where was your office at that time?

A. On the ground floor of the same building.

Q. And what floor were they on?

A. On the third floor.

Q. What did the military officers do with reference to regulating the negroes at that time?

A. They gave them passes to go out about town to go to their work and back to places where they were holding them, issued them passes.

Q. How long did that continue, Mr. Bush?

[130]

A. That was for several days.

The cross examination of this witness brings out nothing that is not brought out on direct examination.

J. A. NORRIS (R. 521)

This witness was called and testified on behalf of the defendant substantially as follows:

That his name was J. A. Norris; that he resided in the city of Tulsa at 720 South St. Louis Street and had lived there for seventeen years; that he was superintendent of the fire alarm system of the City of Tulsa and had held that position for over sixteen years and was superintendent of the fire alarm system on May 31st and June 1st, 1921, and that he was at home in Tulsa on the night of May 31st, 1921; that he heard shooting during the night, which seemed to be in the business section at first and then off toward the Frisen north and that this shooting continued until along

sometime the next day. That on the morning of June 1st, 1921 he came to town and went to Number 4 fire station and from there he went to Number 2 fire station, located on North Main Street and from there he went over on Detroit and Easton to the fire alarm box, thence to Frankfort near the negro church. At page 525 he was asked this question:

[131]

Q. "Just now describe to the court and jury whether or not you saw any white men or negroes armed during the course of the trip that you have just outlined?"

A. Yes, I saw a great many people armed.

Q. Did, you see any white men?

A. Yes, sir.

Q. Did you see any negroes?

A. Yes.

Q. Where was the shooting when you got down there?

A. Well, it seemed to be pretty general north of me there; some south of me.

Q. Was that heavy firing or light firing?

A. Well, it was firing continuous, some place around there there was a gun being discharged every moment, nearly.

Q. What time did you get down town that morning?

A. I got down between six and seven o'clock.

Q. When did the firing and shooting seem to cease?

A. Oh, I don't know, about nine o'clock that day, I judge."

Witness then testified that he had seen two dead bodies, one at Archer and Detroit and the other north of the Frisco Depot; that these were both negroes; that he saw and witnessed the fire in the negro, section and that buildings of every description were burning; that buildings on Archer and Greenwood were burning; he also testified that he did not see any fire set except one in a trunk out on the parking; that three or four or five men in a bunch came along and threw a match or lighted paper or something there and it began burning [132] right away; that he could not estimate the number of men taking part in the disturbance because there were too many of them. He then

testified as to the conditions of the burned area of the negro section. Stated that the buildings on Greenwood on both sides of the street were destroyed by fire, extending from Archer to Cameron streets.

On cross-examination the witness was asked two questions concerning the fire in t he trunk.

B. S. JOHNSON (R. 533)

This witness was called and testified on behalf of the defendant substantially as follows:

That his name was B. S. Johnson; that he was Captain of Number 7 Fire Station; that at the time of the disturbance in Tulsa on May 31st and June 1st, 1921, he was lieutenant at Fire Station Number 2; that his driver was C. H. Moore and that on the night of May 31st, 1921, he was at Fire Station No. 2, as lieutenant at that station; that he received a fire alarm about two o'clock in the morning of June 1st; that prior to receiving this call there had been shooting and considerable trouble.

At page 536 of the record witness was asked this question:

Q. "What was going on, what were the people doing?"

A. The people were driving by the station in cars and there was a lot of shooting down south of us, down by the Katy depot and on [133] down by Archer, and it sounded like to me it was back on east.

Q. The Katy or the Frisco depot? Was it around the Katy or the Frisco?

A. Well, I couldn't see around the Frisco but it was, down in that direction."

That he was unable to tell what kind of people were in the cars, whether they were white or black; that they were traveling in every direction and that he heard shooting during the night and that the first shooting he heard occurred about ten o'clock on May 31st and continued all the rest of the night until probably three or four o'clock the next day. That when he got the call at two A. M. on June 1st he started for the fire (R. 539).

A. "I came down Main Street to Archer and saw the fire, the alarm came in for Archer and Boston, and, when I saw the fire, I saw the reflection of it, we stopped at Main and Archer and I ordered one of the men to catch the plug which is situated on the southeast corner; he got off and caught the hose and caught the plug and we drove about a hundred feet east.

Q. Then, what happened?

A. Well, about the time we caught the plug, everybody that was in the crowd began shooting.

Q. About, how many men were in the crowd?

A. I don't know I couldn't say, the street was full of them, they just closed the [134] street, closed us off, and there was several of them pointed their guns at Mr. Moore and myself and told us not to go any further, to stop.

Q. What did you do then?

A. I told him to stop and he stopped the car and I got off and went around to the back and where one of the men was one the back and told him to disconnect the hose, and I helped him and we disconnected ti and left the hose lying there and backed up and got our other man at the plug and went back to the station.

Q. Were you called out during the night again?

A. The next call was between six and seven o'clock.

Q. Where did you go then?

A. I went back on south on Main to Brady and turned east on Brady to Cincinnati and we caught one plug at Cincinnati, and I don't know how much hose we laid out, we only had eleven hundred feet on the wagon, but we caught one at Detroit and one and Elgin and used the eleven hundred feet of hose that we had.

Q. What did you do after you did that?

A. Well, we just began—the men with some fellows that helped us, we manned all three lines of that hose and began trying to protect the property.

Q. What property?

[135]

A. We was trying to protect the property on the south side, trying to protect property on the south side of Brady at that time that hadn't then caught afire, some dwellings and a hospital."

Witness testified that this was about seven o'clock in the morning and at page 542 this question was asked:

Q. "What else happened while you were down there trying to protect that property?"

A. Well, the colored folks was back north of us and the white people were south of us, we were in between two fires there, they was shooting in every direction. We was busy with our work and I didn't see very much, I was trying to get those lines laid and cover as much ground as possible.

Q. You say the whites were standing back of you?

A. There was a lot of shooting going on and the whites were over on Archer and the Blacks was north, along the Katy track.

Q. Were there many shots coming from the direction where the colored folks were?

A. Yes, both ways, bullets whizzing everywhere.

Q. Were you near a negro hospital?

A. Yes, sir.

Q. What happened with reference to the negro hospital?

[136]

A. Well, when we first got there there wasn't any of those houses on fire.

Q. Yes, Sir.

A. Oh, I will say in ten or fifteen minutes, after we got there they all began to burn, looked to me like. That started on the corner and we tried to put it out and we put a line on that, and there was one caught across the street on the north side of Brady and we put that one out and went back and the hospital caught and I put it out, and by the time I got it out the house on the corner was a fire and I went down there and it got such a headway I seen I couldn't put it out, and I came back and by that time the hospital was on fire again and I put it out the second time and came back to the corner and the house down there had already burned down, and when I went back the hospital was on fire again and I put it out again.

Q. Were there any men around when you were doing that?

A. Yes, sir.

Q. About how many?

A. I would say the street was full of them, men going every direction.

Q. And with reference to Greenwood Avenue, where was the negro hospital?

A. I would judge the number of it would be about 314 or 316 East Brady, between [137] Detroit and Elgin on the south side of the street.

Q. About how far, how many blocks would that be from Greenwood?

A. About a block and a half.

Q. At that time could you see any fires over on Greenwood?

A. Yes, sir.

Q. What was going on over there that you could see?

A. Well, when I first got there, when they first commenced setting this fire on Brady, there wasn't any buildings on Greenwood burning, but along about nine thirty or ten o'clock I looked over there and it looked like the whole thing was on fire, and after these had done burned down or practically down, I looked over there and nearly all of Greenwood was burned down too."

He testified that that afternoon he went over to standpipe hill from where he could see Greenwood and that it looked like everything had been burned down on Greenwood; that after that the next morning he was over on Greenwood and everything was burned. There were some walls standing, but all the inside had been burned out or everything along there. That he knew the location of the Red Wing Hotel and the Dixie Theatre and that these buildings were burned down at that time.

[138]

The witness was cross-examined by JUDGE HAYSON (R. 549) which deals with the same subject as on direct examination. The cross examination ends at page 552.

C. H. MOORE (R. 553)

This witness was called and testified on behalf of defendant substantially as follows:

That his name was Moore; that he lived at Tulsa, Oklahoma; had lived there for a little more than four years; that he was a member of the fire department and was working as fireman at the time of the trouble in May, 1921 and June 1st, 1921; that his position with the fire department was driver of the fire truck; that his lieutenant was Sid Johnson, the same person who had just testified on the witness stand; that he worked at Fire station Number 2 and that Mr. Johnson was on duty at that time as lieutenant; that during the night, of May 31st, 1921, he heard shooting and saw armed men going about the streets, most of them in cars. That this shooting continued up until about three o'clock when he laid down and took a sleep, that they got the first call at two o'clock on the morning of June 1st, 1921 that they responded to the call; that after the call came in they started to Archer and Boston and got about half way between Main and Boston on Archer where they were stopped. That they had caught a plug at Main and Archer and started to Boston, and when they got half way to [139] Boston they were stopped. He had no idea who ordered them to

stop. There were several hundred men around there in the streets. All seemed to be armed. That he saw some of their fire arms. At page 559 this question was asked:

Q. "What did they do to you?"

A. They told us to get away, first ordered us to get away from that hose or there would some one get killed. That was after we stopped.

Q. Then what happened?

A. We disconnected our hose and went back to the station.

Q. You drove the truck back, did you?

A. Yes, sir.

Q. After you got back to the station what did you do?

A. Well, nothing in particular, I sat up there for a while and then I went and laid down and went to sleep.

Q. Did you get another call?

A. Well, there was another alarm but we didn't respond, we had orders not to.

Q. That was during the night?

A. Yes, sir.

Q. Did you get one early next morning?

A. Yes, sir.

Q. Did you respond to it?

A. Yes, sir.

[140]

Q. What time was that?

A. About seven thirty, I judge.

Q. And where did you go then?

A. Well, went to Brady and Detroit, I believe was where we was called to.

Q. What did you do after you got down there?

A. We laid a line out to a fire on Brady and Detroit.

Q. Was there any shooting, going on at that time?

A. Yes, sir.

Q. Did you see any armed men down in that district at that time?

A. Yes, sir.

Q. About how many?

A. I have no idea, there was an awful bunch of men going along there all morning.

Q. Did you hear very much shooting during the time you was down there?

A. Yes sir.

Q. Where did that shooting seem to be?

A. When, we first got down there it seemed to be south somewhere from where we was, down toward Archer, and then of course it went by us later on in the morning.

Q. On up north?

[141]

A. Yes, sir.

Q. What did you do while you was down there fighting that fire on, the last call you got?

A. Well, we was protecting the wholesale house over there and the lumber yard.

Q. You were down near the hospital?

A. Yes, sir.

Q. What did you, do with reference, to staying on the wagon?

A. I didn't do nothing, I was told after I got there to lay another line over on Brady and Elgin.

Q. What did you do, then?

A. I laid a line there, to save that lumber yard.

Q. You drove away from there then and went over there?

A. Yes, sir.

Q. Did you stay on the wagon all the time?

A. Oh, no, I wasn't on the wagon none of the time after I got there only just moving it."

He also testified that there were three lines of hose laid and at page 566:

Q. Did you see any fires while you were down there?

A. Yes, sir.

[142]

Q. Where were they?

A. Well, all over the colored section, looked to me like.

Q. Do you know where Greenwood Street is?

A. Yes, sir.

Q. Did you notice any fires on Greenwood?

A. Well, I couldn't see from there, couldn't see where Greenwood was, but there was fire all over in there.

Q. In that direction?

A. Yes, sir.

Q. And did you afterwards go over into that district after the fire was over?

A. No."

The cross examination conducted by MR. HAYSON, commencing at R. 568, covered the same subjects as testified to in the direct examination.

On re-direct examination, (R. 571), the witness testified that there was shooting between whites and blacks and that they were shooting at each other; that he saw the whites shooting, but that the negroes were too far away for him to see them, but that firing came from the direction where the negroes were; that he saw fires starting all over the district and that they seemed to start on the inside of the buildings.

At page 573 this question was asked:

Q. And in reference to the time of the [143] numerous fires that you saw down there, when did they start, at intervals between one another?

A. Well, it just seemed like it was one and then another, just as fast as one would start one then there would be another start up.

Q. And with reference to the district, was that continuous through all parts of the district that you saw?

A. What I saw, yes, sir.

On re-cross examination he testified that the lumber yard seemed to start on the outside and not on the inside and that during the night they received orders after two o'clock to remain in and not answer any more calls, but about seven or seven thirty the order was recalled and that they answered the seven thirty call.

J. L. DALEY (R. 574)

This witness was called and testified in behalf of defendant substantially as follows:

That his name was J. L. Daley; that he lived at 150 North Florence in Tulsa, Oklahoma and had lived in Tulsa for the last twelve years; that he was driver of a fire truck in Tulsa and had been in that business for six years and was a truck driver for the fire department of Tulsa on the 31st day of May, 1921 and the first day of June, 1921, when the disturbance occurred in Tulsa and that he was working on the night of May 31st, 1921, as truck driver at Station No. 4, located at 17 West Second Street. [144] That during the evening of May 31st, 1921, he saw carload after carload of armed negroes pass the station going in. different directions, but principally in the direction of the court house which was south of the station that he saw other armed negroes walking past the station; that he saw six or seven armed negroes taken into custody and taken to the police station and that this witness had gone to the police station and saw other fire arms; that there were five or six in this crowd and that they were all put in jail; that this occurred about 10:30 on the night of May 31, 1921, and that later on he saw white men gathering in front of the police station, armed. Fire Station No. 4 was immediately adjacent to the police station; that he saw a white man coming out of Joe Magee's place with fire arms, which place was across the street from the fire station and that these white men had fire arms of every description from a twenty-two rifle on up and that there must have been at least three hundred men in front of the fire station during the evening and that he heard shooting all during the evening; that most of the shooting was over toward the Frisco Station but that he heard some shots fired in the direction of the court house. That the Frisco depot was at the south edge of the negro section and that the fighting and shooting continued practically all night and until about eight o'clock next morning or a little later; that he was called out to answer fire alarm during the night at about two o'clock A. M. and that he went to Boston and Archer and was

driving the truck and that there were four or five firemen with him on the truck. He was asked what he did when he got to Boston and Archer.

