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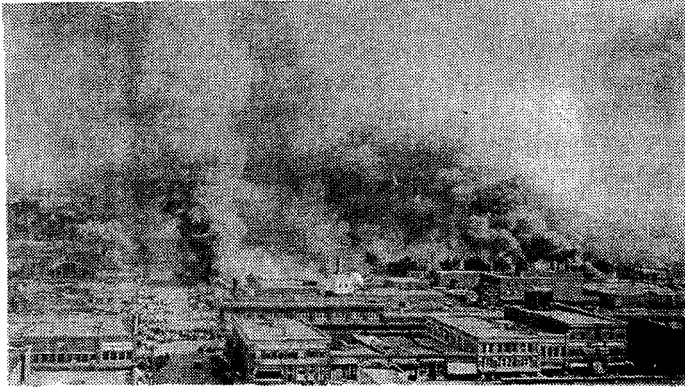
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# THE TULSA RACE RIOT OF 1921 IN THE OKLAHOMA SUPREME COURT

ALFRED L. BROPHY\*



*One witness, whose testimony is not questioned, testified that about 9 o'clock he viewed the scene from the top of the Tulsa Hotel. He testified that it looked like the whole section of the negro district was on fire.*

— Redfearn v. American Central Insurance  
Company, 243 P. 929, 930 (Okla. 1926)

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\* Visiting Professor, Boston College Law School, 2000-01, and Professor of Law, University of Alabama. The themes discussed here are explored in more depth in ALFRED BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RACE RIOT OF 1921* (forthcoming Oxford University Press, 2001).

I am grateful to the extraordinary group of historians and journalists who have loaned me their expertise and have asked provocative questions, especially: Brent Staples, Dedi Felman, Eleanor Beardsley, Terry Gross, Don Ross, Doug Bukowski, Arnold Hamilton, Scott Ellsworth, Samm Brown, Claudia Kolker, Paul Finkelman, Jim Brown, Cathy Williams, Dick Warner, Coni Williams, Eddie Faye Gates, Rik Espinosa, Randy Krehbiel, Michael Overall, and Robert Norris. Sally Howe Smith, Clerk of the Tulsa County Court, and Lee Conner, of the Oklahoma State Archives, both provided essential assistance in locating cases and other important documents related to the riot. I would also like to thank the lawyers who discussed aspects of the Tulsa riot with me, especially Carlos Ball, Kenneth Mack, Christine Desan, Judith Maute, John Nowak, Andrew Klein, Daniel M. Filler, Ann L. Thrasher, Mark Brodin, Robert Westley, Mary Sarah Bilder, Sarah Wilson, Daniel J. Hulsebosch, Richard Storrow, Jack Chin, Arthur LeFrancois, Anthony Farley, Ronald Krotoszynski, Rebecca J. Huss, and Jennifer S. Byram, as well as audiences at American University, Boston University, Boston College, Cumberland Law School of Samford University, the University of Cincinnati, the University of Illinois, Harvard Law School, Indiana University, the University of Oklahoma, Oklahoma City University, the Sovereignty Symposium, Texas Wesleyan University, the TransAfrica Forum, the Tulsa Riot Commission, and Valparaiso University.

On the evening of May 31, 1921, a mob gathered at the Tulsa, Oklahoma Courthouse, threatening to lynch a young black man being held there. The afternoon edition of the *Tulsa Tribune* accused him of attacking a seventeen year old young white girl in an elevator in a downtown office building the day before.<sup>1</sup> When black World War I veterans appeared to stop the lynching, a riot erupted. The Tulsa police chief deputized several hundred white men from the mob. Throughout the night, white Tulsans prepared. And beginning at five o'clock the next morning, white mobs and special deputies invaded Greenwood, the black section of Tulsa, and left it in ruins. By noon, more than one thousand homes had been burned to the ground and thousands of blacks were left homeless. Now, a Commission funded by the Oklahoma legislature is investigating the riot, with the goal to "excavate a history that had been consigned to oblivion for the past 75 years," according to the distinguished historian John Hope Franklin.<sup>2</sup>

Before the Oklahoma legislature established its Commission in 1997, several other official bodies studied the riot. The first two, by the fire marshal and the Tulsa County Grand Jury, occurred just days after the riot.<sup>3</sup> The hastily prepared grand jury report blamed Tulsa's blacks for the riot. It is an extraordinary document, which illustrates in vivid detail how an investigation can select evidence, refuse to seek out alternative testimony, and then formulate an interpretation that is remarkably biased in the story it creates. The grand jury report, for instance, declared that the riot was the direct result of "an effort on the part of a certain group of colored men who appeared at the courthouse . . . for the purpose of protecting . . . Dick Rowland."<sup>4</sup> An indirect cause of the riot was the "agitation among the Negroes of social equality."<sup>5</sup> The other official reports are missing.<sup>6</sup>

There is, however, one other contemporary "report" — the Oklahoma Supreme Court's decision in *Redfearn v. American Central Insurance Company*.<sup>7</sup> The 1926

1. See *Nab Negro for Attacking White Girl*, TULSA TRIB., May 31, 1921, at 1, reprinted in *The False Story Which Set Tulsa on Fire*, BLACK DISPATCH, July 1, 1921, at 1.

2. Rik Espinosa, *Race Riot Panelists OK Dig for Remains*, TULSA WORLD, August 11, 1999, at 1.

3. *Grand Jury Blames Negroes for Inciting Race Rioting*, TULSA WORLD, June 26, 1921, at 1.

4. *Id.*

5. *Id.*

6. The Fire Marshal's report cannot be located. There was another investigation, perhaps by a special city court of inquiry. *Hundred to be Called in Probe*, TULSA WORLD, June 10, 1921, at 1 ("With the formal empaneling and swearing in of the grand jury Thursday morning the third investigation into the causes and placing of responsibility for the race rioting in Tulsa last week was begun."); *Police Order Negro Porters Out of Hotels*, TULSA TRIB., June 14, 1921, at 1 ("This action . . . follows scathing criticism of the system that allowed the Negro porters to carry on their nefarious practices of selling booze and soliciting for women of the underworld made . . . at the city's court of inquiry held several weeks ago."); see also *Freehling Forms Distinct Court for Evidence*, TULSA TRIB., June 7, 1921, at 1 ("Formation of this court brought the total of riot investigations already ordered up to three. The first to be ordered was one by a grand jury. The second was authorized by the federal government."). Freehling's state investigation was apparently folded into the grand jury report. *Jury Probe of Riot Blocked; Inquiry is On: Freehling in Charge at Courthouse*, TULSA TRIB., June 8, 1921, at 1. The federal government investigation apparently produced no report. *Orders Federal Quiz into Riot: Attorney General Dougherty to Find Out if U.S. Laws Violated*, TULSA WORLD, June 4, 1921, at 1.

7. 243 P. 929 (Okla. 1926).

opinion by Commissioner Ray culminated a three year suit by William Redfearn, a white man who owned two buildings in Greenwood, the Dixie Theatre and the Red Wing Hotel. Redfearn lost both buildings, which were insured for a total of nineteenth thousand dollars. The American Central Insurance Company refused payment on either building, citing a riot exclusion clause in the policies.<sup>8</sup> Redfearn sued on the policy in May 1922, and the case was tried in April 1924. The insurance company defended, claiming that riot destroyed the property, and Tulsa County District Court Judge Edwin R. McNeil directed a verdict for the defendant at the conclusion of the trial.<sup>9</sup>

This essay explores the *Redfearn* case's contribution to our understanding of the Tulsa Race Riot. The trial crystallized several key issues, such as the role of the Tulsa police (and their special deputies) in the riot and how the riot started and progressed.<sup>10</sup> Redfearn sought to recover insurance, which he thought he might be able to do, if he demonstrated that the burning was done by Tulsa officials. Thus, the trial brought into focus the role of the deputies, as well as Oklahoma law on insurance and municipal liability. This essay also mines the briefs, which contain dozens of pages of eyewitness testimony, to reconstruct a detailed description of how the riot unfolded. Because the briefs in *Redfearn* provide important eyewitness testimony, which has not been used by previous historians and is available only at the Oklahoma State Archives in Oklahoma City, the plaintiff's brief is reprinted here in an appendix.