[145]

Q. "What did you do when you got there?"

A. Well, when we got down there it probably looked to me like about a thousand men down there.

Q. White or black?

A. White.

Q. Were they armed or unarmed?

A. Armed, all I could see.

Q. Those you saw were armed?

A. Yes, sir.

Q. All right, What happened when you got down there?

A. Well, there was a nigger house on fire there, and just as soon as I pulled up to the corner they ordered me to stop and I did.

Q. What did they say to you?

A. They told me to move on, not to stop there; they told me the second time before I did.

Q. Did anything happen while you was down there?

A. Well, just as I turned my truck around there was a bunch of shots fired, I think they fired them though, they were hollering when I turned my truck around and started to return to the station.

Q. Did you see anybody killed down there?

A. The second time I did.

[146]

Q. Where did you go after you were ordered back?

A. Back to the station.

Q. Then what did you do?

A. Well, about three o'clock we got another call for Archer and Boston.

Q. What did you do then?

A. Well, there was a mattress or something inside on fire and I got down off the truck and went over there and there was three or four—I think it was three or four—I think it was three dead colored fellows lying back behind this building that was burned up, and I think the rest of the boys put this mattress out and they all ordered them to leave, and in the meantime there was four or five shots fired from down in that low place where there was some old boilers or something down there between Boston and Cincinnati.

Q. Did you ever see anybody, killed on that trip?

A. Not on that trip, no.

Q. Did you see anybody killed on any of the trips you made down there?

A. Yes, sir.

Q. Where was that?

A. On Archer and Elgin.

Q. And what trip was that?

A. It was on the trip about five forty-five.

[147]

Q. What happened on the trip at three o'clock?

A. Well, we was there—the other fellows went in and I think put this mattress out and then we was ordered back to the station and we came back.

Q. Who ordered you back?

A. The crowd ordered us back.

Q. What did they say to you?

A. Told us to go on back and get away from there.

Q. You got, did you?

A. Didn't do anything else.

Q. Then you went down again at what time?

A. The chief told us to go to Archer and Elgin, told us to drive east on Second to Elgin to dodge the crowd, and try to get up to Archer and Elgin.

Q. Did you do that?

A. Got as far as First and Elgin.

Q. What happened there?

A. Fellow stopped me with a big rifle.

Q. What did he say to, you?

A. Told me to stop and I did, and I got down off of the truck and started walking down there and there was several hollered at me not to come any further.

Q. Then what did you do?

[148]

A. Well, then that was the time I saw a fellow killed.

Q. Was he a white man or a black, man?

A. White man.

Q. And where was he with reference to your truck?

A. Well, he was about a block north, a little better than a block probably.

Q. What did you do after they ordered you back?

A. Well, I came back and turned my truck around and, went, back to the station.

Q. You were ordered back there three times, then?

A. Yes, sir.

Q. And did you get another call after that?

A. Yes, sir, we got a call, the box came in, I think, at Cameron and Detroit, and I laid a line from Cameron and Cincinnati, and in the meantime the Manager of the Tulsa Ice Company said that the barn was on fire, so the chief told me if I had any hose left, to go down there if I possibly could, so I left a man to take care of the line and I came back down Cincinnati to Archer and before I thought I was running right into the firing there, they was firing down off of them buildings.

Q. Where were the buildings they were firing from?

A. Off of First Street there, there was several [149] people up on top of the buildings, And before I thought, I almost drove into it. I turned west on Archer and came to Main and came south on Main to First and east, on First to Cincinnati and came in behind it, and went east down the railroad tracks to the Frisco track and Detroit, and hooked up a line there and turned it over to some ice drivers or employees of the Tulsa Ice Company.

Q. Then what did you do?

A. Well, I turned around, and somebody shot at me while I turned my truck around.

Q. That was when you were down by the ice plant?

A. Yes, sir.

Q. Did he hit you?

A. No, hit the truck.

Q. What did you do then?

A. I came back south and made my same circuit and run back to Cameron and Cincinnati, and I just pulled up and Chief White came along and ordered me back to the station to reload the wagon.

Q. Did you go back to the district after that?

A. No, sir.

Q. You went off duty then?

A. Yes, sir, I laid off

Q. When you were down there did you see any or hear any shooting?

[150]

A. Yes, sir.

Q. About how many men took part in that shooting?

A. Well, that would be hard to judge.

Q. Were there a few or a lot of them?

A. There was lots of them, looked to me like over a thousand, or maybe more than that.

Q. Did you see any fires while you were down there?

A. Well, on the later alarms I did.

Q. And where were they?

A. They were all around, looked like a lot around Greenwood and the Frisco track and around up in there.

Q. And did you afterwards during any part of the day after the fire was over, go over in that district?

A. Well, I think the next day or two I drove over there, but I couldn't get over there; I got as far as Archer and Cincinnati and they turned me back so I came on back.

Q. Can you tell us the extent of that fire, what properties were burned down there and on what streets?

A. Well, it was scattered over all the negro district over there.

Q. Fires?

A. Yes, sir.

[151]

Q. With reference to Greenwood, what was the condition of the buildings on that street on both sides of it?

A. North Greenwood?

Q. In the business section of the negro district.

A. Well, on the corner of Archer and Greenwood, you see there was some fire but you couldn't detect the exact location, by being off from it.

Q. You afterwards saw the condition after the fire, did you?

A. Yes, sir.

Q. What had happened to those buildings on each side of Greenwood?

A. Well, they had burned down.”

The cross examination of this witness, conducted by Mr. Hayson, appears on pages 600 and 601. He sought to locate the Dixie Theatre and Red Wing Hotel, but witness testified that he was not familiar with either location. He also asked a few questions with reference, to his different trips during the night and if there was fire over in the vicinity of the location of the Red Wing Hotel at the time he answered the alarm at 5:45.

On re-direct examination he testified that the fires which he saw in the vicinity of the Red Wing Hotel occurred between the time he made the call at 5:45 and when he quit at 8 o'clock and that he did not know the particular minute that he saw the fire in that vicinity, as he was busy with his work as a truck driver.

At page 604 he testified that there were a [152] lot of fire alarms turned in that night, but he only remembered those which he answered by going to the fire and that these alarms came from boxes in the negro district.

On re-cross examination (R. 605) he testified that he did not go back to work after eight o'clock on the morning of June 1st, until the next morning, at which time he was working day shift. This because he had been on duty twentyfour hours up to eight o'clock on June 1st, 1921.

At page 606 the defendant rested and then asked and was given permission to re-open for the purpose of offering another witness.

LUTHER JONES (R. 606)

This witness was called and testified in behalf of the defendant substantially as follows:

That his name was Luther Jones; that he had lived in Tulsa for the past fourteen years and was a lawyer by profession with offices in the Kennedy Building, Tulsa, Oklahoma, and that he was living in Tulsa on May 31, 1921 and June 1st, 1921, at the time of the trouble which occurred in Tulsa, and that he remembered the Tulsa race riot; that he was at the court house when the trouble started about nine o'clock on May 31st and that there was a great crowd of white people around the court house and that while he was there and a few minutes after he arrived one or two truck loads of negroes came.

At page 609 of the record he testified as follows:

A. “And there were several cars and truck loads of negroes that drove around the court house two or three times, as I remember it, and the white, people were mak-[153] ing—they were yelling and had their guns in the cars and the trucks and some of the white people were making a good deal of complaint about it, you could hear it at different places here, I circulated around through the crowd in this street (indicating) and on Boulder. And some of

the officers came out and requested the negroes, to leave, Bill McCullough for one, and they drove off down east on Sixth Street that was the next to the last time I saw them. Then they came back in a few minutes, and I was down here south of the Court House door; they drove down there and parked their cars some place, I didn't see where, and they marched single file down west of the Court house, and they got along over there and I heard a pistol shot or a gun shot in this direction (indicating). They was, I guess there must have been fifteen hundred people around the Court House here, women and children and men, and when that shot was fired, then there must have been fifty other shots. I, like a lot of other people, run into a house on the corner here. I stayed there until the firing ceased and I came out and went over to the Elks Club. It must have been about nine thirty or ten o'clock at that time, and I heard shooting scattered at different places after I went over there.

Q. "Mr. James, when you came out of that house, did you notice any dead bodies?

A. I saw one man there.

[154]

Q. Did you recognize him?

A. I didn't know the gentleman. It seems to me I knew his name, probably I didn't know his name until the next day, but I saw the man and helped put him in a car.

Q. You afterwards learned his name?

A. Yes, sir.

Q. What was that name?

A. W. H. Dage, who worked for the pipe line department of the Pierce Oil Company.

Q. What did you do when you went to the Elks Club?

A. I went over to the Elks Club and stayed over there on the steps for a few minutes and then went over to Main Street; three or four men went along with me.

Q. Tell us what you saw and what you did.

A. I saw a gang of men standing in front of the Southern Hardware Store and saw them break in, and then there were a gang of men in front of Dick Barden's pawn shop where they keep fire arms and they broke in there, and I saw several men enter McGee,'s place where they keep arms.

Q. What did they get when they went in those places?

A. Got guns and ammunition.

Q. Those were white men?

A. Yes, sir.

Q. What else took place on the street that night?

[155]

A. I saw in I guess twenty minutes after the firing occurred at the court house, the streets were full of armed white people; the negroes had disappeared from the streets, from this part of town, and we would see them coming in in every direction, from every direction in cars with guns, white people.

Q. Yes.

A. Then I was down at the police station.

Q. What took place at the police station?

A. They were sending men out to the different parts of town, to guard the town, armed men.

Q. How long did you stay down there?

A. I was there only a few minutes.

Q. Then where did you go?

A. I went along up and down Main Street and over toward the Tulsa Hotel and back over toward the Elks Club.

Q. And when did you retire?

A. I lived on the north side, and I was informed by some police officer, I don't remember whom, now, that I couldn't cross the Frisco tracks, and so I went with a friend and retired at a room in the Elks Club, about two o'clock and stayed in there for about a couple of hours.

Q. And from the time you went from the Court House, up until two o'clock, was there any [156] shooting going on during that period of time?

A. Continuously.

Q. You say you got up at two o'clock?

A. Four o'clock; they were making so much noise, passing around and so much noise, we couldn't go to sleep and we got up.

Q. And when you got up at four o'clock what did you do or see?

A. Well, I made the same—traveled all around the same streets I traveled over in the early part of the evening, down to the Tulsa Hotel and up along Main Street.

Q. What did you see when you first got on the street?

A. Well, I saw about what I had seen in the earlier part of the evening, a lot of armed white men.

Q. And did you notice any—did you hear any shooting after you got up?

A. I did, yes.

Q. Where was that shooting?

A. It was over towards the direction of the north side, towards stand pipe hill.

Q. And did you go down in that part of the town?

A. I did not.

Q. How long did that shooting continue down there?

[151]

A. Well, it continued, I guess, up until nine or ten o'clock; I am sure it continued up to that time.

Q. Did you see any fire that was down in that section of the town?

A. I saw the fire and the smoke, about seven or eight o'clock.

Q. Where were you?

A. I was on the street then, and about nine o'clock I went up on top of the Tulsa Hotel, and I viewed the district, from there.

Q. And about how many different fires could you detect down there?

A. Oh, I don't know, it looked like the whole of that section down there from Cincinnati to Greenwood was on fire in the negro district.

Q. In viewing that fire from the Tulsa Hotel, did it appear that it was one fire or separate fires?

A. Well, I saw several different fires.

Q. About how many?

A. Oh, I don't know, must have been thirty or forty I guess at different places.

Q. Did you see any other dead bodies than that man you saw coming out of the house that evening?

A. I saw one or two on a truck, negroes brought up through Main Street, and I saw a dead nigger—I saw some of them from the top of the Tulsa Hotel, and then there [158] was a nigger killed down here at the entrance of the alley behind the Palace Building, on Fourth Street.

Q. Did you see any other dead bodies?

A. No, I don't think so."

The cross examination conducted by MR. PTAK. commences at page 619 and concludes on page 622 and covers the same ground covered by the direct examination.

The defendant (R. 622) rested its case.

Plaintiff's Rebuttal Testimony.

F. T. SMITH, (Colored) R. 623.

This witness was called and testified on, behalf of the plaintiff on rebuttal, substantially as follows:

That his name was F. T. Smith; that he lived at 920 East Indianapolis, Tulsa, Oklahoma and had lived in Tulsa since 1912. When asked what his business was answered:

A. "I am representative or porter at the National Bank of Commerce".

and that he had been such representative for four or five years; that he remembered the occasion of some fire on the 1st day of June, 1921; that he was at the Gurley Hotel at 10:30 or 10:45 the morning of June 1st and that the Gurley Hotel was located on Greenwood Avenue; that the Gurley Hotel was destroyed by fire on that date; he testified that he knew the location of the Dixie Theatre and the Red Wing Hotel (R. 624). He then located these properties with reference to the Gurley Hotel; that the last time he saw Gurley, the owner of the hotel, on June 1st, 1921 was about one hour before the witness left the hotel and that the hotel was burned after Gurley left the hotel; that the hotel was not burning when the witness left the hotel that the Dixie Theatre and the Red Wing Hotel were not on fire at the time witness left the Gurley Hotel. (R. 620) He testified that when he left the hotel [159] he went to the corner of Greenwood and Archer and that he could see down Greenwood as far as Cameron and could see the Dixie Theatre and the Red Wing Hotel; that he left the hotel because four soldiers came to the hotel and hollered that if there was anyone in there to come out, that he went out and that these men told him that they were soldier sand that he went with them and went to the corner of Archer and Greenwood and stayed there about thirty or thirty-five minutes (R. 027) and that they, were waiting at this corner until the persons he called soldiers could gather together negroes from, the different premises. That while he was there at the corner there were ten or twelve people at that intersection, including two or three soldiers. (R. 628). He testified that when he left that intersection there were no fires on north Greenwood between Archer and Cameron and that he went from there to Convention Hall. He then described the course he took in going to Convention Hall and what happened.