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8. Brief for Plaintiff in Error at 13-14, *Redfearn v. Am. Cent. Ins. Co.*, 243 P. 929 (Okla. 1926) (No. 15,851).

9. *Id.* at 4 (trial began April 16, 1924). No previous historian has utilized the *Redfearn* opinion or record. Until the spring of 1999, when the author brought it to the attention of the Tulsa Race Riot Commission, apparently no one was aware that the case went to trial. Rik Espinosa, *Riot Suit Possible*, *TULSA WORLD* Aug. 16, 1999, at 1 (referring to *Redfearn* testimony in reconstructing riot). The definitive book on the riot, Scott Ellsworth's *Death in a Promised Land: The Tulsa Race Riot of 1921*, mentions Redfearn's suit, but does not mention that it went to trial. See SCOTT ELLSWORTH, *DEATH IN A PROMISED LAND: THE TULSA RACE RIOT OF 1921*, at 135 (1982).

10. The trial is a particularly good vehicle for crystallizing the issues, which can sometimes tell a great deal about the ideology surrounding the trial, in addition to the factual questions in front of the court. See, e.g., Robert A. Ferguson, *Story and Transcription in the Trial of John Brown*, 6 *YALE J.L. & HUMAN.* 37 (1994) (mining John Brown's trial to "arbitrate between conflicting stories about a controversial event . . . that, consequently, . . . take[] on a larger cultural meaning"); Melissa J. Ganz, *Wicked Women and Veiled Ladies: Gendered Narratives of the McFarland-Richardson Tragedy*, 9 *YALE J.L. & FEMINISM* 255, 263-77 (1997) (exploring ways that jurors' cultural ideas influenced trial). Trials present facts through the prism of legal doctrine. We see how lawyers fit their stories about events into a framework that will most likely allow recovery. Much of the recent work in this area has related to trials involving sex. See generally RICHARD WIGHTMAN FOX, *TRIALS OF INTIMACY: LOVE AND LOSS IN THE BEECHER-TILTON SCANDAL* (1999); LAURA HANFT KOROBKIN, *CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY* (1998). Other trials, like those for Salem Witchcraft, illuminate deep-seated cultural conflicts, exposing religious and social values. See PETER HOFFER, *THE DEVIL'S DISCIPLES: MAKERS OF THE SALEM WITCHCRAFT TRIALS* (1996).

### *I. The Tulsa Race Riot: The Conflicting Interpretations*

In the eighty years since the riot, there have been many interpretations of the riot's causes and its progress. Contemporary interpreters presented particularly divergent opinions on the riot. White Tulsans blamed a breakdown of law, as well as Greenwood residents' exaggerated ideas of equality. Black Tulsans also spoke about the breakdown of law and about the role of the city government in the riot. Those conflicting interpretations are central to understanding what happened during the riot and in using the riot as a prism for understanding race relations in the Progressive Era.

#### *A. Contemporary Interpretations*

In the days after the riot, Tulsans asked how could such a disaster have happened? In the newspapers and the pulpits, white Tulsans expressed remorse. And promised to help rebuild. The *Tulsa World* editorialized that the "race" war was as unjustified as it was unnecessary. Because of it Tulsa is blazoned as a community where tolerance does not exist, where the constitution of the United States can be enforced or suspended at will; where prejudice and race bigotry rules . . . ."<sup>11</sup>

But Tulsans wondered, how had this happened? Within a week after the riot, the major contours of the explanation appeared. Bishop Mouzon expressed remorse at what had happened:

Civilization broke down in Tulsa. I do not attempt to place the blame, the mob spirit broke and hell was let loose. Then things happened that were on a footing with what the Germans did in Belgium, what the Turks did in Armenia, what the Bolsevists did in Russia.<sup>12</sup>

Mouzon, however, laid much of the blame on Tulsa's blacks. Indeed, the *Tulsa World* titled the story of Mouzon's sermon, "Black Agitators Blamed for Riot."

Others blamed the general breakdown of law.<sup>13</sup> The criticism of lawlessness in Tulsa frequently referred to the blacks' attempt to protect Dick Rowland.<sup>14</sup> The *Tribune* editorialized that "lawless Negroes" caused the riot: "It appears to be reasonably well established that certain lawless Negroes had for some time been collecting arms and ammunition. It is also well established that lawlessness was allowed to run unarrested in the old 'Niggertown.'"<sup>15</sup> The *Tribune* laid blame

11. *The Disgrace of Tulsa*, TULSA WORLD, June 2, 1921, at 3.

12. *Black Agitators Blamed for Riot*, TULSA WORLD, June 6, 1921, at 1 ("Bishop Mouzon cites visit of Radical Negro as One Cause of Battle").

13. *Niles Blames Lawlessness for Race War*, TULSA TRIB., June 2, 1921, at 4 ("A bad psychological condition occasioned by a spirit of unrest and some unemployment dovetailed into the lawlessness which grew like a snowball and rapidly got beyond control of officials. The situation was quickly taken advantage of by some of the lawless element among the whites.")

14. *Mayor Warned of Uprising Negro Avers*, TULSA TRIB., June 6, 1921, at 1.

15. *It Must Be Stopped*, TULSA TRIB., June 11, 1921, at 10.

squarely on Greenwood residents: "[T]he race riot here was planned by the bad Negroes and . . . the law-defying Negroes are planning more 'splendid riots' to be delivered by September."<sup>16</sup> The *Tulsa World*, in an editorial entitled "Bad Niggers!," laid the riot on a group of "those of the colored race who boast of being 'bad niggers':" "These it was, seizing the merest existence of an excuse, who armed themselves and invading the business district of the city defiantly sought to take the law into their hands."<sup>17</sup>

Mayor T.D. Evans also blamed Greenwood residents for the riot.

Let the blame for this Negro uprising lie right where it belongs — on those armed Negroes and their followers who started this trouble and who instigated it and any who seek to put half the blame on the white people are wrong and should be told so in no uncertain language.<sup>18</sup>

Evans thought the conflict, which he called a "Negro uprising," was inevitable.<sup>19</sup> "If this be true, and this judgment had to come upon us, then I say it was good generalship to let the destruction come to section where the trouble was hatched up, put in motion, and where it had its inception."<sup>20</sup> Evans went so far as to propose a law prohibiting blacks from owning guns.<sup>21</sup>

Underlying the breakdown of law, there was racial tension, which was promulgated by black newspapers. "America is not going to submit to any attempt to shift responsibilities for this kind of outbreak. The Negro newspapers are full of just this sort of incendiary stuff. And IT MUST BE STOPPED."<sup>22</sup> William Redfeare, the owner of a movie theater in Greenwood, blamed black Tulsans, who disliked whites. At the Fire Marshal's inquiry, he testified:

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. . . . One I.H. Spears, a Negro lawyer, . . . made the following statement: "Every time he heard of a lynching it made him want to purchase more ammunition."<sup>23</sup>

16. *It Must be Stopped*, *supra* note 15.

17. *Bad Niggers!*, TULSA WORLD, June 4, 1921, at 4.

18. *Public Welfare Board Vacated by Commission*, TULSA TRIB., June 14, 1921, at 2. Evans mentioned that armed Greenwood residents had twice before come to the white section of Tulsa "and made certain demands under threat of force." *Id.* He proudly proclaimed that "we wager that trip number two will not take place soon." *Id.*; *see also Grand Jurors' Probe Takes a New Angle*, TULSA TRIB., June 13, 1921, at 1 (testimony of J.H. Smitherman that some armed Greenwood residents, led by Dr. R.T. Bridgewater, went to courthouse in 1919 to protect Jewel Davis from lynching); *Negro Sally Before Riots Not First One: Witnesses Relate Visit to Police Station*, TULSA TRIB., June 12, 1921, at 1.

19. *Public Welfare Board Vacated by Commission*, TULSA TRIB., June 14, 1921, at 1.

20. *See id.*

21. *See id.*

22. *It Must Be Stopped*, *supra* note 15.

23. Brief for Defendant in Error at 47-48, *Redfeare v. Am. Cent. Ins. Co.*, 243 P. 929 (Okla. 1926)

Spears' statement illustrates the concerns of black Tulsans with their own protection and captures the mood of the time.

### 1. *Tulsa Grand Jury Report*

The grand jury report, issued June 25, provides a mature statement of the traditional, white Tulsa interpretation of the riot. In a now laughable phrase, the *Tulsa Tribune* stated shortly before the grand jury issued its report that "Tulsa, Mr. Mayor, is in no mood to witness another whitewash exhibition."<sup>24</sup> Such a statement is laughable because the grand jury used evidence so selectively and because it articulated a one-sided interpretation of the riot.

The grand jury, which began work on June 7, took testimony from dozens of white and black Tulsans. It cast its net widely, looking at the riot as it unfolded, as well as social conditions in Tulsa more generally. It operated within the framework established by Tulsa District Judge Biddson. He instructed them to investigate the causes of the riot. Biddson feared that the spirit of lawlessness was growing. The jurors' conclusions would be "marked indelibly upon the public mind" and would be important in deterring future riots.<sup>25</sup>

The grand jury fixed the immediate cause of the riot as the appearance "of a certain group of colored men who appeared at the courthouse . . . for the purpose of protecting . . . Dick Rowland."<sup>26</sup> From there, it laid blame entirely on those people who sought to defend Rowland's life. It discounted rumors of lynching: "There was no mob spirit among the whites, no talk of lynching and *no arms*."<sup>27</sup>

Echoing the discussions of the riot in the white Tulsa newspapers, the grand jury identified two remote causes of the riot, which were "vital to the public interest."<sup>28</sup> Those causes were the "agitation among the Negroes of social equality"<sup>29</sup> and the breakdown of law enforcement. The agitation for social equality was the first of the remote causes the jury discussed:

Certain propoganda and more or less agitation had been going on among the colored population for some time. This agitation resulted in the accumulation of firearms among the people and the storage of quantities of ammunition, all of which was accumulative in the minds of the

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(No. 15,851).

24. *It Must Be Stopped*, *supra* note 15. What was the whitewash the *Tribune* feared? That the Tulsa police had been negligent in policing Greenwood: "It appears to be reasonably well established that certain lawless Negroes had for some time been collecting arms and ammunition. It is also well established that lawlessness was allowed to run unarrested in the old 'Niggertown.'" *Id.*; see also *Tulsa Will*, TULSA TRIB., June 4, 1921, at 4 ("The time has come when the citizens who are proud of Tulsa must demand that officers of the law give time to cleaning up this town . . . instead of trying to find excuses to whitewash that which has been obvious inefficiency.").

25. *Judge Biddson's Instructions to Grand Jury*, TULSA TRIB., June 9, 1921, at 1.

26. *Grand Jury Blames Negroes for Inciting Race Rioting*, *supra* note 3.

27. *Id.*

28. *Id.*

29. *Id.*

Negro which led them as a people to believe in equal rights, social equality, and their ability to demand the same.<sup>30</sup>

Such was the mindset of the grand jury, which thought ideas about racial equality were to blame for the riot, instead of explaining why Greenwood residents felt it necessary to visit the courthouse.

The second remote cause, the breakdown of law enforcement, received more attention. The jury first identified the weakness of law enforcement in Greenwood. It alluded to disparate enforcement of vice laws in Greenwood and the "indiscriminate mingling of white and colored people in dance halls and other places of amusement."<sup>31</sup> It recommended that "'colored town' be policed by white officers" and that "every law be positively enforced to the end that a proper relationship may be maintained between the two races . . ."<sup>32</sup>

The great ideas of equality through law, such as anti-lynching campaigns, made their way from the centers of the renaissance — Chicago and New York — to the provinces, like Tulsa. Those ideas of equality were transmitted to Tulsa through literature published at the centers of the renaissance.<sup>33</sup> The *Tulsa Star*, the weekly periodical of the Greenwood community, frequently wrote about the breakdown of law.<sup>34</sup> Hardly an issue appeared that did not talk about lynching and the need to

30. *Id.*

31. *Grand Jury Blames Negroes for Inciting Race Rioting*, *supra* note 3.

32. *Id.*

The props were knocked from under the recent municipal whitewash court of inquiry into the conduct of the police department in the final report of the race riot grand jury . . . . Booze joints and houses of prostitution have operated in complete and open defiance of the police, while lawless whites have been allowed to roam the city unmolested by city officers, the report shows.

*Lawlessness Is Rapped in Final Report*, TULSA TRIB., June 26, 1921, at 1. In reviewing a claim that children were white and could attend a white school, the Oklahoma Supreme Court emphasized the importance of the issue by observing that it is "a well-known fact that white persons and Negroes do not associate with each other on terms of social equality." *Cole v. Dist. Bd. of Sch. Dist. No. 29, McIntosh County*, 123 P. 426 (1912).

Reports of sale of alcohol and drug dealing in Greenwood were frequent. *See, e.g., Choc Joint First to Open in Burned District, He Says*, TULSA WORLD, June 3, 1921, at 5 ("The first Negro establishment to open yesterday was a 'choc' joint and notorious place where liquor was sold and where men and women of questionable character congregated."); *"Dope" Center Gone: Riot Fire Destroyed Rendezvous for Drug Peddlers that was Raided a Few Weeks Ago*, TULSA WORLD, June 5, 1921, at 21A; *Drug War Goes on as Addicts Get Long Terms*, TULSA TRIB., June 19, 1921, at 2 ("Joe Fornan, confessed addict, who said he was a Cherokee Indian, declared he bought his morphine for a dollar from a Negro at the corner of Boston and Archer street.")

33. Defendant's Brief at 60, *Redfearn* (No. 15,851) (discussing literature in circulation in Greenwood).

34. *See, e.g., America's Pastime — Lynching!*, TULSA STAR, July 31, 1920, at 1; *Mob Foiled in Attempt to Lynch Man!*, TULSA STAR, Mar. 6, 1920, at 1 (reporting foiled lynching in Shawnee); *Republicans and Jim Crow Cars [sic] Disgrace*, TULSA STAR, Jan. 31, 1920, at 1.

For more on the anti-lynching campaign, see CLAUDINE FERRELL, NIGHTMARE AND DREAM: ANTYLYNCHING IN CONGRESS, 1917-1922 (1986); W. FITZHUGH BRUNDAGE, LYNCHING IN THE NEW SOUTH (1993) 160-244; Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA



eliminate extra-legal violence. Under the heading "Mob Rule and the Law," the *Star* praised a group of black men from Shawnee who acted to prevent a threatened lynching of a black man who was being transported to the state penitentiary:

As to the Colored men of Shawnee who, it is alleged, stole an auto, armed themselves and went to protect the prisoner, aside from taking the auto which was manifestly wrong, but perhaps not without some [extenuating] circumstances, since their intentions were to uphold the law of our state, they are the heroes of the story. If one set of men arm themselves and chase across the country to violate the law, certainly another set who arm themselves to uphold the supremacy of the law and prevent crime, must stand out prominently as the best citizens. Therefore the action of the Colored men in this case is to be commended. We need more citizens like them in every community and of both races.<sup>35</sup>

Growing up, Ralph Ellison read Roscoe Dunjee's editorials in the Oklahoma City *Black Dispatch*, which also spoke of the Constitution — the rule of law — as the basis for "solving the racial predicament."<sup>36</sup> Dunjee put his faith in institutions over individuals, the reverse of what abolitionists had argued in the century before. For abolitionists, it was individuals who were humane, while the law was unjust.<sup>37</sup> By the 1920s, however, it was law that might promise equality, while individuals (whether clothed with the authority of the state or not) were feared.<sup>38</sup>

When a mob in Oklahoma City lynched a black man on August 22, 1920, the *Star* proudly told that the "Governor invokes law against mobbists."<sup>39</sup> In editorials,

WOMEN'S L.J. 1 (1993).

35. *Mob Rule and the Law*, TULSA STAR, Mar. 6, 1920, at 8.