Cross-Examination (R. 629)

Witness testified that he was at the Gurley hotel part of the time.

1. "I was in the Gurley Hotel until nine thirty or nine forty-five-1 beg your pardon, I mean ten thirty or ten forty-five.

Q. You are sure it wasn't nine-thirty or nine forty-five?

A. No, sir.

Q. When did you get in the Gurley hotel?

A. You mean that day?

Q. That night.

A. It must have been about eight or eight thirty.

Q. In the morning?

A. That night.

Q. The night before May 31st.

A. May 31st.

Q. You stayed there all night, did you?

A. Yes, sir.

Q. Did you hear any shooting during the night?

A. Well, I think I did.

Q. Heard a whole lot of it, didn't you?

A. Well, I heard a little bit, quite a bit.

Q. There were niggers down there up and down Greenwood and Archer, armed, weren't there?

A. I don't know, I was upstairs.

Q. You didn't go down to see?

A. No, sir.

Q. But you did hear the shooting?

A. Yes, sir, but the shooting was westward from me.

Q. Over toward the depot?

[162]

A. Well, west.

Q. Would that be toward the Frisco depot?

A. Well, the Frisco depot would be a little southwest.

Q. Archer would be west of you?

A. Archer, no, sir, Archer was south of me.

The testimony then discussed the direction and witness testified that he did not know where the shooting was, as he was in his room and could not tell, but it sounded like it was back west of the hotel.

At record page 631 he testified:

Q. " What time did you wake up in the morning?

A. Well, I, wakened about five-thirty.

Q. That was when the whistle blew, wasn't it?

A. Yes, sir.

Q. That was a signal for them to start the fight, wasn't it?

A. I don't know, I was not fighting.

Q. Didn't you hear the shooting?

A. Well, I, heard some shooting, yes, sir.

Q. You heard quite a bit of it too, didn't you?

[163]

A. I heard quite a little.

Q. And that continued down until the time you left the Gurley Hotel, didn't it?

A. As to time ?

Q. Yes.

A. No, they wasn't doing much shooting.

Q. They were doing some though, weren't they?

A. Well, along about seven or eight o'clock there wasn't very much of it.

Q. And wasn't there shooting over in the north part of the negro section after you left the Gurley Hotel and was standing down on the street?

A. In the north part?

Q. Yes, north.

A. I didn't hear any.

Q. You heard shooting over on stand pipe hill, didn't you?

A. Well, the shooting was west of me you see when I was in the room.

Q. You was pretty well excited, wasn't you?

A. No, sir, I was in the house.

Q. You wasn't excited at all?

A. Not very much.

Q. Did you leave the hotel at the time Gurley left?

[164]

A. Oh, no, Gurley left an hour before I did.

Q. Gurley left an hour before you did?

A. Yes, sir.

Q. Are you sure of that?

A. Absolutely.

Q. You saw him leave, did you?

A. Yes, sir.

Q. Wasn't there a whole crowd went down when Gurley went down?

A. No, didn't very many go down with Gurley.

Q. About thirty-five or forty?

A. No, sir.

Q. Wasn't the stairway full and didn't he elbow his way down?

A. No, he and his wife went down side by side. He made the remark that he was going to look around with his wife. We kidded him when he went down and said that was about the first time he ever been out with his wife.

At page 634.

Q. "At that time there wasn't a building burning on Greenwood, was there?"

A. From Archer to Cameron?

Q. You say there wasn't a building burning, there wasn't a building burning?

[165]

A. No, sir, there wasn't a building burning at that time.

Q. There wasn't a building burning on Archer when you came down there?

A. Oh, yes.

Q. There was? What buildings were burning on Archer?

A. I think the building that Mrs. Sadwich (?) occupied was burning.

Q. That was the midway, was it?

A. Yes, that is right.

Q. Did you see when it started to burn?

A. No, sir.

Q. You were still tucked away in your room, wasn't you?

A. No.

Q. Where were you?

A. Upstairs, I wasn't in the room.

Q. Whereabouts?

A. In the Gurley Hotel.

Q. You looked out the window?

A. I never did look out no windows.

Q. You stayed right in your room, didn't you?

A. No.

Q. Where did you stay?

A. Up in the hotel at different places, any [166] place that I could be to get away from the window.

Q. That you felt the safest, is that right?

A. Well, that is about right.

Q. You didn't want any of those shots that were being fired to hit you, did you?

A. No.

Q. That is why you were keeping away from the windows, and they were coming pretty fast, weren't they?

A. Well, I don't know how fast they were coming because I wasn't in the room very long.

Q. You didn't stay in one place very long?

A. I stay at one place a long, long time.

Q. Where was that?

A. That was on the third floor; up on the third floor they have rooms on each side and rooms in the middle.

Q. You got in the middle room, didn't you?

A. I was going to answer if you would let me; they have a passage between the middle rooms.

Q. Yes, sir.

A. A passage, and there is a toilet there, and there is a little jump off you might call it, little back off place there. I put my chair and set right there.

Q. In that toilet?

[167]

A. No, not in the toilet, outside of the toilet where the little back off place, say something like this (indicating).

Q. And you were back in there where you wasn't going to let any of those bullets get after you that came in the windows?

A. Yes, sir.

Q. And that is why you were there?

A. Yes, sir.

Q. You was some scared?

A. No, I wasn't so afraid.

Q. You wasn't scared, but you were just getting out of the way?

A. No, I thought when I got there I was⁹ in safety, there was no need to be scared then.

Q. You was getting away from the riot, wasn't you?

A. I don't know, I guess there was a riot.

He then described the Pyro building and its location and stated he remembered the Midway and Partee building burning and that those were the only buildings, including possibly the Pyro building, that were burning when he got down on the street. At record page 637 he was asked this question:

Q. And so far as you know there wasn't [168] any other buildings on Archer on either side, besides those two, that, we're burning up to ten thirty in the morning?

A. That is all that I saw.

At record page 638 he was asked this question:

Q. "There wasn't any other fires in that whole district that you saw or could have seen when they took you down out of the Gurley Hotel at ten thirty or ten forty-five, was there?"

A. Only two places that I remember.

Q. Then the only fires that occurred down in the nigger district on that day, happened after ten thirty or ten forty-five on the morning of June the 1st?

A. I don't know when it happened.

Q. You don't know when it happened?

A. No.

Q. It hadn't happened when you left there at ten thirty or ten forty-five, had it?

A. I don't know, I am talking about that that I saw.

Q. I say, the only fire you saw was those two buildings?

A. Yes.

At page 639 of the record he was asked this question;

[169]

Q. "And if any of that, property burned between Greenwood and Detroit, west of where you were, other than those two buildings, they burned after you left at ten thirty or ten forty-five, didn't they?"

A. I don't know when they burned.

Q. They hadn't burned when you left?

A. I don't know."

He then testified as to how he spent his time in the hotel; that he did not know who was with him; that he stayed in the little jump off place there from six o'clock in the morning until eight o'clock, and at record page 644 he testified in

reference to why he did not go to work on the morning of June 1st, 1921:

A. " Well, when I got up that morning the noise was going on and the shooting, and I called up the president of the bank and he advised me not to attempt to come, so I remained in the Gurley Hotel.

Q. It was on account of the trouble that was going on that you didn't go to work, wasn't it? That shooting in there?

(On objection the conversation with the president was stricken.)

Q. The reason you didn't go to work was on account of the shooting, wasn't it?

A. Oh, yes.

[170]

Q. You were afraid of getting killed, weren't you?

(Objection sustained.)

Q. The reason you didn't go to work was you were afraid to go when you heard the shooting, and because you were afraid you would get killed, wasn't it?

(Objection sustained-exceptions.)

Q. When did you first learn of the trouble up town?

A. What do you mean by up town?

Q. When did you first hear of the trouble between the whites and blacks in town at that time?

A. I don't know just when I heard of the trouble between the whites and the blacks, because I went up in my own room early that night and I didn't know of the trouble between the whites and the blacks.

Q. You knew there was trouble, didn't you?

A. I knew,—well, I don't know, I heard some of what was going on but I kept in my bed though.

Q. You saw the negroes armed down on Greenwood the night before you went to bed, didn't you?

A. Well, there was quite a bunch down there and they was milling around and talking.

Q. Talking about lynching a boy, wasn't they, up at the court house?

[171]

A. They was talking about they was afraid somebody was going to lynch the boy.

Q. They said they wasn't going to let him be lynched, didn't they?

A. I don't know, might have said something like that.

At page 647:

Q. Why did you go in the hotel about eight o'clock and stay there?

A. Well, as I before told you, there was quite a crowd milling around and I didn't want to be in a bunch, in that bunch, and I went in up to my room.

Q. You wasn't—you wanted to get out of any trouble that happened?

A. I didn't want to be in any big bunch, I didn't know whether any trouble was going to happen or not; that bunch appeared to me kind of a rough neck bunch or kind of like that, I didn't want to be with it.

Q. In other words, you didn't want to get in any trouble yourself?

A. Don't ever want to.

Q. That is the reason you got away from that bunch that was hunting trouble that night?

(Objection sustained.)

Q. Those negroes were down there talking trouble, wasn't they?

(Objection sustained.)

[172]

Q. As I understand you then, the reason that you went to your room at eight o'clock and stayed there was to keep out of trouble?

A. I wouldn't say exactly, I said I didn't want to be with that bunch, didn't want to be around that bunch.

Q. Why was it you didn't want to be with the bunch there?

A. As I told you, it seemed to be kind of a rough bunch and I didn't want to be with that bunch and I went to the room.

Q. Was that rough bunch armed?

A. I don't know, it might have been, I don't know.

Q. Didn't you see some fire arms down there?

A. It appears to me that I saw one, or probably two.

Q. Did you see Gurley talking to the negroes and trying to get them to cut it out?

A. I saw him talking.

Q. What was Gurley saying to them then?

A. I think he told them they ought to go home, something like that.

Q. I will ask you if he didn't tell them there wasn't going to be a lynching, Barney Cleaver had told him there wasn't going to be any lynching and they better go on home and not go up to the court house?

[173]

A. He probably might have told them that, I don't know.

And at page 652 he was asked this question:

Q. "Then you didn't leave there until about eleven fifteen, did you?"

A. Yes, sir.

Q. It was eleven fifteen when you left there, was it?

A. About that time.

Q. Did you look at your watch?

A. Well, no sir, not at that time.

Q. At the time you left there at eleven fifteen, there wasn't any fires on Greenwood, was there?

A. Not between Cameron and Archer.

Re-direct Examination

At page 653 witness described the course he took in going to Convention Hall and stated he was summoned as a witness for the defendant.

At page 654 witness stated that shortly after the fire he made a statement to Mr. Rittenhouse on about August 3rd, 1921.

Re-cross Examination

On re-cross examination he was asked this question:

[174]

Q. " Nobody asked you when you came out of the Gurley Hotel, did they?

A. No, sir."

ABRAHAM RIPS (R. 655)

This witness testified on behalf of the plaintiff (R. 655) as follows:

" That he lived in Tulsa, Oklahoma and was living in Tulsa on June 1st, 1921 and his place of business was at Frankfort and Brady in the same block with the Red Wing Hotel that he was in the oil well supply business; that his buildings were frame; that the Katy tracks were in front of his buildings; that he was down in that part of town in the morning of June 1st, 1921, arriving there between eight and nine o'clock or something like that, he saw the fire department there and that they were putting out fire on some coal cars that were burning, these cars being in front of his shop; that he believed the wind was blowing east and the wind was from the west; that his buildings had started to burn when he got there and he. asked the firemen if they would turn the hose on his buildings and they said they

couldn't and that he had some horses on his premises and that he got them out; that he was afraid they would catch on fire. That he was down there about half an hour and when he left the Red Wing Hotel was still there and was not on fire. At record page 659 he was asked this question:

Q. Did you observe any shooting going on in that section of town?
[175]

A. No, I didn't see it, I wouldn't be there if there was.

That he did not observe any other fire department in that section of the town and that he left and did not return for a day or so.

On cross examination he testified among other things (R. 663):

Q. "There was a riot in town, was there?"

A. I knew there was a riot in town, yes, that is all I knew myself."

(Objections to this were sustained and exceptions allowed.)

At page 664 of the record this question was asked:

Q. "Then you do know what was going on on June the 1st, 1921, don't you?"

A. All through the night, yes, and all day, yes.

Q. And you did as a matter of fact hear shots that were fired down there beginning at five o'clock in the morning when the whistle blew, clear up until eleven or twelve o'clock?

A. Until twelve o'clock?

Q. Along about that time.

A. No, sir, maybe I heard that morning at home, in fact I heard shots in front of my house several times during the night [176] and early in the morning, but I was up at seven.

Q. Now when you got down there between eight and nine o'clock in the morning there, was a lot of fire there, wasn't there?

A. Yes.

He then described the buildings that were burning on Archer and what he did while he was in the district substantially as testified to on direct examination.

On re-direct examination (R. 667) he testified that he had no interest in the lawsuit and that he had no insurance on his building.

HENRY HALE (R. 668)

This witness was called and testified on behalf of the plaintiff on rebuttal substantially as follows:

"That his name was Henry Hale; that he lived at 415 South Lansing, Tulsa, Oklahoma and had lived in Tulsa for fifteen years and was living in town on the 1st day of June, 1921; That he was a salesman for the Nichols Hardware and was working for them at that time; that he knew where the Dixie Theatre was and also the Red Wing Hotel and that he was over in that section of town the first of June, 1921 at about 8:30 or 9 o'clock in the morning at the intersection of Brady Street and the Katy tracks and that [177] at the time he was at that intersection he heard no shooting and there was no fire at the Red Wing Hotel or the Dixie Theatre; that he stayed in the district about an hour; that he left and returned again to the district about 10:30 or 11 o'clock; that he went down Brady Street to Greenwood and was at the side of the Red Wing Hotel and that he was just kind of looking around and that there was no shooting going on at that time at that place and that he left about a quarter after eleven.