36. RALPH ELLISON, *Perspective of Literature*, in THE COLLECTED ESSAYS OF RALPH ELLISON 766, 767 (John F. Callahan ed., 1995) [hereinafter ESSAYS OF ELLISON]. After the riot, Dunjee advanced his own alternative interpretations of law. See, e.g., *Invoke the Due Process Clause*, BLACK DISPATCH, July 1, 1921, at 4 (urging federal lawsuit to overturn zoning ordinance); see also ESSAYS OF ELLISON, *supra*, at 451, 458-59 ("The whole concept of changing segregation through appeals to the Supreme Court was present in Oklahoma City when I was a boy, and was propagated through the columns of a weekly newspaper."); *America's Congo: Pickens Writes on Insidious Debt-Slavery System of South*, BLACK DISPATCH, Mar. 25, 1921, at 1, 6 (reprinting article from the *Nation*, Mar. 23, 1921, exploring lynching of Arkansas farmer Henry Lowry); *Police Attempt to Block Reconstruction: Blacks Seek Injunction Against Illegal Ordinance*, BLACK DISPATCH, Aug. 19, 1921, at 1 (reprinting petition challenging zoning ordinance that made rebuilding of Greenwood prohibitively expensive).

37. See Alfred L. Brophy, *Humanity, Utility and Logic in Southern Legal Thought: Harriet Beecher Stowe's Vision in Dred: A Tale of the Great Dismal Swamp*, 78 B.U. L. REV. 1113, 1113-61 (1998) (examining Stowe's question of why judges who understood the inhumanity of slave law still followed the law).

38. RALPH ELLISON, *Perspective of Literature*, in ESSAYS OF ELLISON, *supra* note 36, at 768 (retelling the quip of Oklahoma Judge Estes, made from the bench, that "a Model T Ford full of Negroes ranging at large on the streets of the city was a more devastating piece of bad luck than having one's path crossed by thirteen howling jet-black tomcats").

39. *Gov. Invokes Law Against Mobbists*, TULSA STAR, Sept. 9, 1920, at 1; see also *And This Is the White Man's Law?*, BLACK DISPATCH, Sept. 2, 1920, at 4; *Claud Chandler Hung by Mob, Posse Follows*

the paper chastised Oklahoma City blacks for not defending the man lynched there: "[T]he proper time to afford protection to any prisoner is BEFORE and DURING the time he is being lynched, and certainly not after he is killed."<sup>40</sup> Later it noted,

While the boy was in jail and while there was danger of mob violence any set of citizens had a legal right — it was their duty — to arm themselves and march in a body to the jail and apprise [sic] the sheriff or jailer of the purpose of their visit and to take life if need be to uphold the law and protect the prisoner.<sup>41</sup>

As black Tulsans discussed — and celebrated — the importance of the rule of law, they built upon a central theme of American legal culture. Through litigation, for instance, Tulsa blacks sought to use legal principles to maintain equality, even as the courts articulated doctrines that drew distinctions based on race. In 1912, for instance, Tulsa lawyer J.B. Stratford was arrested for violating Oklahoma's railroad segregation statute. Oklahoma mandated segregation in railroad cars. But the legislature was also concerned with the economic effect of segregation on railroads. Railroads were required to have separate cars for blacks and whites, but they were exempted from hauling luxury cars for blacks if there were insufficient demand to make the cars economically feasible.<sup>42</sup> In *McCabe v. Atchison, Topeka & Santa Fe Railway*,<sup>43</sup> the United States Court of Appeals upheld the Oklahoma statute. The court reasoned that there was relatively little demand by blacks for the luxury cars: "Practical considerations, which are potent in reaching a correct interpretation of any statute, cannot be ignored in applying the principle of equality of service . . ."<sup>44</sup> The court extended *Plessy v. Ferguson*,<sup>45</sup> in a nonsensical explanation of separate but equal, it concluded:

*Too Late, Body Found West of City*, BLACK DISPATCH, Sept. 2, 1920, at 1; *Recognize the Negro as a Man*, BLACK DISPATCH, Sept. 2, 1920, at 4.

40. *Misguided Oklahoma Patriots*, TULSA STAR, Sept. 4, 1920, at 4.

41. *The Facts Remain the Same*, TULSA STAR, Sept. 18, 1920, at 8; cf. RALPH ELLISON, *Invisible Man*, in *ESSAYS OF ELLISON*, *supra* note 36, at 454 ("Why hadn't they come when they could have stopped it all?"). In October 1920 the *Star* told the story of another foiled lynching in Okmulgee. A black man was arrested for assaulting a white woman and the sheriff moved him from Okmulgee to Muskogee and from there to the state penitentiary at McAlester. A headline proclaimed "Colored Men Armed for Self-Defense Waited for Attack that Did Not Come." *Riot Averted by Race Men in Okmulgee*, TULSA STAR, Oct. 16, 1920, at 1. See also *Near Lynch Victim Proved To Be an Innocent Man*, TULSA STAR, Oct. 23, 1920, at 3; *New Steps to Save Riot Victims!*, TULSA STAR, Dec. 11, 1920, at 1 (discussing Elaine, Arkansas, case). The Arkansas riot, which was an alleged "Negro insurrection," was on the mind of white Tulsans at the time of the riot, as well. See *Negroes Again Reprieved*, TULSA WORLD, June 10, 1921, at 12; *Negroes Must Pay for Slaying War Veteran*, TULSA WORLD, June 3, 1921, at 9 (discussing Arkansas governor's rejection of clemency for six black men sentenced to death for the killing that started the riot). Their convictions were later overturned, because of extraordinarily unfair procedures. RICHARD C. CORTNER, *A MOB INTENT ON DEATH: THE NAACP AND THE ARKANSAS RIOT CASES 154-55* (1988).

42. See REVISED LAWS OF OKLA. ANN. 1910 art. 5, § 860 (Pioneer 1912) ("Separate Coach" law passed Dec. 18, 1907).

43. 186 F. 966, 970 (8th Cir. 1911).

44. *Id.* at 971.

45. 163 U.S. 537 (1896).

Equality of service, however, does not . . . mean identity of service; and manifestly this rule does not require permanent provision for equal service, irrespective of the demand for it. . . . [T]he principle of equality of service between the two races in Oklahoma contemplates substantial similarity of service, and this only when conditions and circumstances under which it is required are substantially the same.<sup>46</sup>

After Stratford was acquitted of violating the Jim Crow law, he sued the Midland Valley Railroad for false imprisonment and malicious prosecution. He argued that the conductor should not have had him arrested for violating the law. To support that claim, Stratford had to show that the arrest was unlawful. He argued the arrest was unlawful for three reasons. The first two were technical. First, he argued that he could not be arrested in the county where he was because his actions occurred outside of the county. Second, he argued that violation of Oklahoma's Jim Crow law was a misdemeanor and that one could not be arrested for a misdemeanor without a warrant unless the misdemeanor occurred in the presence of the arresting officer. The third reason was more substantial: that interstate passengers were not subject to Oklahoma's Jim Crow law.<sup>47</sup>

The court narrowly interpreted the cause of action for malicious prosecution, concluding that there was probable cause to arrest, because the law was violated on its face.<sup>48</sup> Simply, Stratford's argument about the unconstitutionality of the Jim Crow law did not affect the right of the conductor to rely upon the law. The Oklahoma Supreme Court, resting on the Eighth Circuit's 1911 decision in *McCabe v. Atchison, Topeka, and Santa Fe Railway*,<sup>49</sup> upheld the Jim Crow law. It then went on to immunize the railroad from liability, stating that the officer had a good faith belief in the validity of the law.<sup>50</sup> The Supreme Court dismissed the arguments against the segregation statute as irrelevant to the case. So J.B. Stratford lost the case, but he registered the importance of the issues and put the Oklahoma legislature and Oklahoma businesses on notice that he would challenge their practices. Nearly a decade before the riot, one of the important players in the clash at the end of May 1921 was already on the stage.

And yet other Oklahoma blacks continued the struggle. McCabe brought his case up to the United States Supreme Court, which affirmed the denial of relief on technical grounds: that McCabe failed to demonstrate that he had actually suffered harm.<sup>51</sup> The Supreme Court's opinion, however, in one paragraph indicated that the statute was unconstitutional and thus railroads had to partition their Pullman cars to

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46. *McCabe*, 186 F. at 971.

47. *Stratford v. Midland Valley R.R. Co.*, 128 P. 98, 99 (Okla. 1912).

48. *Id.* at 100.

49. *McCabe*, 186 F. at 970.

50. *Id.* at 976.

51. *McCabe v. Atchison, Topeka, and Santa Fe Ry. Co.*, 235 U.S. 151, 163 (1914); see also ALEXANDER M. BICKEL & BENNO C. SCHMIDT, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT*, 1910-21, at 775-84 (1984).

provide luxury accommodations for people of all races.<sup>52</sup> Exemptions based on economic concerns would allow constitutional protections to turn on "the number of persons who may be discriminated against."<sup>53</sup> Railroads could, of course, deny all passengers luxury accommodations. But "if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused."<sup>54</sup> *McCabe* became an important turning point in the Supreme Court's approach to race. It signaled that *Plessy's* "separate but equal" command might actually require "equal" treatment. *McCabe* served as a basis for a number of subsequent cases.<sup>55</sup> It is an example of the way that the idea of law was used to challenge segregation. By holding courts to the doctrine they had laid down, Oklahoma blacks might remake the world. In the *Tulsa Star*, editor A.J. Smitherman shattered the idea — as did people like J.D. Randolph, the custodian of the Oklahoma state law library — that blacks "could obey . . . laws, but not make or interpret them."<sup>56</sup>

The Tulsa grand jury mocked the idea that the law ought to take its course when it blamed the Greenwood residents who sought to protect Rowland's life, so that there would be a trial. As white Tulsans looked down upon burning Greenwood from the rooftops of Tulsa's buildings, they saw the complete breakdown of law. One can imagine that they mocked the law as they watched the burning, though it was the rioters themselves — many of whom were clothed with the authority of the state — who did the most violence to the idea of law, as the black press pointed out.

## 2. An Alternative Interpretation of the Riot: The *Chicago Defender* and *Black Dispatch*

As white Tulsans interpreted the riot as the breakdown of law in Greenwood, black newspapers such as the *Chicago Defender* and Oklahoma City's *Black Dispatch* also focused on the breakdown of law in Tulsa. After describing the invasion of Greenwood by white mobs, the *Chicago Defender* blamed the Jim Crow system "for the whole revolt."<sup>57</sup> Black women and children were treated poorly on the segregated railroad cars and when men protested the mistreatment, they were beaten and thrown off the train. Even worse was law enforcement:

The police department has been flagrant in its attention to law and order. The color of one's skin will determine the manner in which the case is to be handled. Clubs are used instead of justice in the courts. This practice has reached such a state that members of the Race here decided to protect

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52. *McCabe*, 235 U.S. at 161-62.

53. *Id.* at 161.

54. *Id.*

55. See, e.g., *Barrows v. Jackson*, 346 U.S. 249, 255 (1953); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938).

56. RALPH ELLISON, *The Perspective of Literature*, in *ESSAYS OF ELLISON*, *supra* note 36, at 766.

57. *Bombs Hurlled from Aeroplanes in Order to Stop Attacks on the Whites*, *CHICAGO DEFENDER*, June 4, 1921, at 1.

prisoners thrown in jail on "assault charges." It was when the police department failed to grant ample protection to Dick Rowland Tuesday that an armed band of citizens surrounded the jail . . . .<sup>58</sup>

The *Chicago Defender* told of the riot from the perspective of Greenwood residents. Its headlines included "Bombs Hurlled from Aeroplanes in Order to Stop Attacks on the Whites,"<sup>59</sup> "Armed White Ruffians Who Begged for Guns to Help Murder,"<sup>60</sup> and "Police Turn Criminals, Swell Tulsa Death List."<sup>61</sup>

The perspective of Greenwood residents, like that of the *Chicago Defender*, differed from that of white Tulsans. Greenwood residents saw the riot as the result of lawless behavior of the Tulsa government. Airplanes were central to those accounts. Mary Jones Parrish, a victim of the riot, wrote a book, *Events of the Tulsa Disaster*, detailing the progress and aftermath of the riot. She focused on the use of airplanes:

[W]e heard such a buzzing noise that, on running to the door to get a better view of what was going on, the sights our eyes beheld made our poor hearts stand still for a moment. There was a great shadow in the sky and, upon a second look, we discerned that this cloud was caused by fast approaching aeroplanes. It then dawned upon us that the enemy had organized in the night and was invading our district, the same as the Germans invaded France and Belgium.<sup>62</sup>

There remains substantial question, however, whether airplanes bombed Greenwood.

At a minimum, it seems airplanes were used to coordinate the attack. The *Tulsa Tribune* reported:

The men in the air were alert for movements of Negroes in the sections where shots were being fired from sniping stations at the advancing whites, and they often dipped low in their planes to pick out the exact positions of the barricades. Over outlying portions of the country they watched for groups of Negroes reported to be on their way to Tulsa as reinforcements, according to persistent rumors which reached the city all day.<sup>63</sup>

58. *Id.*

59. *Id.* Randy Krehbiel has called into question the accuracy of the *Chicago Defender* account. Randy Krehbiel, *Post-Riot Lawsuits Reveal Clues, Mysteries*, TULSA WORLD, Feb. 6, 2000, at A19.

60. *Armed White Ruffians Who Begged for Guns to Help Murder*, CHICAGO DEFENDER, June 11, 1921, at 1 (discussing contributory causes of riot).

61. *Id.* at 2.

62. MARY E. JONES PARRISH, *EVENTS OF THE TULSA DISASTER* 20 (Clarence Love ed., Out on a Limb Pub. 1998) (n.d.).

63. *Air Observers Watched Blacks for the Police*, TULSA TRIB., June 2, 1921, at 3; see also B.F. Ingraham, *In Defense of Officers*, TULSA WORLD, June 9, 1921, at 4 ("But when the airships began to hum, I again went to the main part of the city and saw our police bending every effort to take care of our city.")

In the wake of the riot, airplanes were also used to keep watch over blacks elsewhere in Oklahoma.<sup>64</sup>

The use of the new technology of airplanes is itself an important signal of the role that technology played in race relations. While airplanes might become an indicator of equality (and vehicle by which salvation is achieved), as Ralph Ellison's essays "Flying Home" and "A Party Down at the Square" suggest, in Tulsa they were the means of destruction.<sup>65</sup> Ellison, writing around the time of World War II, found airplanes symbols of the equality that blacks could achieve. At one point he planned to set a novel in a Nazi prisoner of war camp, where the ranking prisoner of war was a black aviator.<sup>66</sup> And in Ellison's short story "A Party Down at the Square," a plane, lost in the fog around Birmingham, was drawn to a bon fire where a black man was being burned to death. The plane temporarily interrupted the burning — and held out the hope of salvation. When the plane left, the killing continued. But in Tulsa, the new technology promised not equality, but continued — and more effective — destruction.<sup>67</sup>

One looking down from the rooftops of downtown Tulsa into the burning Greenwood would have thought the idea that the courts might someday enforce such notions of equality unthinkable — "even as a comic, practical-joking inflation of the original."<sup>68</sup> Yet, at some point, in the what was then far-distant future, that outsider call for the rule of law triumphed.<sup>69</sup> And so, forces set in motion generations before, caused a fundamental reworking of American law, as white Oklahomans responded to the theme of the rule of law that featured so prominently in black culture.<sup>70</sup>

64. See *Trip by Airplane Disproves Rumor*, TULSA WORLD, June 7, 1921, at 7.

Innumerable and persistent rumors of further threatened uprisings by Negroes were set at rest Monday morning when Police Captain George H. Blaine made a scouting trip by airplane to virtually all of the Negro settlements in this section of the state, and to all white towns where the Negro population is heavy.

*The Disinterested Spectator*, TULSA TRIB., June 7, 1921, at 16.

65. See RALPH ELLISON, *A Party Down at the Square*, in *ESSAYS OF ELLISON*, *supra* note 36; RALPH ELLISON, *FLYING HOME AND OTHER STORIES* 71, 147 (John F. Callahan, ed. 1996) [hereinafter *ELLISON, FLYING HOME*].

66. See RALPH ELLISON, *On Initiation Rites and Power*, in *ESSAYS OF ELLISON*, *supra* note 36, at 520, 522.

67. The machine entered the garden to destroy it. *But cf.* LEO MARX, *THE MACHINE IN THE GARDEN: TECHNOLOGY AND THE PASTORAL IDEAL IN AMERICA* (1964).