And at Record 670:

A. "Well, must have been about a quarter after eleven when I left there and the thing was on fire then.

Q. What was?

A. About a quarter after eleven, there was fire up above it then.

Q. What do you mean by that?

A. Above the Dixie Theatre.

Q. The Dixie Theatre was on fire at that time?

A. Well it caught pretty shortly, right then I think.

Q. Do you know when the Red Wing Hotel caught fire, or did you see that burn?

A. I saw the smoke come out at the end.

Q. At what time was that?

[178]

A. Well, that was shortly after the theatre was afire."

Cross-Examination (R. 671)

Q. "You came by Rips' property when you came up to Brady, didn't you?

A. Yes, sir.

Q. And it wasn't on fire, was it?

A. I don't know.

Q. You are not positive about anything that happened down there that morning, are you?

A. Oh, yes.

Q. You had a gun on?

A. No.

Q. Worked at a hardware store?

A. Yes, sir.

Q. Where was your hardware store?

A. First and Cincinnati.

Q. The whites got in there and got the ammunitions and rifles out, didn't they?

A. I don't know.

Q. You wasn't there at the time?

A. No, sir.

Q. Were you down at the store any that morning?

A. Seven o'clock.

[179]

Q. What was the condition of the building when you got there?

A. Well, the front was broke out, that is the plate glass.

Q. What was the condition of the stock?

A. Fairly good, except right around where the ammunition was and the guns.

Q. The ammunition was gone?

A. Well, some of it, some of it scattered over the floor.

Q. The guns were gone, weren't they?

A. Yes.

Q. Where had you been prior to seven o'clock that morning?

A. At home.

Q. You heard the shooting, did you?

A. Yes.

Q. Did you come down close to the negro section along about seven o'clock to see what was going on?

A. No, I came to the store.

Q. Was that away from it at that time?

A. I came down Second Street, would be about the usual course.

Q. There was considerable shooting down here that morning, wasn't there?

A. There was some, yes, sir.

[180]

Q. Do you know anything about that trouble they had here?

A. Yes, sir.

Q. What do you know about it?

A. I know they had it.

Q. You know there was trouble between the whites and the blacks?

A. There was trouble between somebody, I don't know who.

Q. Quite a battle?

A. I imagine, I don't know.

Q. From what you heard, you imagine it?

A. I seen a good deal.

Q. Did you see any dead bodies?

A. No, sir.

Q. See anybody get shot?

A. No.

Q. But when you passed this man Rips' property about ton thirty or ten forty-five it wasn't on fire, was it?

A. I don't know, I couldn't say.

Q. Well, how did you pick out the Red Wing Hotel as distinguished from the Rips' property?

A. Well, I was a little bit interested there.

Q. What were you interested in it for?

[181]

A. Well, I had worked for the man a long time.

Q. You had worked for Redfern?

A. Yes, sir.

Q. How long had you worked for Redfern?

A. Eleven years.

Q. What were you doing when you worked for Redfern?

A. I was foreman of the wholesale house.

Q. Down there in that section?

A. No, sir.

Q. Worked for Redfern eleven years?

A. Yes, sir.

Q. You are not working for him now?

A. No, sir.

Q. How long has it been since you worked for him?

A. Four years the first of March.

Q. That is the reason that you were down there looking at his property?

A. No, sir, just kind of interested in it; I knew all of this very well over there, for that matter.

Q. But because you worked for him for eleven years, you went over to see if his property was burning?

A. Just kind of interested to know whether it was burning or not.

[182]

Q. You didn't do anything down there yourself, you didn't take any part in that?

A. No, Sir.

Q. But you were down there?

A. Yes, sir.

Q. Did you help march the negroes out there to Convention Hall?

A. No, Sir.

Q. You were down there all alone, were you?

A. Well, practically so, yes."

He testified that he did not take part in any of the shooting; that he did not see any of the fires and that there were fires burning on Archer and on Easton; that he saw the firemen down there; that he saw quite a bit of fires and that there were some right in where he was.

Re-direct Examination (R. 674)

"He testified that he saw the firemen down there working and they were throwing water on the Williams Building near the Gates-Nichols wholesale house and he noticed a lumber yard by the track, but he did not see whether it was on fire or not, and that the people he was working for had some property down in that section, consisting of wholesale houses and warehouse at Brady and Katy tracks and that he was looking after that too; that he had testified he had worked for Redfern as foreman in a wholesale house at First and Cincinnati for eleven years."

[183]

At Record page 676 the plaintiff rested.

It is to be noted that the three witnesses who testified on rebuttal on behalf of the plaintiff did not show or testify to any intervening cause for the fire. In fact there is no evidence in the entire record from which any reasonable man could conclude that there was an intervening cause. It is our contention that where the plaintiff shows by his testimony on direct examination that he did not know the cause of the fire and then admits on cross examination that the fire was caused by the riot and when the defendant's testimony conclusively shows that the fire which destroyed the plaintiff's property was either a direct or indirect result of the Tulsa race riot, that then the burden was upon the plaintiff to establish by competent

evidence an intervening cause and that without such proof of an intervening cause there was no controverted fact to go to the jury. That from the evidence offered on behalf of the plaintiff and defendant all reasonable men would agree that this fire was either a direct or an indirect result of the Tulsa race riot.

The theory of the plaintiff's case is stated by his counsel in the opening statement, wherein he says:

[184]

"* * * and that this fire was of unknown origin and that since he suffered a total loss, that since these policies were in force and since the destruction was by fire of unknown origin, that he is entitled to recover the face of the policies on this loss."

At Record page 676 the jury was excused, both sides having rested and the defendant interposed the following motion for a directed verdict:

MR. RITTENHOUSE:

"Now, comes the defendant and moves the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff, for the reason that the policies sued on, and each of them, contains the following clauses: In the insuring part of the policy reads as follows: 'In consideration of the stipulation herein named, and of Ninety Eight Dollars (\$98-00) premium, does insure William Redfearn for the term of one year from, the 12th day Of September, 1920 at noon, to the 12th day of September, 1921, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding Five Thousand Dollars', that being policy No. 6112; and policy No. 6205 being the same, except reciting a consideration of Seventy eight dollars and eighty cents (\$78.80) and insuring for one year from the 15th day of March, 1921 to the 15th day of March, 1922 and policy No. 6122 contains the same provision except a premium charge of One hundred and eleven dollars and twenty [185] cents (\$111.20) and insuring for one year from the 23rd day of August, 1920 to the 23rd ,day of August, 1921; and each of said policies contain the further provision as follows: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riots, civil war

or commotion, or military or usurped power, or by order of any civil authority or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon; and for the further reason that all the evidence in this case shows that, a riot began or was commenced on the 31st day of May, 1921 and continued during the night and up until about noon of June 1st, 1921, and that said property described in the policies above mentioned was destroyed by fire which was set by more than three persons during the course of said riot, and that under and by virtue of the terms of the policies, the defendant would not be liable in this action; and that there is no evidence in this case which tends even remotely to show that said fire was (not) caused by any other means or had any other origin than that of the riot or being set by rioters, and for those reasons, the defendant is entitled to have the jury instructed to return a verdict in its favor. Now, if Your [186] Honor please, I want to be heard on that."

Thereupon the jury was excused. (R. 678)

Thereupon (R. 679) counsel for plaintiff and defendant presented and argued said motion and at record page 679 the following record was made:

THE COURT:

"Well Gentlemen, you have argued to the court pro and con here at some length. The court is under the impression that there, is no question in the court's mind but what this is the result of the riot, and so, let the demurrer be sustained.

MR. RITTENHOUSE:

And the jury instructed to return a verdict for the defendant?

THE COURT:

Yes, if you desire it that way.

MR. RITTENHOUSE:

Yes, that is what I want.

MR. HAYSON:

To which the plaintiff excepts.

THE COURT:

Call the jury.

Whereupon the jury returned to the court room.

THE COURT:

Gentlemen of the Jury, the question has come up as a matter of law in this matter and the court finds and I am requesting the jury to return a directed verdict in this matter; a form has been prepared and one of your number will sign the same as your foreman and [187] return a verdict for the defendant in this case." Whereupon the verdict was signed by the foreman.

THE COURT:

"Gentlemen, you may be discharged from further consideration of the case, and report to the court clerk's office in reference to your time.

MR. PTAK:

We want to except to this verdict.

THE COURT:

Make whatever record you want.

MR. HAYSON:

To the returning of the verdict into court under the direction of the court for the defendant, the plaintiff excepts and exception is allowed.

THE COURT:

All right.

(The court then took a recess)

MR. HAYSON:

"Let the record show motion for new trial is filed, considered by the court and overruled.

THE COURT:

And the same is filed, and let the same be overruled.

MR. HAYSON:

To which the plaintiff excepts, and the plaintiff in open court gives notice of appeal, etc. 90-10-5, etc."

It is respectfully submitted that under the [188] evidence in this case that there was no issue of fact to be submitted to a jury and that all the evidence showed that the property of the plaintiff was destroyed as a result of the "Tulsa Race Riot".

Discussion of Citations of Plaintiff in Error

Citations—Directed verdict

Several Oklahoma cases are cited by counsel for Plaintiff in error, brief p. 95-96-97 and 98, as to when the trial court is justified in sustaining a motion for and in directing a verdict in the trial of any cause. The rule is stated in *Kinney v. Groom*, 163 Pac. 531, 63 Okla. 164, as follows:

"It is only when the evidence with all the inferences the jury could reasonably draw therefrom, will be insufficient to support a verdict for the plaintiff, that the court is authorized to direct a verdict for the defendant, and unless the evidence is such that no recovery can be had upon and view that can be properly taken of the facts as presented by the evidence, the case should be left to the jury under proper instructions."

Other cases to the same effect are cited by counsel, in their brief, and while this is the rule, it cannot be relied upon for a reversal of this case, as there was no evidence offered by the [189] plaintiff in error as to the cause or origin of the fire, on his direct testimony he stated that the cause of the fire was *unknown* to him, however on cross-examination he admitted that this fire was caused either directly or indirectly by the "Tulsa Race Riot".

The demurrer to the evidence was overruled, exceptions allowed and the defendant in error then proved conclusively that the fire in question was not only indirect but was a direct result of the "Tulsa Race Riot". And the plaintiff below did not offer any evidence to prove an *intervening cause* for the fire, that is, that the fire may have resulted from some cause other

than the riot. With the record in this condition both sides rested. The plaintiff contends that as he had testified on direct examination that he did not know the cause of the fire, and although the defendant had proved, by evidence, conclusively that the fire resulted from the "Tulsa Race Riot", yet the court should have submitted the case to the jury to see if they would not venture a guess that a defective wire, mouse or something else might have caused the fire, even though no evidence had he introduced by him to show an *intervening cause*.

From a reading of the testimony of the plain-[190] tiff, William Redfern, especially the cross-examination, it is evident that Mr. Redfern merely kidds[sic], himself when he states that he did not know the cause of this fire, or that there was not a riot in Tulsa on the date in question, or that his property was not burned by the rioters.

It is our contention that all reasonable men could come to but one conclusion from the testimony in this case, and that that conclusion would of necessity be, that there was a riot in Tulsa on May 31st and June 1st, 1921, and that practically the entire negro section of that city was destroyed during the riot; that the fire that destroyed the property of the plaintiff, William Redfern, was set by rioters; that more than three persons actually set this property on fire, and that the evidence does not in any manner, show an intervening cause and that under these conditions there was only one course for the trial judge to take to direct the jury to return a verdict for the defendant.

It must not be overlooked that counsel in their brief practically admit that there was a riot, referred to by them as a disturbance.

Neither should it be overlooked that counsel have persistently omitted to comment upon the testimony of witness

GREEN E. SMITH R. p. 112 who [191] saw fifteen or twenty white men set the properties of the plaintiff on fire.

American Central Ins, Co. v. Stearns Lumber Co. 36 L. R. A. (ns) 566; 145 Ky. 255.

This case is cited by counsel at page 101 of their brief and counsel claim this to be a parallel case to the one at bar.

This case distinguishes the case of *Spring Guardian Ins. Co. v. Imperial Tobacco Co.*, 20 L. R. A. (ns) 277; 132 Ky. 7, 136 Am. St. Rep. 164 1.16 Sec. 234, which is the leading case on the subject of riot where an insurance policy is involved, and holds that under the facts proven at the trial the fire (in the Stearns Lumber Company case) was not caused directly or indirectly by the rioters, but was caused directly by reason of the wrongful act of the deputy marshal in ordering his men to set the building on fire. The court then holds that the deputy marshal was without civil authority to order the building burned and that the act of the marshal intervened between the riot and the fire; that while there was a riot in the building, that there was an intervening cause for the fire distinct from the riot.

So far as the question of liability under the [192] insurance policy is concerned the case has no application to this case whatever. It is, authority, however, for the proposition that where it is established that, the fire was caused "directly or indirectly" by the riot, that there must appear in the proof, evidence of an *intervening cause*, for the fire, before the insurance company can be held liable.

The note, 36 L. R. A. (ns) 566, has this to say concerning this case:

"A search has failed to disclose any other case in which it is sought to hold an insurance company liable for

the destruction of a building burned to secure a fugitive from justice.

No authority is cited in the *Stearns case* on the question of liability under such facts, and we are unable to find any case to support the "Stearns" case.

We cited the *Stearns case* at the trial on the proposition that where the fire is shown to have been caused "directly or indirectly" by riot, that the plaintiff must then come back and show an *intervening cause*, in the opinion, 36 L. R. A. (ns.) 568, the court says:

The loss of the house was the direct result of another unlawful act, *which interven-* [193] *ed* between their act and the burning of the house. The unlawful act of the marshal in setting fire to the house was the cause of the loss."