68. RALPH ELLISON, *Going to the Territory*, in *ESSAYS OF ELLISON*, *supra* note 36, at 591, 592.

69. See generally *Climbing the Ladder of the Law*, in B. C. FRANKLIN, *MY LIFE AND AN ERA* 238-47 (John Hope Franklin & John Whittington Franklin eds., 1997); see also J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER, 1844-1944*, at 504-11 (1993) (discussing black lawyers in Oklahoma and their role in opposing segregation); *Evil Blossometh*, BLACK DISPATCH, Feb. 9, 1922, at 4 ("In respect for law lies the safety of any nation; contempt for law has brought us to the abyss of chaos where we stand today.").

70. See, e.g., A. J. Smitherman, *Aftermath of the Tulsa Race Riot*, BLACK DISPATCH, Jan. 26, 1922, at 2. Smitherman quoted Editorial, *An Appeal to Reason*, TULSA WORLD, June 3, 1921, at 4, which warned that:

The wretched mob spirit still smolders . . . Standing high above every recognizable fact is this tremendous unsurmountable truth: These people have a right to life, to the pursuit of happiness and to their earthly possession. To deny them those rights is to set aside the

### B. Modern Interpretations

The first modern interpretation of the riot came in 1972 from Tulsa historian Ed Wheeler. Wheeler presented a timeline of the unfolding of the riot, from the confrontation in the elevator, to the publication of the *Tribune* story of Rowland's arrest, to the rumors of lynching, and then the confrontations at the courthouse. He presented a balanced narrative of what happened and was cautious to avoid comment on the cause.<sup>71</sup> For example, he balanced a quote from Barney Cleaver, the only black in the sheriff's department, who encouraged the Greenwood residents to go home,<sup>72</sup> with a statement that the whites at the courthouse were threatening lynching.<sup>73</sup> Both perspectives suggest that the actions of a small group of blacks and whites led to the riot, although Wheeler lays the majority of blame on white Tulsa. Wheeler opened the riot to serious, public discussion. But readers were left to formulate their own interpretation.<sup>74</sup>

Scott Ellsworth's 1982 book, *Death in a Promised Land*, provides the most detailed narrative of events currently available.<sup>75</sup> Ellsworth attributed the riot to the conflict between Greenwood residents and the lawlessness of white Tulsa. He concludes that the riot was nearly inevitable given the climate of fear (of each other) in both black and white Tulsa. Ellsworth points to the lynching of Roy Belton, a white man, in Tulsa in August 1920 as an important precursor to the riot.<sup>76</sup> Black Tulsans, particularly World War I veterans, were not going to let Dick

basic law of the land and deliberately take a key-stone from the arch of the government in this country.

*Id.*

71. See Ed Wheeler, *It Happened in Tulsa* (visited Sept. 10, 2000) <<http://www.TulsaToday.com/racewar.htm>>.

72. See *id.* (quoting Barney Cleaver, from *When Riot Stalked in Tulsa*, *TULSA WORLD*, June 2, 1921, at 7 ("Boys, you are not doing right . . . There isn't anybody going to get that boy tonight. He is perfectly safe here. You shouldn't have done this thing for it only stirs race trouble. Go on home and behave yourselves.")).

73. See Wheeler, *supra* note 71.

Sheriff McCollough upon viewing the growing crowd, left the courthouse and appeared before the white crowd where several white men loudly demanded that the Negro prisoner be turned over to them at the south entrance of the courthouse. The crowd grew increasingly ugly. Whites continued to arrive to reinforce the original crowd. New arrivals carried firearms openly.

*Id.*

74. Near the end of his article, Wheeler quoted several prominent white Tulsans, who laid the blame for the riot on Greenwood residents.

[A] vicious white influence has been at work among the Negroes aided and abetted by vicious members of the Negro race; that meetings were held, incendiary speeches made and that preparations for racial trouble had been made by the assembling of a large amount of high powered ammunition and modern weapons of offense.

*Id.* (quoting Clarence D. Douglas, Tulsa historian).

75. See ELLSWORTH, *supra* note 9. Hannibal Johnson's 1998 book *Black Wall Street*, which records the trajectory of Greenwood from its origins, through the riot, to the present, presents an interpretation of the riot similar to Ellsworth. See HANNIBAL B. JOHNSON, *BLACK WALL STREET: FROM RIOT TO RENAISSANCE IN TULSA'S HISTORIC GREENWOOD DISTRICT 27-79* (1998).

76. ELLSWORTH, *supra* note 9, at 38-44.

Rowland be lynched. But neither could white Tulsans abide the Greenwood residents' independence. Ellsworth's detailed narrative is invaluable as a source for understanding the powerful ideas funneling into riot, as well as the ways the riot unfolded and its aftermath.

The richest account of the riot, which explores both the origin of the riot in the violence of Progressive-era Oklahoma and its meaning for subsequent generations, comes from Brent Staples. His December 1999 article in the *New York Times Magazine* focuses on the city's culpability in the riot — and the implications of that culpability for reparations.<sup>77</sup>

Important questions remain about the role of the special police deputies in the riot, their role in destruction, the purpose of the arrests of the Greenwood residents, and whether they were designed to insure the safety of Greenwood residents or to protect white Tulsans from a "Negro uprising."<sup>78</sup> Redfearn's trial, which generated several hundred pages of briefs in the Oklahoma Supreme Court, can answer some of those questions about the riot.

## II. The Redfearn Litigation

William Redfearn, like many other Greenwood property owners, sought compensation from his insurance company right after the riot. Shortly after the riot, insurance companies made clear that recovery would be difficult.<sup>79</sup> Redfearn's insurance company refused payment on the policies covering his Red Wing Hotel and his Dixie Theater, citing the riot exclusion clause in the policies. Redfearn filed suit in May 1922, against his insurance company as well as the city. The case against the insurance company went to trial in April 1924; it is unclear what happened to Redfearn's claims against the city.

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77. See Brent Staples, *Unearthing a Riot*, N.Y. TIMES MAG., Dec. 19, 1999, at 64-69.

78. See, e.g., Van Voorhis to Rooney, Detailed Report of Negro Uprising for Service Company, 3d Inf. Okla. Nat'l Guard (July 30, 1921) (Oklahoma State Archives).

79. See, e.g., *Insurance Men Say Policies Won't be Paid*, TULSA TRIB., June 2, 1921, at 4; see also *Fight It Out in the Courts*, BLACK DISPATCH, June 24, 1921, at 4 ("In all probability there will be no chance for the Negroes to recover from the insurance companies who have no provision in their contracts for losses sustained thru riot, insurrection or civil commotion.")

The Oklahoma law on recovery for race riots, moreover, was against victims. The Oklahoma Supreme Court had refused to allow recovery against the city of Norman when Norman officials attacked and severely injured a black man. See *Wallace v. Norman*, 60 P. 108 (Okla. 1900) (limiting city of Norman's liability for April 1898 riot); see also *Silva v. City Council*, 148 P. 150 (Okla. 1915); *Cummings v. Lobsitz*, 142 P. 993 (Okla. 1914); *City of Lawton v. Harkins*, 126 P. 727 (Okla. 1912). The *Black Dispatch* urged that Greenwood residents seek justice in the federal courts. See *Invoke the Due Process Clause*, BLACK DISPATCH, July 1, 1921, at 4.

If we can get one of these cases started in the federal court, wherein the petitioner makes claim for damages from the city of Tulsa, it will be a better and safer bet than an action started in a state court. We are not strong for the sort of judgment which a Negro petitioner would get in Tulsa county in such a case. The federal proceedings would give the black man his best shot at justice.

*Id.*



### A. Insurance Company Liability: Framing the Questions

Redfearn's case against his insurance company hinged on the interpretation of the riot exclusion clause.<sup>80</sup> Redfearn sought to construe the riot exclusion clause narrowly. He relied on a Kentucky case, which allowed recovery in the face of a riot exclusion clause when a building was destroyed by sheriff's deputies during a riot. Redfearn's legal argument shaped the issues that were important at trial; it brought into focus the role of the special police deputies in the riot. On appeal Redfearn argued that the jury should have determined whether the loss was caused by police rather than rioters.<sup>81</sup>

Redfearn had a tough row to hoe on appeal. The trial judge concluded that there was no doubt in his mind that the damage was caused by the riot.<sup>82</sup> There was substantial evidence, including direct testimony that Redfearn's property was set on fire during the riot.<sup>83</sup> The key question then became how to interpret the riot exclusion clause.