There is no conflict in the record in this case as to whether there was or was not a riot—all the evidence shows conclusively a *Riot*; and Green E. Smith is not contradicted on his testimony that the rioters set plaintiff's buildings on fire. And there is not one bit of evidence that the fire was "caused by officers of the law in attempting to arrest rioters or suppress a riot". There was no one shown to have been in the buildings, or either of them, to arrest. Redfern had locked his "Dixie Theatre" at nine thirty the night before and was at the time this place was set afire standing south of the intersection of Greenwood and Archer. How can it be said, therefore, that there was need of breaking into his building to make an arrest, when this property was closed and locked. Likewise there is no evidence that there was anyone in the "Red Wing Hotel" to arrest.

Nor is it shown in this (Redfern) case that an officer or supposed officer gave any order to arrest anyone or to set either property on fire to effect an arrest.

To our minds, there is nothing similar between the Redfern case and the Stearns case. The case of *Spring Garden Ins. Co. v. Imperial Tobacco Company*, also decided by the Supreme Court of Kentucky, is in point and will be discussed later in this brief.

Rossion vs. St. Paul Fire & Marine Ins. Co., 188 Pac. (Calif.) 564.

This case is cited by counsel at page 105 of their brief to show that the burden is upon the Insurance Company to prove, that the fire fall within an exemption clause of the policy. It also is authority for the proposition that the burden is upon the plaintiff to show an *intervening cause*, when the defendant has sustained the burden so placed upon him.

Under this case, and also under the Stearns case, the proof comes in this order, (1) the plaintiff proves his policy, ownership of the property, furnishing of proof of loss, and amount of loss and the fire, then (2) the defendant must prove the exemption, and if this is done, then (3) the plaintiff must prove an *intervening cause* for the fire. If there is evidence of an *intervening cause*, the case goes to the jury, if there is not, and the only evidence on the question shows that the fire loss comes within the exemption clause, then there is [195] no liability, and no question of fact to go to the jury. It is then a question of law for the court. So it was in the case at bar.

'The case of *Kirshenbaum v. Massachusetts Bonding & Ins. Co.*, 186 N. W. (Nebr.) 325, is directly in point, though arising upon a burglary policy which contained the riot clause, the court in the third syllabus, holds:

"Where on the trial of an issue of fact the proof relating to the disputed issues is so clear and conclusive that reasonable minds cannot reach different conclusions, it is not error for the trial court to dismiss the jury and enter judgment in accordance with the evidence."

In the body of the opinion, at page 326, the court says:

"Plaintiffs, as we understand their position, do not concede that the rioters who assembled for the purpose of taking the prisoner from the county jail and lynching him were the same parties who broke into the store and carried away the goods, which consisted chiefly of firearms and ammunition. Defendant's position is that it immaterial whether the crowd at the courthouse and the crowd assembled in front of plaintiff's store be regarded as one body or as two; that in either event the loss suffered fell within the exemption clause of the policy pleaded by the defendant. We do not deem it necessary to set out the testimony of the witnesses verbatim. [196] Plaintiffs did not see the breaking, but we have the testimony of several disinterested witnesses, each describing the scene in substantially the same manner. From this testimony, which is free from material conflict, it appears that groups of men were going up and down the streets making a great noise; that they broke and entered at least eight places of business; that firearms were taken out and shots were discharged; and that from time to time they called, 'Let us get some ammunition,' 'Let us get some guns,' 'Lynch him,' 'Kill him,' and 'Get the nigger.' They did not seem to be working as individuals, but as groups made up of many individuals. At least one policeman is shown to have been in the vicinity of plaintiffs' store, but he was apparently unable to quell the commotion. It appears that the parties who inflicted the loss on plaintiffs were engaged in the unlawful, and, in the end unsuccessful, effort to get possession of the prisoner and lynch him.

(1, 2) Riot and civil commotion import occasional local or temporary outbreaks of unlawful violence, which, though temporarily destructive, do not rise to the proportions of organized rebellion against the government. *Boon v. Aetna Ins. Co.*, 40 Conn. 575. The words 'riot or civil commotion' as used in the policy in suit will be given their popular or usual meaning, and be held to imply the wild or irregular action or tumultuous conduct on the part of three or more persons assembled together for the common purpose of doing an unlawful act.

(3) The proof is conclusive that a 'riot or civil commotion' existed, and that it was [197] the proximate cause of plaintiffs' loss. Under the evidence, reasonable minds could not reach different conclusions, and there was no question to submit to the jury. It follows that the

court did not err in entering judgment for defendant, and the judgment is affirmed."

Pacific Union Club vs. Commercial Union Assurance Company, 107 Pac. 728.

The above case is cited by counsel for plaintiff in error, at page 107 of their brief. This case has no application to the case at bar, as in that case the fire was not caused either directly or indirectly or even remotely by reason of the earthquake, but occurred the day following the earthquake and the company set up as a defense that the water mains were broken by the earthquake the preceding day, which prevented the fire department from, putting out the fire and the court rightly held that the fact that the water mains were broken by the earthquake was not the direct or indirect cause of the fire. In that case the fire occurred from one of the causes insured against, and occurred at a time when there was no earthquake or other cause included in the exemption clause.

Earthquake Cases

The Pacific Heating & Ventilating Co. vs. Willliamburg City Fire Ins. Co.,

111. Pac. (Calif.) 4.

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Counsel for plaintiff in error, at page 109 of their brief, have cited the above case as applicable to the case at bar. This case also cites a number of other cases that arose at the time of the San Francisco earthquake. The case deals with the construction of the earthquake clause, which is incorporated in the riot clause in that policy.

The policy in question did not contain an *earthquake clause*. The provision of the policy sued on, known as the riot clause, is as follows:

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

The clause of the policy construed in the *earthquake case* cited by counsel is as follows:

"This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power , or by order of any civil authority; or for loss or dam- [199] age occasioned by or through any volcano, earthquake, or hurricane, or other eruption, convulsion or disturbance; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon."

The Supreme Court of California in the cases cited by counsel, as well as the Federal Court in the case of *Baker & Hamilton v. Williamsburg City Fire Insurance Company*, 157 Fed. 280, distinguishes between the *riot clause* of the policy and the *earthquake clause*, and holds that the words "directly or indirectly" contained in the riot clause apply only to that part of the clause and that the words following the semi-colon after the riot clause "or for loss occasioned by or through earthquake" is to be construed independently of the words "directly or indirectly" as used in the riot Clause and that the words "or for loss occasioned by or through earthquake" exempted the company from liability only in case of a direct loss caused by earthquake.

Had the words "directly or indirectly" been [200] used in the earthquake portion of the clause exempting the company from liability, there would have been no liability in the earthquake cases, but since those words were omitted from that part of the clause exempting the company from liability from earthquake, the company was held liable for an *indirect loss* resulting from earthquake and the court in the case cited by counsel says:

"A policy insuring against loss, by fire, providing that insurers shall not be liable for loss caused 'directly or indirectly' by other of certain causes and then, after a semi-colon, 'or for loss * * * occasioned by or through * * * earthquake, except from the policy, regards loss through earthquake, only such as is *caused directly* as well as proximately thereby; and so not a loss from fire set by earthquake to a distant building and communicated to the insured building through the burning of the intermediate buildings."

And in the body of the opinion the court says:

"By its plain terms the company agreed to pay him a certain sum in case of the destruction of his property by fire. His property was destroyed by fire, and the defendant thus became liable unless saved by the exemption in the clause hereinbefore quoted. The first part of the exception, to-wit:

'This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or military or usurped power, or by order of any civil authority'.

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ends by a semi-colon. It is thus plainly stated that the company shall not be liable for loss caused directly or indirectly by the various things therein enumerated. As the damage in this case was not caused by any of the things enumerated in the first class of the condition, it, therefore, is not subject to the comprehensive words 'caused directly or indirectly.' After the use of the above quoted words, and after the semi-colon, occur the words 'or for loss or damage occasioned by or through any volcano, earthquake, * * *.'

"The words 'damage occasioned by or through * * * any earthquake' by their fair interpretation mean such damage as is caused 'by or through an earthquake.' What was the

cause of the plaintiff's loss or damage? It was fire, the peril which he had insured against. When the earthquake occurred, and the vibrations of the earth ceased, the plaintiff's property had not been damaged, nor had he lost it. His property remained intact, and it had not been set on fire by the earthquake. He had suffered no loss by the earthquake or through the earthquake. He afterwards lost his property by fire, which was the direct, and proximate cause of his loss.

"It is true that the appellant claims that the earthquake caused the fire in the building occupied by Mack & Co., and that this fire caused the fire in the adjoining building, and so on until finally it reached and burned the property of the plaintiff. If we go back from cause to cause, we can trace the parent cause to the earthquake which was the remote cause of the fire. But the plain common-sense reading of the policy would convey no information [202]

to plaintiff that he could not recover if the cause of the fire was an earthquake.

"The company, by its own words, in the first part of the clause has provided that it shall not be liable for loss in certain cases caused either 'directly or indirectly,' by the things therein enumerated. It then, after a semi-colon used in other language. 'It dropped the words 'directly or indirectly,' and in lieu thereof used the words 'by or through.' Was it the intention that the words 'by or through' should have a different meaning from the words 'directly or indirectly'? We think it clearly appears that it was not intended by the use of the words 'by and through' that the defendant was not to be held for any loss *indirectly caused* by earthquake, volcano, hurricane, or any, of the terms used after the words 'by or through.'

In this same case, the court quoting from *Baker & Hamilton v. Williamsburg City Fire Insurance Company*, 157 Fed. 280, as follows:

"Having seen that this exception relates to the origin of the fire, and that there must be a direct connection between the earthquake and the starting of the fire, it seems reasonably clear that it was the intention of the defendant to exempt itself from liability if an earthquake should be the immediate, proximate, and direct cause of a fire which destroyed the property. That might occur in a good many ways. Earthquake might cause a fire in the building by short-circuiting of the wires, or by a gas

explosion, or by throwing inflammable material into contact with the fire of a [203] furnace, or the like, and this would be an earthquake-caused fire. But if such a fire should start in a building a mile away, and be thence communicated. from building to building until it reached property not directly so affected, a fire originating would be *indirectly caused* by earthquake, and not *directly*.'"

It is, therefore, clearly apparent that the earthquake cases have no application to the case at bar, for the reason that the riot clause contains the words 'directly or indirectly' and if fire was started by reason of the riot and was communicated from building to building until it had reached the plaintiff's property, the company would still be exempt from liability as that fire would be *indirectly caused by* the riot. The California court and the Federal court construed the earthquake clause to exempt the company from liability only of fires *caused directly* by earthquake.

Statutory and Common Law Definition of Riot.

Counsel for plaintiff in error have cited no cases construing the riot clause of the policy, neither have they discussed *the Imperial Tobacco Company case*, decided by the Supreme Court of Kentucky, which is the leading case on the subject of riot, as connected with a fire insurance policy.

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There are no cases in Oklahoma which pass upon the riot clause of a standard form fire insurance policy and this is the first time that this question has been before this court.

Before discussing the Imperial Tobacco case and other cases, we wish to call the court's attention to a few decisions and statutes bearing upon the question of riot.

By Section 2006, *Oklahoma Compiled Statutes*, 1921, riot is defined as follows:

"*Riot defined.* Any use of force or violence or any threat to use force or violate if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot."

In the case of *Simmons v. Territory*, 11 Okla. 574, the Territorial Court held:

"1. *Riot-Number of Participants.* By the statutes of Oklahoma three or more persons must act together in order to commit the offense of riot; a less number than three cannot commit such offense, but any one or more of those participating in the riot may be tried and convicted."

In the case of *Cochran. v. State*, 4 Okla. Cr. 379, 111 Pac. 974, at page 975, the court says. after quoting the Oklahoma statute on riot:

"From this it is seen that the statutory [205] elements of the crime of riot are the use of force or violence, of threats to use force or violence, accompanied by immediate power of execution. Unless these elements exist there can be no riot; * * *."

In the case of *Crawford v. Ferguson, County Judge*, 5 Okla. Cr. 377, 115 Pac. 278, which involved the disqualification of the judge on an application for mandamus, the court holds:

"1. *Riot-What Constitutes.*

"Where three or more persons, without authority of law, combine together, and by reason of threats to use force or violence, if accompanied by immediate power of execution, seek to accomplish any unlawful purpose, they are guilty under the law of riot."

In the second syllabus the court holds:

"The violation of law under the guise of attempting to enforce the law, is not only illegal, but it is anarchy."

In the case of *Proctor v. State*, 5 Okla. Cr. 553, 115 Pac. 630, the court in the first syllabus holds:

"To constitute the offense of riot, there must be, not only a common intent on the part of three or more persons, acting together to do an unlawful act, by use of force or violence or by threats to use force and violence,

accompanied by immediate power of execution, but also concert of action in furtherance of such intent. And where the evidence fails to prove [206] or tend to prove any facts or circumstances, from which a common intent to do such act might be inferred, or that such person assembled, confederated, acted in Concert, or acted together, a conviction for riot will not be permitted to stand."

And in, the body of the opinion the court says:

"Under the statute a riot cannot be committed by one person alone or two persons acting together; there must be three or more persons acting together, and without authority of law. Therefore, in order to make out a case of riot, it was incumbent upon the state to prove, beyond a reasonable doubt, that. there were three or more of the defendants acting together, and without authority of law; that the three or more defendants, without authority of law, used force or violence, or threatened to use force or violence, which threats were accompanied by immediate power of execution, and that they so acted together."

To the same effect is-

Castile vs. State, 161 Pac. (Okla. Cr.) 330.

Darnell vs. State, 174 Pac. (Okla. Cr.) 290.

Johnson vs. State, 16 Okla. 428, 183 Pac. 926.

In the case of *Spring Garden Insurance Company v. Imperial Tobacco Company*, 132 Ky. 7, 116 S. W. 234, 136 Am. St. Rep. 164, 20 L. R. A. (N. S.) 277, the common definition of riots is as follows:

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"A 'riot' is described to be a tumultuous, disturbance of the peace by three persons or more assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in, a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful."