There was one precedent, the Kentucky Court of Appeal's 1911 decision in *American Central Insurance Company v. Stearns Lumber Company*, which offered some hope to Redfearn. One reasonable reading of *Stearns Lumber* was that damage caused by state actors during a riot was not subject to a riot exclusion clause. To force rioters out of a building owned by Stearns Lumber, the marshal set the building on fire. The insurance company refused to pay for the damage,

#### 80. The clause provided:

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 insures, 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.

Plaintiff's Brief at 2-3, *Redfearn v. Am. Cent. Ins. Co.*, 243 P. 929 (Okla. 1926) (No. 15,851).

81. *Redfearn v. Am. Cent. Ins. Co.*, 243 P. 929, 930 (Okla. 1926). He also argued without much vigor that the jury should have been allowed to determine whether the destruction was caused by the riot or some other cause, such as a fire at a near-by lumber yard. *Id.*

82. *Id.* In order to grant a directed verdict, which took the case away from the jury, the trial judge was required to view the evidence in the light most favorable to Redfearn. A directed verdict was inappropriate if any reasonable minds could differ on the inferences drawn from the facts. *Waldrep v. Exchange State Bank of Keifer*, 197 P. 509, 512 (Okla. 1921).

The case was appealed from a directed verdict against Redfearn, which meant that the trial judge concluded that there was no evidence from which a jury could conclude that the men wearing badges were officers. Yet cases involving resisting arrest routinely conclude that a police badge indicates one's authority to arrest. Simply put, if one of the blacks involved in the riot resisted one of the men wearing a badge, he could have been prosecuted for resisting arrest. Commissioner Ray could have insulated the insurance company from liability with the statement that, even assuming the men wearing badges were police officers, that they were acting beyond their authority and were thus acting as rioters. Ray's inconsistency in applying precedent suggests that his motive was not solely impartial decision of the case before him, but the insulation of the police department and Tulsa from liability.

83. Compare Plaintiff's Brief at 32, *Redfearn* (No. 15,851) (testimony of William Redfearn) with Defendant's Brief at 112-17, *Redfearn* (No. 15,851) (testimony of Green E. Smith).

claiming that the building burned as a result of the riot. The Kentucky Court of Appeals interpreted the riot exclusion clause narrowly and held that the loss was due not to the riot, but to "the wrongful act of the marshal in setting fire to the house without authority."<sup>84</sup>

The *Stearns Lumber* opinion is difficult to interpret. At one level, there was a link between the riot and the loss of the building. The insurance policy excluded coverage whenever riot was the "direct or indirect" cause of the loss. One might think that the riot was the indirect cause of the loss; the fire was set during the riot, in an attempt to end it. The court assessed the facts differently. Because the loss was due directly to the "unlawful act of the marshal," the court refused to allow the riot exclusion clause to excuse liability.<sup>85</sup> Perhaps the theory was that an indirect cause cannot excuse liability when there is a direct cause that is covered by the contract. But the court thought that the "marshal's posse, acting under his orders, were not rioters."<sup>86</sup> One simple conclusion to draw from *Stearns Lumber* is that destruction caused — even during a riot — by police officers are not the result of riot. A reasonable interpretation of the case is that loss caused by police is not loss caused by riot. Redfearn drew the parallels between *Stearns Lumber* and his situation. In both cases, the loss was caused by police and those acting under police orders.<sup>87</sup> Redfearn cited extensive precedent showing that exclusions from coverage are construed narrowly.<sup>88</sup> Such was the legal framework on which actors played out their drama — the legal system's matrix for evaluating the data points plotted by the observers of the riot.<sup>89</sup>

### III. Listening to Redfearn: The Importance of the Trial in Reconstructing the Riot

#### A. The Origins of the Riot

In order to fit his claims into the existing law, Redfearn needed to show official involvement in the burning. His strategy at trial and on appeal was to link the special deputies and the burning. Redfearn's primary case consisted only of his testimony, which showed the value of his property and that it was destroyed near midday on June 1, well after most Greenwood residents had been arrested.<sup>90</sup>

84. 140 S.W. 148, 150 (1911).

85. *Id.*

86. *Id.*

87. Redfearn had to be careful in arguing that police caused the damage, however, because there was also a clause in the insurance contract exempting damage caused "by order of any civil authority." Plaintiff's Brief at 2-3, *Redfearn* (No. 15,851). Here Redfearn had to argue that the damage was by police, but not by order of civil authority.

88. Plaintiff's Brief at 107-08, *Redfearn* (No. 15,851).

89. Cf. RALPH ELLISON, *Perspective of Literature*, in *ESSAYS OF ELLISON*, *supra* note 36, at 781 ("The law ensures the conditions, the stage upon which we act; the rest of it is up to the individual.").

90. Redfearn testified about what he did as the riot was starting. He closed his theater around 9:30 when a black woman came into the theater and began telling patrons that there was trouble. Redfearn saw people on the street, worried that there might be a lynching. At that point, Redfearn closed his theater and went to the courthouse. Plaintiff's Brief at 30, *Redfearn* (No. 15,851).

The insurance company then began its case. The insurance company had a very different theory of the case. According to the American Central Insurance Company, the riot was the result of racial tensions, set off by Tulsa's blacks and that the destruction was the result of riot, not police action. In rebuttal to Redfearn's case, the insurance company introduced a series of witnesses, mostly Greenwood residents, to show that the destruction was caused by riot. The insurance company began with testimony from C.F. Gabe, a black man who served in the Tulsa police department after the riot.

Gabe told in elegant, direct language the strands leading up to the riot. He picked up the story at 6:30 on the evening of May 31 when he was visiting his friend Ed Howard. Howard, one of those killed in the riot, said, "'C. F., they are going to lynch that boy, tonight! 'Let's see about it, let's go up there.'" Gabe headed for the Courthouse, where there were already perhaps eight hundred men, women, and children. O.W. Gurley, one of the wealthiest Greenwood residents and owner of the Gurley Hotel, was there, talking with Barney Cleaver and Sheriff McCullough. "Somebody hollered [McCullough] '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.'"<sup>91</sup>

As Gabe was leaving the courthouse, he saw black men heavily armed and white men headed off for the armory to get weapons. Back in Greenwood, Gabe tried to work with John Smitherman, a black deputy sheriff, to calm Greenwood.<sup>92</sup> Smitherman's brother was editor of the *Tulsa Star*. They sought help from J.B. Stradford. He said, "'Gabe, I ain't going up, if they want me, bring them down to me, I ain't going.'"<sup>93</sup>

Gabe again started heading downtown, but at this point the riot was getting underway; both blacks and whites were searching for guns. Gabe saw a:

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.<sup>94</sup>

But by then it was already too late. Gabe testified to the chaotic situation:

[S]omebody fired a shot, . . . they fired at this fellow and I think killed him, I know they shot him because he hollered, and when they done

91. *Id.* at 76.

92. John Smitherman was arrested for inciting riot. *See Smitherman, Held for Inciting Riot, Released on Bond*, TULSA TRIB., July 11, 1921, at 2. The indictments returned against Greenwood residents — many of whom fled Tulsa after the riot — is an example of the ways that legal mechanisms were used to drive out even more Tulsa blacks. *See 38 Indicted in Race Riot Probe*, TULSA WORLD, June 19, 1921, at 2 (reporting that first indictments returned by grand jury were against blacks and that most had fled the city); *see also Bye, Bye Tulsa Is Song of Many Blacks Without Jobs Here*, TULSA TRIB., June 11, 1921, at 2.

93. Defendant's Brief at 79, *Redfearn* (No. 15,851).

94. *Id.* at 80.

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 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 often and every once in a while you could see somebody holler, see somebody pick up a man.<sup>95</sup>

It was the next morning that riot crossed the railroad tracks separating white and black Tulsa, when the destruction of Greenwood began. At 5 o'clock on the morning of June 1, a whistle blew. Gabe's wife told him to get up. She said, "the white folks is killing all the niggers in town and burning all their houses."<sup>96</sup> There was shooting nearby; bullets hit his piano. When Gabe looked out of his house, he saw two men coming towards him. One told him to "go back and get behind the piano and get down in there, we ain't going to bother you, you are all right."<sup>97</sup> The men moved up the street and were shot. Then came an airplane, which was smoking. Someone shot at the airplane from the ground.