In the, instant case the evidence shows that there was all the way from a few hundred to several thousand people engaged in

the Tulsa. race riot; that they met at different places, some at the court house, some on Greenwood Avenue, some at the hardware store, some at the pawn shop, and fully armed themselves with guns and ammunition, with a common intent to execute a common plan, to-wit: the extermination of the colored people of Tulsa and the destruction of the colored settlement, homes and buildings, by fire. There is no question but that they had the intent; that they had the immediate power of execution and that they in fact did carry out their purpose and intent. A reading of the record in this case, which is voluminous, shows beyond a reasonable doubt that a riot existed and that the plaintiff's property was burned by reason of that riot.

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Riot Cases—Riot Clause.

There are a number of cases which define riot and determine the non-liability of an insurantee company under a standard form policy containing what is known as the riot clause. The earthquake cases are an example of determination of liability where the loss resulted indirectly from the earthquake and the earthquake clause was held to exempt the company from direct loss caused by earthquake, holding that the words "directly or indirectly" as used in the riot clause were not brought forward into the earthquake clause, hence those cases have no application to the instant case, as the word "directly or indirectly" are used in the riot clause in the policy sued on herein and this case is, therefore, governed by the following cases, from which we quote extensively:

Spring Garden Ins. Co. v. Imperial Tobacco Co.
Connecticut Fire Ins. Co. v. Imperial Tobacco Co.
Caledonian Ins. Co. v. Imperial Tobacco Co.

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Hanover Fire Ins. Co. v. Imperial Tobacco Co.

Pennsylvania Fire Ins. Co. v. Imperial Tobacco Co.,
132 Ky. 7, 116 S. W. 234. 136 Am. St. R. 164, 20
L. R. A.. (N. S.) 277.

"2. *Contracts—152—Construction — Use of Words.*

Words in a contract must be interpreted according to their ordinary and popular sense, unless from the context it appears to have been the intention of the parties that they should be understood in a different sense or by the usage of trade or the custom of the country they have and were understood by the particular or peculiar meaning as distinguished from their ordinary meaning."

"4. *Insurance—146—Construction of Policies—Intention of Policies.*

In the construction of insurance contracts as well as others, the intention of the parties is to be gathered from an inspection of the entire instrument and all parts of it, and all words employed should be given meaning and effect if possible."

"5. *Insurance—421—Construction of Policy—Fire Policy — Exceptions—'Riot.'*

"An insurance policy recited that the insurance company insured certain property against 'all direct loss or damage by fire, except as hereinafter provided'; the quoted words appearing in large printed letters in the [210] body of the policy and in a part of the insuring clause. In small printed letters in the body of the policy were rewritten exceptions that would relieve the company from liability, among them: 'This company shall not be liable for loss caused directly or indirectly by * * riot, * * *, Held, that as the insurance was solely against fire, the words 'except as hereinafter provided' referred to the words 'against all direct loss or damage by fire,' and exempted the company from liability for destruction of the insured property by fire as the result of a riot. There being no statute defining or describing a riot, the common law must be looked to for a definition, according to which a riot is a tumultuous disturbance of the peace by three persons or more, assembling together of their own authority with an intent mutually to assist each other against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing it in a

violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful; and hence where a body of 100 or more men, armed and disguised, unlawfully confederated and banded together for the purpose of destroying property of an individual, and in pursuance of the unlawful conspiracy burned it, and at the same time intimidated and terrorized the inhabitants and civil authorities, the fire which burned the property was caused by a riot."

The judgment for the plaintiff was reversed, the court saying in the opinion:
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"The policy Issued by each company contains the same emiditions and exceptions. They are what is known as the 'Standard Fire Insurance Policy of the states of New York, New Jersey, Connecticut, and Rhode Island,' and stipulate that the company insures the property of the appellate tobacco company against ,*'all direct loss or damage by fire, except as hereinafter provided.'* These words appear in large printed letters in the body or the policy and as a part of the insuring clause. In small printed letters in the body of the policy are the exceptions that relieve the company from liability. Among these exceptions, and in a separate clause, is the following:

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

The defense relied upon was presented in answers, to which a general demurrer was sustained; and, declining to plead further, the petition was taken as confessed and judgment entered for the full amount claimed by the insured.

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So much of the answers to which a demurrer was sustained as is material to the questions involved reads as follows:

'This defendant further says that said policy of insurance was issued by it to the plaintiff and accepted by the plaintiff as aforesaid, and provides that it does insure the Imperial Tobacco Company of Kentucky for the term of one year from the --

----- day of November, 1906, at noon, to the ----- day of November, 1907, against all direct loss or damage by fire, except that said company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion or military or usurped power, or by order of any civil authority, and this defendant avers and charges the facts to be that said loss mentioned and set forth in the plaintiff's petition[sic] was caused directly or indirectly by invasion, riot, or commotion or usurped power, in violation of the terms and provisions of said policy and that under the express terms and conditions of said policy the same thereby became and at the time of the bringing of this suit and at all times after said fire occurred was and is wholly null and void.

This defendant further says that all of the property mentioned and described in said petition, and which is described in and by said policy of insurance, was destroyed and burned by fire on the night of November 30, 1906, or early in the morning of December 1, 1906, by reason of an invasion, riot, and commotion and usurped power within the true intent and meaning of said provision contained in said policy of insurance above set forth, and that the said property was destroyed and burned as afore-[212]said by a large body of men, about 100 or more in number, who invaded the city of Princeton, Ky., on said night of November 30, 1906, or morning of December 1, 1906, and who were armed and disguised at the time of said invasion, and who unlawfully conspired and confederated and banded themselves together for the purpose and with the intent of destroying all the property mentioned and described in the plaintiff's petition, including the three and one-story brick and frame, metal roof building, and its contents, consisting of tobacco in bulk and in packages, and described in the petition, and being the property referred to in the petition as well as a large amount of other property located in said city of Princeton and owned by numerous other parties, and that, in pursuance of said conspiracy, confederation, and unlawful purpose, on the night of November 30, 1906, or morning of December 1, 1906, said large body of men armed and disguised and banded together as aforesaid for the purpose of destroying the property described in plaintiff's petition, as well as a large amount of other property in said city of Princeton, invaded the city of Princeton, Ky., and took forcible possession of the police station, and the police force of said city, and also surrounded and took forcible possession of the fire department of said city of Princeton, Ky., and also surrounded and took forcible possession of the town hall of said city of Princeton, Ky., and of all telegraph and telephone offices in said city of Princeton, and by the numbers and strength of said invaders they

overawed and intimidated and terrorized and usurped the power of the civil authorities of said city, [214] and took forcible possession of said city authorities and of the civil administration of said city, and also of the inhabitants and citizens thereof, and by use of their firearms said mob did hold up, overawe, intimidate, terrorize, and usurped the power of the civil authorities of said city, and took forcible possession of said civil authorities and of the civil administration of said city and also of the inhabitants and citizens thereof, and by use or their firearms said mob did hold up, overawe, intimidate, terrorize, and utterly subject and usurp the power of the civil authorities as well as the inhabitants of said city of Princeton to their unlawful control, and, after doing this, proceeded to the property of the plaintiff, as well as to a large amount of other property in said city of Princeton, and tore down, dynamited, blew up, shot into, and destroyed and burned the property of said plaintiff, as well as the property of other citizens of said city of Princeton, Ky., all of said acts being committed and commotion being created in an unlawful and riotous manner by said large body of men who invaded said city of Princeton for the purpose of creating said riot and of destroying said property.'"

* * * *

After quoting the definitions of riot found in Blackstone and other authorities, it is further said:

"But it is said by counsel for appellee that it would be absurd to hold that, ir two persons assembled to burn a person's property in a tumultuous manner, the insurance companies would be liable for the loss, but that, if [215] a third man joined them in unlawful enterprise, the companies would not be liable. Hence it is argued that the definitions noted should not control, but that a riot in the meaning of the word as used in the policies must be a condition more or less analogous in effect to an invasion, insurrection, civil war, or usurpation of power, something aimed not at a single or several individuals engaged in a particular business, but at society as organized, having for its purpose the overturning permanently or temporarily of the existing order of things. But, in view of the well-understood meaning of the word it cannot be given this construction. In using it in the policies the companies must have intended that it should have and receive the only ineaning given to it by both lawyers and laymen-in short, its popular and usual meaning. In fact, no other definition can be attached to it without going outside of the standard authorities that have treated on the subject, and doing

violence to the accepted rules concerning the construction of words in a contract or writing. It is everywhere agreed that words in a contract must be interpreted according to their ordinary and popular sense, unless from the context it appears to have been the intention of the parties that they should be understood in a different sense or by usage of trade or custom of the country they have and were understood by the parties to have a particular or peculiar meaning as distinguished from their ordinary meaning. 17 Am. & Eng. Encyc. of Law, p. 12; 9 Cyc. pp. 578, 583; 1 Chitty on Contracts, p. 113. *And it may be here observed that what constitutes a riot does not depend so much on the number of persons [216] engaged or assembled, as it does in the manner in which they act. It is the disorder, the tumult, the terrorizing, the putting in fear, the violence, the unlawful acts that are the essential things.* Three armed men, banded together for the purpose of doing an unlawful act, with force and violence, acting in a tumultuous and disorderly manner, might be guilty of conduct amounting to a riot; whereas, a hundred or more, although acting in concert, in a disorderly and noisy manner and disturbing the peace, would not constitute a riot, unless some unlawful act was committed, although such a body might be an unlawful assembly. We are not, however, called upon in this case to make any nice or refined distinctions as to what number or persons, or what character of conduct, would constitute a riot if only a few were engaged in it and their actions might have room for doubt as to whether or not what they did amounted to a riot. We can easily understand that there might be serious doubt as to whether the acts of three, or a small number of persons, or, indeed, any number, acting in concert for an unlawful purpose, would amount to a riot. Whether what they did would or not be a riot within the meaning of the definitions given would depend upon the *facts and circumstances presented in the particular case.* But we can say without any feeling of hesitation or sense of uncertainty that, if the facts stated in the answers do not describe a riot, it would be impossible to frame an answer that would. *If a body of 100 or more men, armed and disguised, unlawfully confederated and banded together for the purpose and with the intention of destroying the property of an in-[217] individual, and who in pursuance of such unlawful conspiracy do destroy it, and at the same time intimidate, overawe, and terrorize the inhabitants and civil authorities, is not a riot, we are at a loss to know*

what facts it would take to constitute a riot under any definition the word has ever received."

As stated by the court in the opinion it appears that no definition of the word "riot" appears in the statutes of the state of Kentucky, and hence the court was compelled to resort to the common law definition of the word to ascertain its meaning as used in the standard form of fire insurance policy. The Oklahoma Statutes R. L. Okla. 1910 sec. 2558, define the word "riot".

The court further say:

"As riot was the direct cause of the fire, the next question is: Did the policies relieve the companies from liability? In the consideration of this meaning of the case, it must be kept in mind that the policies only insured against direct loss or damage caused by fire. Loss or damage from any other cause, except lightning, was not insured against. The contract of insurance *did not undertake to protect the insured against loss by riot or invasion, or insurrection, or civil war, or military or usurped power, or by order of any civil authority, or by theft;* so that the words 'except as hereinafter provided,' following the words 'against all direct loss or damage by fire,' if they are to have any meaning at all, or are to be given effect whatever, must exempt the com- [218] panies from loss by fire 'caused directly or indirectly by an invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil mithority,' because the policies did not undertake to protect the insured, either directly or indirectly, against loss resulting from either of the causes mentioned. If the words 'except as hereinafter provided' had been omitted from the contracts, then the insurance would have been against fire from any and all causes. *But, not desiring to assume responsibility for all fires,* the companies limited their undertaking and agreed to indemnify the insured against loss by fire except as provided in the policies. It will thus be seen that the words 'except as hereinafter provided' are material and important in their effect upon the rights of both the parties to the contracts. *It will thus be folly to say that the purpose was to exempt the companies from loss caused by riot alone, unaccompanied by fire, when nothing but fire is insured against;* as in no

event and under no circumstances were the companies liable for loss by riot alone or loss not occasioned by fire. Manifestly, when the insurance was protection against fire alone the companies could not be held liable for the injury or destruction of the property by a riot without a fire. In other words, if the rioters had torn down the building, or had carried off the property covered by the policies, or had injured or damaged it in any way, the companies would not have been responsible. Therefore we repeat that, unless it was intended by the contracts of insurance to relieve the companies from liability for fire caused by riot, the words 'ex-[219] cept as hereinafter provided' are absolutely meaningless.

The companies had the unquestioned right to insert as many reasonable provisions in the policies excepting them from liability as they thought proper or necessary. We know of no rule of law that denies to insurance companies this privilege. They may limit the amount of insurance they will offer, may limit the species of property they will insure, may provide reasonable conditions that the insured must observe, as well as conditions that will in certain states of cases operate as a forfeiture of the policies or waiver of the right of the insured to recover upon them, and may protect them selves from loss resulting from causes that they do not desire to offer indemnity against. Why, then, should these words by which the companies undertook to limit their liability be stricken from the policies or ignored in their construction? They are not obnoxious to any principle of law or public policy. They are not surplusage. They are not in conflict with any other provisions in or words of the policies. They may be read harmoniously in connection with the other and subsequent clauses, and when so read, become a material intelligent part of the contracts. They are, inserted for a purpose, intended to have a meaning, are not of doubtful or uncertain import, and when fairly and reasonably applied they exempt the companies for loss by fire when the fire is caused by a riot. It is also a familiar principle everywhere recognized in the construction of contracts, including contracts of insurance, that the intention of the parties is to be gathered from an inspection of the entire instru-[220]ment; and that all parts of it, and all words employed, should be given meaning and effect if this can be done."

The judgment was reversed with directions to the trial court to overrule the demurrer to the answer in each case, and for further proceedings in conformity with the opinion.

Lycoming Fire Ivs. Co. v. Schwenk, 95 Pa. St. 891 40 Am. R. 629:

"An insurance policy provided that a company should not be liable for fire caused by invasion, insurrection, riot, civil commotion, or military or usurped power.' A coal-buriker insured was burned by a party of men at night who fired shots and drove away the watchman. *Held*, a riot, without proof of a previous unlawful assembling, accompanied by force and violence."

The judgment was for the plaintiff, which was reversed on appeal for error in the instructions given.

After reciting the evidence as to the ellaricter of the disturbance that preceded and accompanied the setting of the property on fire, which was burned and lor which recovery was had against the insurer on its policy, the court say:

"We are decidedly of the opinion that in the foregoing testimony every element of a riot is found, whether at conunon law or under [221] our act of 1705. That was an unlawful assemblage of three or more persons combined together to perpetrate all outrageous and violent crime. The commission of the crime was immediately preceded by numerous discharges of firearms. Two peaceable citizens engaged in watching and protecting the premises, placed there for that purpose, were compelled to flee therefrom in terror of their lives. The crime was arson, one of the most odious known to the criminal law. It was committed at a late hour of the night, when the great majority or persons are in their beds and asleep and least prepared to defend themselves or their property. It is an offense having a more natural and necessary tendency to put whole communities in fear and terror than almost any other. In this instance it was accompanied by the voices of men calling for wood and oil with which to apply to the fire, by the loud and appalling noise of exploding weapons of destruction, and the criminals themselves were a band or men, whose numbers could not be determined on account of the darkness of the night. *For a court in charge of a jury to speak of such an occurrence as anything less than a riot*

of the most marked and distinct character would be simply to mislead them. We think the learned judge of the court below in his comments to the jury dealt quite too leniently with the plain and undisputed facts of the case."

The Aetna Ins. Co. v. Boon, 95 U. S. 117, 24 L. Ed.

395:

2. "Where a policy of fire insurance excepts liability for a fire which may happen by means of an invasion, or of any military or [222] usurped power, a fire which happened by means of the burning of the property by a U. S. military commander, in order to prevent military store from falling into the possession of the rebel forces, was excepted from the risk undertaken by the insurers."

3. "The proximate cause is the efficient cause; the one that necessarily sets the other causes in operation."

We quote from the opinion:

"The policy contains this express stipulation[sic]:

'Provided always, and it is hereby declared, that the company shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or, of any military or usurped power, or any loss by theft at or after a fire.'

The general purpose of this proviso is clear enough, but there is controversy respecting the extent of the exemption made by it. It has been very strenuously argued that the words 'military or usurped power' must be construed as meaning military and usurped power; that they do not refer to military power of the government, lawfully exercised, but to usurped military power, either that exerted by an invading foreign enemy or by an internal armed force in rebellion, sufficient to supplant the laws of the land and displace the constituted authorities. There is, it must be admitted, considerable authority, and no less reason, in support of this interpretation. To our view of the present case, however, we [223] are not called upon to affirm positively that such is the true meaning of the words, in the connection in which they were used in the policy now under review; for, if it is conceded that it is, we are still of opinion that the fire which destroyed the premises of the plaintiffs below 'happened', 'took place', or occurred by means of a risk excepted in the policy. In other words, it was caused by invasion, and the usurped military power of a rebellion against the government of the

United States, as the contracting parties understood the terms 'invasion' and 'military or usurped power.'

Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object, and plain intent of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured.

That the destruction of the plaintiff's property by fire was a consequence of the attack of the organized rebel military forces upon the forces of the United States holding possession of Glasgow, the special findings of facts clearly show. Glasgow was a military post, and was a place of deposit for the military stores of the United States, which was the city hall. The city was guarded and defended by a military force under the command of Col. Harding.

On the 15th day of October, 1864, an armed force of rebels, under military organization, surrounded and attacked the city at an early hour in the morning and threw shot and shell into the town. * * *

During the battle, and when the govern-[224] ment troops had been driven from their exterior lines of defense, it became apparent to Col. Harding that the city could not be successfully defended, and he thereupon, in order to prevent the said military stores from falling into the possession of the rebel forces, ordered Major Moore, one of the officers under his command, to destroy them.

In obedience to this order to destroy the said stores, and having no other means of doing so, Major Moore set fire to the city hall, and thereby the said building, with its contents, was consumed. Without other interference, agency or instrumentality, the fire spread along the line of the street aforesaid to the building next adjacent to the city hall, and from building to building through two other intermediate buildings to the store of the plaintiffs, and destroyed the same, together with its contents, including the goods insured by the defendant's policy aforesaid. During this time, and until after the fire had consumed such goods, the battle continued; and no surrender had taken place, nor had the forces of the rebels, nor any part thereof, obtained the possession of or entered the city.

In view of this state of facts found by the court, the inquiry is whether the rebel invasion or the usurping military force or power was the predomiuating and operative cause of the fire. The question is not what cause was nearest in time or place to the catastrophe. That is not

the meaning of the maxim 'causa proxima, non remota spectatur.'

The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely in- [225]cidental or instruments of a superior or controlling agency are not the proximate causes and the reasonable ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster. A careful consideration of the authorities will vindicate this rule.

Mr. Phillips, in his work on insurance, sec. 1097, in speaking of a Nisi Prius case of a vessel burnt by the master and crew to prevent its falling into the hands of the enemy, *Gordon v. Rimmington*, 1 Camp., 123, says, "The maxim, *causa proxima spectatur*, affords no help in these cases, but is, in fact, fallacious; for if two causes conspire, and one must be chosen, the more scientific inquiry seems to be, whether one is not the efficient cause, and the other merely instrumental or merely incidental, and not which is nearer in place or time to the consummation of the catastrophe.' And again in sec. 1132:

'In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient, predominating peril, whether it is or is not in activity at the consummation of the disaster. '

In *Brady v. Ins. Co.*, 11 Mich. 425, Ch. J. Martin, in delivering the opinion of the court, said: 'That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed.' * * *

Policies of insurance do not protect an as-[226]sured against his voluntary destruction of the thing insured. Yet in *Gordon v. Rimmington* (supra) it was held that, when the captain of a ship insured against fire, burned her to prevent her falling into the hands of the enemy, it was a loss by fire within the meaning of the policy. It was because the fire was caused by the public enemy. The act of the captain was the nearest cause in time, but the danger of capture by the public, enemy was regarded as the dominating cause.

And in this court similar doctrine has been asserted; *Ins. Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65, the principle of which case, we think should rule the present. There it

was, in effect, ruled that the efficient cause, the one that set others in motion, is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster.

In *Butler v. Wildman*, 3 B. & Ald., 398, may be found a case where the captain of a Spanish ship, in order to prevent a quantity of Spanish dollars from falling into the hands of an enemy threw them into the sea. The suit was upon a policy insuring the dollars, and judgment was given for the plaintiff. Bayley, J., said: 'It was the duty of the master to prevent anything which could strengthen the hand of the enemy from falling into their possession. Now, as money would strengthen the enemy, it was the duty of the master to throw it overboard; and the sacrifice of the money was, therefore, *ex justa causa*. It seems to me, therefore, this is a loss by jettison. But if it is not a loss by jettison, it is a loss by enemies. It clearly falls within the principle [227] stated by Emerigon, in the case of the destruction of a ship by fire; and I think the enemy was the proximate cause of the loss. Holroyd, J., said: 'It seemed to him it was a loss by enemies, for the meditated attack was the direct cause of the loss. A similar doctrine was asserted in *Barton v. Tus. Co.*, 42 Mo. 156; and in *Marcy v. Ins. Co.*, 19 La, Ann. 388. * * *

The proximate cause, as we have seen, is the dominant cause, not the one which is incidental to that cause, its mere instrument, though the latter may be nearest in place and time to the loss. In *R. co., v. Kellogg* (ante 256), we said, in considering what is the approximate and what the remote cause of an injury: 'The inquiry must always be whether there was any immediate cause disconnected from the primary fault, and self-operating, which produced the injury' In the present case, the burning of the city hall and spread of the fire afterwards was not a new and independent cause of loss. On the contrary, it was an incident, a necessary incident and consequence, of the hostile rebel attack on the town—military necessity caused by the attack. It was one of a continuous chain of events brought into being by the usurped military power events so linked together as to form one continuous whole. The case is, therefore, clearly within the doctrine asserted by Emerigon, and held in *Butler v. Wildman*, and in other cases we have cited. Hence it must be concluded that the fire which destroyed the plaintiff's property took place by means of an invasion or military or usurped power, and that it was excepted from the risk undertaken by the insurers."

* * *

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Conver v. Alavchnster Ins. Co. (C.C A. 9th Ct. 130 Fed. 743) ; 70 L. R. A. 106.

"2. *Same-Open Policy - Provisions - Enforcement.*

Where complainants accepted an insurance certificate insuring their crop against fires subject to all the terms and conditions of a certain open policy in defendant's possession made a part of the certificate, plaintiffs were bound by the provisions of such open policy though they had no knowledge thereof."

"3. *Same-Fires-Police Regulations - De Facto Authority.*

Where the supervisors of a county ordered fires to be started on certain pasture land for the purpose of destroying 'insects which were injurious to fruit, crops, etc., under Cal. St. 1897, pp. 465, 466, c. 277, authorizing such supervisors to provide for the destruction of insects and to make sanitary regulations not in conflict with general laws, such supervisors had de facto authority to start the fire, which was sufficient to relieve an insurer of grain destroyed thereby, under a provision in the policy that insurer should not be liable for any loss occasioned by order of any civil authority, though the fire was started on other property, and the burning of plaintiff's grain was occasioned by the fire getting beyond control."

We quote a part of the statement of the case having reference to the third paragraph of the syllabus:

In the month of June, 1902, lands in the [229] county in which the land referred to in the certificate is situated were threatened with disaster by a plague of grasshoppers, and on June 17, 1903, the board of supervisors of said county made an order referring to the threatened danger from said pest, and reciting that the only practical method of destroying the same and saving the orchards and vineyards in said county was to burn the grass upon certain pasture land, and ordering that the grass thereon be condemned and destroyed. by fire. The order was carried out, and the fire was started at a point from three to four miles distant from the land upon which the grain of the plaintiff in error was situated, but it

got beyond control and reached the land of the plaintiff in error, and burned their grain insured as aforesaid." * * *

The policy contained the provisions, that:

"This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority."

In the opinion it is said:

"It is contended, further, that the property was not directly or indirectly destroyed by order of civil authority; that there was no law authorizing the supervisors of a county to destroy the property of the citizens thereof; and that the property of the plaintiffs in error was destroyed by accident or neglect, and without their fault. The record of the findings of the trial court show that the fact was established [230] that the fire was started under an order of tile supervising or the county. The statutes of California of 1897, pp. 465, 466 c., 277, confers authority upon the supervisors of a county to provide for the destruction of insects injurious to fruit trees, vines or plants, and to make and enforce local police, sanitary, and other regulations not in conflict with general laws. But whether or not there was lawful authority to start the fire which incidentally caused the damage in this case there was de facto authority. The order was in fact made, and made by the officers to whom the said powers were given, and thereby the loss occurred.

This, we think, excuses the insurance company. *Barton v. Home Insurance Co.*, 42 Mo. 156, 97 Am. Dec. 329. *The fact that the loss was the result of a fire started on other property, and that the property of the plaintiffs in error was not ordered to be burned, do not render the exemptions of the policy inapplicable.* There was but one fire. It was ordered by civil authority. *It indirectly caused the loss, and there was no intervening cause.* *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395; *Granik Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Kripper v. Biebl*, 28 Minn. 139, 9 N. W. 671."

Judgment for insurance company was affirmed.

Germania Fire Ins. Co. v. Deckard. 3 Ind, App. 361, 28

N. E. 868:

"7. The policy stipulated that it should not cover 'any loss or damage by fire caused by means of any invasion, insurrection, riot,' etc. Rev. St. Ind. 1881, Sec. 1918, provides that, 'if three or more persons shall do an act [231] in a violent and tumultuous manner, they shall be deemed guilty of a riot.' Held, that where five masked men at night forcibly break into a dwelling house, and compel the occupant to vacate under threats of personal violence, and then burn down the building, this constitutes a riot."

We quote from the opinion:

" By the terms of the policy it was agreed that the insurance should not cover 'any loss ,or damage by fire caused by riwans of any invasion, insurrection, riot, civil commotion, or military or usurped power.' One paragraph of answer set up the defense that the building in question was destroyed by fire by means of a riot. The findings of the jury upon this issue are contained in paragraphs 7 and 8 of the verdict, which are as follows:

'That said building was, on the night of the 1.6th of May, 1890, by three or more men, in a forcible manner, broken into, and afterwards 'burned.'

(8) 'That on the night of the 16th of May, 1890, five men, with their faces disguised, came together at said building, and with a fence rail forcibly broke open the door of the building, and three of them entered, and told the tenant therein to get out of bed and out of the house, under threats that if he did not they would roast him, saying, "We are going to burn the house." They lead said tenant away from the building.' No question is raised challenging the validity of that part of the contract under consideration, nor, indeed, can we percieve, upon what ground it could be successfully [231] challenged. Barton v. Ins. Co. 42 Mo. 156; Ins. Co. v. Schwenk, 95 Pa. St. 89; Dupin v, Ins.,Co. 5 La. Ann. 482; May Ins. sec. 403; 7 Am. & Eng. Enc. Law, 1042.

It is argued, however, that the verdict does not show that the house was burned by the rioters. We think it fairly appears that it was so burned. The several parts of the verdict state that the house was broken into forcibly, and afterwards burned by three or more inen, on the night of the 16th of May, 1890. The eighth paragraph contains a more elaborate description of the men, and their assembling

and unlawful conduct. Where five masked men, in the night-time, assemble and forcibly break into a dwelling-house, and compel the occupant to vacate under threat of personal violence, and then burn down the building, it constitutes a 'riot', within the legal definition or that term. Rev. St. 1881, sec. 1981; State v. Acra, 28 N. E. Rep. 570. The court erred in awarding appellee judgment on the verdict."

Dupiv v. Alutual lus. Co., .5 La. Ann. 4821 3 Fire Ins, Cas. (Bennett) 128:

"Where a house is destroyed by a riotous assemblage, and there is a clause in the policy excepting a loss of that character, *the insurance company is not liable for the loss*. It is, in such a case, immaterial that the rioters assembled originally for a lawful purpose, but afterwards were guilty of a riot."

"It is not necessary, in order to exempt an insurance company from liability for loss by a riot, that the guilt of the rioters should have first been established by a criminal prosecution."

"Slidell, J. The action is upon a policy [233] of insurance. The defense is, that the building insured was set fire to and destroyed by rioters, and that the case comes within the following clause in the policy: 'Provided always, and it is hereby declared, that this corporation shall not be liable to make good any loss or damage by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or or any military or usurped power, or by an earthquake or hurricane.' We concur with the district judge in the opinion that the defense was sustained by the evidence. It is true, that the persons who set fire to the house had originally assembled without any design, but, for an *innocent purpose*.

But it seems, says a writer of high authority, to be clear, that if, in an assembly of persons met together on *any lawful occasion*, a sudden proposal should be started of going together in a body to pull down a house or inclosure, or to do any other act of violence, to the disturbance or the public peace, and such notion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together for such a new purpose is in no way extenuated by their being met at first upon another. Russell on Crimes, vol. 1, p. 268, citing 1 Hawkins P. C. c. 65, s. 3.

It is said, that the precise number of persons engaged in setting fire to the house is not proven; and under the authorities it may be conceded that, to constitute a riot, there must be a tumultuous disturbance of the peace by

three persons or more. See Russell, vol. 1, p. 266. We consider it, however, clear from the evidence, that the number of persons engaged-[234] ed was more than three; and that, for the purposes at least of the inquiry in a civil action, *the fact of a riot was established*. The riot seems to have been preceded by an affray; but, in our opinion, was not the less on that account, in legal contemplation, a riot. It is said, that if there was a riot, the defendants were obliged to establish the fact by the Judgment of a competent court in a criminal proceeding, wherein the rioters were tried and convicted. The plaintiff has not cited, nor are we aware of any authority in support of this proposition." Judgment affirmed.

Lockett-Wake Co. v. Globe & Rutgers Fire Ins. Co., 171 Fed. 147 (Cir. Ct. W. D Kentucky.) ;

'1. *Insurance - 421 - Construction of Policy - Exceptions.*

In a policy insuring property against loss by fire except as otherwise provided, a clause excepting 'loss caused directly or indirectly by invasion, insurrection, riot,' etc., *must be construed as an exception of the insurer from liability for a loss from fire caused by a riot; as a loss otherwise than by fire being entirely outside the terms of the policy.*"

"2. *Insurance - 146 - Construction of Contract.*

Insurance policies are contracts by the terms of which both parties are bound, when clear and unambiguous."

"3. *Insurance -146 - Exceptions to Policy-Waiver.*

The fact that an insurance agent, who [235] issued policies to plaintiff, urged as an inducement to procure such insurance the very danger which afterwards caused a loss, but which was within the exception contained in the policies, *does not constitute a waiver by the insurer of such exception*, where there no agreement to that effect, and the policies were delivered and accepted with such clause retained."

We quote from the opinion by EVANS, District Judge:

"Each policy provides that the defendant company 'does insure' the plaintiff in the amount stipulated for the

specified term 'against all direct loss or damage by fire except as hereinafter provided,' and each policy thereafter contained 'a provision which, for brevity's sake, will be called the 'excepting clause', and which is in this language:

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

* * * "The defendant answered, asserting that the insured property was caused by a fire [236] which was caused by acts which are specifically and in detail set forth; and which, in the judgment of the court, show that the fire and consequent loss was caused by a riot within the meaning of the words as used in the policy. In the judgment of the court the conduct, described in the answer, of persons commonly called 'Night Riders', constituted a 'riot,' and those persons, when assembled and acting together, constituted a 'mob', within the meaning of those *almost synonymous words* as given by Bouvier in his Law Dictionary. The court has no doubt that the facts stated in the answer bring the loss within the express stipulations of the parties as set forth in their contracts.

When the demurrer was argued, it was urged on behalf of the plaintiff that inasmuch as the excepting clause stipulated that 'the company shall not be liable for loss caused directly or indirectly by invasion, riot,' etc., and did not provide that 'the company shall not be liable for loss by fire caused directly or indirectly by invasion, riot,' etc., the policy covered the loss independently of the excepting clause, and that the answer did not show a state of facts which brought the case within the clause, because the words 'by fire' were not included therein. This view appears to be supported by the case of *Commercial Ins. Co. v. Robinson*, 64 Ill. 265, 16 Am. Rep. 557; but we cannot yield to the argument nor to that case. The view seems to be wholly unsound and unmaintainable. The only loss insured against or which is covered by the policies is 'loss by fire', and we do not doubt [237] that the exception in the policies of loss caused directly or

indirectly by 'riot' must include those from fires which are the work of rioters. The excepting clause necessarily relates back to a 'loss by fire,' as that phrase is previously used in the policy; otherwise the excepting clause is meaningless as referring to a loss not covered by the insurance. When we lay out of view all the intervening and inapplicable clauses in the policy, and endeavor to bring into juxtaposition those clauses which bear upon the question now involved, we think the only fair and sensible construction of the contracts is that the policies insured the plaintiff against direct loss by fire except as further therein provided, to the effect that the defendant shall not be liable for any loss caused directly or indirectly by riot. If the loss was not by fire, it was not insured against at all, and the excepting clause was useless. If the loss was by fire, it was insured against, unless the fire bringing about the loss was caused directly or indirectly by riot. If the latter, the loss comes within the excepting clause; but in the former the loss was not insured against at all, so that in either event the defense is good. That this is the fair and natural interpretation of the language of the parties in the contract sued on we do not doubt, and we think these conclusions are supported by the decisions in *Insurance Co v. Boon*, 95 U. S. 117, 24 L. ed. 395; *Insurance Co. v. Tweed*, 7 Wal. 44, 19 L. ed. 65; and *Montgomery v. Firemen's Ins. Co.*, 16 B. Mon. (Ky.) 442."

Hocking v. British Am. Assur. Co. 62 [238] Wash. 73, 36 L. R. A. (N. S.) 1155, 113 Pac 259:

1. *Insurance - 421 - Fire Insurance- Construction of Policy-Exemptions from Liability.*

In a provision of a fire policy that the company shall not be liable for loss 'caused directly or indirectly from invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority or by theft,' the word 'indirectly' covers all the causes of loss mentioned, and will exempt the company from liability where the loss occurred indirectly by order of any civil authorities, as well as where it resulted directly therefrom."

"2. *Insurance -146 - Fire Insurance - Construction of Policy -Reasonable. Construction.*

Fire insurance policies, as other contracts, should be reasonably interpreted in accord with the apparent object and intention of the parties."

"3. *Insurance - 427 - Fire, Insurance Cause of Fire.*

Where the fire resulted from the fumigation of the insured house against small pox by order of the city board of health, its order directing the fumigation of the house was the preponderating or producing cause of the fire, and not the negligence of the health officer in fumigating."

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"4. *Insurance - 427 - Cause of Loss - Proximate Cause.*

The proximate cause of a fire is the efficient cause which puts the other causes in motion."

Judgment of nonsuit was entered and plaintiff appealed, and the case affirmed.

In the opinion the court says:

"The appellant first contends that the word 'indirectly' has reference only to the causes preceding the phrase 'or by order of any civil authority'; that this is made plain by the use of the word 'by' in the phrase last quoted (see syllabus 1, supra), and that the exemption in that clause is available only in case of loss occurring 'directly' by order of some civil authority. It is also said that the clause 'or by theft' gives support to this view. We think that, such a construction would do violence to the language which the parties have seen fit to use, and that it would be also a strained and unnatural interpretation of their meaning. As was said in *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395:

'Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured.'

"It is also contended that the proximate cause of the fire was the negligence of the [240] health officer, and that the fire was not even the indirect result of the order of the board.

It is argued that the exemption was only *intended to apply to a case where the property is destroyed by some*

direct act of the civil authority to prevent the spread of fire or disease or such like. We think the contention is not sound. Putting aside refined distinctions, it is obvious that the preponderating or producing cause of the fire was the order of the board of health directing its inferior officers to fumigate the house. The civil authority put its own agency into operation, and the fire was the indirect result. *There was no intervening cause.* The proximate cause is the efficient cause, the one which puts the other causes into motion."

Barton v. Home Ins. Co., 42 Mo. 156, 97 Am. Dec. 329, 5 Fire Ins. Cases (Bennett,) 172:

"The policy provided that the company should not be liable for any loss by means of any invasion, insurrection, military or usurped power. The fire took place while the Confederate army was in possession of Glasgow, Mo.: *Held*, that if the military or usurped power of the enemy was the proximate cause of thi fire, the company was not liable."

The suit was on a policy covering a lot of hemp, which was burned while stored in a ware-house.

We quote from the opinion:

'Provided, always, and it is hereby [241] declared that this corporation shall not be liable to make good any loss or damage by fire which may bappen by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power, or of any loss by theft at or after the fire.'

The defendant contends that it is, exempted from the payment of the loss by reason of the above recited proviso; but it is, urged by the plaintiffs that to constitute an exemption in consequence or usurped power, it must be shown, that the property was destroyed by the order or direction of the officer commanding the rebel army. We lay out views of all that part of the case, and the instructions given in relation to riot, as there is nothing to show that the property was burned by reason of a riot, either in the manner contemplated by the policy or by law.

If the defendant is not, liable, it is on account of the exclusion, in the policy, of loss happening by means of military or usurped power. The whole case turns upon, the

construtcion[sic] which shall be given to those words. With respect to the rules of construction of policies of insurance, except to cases relating to warranties, it is the duty of the court to adopt the construction that, in their judgment, shall best correspond with the real intention of the parties. As far as our investigation has lead us, this is a case of new impression in this country; and the reason is manifest, because we have had but one great rebellion in the whole period of our history which would enable the clause to have any force or application.

[242]

In the case of Drinkwater v. The Corporation of the London Assurance Company, 2 Wils. 363, the covenant upon a policy of insurance against fire provided that the defendants shall not be liable in case the house was burnt by reason of an invasion, foreign enemy, or any military or usurped power. The house was burnt by a mob, and it was held not within the proviso.

Wilmot, C. J., in the opinion, said: 'My idea of the words "burnt by usurped power". from the context, is that they mean burnt or set on fire by occasion of an invasion from abroad, or of an internal rebellion when armies are employed to support it.'

Now, the contract was made between the parties with reference to the usual risks incurred in ordinary times. The extraordinary hazard arising from insurrection, invasion, military and usurped power when the arm of the civil magistrate is powerless, are expressly guarded against and excluded. It would be doing violence to the language which the parties have seen fit to use, and would be also a strained and unnatural interpretation of their meaning, to say that the insurer would be liable in all cases except where he could show that the burning took place by order of the officer immediately commanding the rebellious forces. The language of the proviso is, that the company shall not be liable for any loss or damage by fire which may happen by means of invasion, military or usurped power, etc. If the military or usurped power, or the invasion, was the means that occasioned or the proximate cause of the loss, then the company [243] cannot be held liable within the terms of its contract. An army of invasion or engaged in rebellion is liable to commit acts of spoliation or burning without any direct commands from the superior officers, and the insurer certainly never intended to incur any risk by reason of such acts. To exonerate the defendant from its liability, it is not

material how or in what way the fire originated, provided it was within the range of any one or more of the excepted causes. The real question is, did the fire happen or the loss occur by reason of or in consequence of the military or usurped power or the rebels being in Glasgow, and were they the proximate cause of the burning and destruction of the property? If so, the judgment should be for the defendant; otherwise, for the plaintiff." * * *

From the foregoing it is apparent that this defendant in error is not liable for a loss resulting either directly or indirectly from riot and that the court did not err in sustaining a motion for a directed verdict.

Second Proposition

The second proposition urged by plaintiff in error, at page 115 of their brief, is

"The Court erred in overruling the motion for new trial."

Except as to one proposition, this subject [244] is, we think, sufficiently covered by the argument and authorities hereinbefore set out.

There could not be error in this regard, or if there could have been error, it was waived by counsel requesting the court to overrule the motion for new trial. This request was made, as shown by the record, page 680, as follows, to-wit:

MR. HAYSON:

"Let the record show motion for new trial filed, considered by the court and overruled.

THE COURT:

And the same is filed, and let the same be overruled.

MR. HAYSON:

To which the plaintiff excepts; etc., notice of appeal, etc."

This court has held that a litigant cannot invite the action of the court and then predicate error thereon. In the case of

Davis v. Farnsworth, et al., 171 Pac. 475, 66 Okla. 268, this court said:

"It will be seen from the above excerpt that after the demurrer to the evidence was interposed counsel for the plaintiffs expressed his willingness that the same might be sustained, in this, he said, 'I am willing that the court sustain the demurrer,' thus inviting the action of the court of which he complains on this appeal. This he cannot do. He cannot consent, that a demurrer be sustained then assign it as error on appeal. This doctrine is so well established in this jurisdiction that it ought [245] not to be necessary to cite authorities in support of it. However, a few of the cases announcing this rule are: *Territory v. Cooper*, 11 Okla. 699, 69 Pac. 813; *Wallace v. Duke*, 44 Okla. 124, 142 Pac. 308; *Page v. Tryon*, 154 Pac. 526; *Pressley v. Incorporated Town of Sallisaw*, 154 Pac. 660; *C., R. I. & P. R. Co. v. Norton*, 157 Pac. 917; *St. L. & S. F. R. Co. v. Hodge*, 157 Pac. 60.

Therefore, there was no error of the court overruling the motion for new trial. Since the plaintiff invited the action of the court in overruling the motion for new trial, and since, by reason thereof he cannot predicate error thereon, the appeal should be dismissed and the decision affirmed.

CONCLUSION

In conclusion we submit that the court did not err in sustaining the motion for a directed verdict and in overruling the motion for new trial, and that the judgment of the lower court should be sustained.

Respectfully submitted

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Oklahoma City,
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