Two more white men came. They did not know Gabe. One said to the other "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.'<sup>98</sup> Gabe was taken to Convention Hall, then to the Fair Grounds, and finally to Sheriff McCullough's house, where he stayed the night. Such is the level of detail in the Redfearn testimony. The testimony preserved the crisp unfolding of the riot.

It also captures the uncertainty of outcome, which is central to a true understanding of history. For we have the written, neatly stylized version of "ancient myth" and "the other unwritten and chaotic and full of contradictions, changes of pace, and surprises as life itself."<sup>99</sup> As we try to recover the unwritten history, Redfearn's

95. *Id.* at 79-80.

96. *Id.* at 82.

97. *Id.* at 83.

98. *Id.* Gabe also testified in the trial of Police Chief John Gustafson. He presented a similar account. See *Witness Says Cop Urged Him to Kill Black*, TULSA TRIB., July 15, 1921, at 1, 9; *Instruction is Denied by Court*, TULSA TRIB., July 16, 1921, at 1, 9.

99. RALPH ELLISON, *Going to the Territory*, in *ESSAYS OF ELLISON*, *supra* note 36, at 591, 594; see also BRENT STAPLES, *PARALLEL TIME: GROWING UP IN BLACK AND WHITE* (1994) (exploring ways that life unfolds and the ways that individuals and families perceive, react to, and rewrite that history). Ellison's essay spoke in terms similar to those employed by Bernard Bailyn, whose widely read monograph on Thomas Hutchinson, the governor of Massachusetts on the eve of the American Revolution, presented a sympathetic portrait of the Loyalist, in an effort to present a comprehensive portrait of the coming of Revolution. See BERNARD BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* ix (1974). One hopes that the Redfearn testimony, when combined with a careful reading of the other texts, will enable us to "embrace the whole event, see it from all sides." *Id.* We might even see "the inescapable boundaries of action; the blindness of the actors — in a word, the tragedy of the event." *Id.*

hundreds of pages of testimony will be indispensable. It may no longer be possible to think of the events put in motion by the *Tulsa Tribune's* story on Rowland having any other outcome, but it is necessary to understand the contingencies, to put ourselves back in the events as they were occurring, to understand how forces came together in the riot. We now know the broad contours of the riot, but the testimony fills in gaps in specific areas and recovers the chaotic, fearful environment in which black and white Tulsans struggled to prevent violence, even as strong forces, like the ideas of equality and enforcement of the law against mob violence, clashed with white views of the place that blacks should occupy.

The testimony of a white man, Henry Sowders, portrays particularly well the conflicting narratives of white and black Tulsa, because he observed them both.<sup>100</sup> Sowders ran the motion picture machine in the Williams Dreamland Theater, so he saw events unfolding in Greenwood. The Dreamland Theater was on Greenwood, in the block north of Archer, at the center of Greenwood's business district. Sowders noticed a crowd gathering on Greenwood about 7:30 p.m..<sup>101</sup> When the second showing was starting about ten p.m., Mr. Cotton, the manager, asked him to turn the lights back on.<sup>102</sup> At that point, Sowders saw that Cotton was armed. Cotton told Sowders he was "protecting himself — looking out for number one . . ."<sup>103</sup> There were guns at a side door; someone called "Quick, come out and get your guns."<sup>104</sup> And a few black men came to get the guns, as others left the theater. It was empty in a few minutes.

Meanwhile, Sowders went out to Greenwood. When Cotton told him there was fighting going on, Sowders went to leave. But he found his car "full of niggers, they had turned the top back, . . . and was standing up in the back seat with their

The competing narratives of the insurance company and Redfearn showed the ways that Tulsans interpreted what happened during the riot and the conclusions they drew from those events. Cf. Hendrick Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899 (exploring criminal prosecutions for pig keeping in New York City and concluding that there were multiple ways that legal structures dealt with customs of pig keeping; those multiple responses testify to the diversity within American legal culture at the time); Judith L. Maute, *Peevyhouse v. Garland Coal and Mining Co. Revisited: The Ballad of Willie and Lucille*, 89 NW. U. L. REV. 1341 (1995) (exploring in detail the background to an infamous Oklahoma case). Redfearn shows the competing interpretations of the riot's origins even within the Greenwood community itself and the constraints imposed upon the Oklahoma Supreme Court by desire to limit the city's liability. The testimony shows the diversity of opinions in Tulsa and the ways that legal doctrine shapes those opinions.

Those competing interpretations can tell us a great deal about larger Tulsa and American society, much as studies of medicine and law serve as mirrors for society more generally. See, e.g., EDWARD H. BEARDSLEY, *A HISTORY OF NEGLECT: HEALTH CARE FOR BLACKS AND MILL WORKERS IN THE TWENTIETH-CENTURY SOUTH* viii (1987); Eben Moglen, *The Transformation of Morton Horwitz*, 93 COLUM. L. REV. 1042 (1993) (discussing modes of legal history and the reflections on culture they provide); see also GAIL WILLIAMS O'BRIEN, *THE COLOR OF LAW: RACE, VIOLENCE, AND JUSTICE IN THE POST-WORLD WAR II SOUTH* (1999) (mining grand jury testimony on 1946 Columbia, Tennessee, riot).

100. See Defendant's Brief at 85, *Redfearn* (No. 15,851).

101. *Id.*

102. *Id.* at 86.

103. *Id.*

104. *Id.*

feet, looked like about nine niggers in there."<sup>105</sup> When Sowders asked for his car, "a big husky Negro picked him up and set him over on a Ford truck and told him to stay there."<sup>106</sup> The man then paid the Ford's driver to take Sowders to the station. On the way to the station, Sowers saw the street filled with men carrying guns. Upon crossing the tracks, Sowders saw Police Officer H.C. Pack holding back three black men, while others were crossing the tracks.<sup>107</sup> As they approached Cincinnati, "they nearly ran over a Negro standing in the middle of the street shooting, and he noticed two others lying in the street, he didn't know whether they were wounded or dead."<sup>108</sup> Then, by himself at this point, he went to Main street, where he saw men taking arms from a pawn shop. "[H]e made inquiry as to what was going on, and was told he had better get on home to his family, if he had one, or else get some arms, for the thing was coming on."<sup>109</sup>

Like Sowders' testimony, the testimony of Greenwood residents Barney Cleaver, O. W. Gurley, H. C. Pack, Green E. Smith, Susan Williams, and C. W. Kern can reconstruct the actions of individuals. The riot does not need to be remembered only as mobs and nameless victims. Redfearn allows us to hear the testimony of riot victims and observers, to understand the thoughts of people at the time.

### *B. The Involvement of the Police*

The Redfearn testimony also provides important evidence about a very specific question: What was the role of the special deputies in the riot? Advocates of reparations maintain that one of the key characteristics of the Tulsa riot, which distinguishes it from many other riots of the time, is the role of the culpability of the city in the destruction.<sup>110</sup>

Redfearn's brief collects the evidence of the involvement of the special deputies. The evidence comes from two sources: those who saw what was happening in white Tulsa and those who saw what was happening in Greenwood. Together the evidence presents a compelling case for the city's culpability.

The evidence of the reaction of white Tulsa comes largely from Wesley Bush, the fire marshal.<sup>111</sup> He arrived at the police station sometime after ten p.m. Throughout the night he saw people standing around the station; the street was full of armed people.<sup>112</sup> Many of those people were going into the police station.<sup>113</sup> He saw "bunches of men go out of the police station, but he didn't know where they

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105. *Id.* at 87.

106. *Id.*

107. Pack also testified in the Redfearn trial. Pack's testimony offers the possibility of reconstructing the interlocking experiences of the characters in the riot. See Plaintiff's Brief at 50-53, *Redfearn* (No. 15,851).

108. *Id.*

109. *Id.* at 88.

110. Staples, *Unearthing a Riot*, *supra* note 77, at 65 (discussing case for reparations).

111. See Plaintiff's Brief at 68, *Redfearn* (No. 15,851).

112. *Id.*

113. *Id.*

would go; that they would leave the police station and go out, and come back."<sup>114</sup> By itself, Bush's testimony merely establishes that the police station was a gathering point for men planning their next moves. That is precisely what one would expect during a riot.

What was happening inside the station is important. For that, one needs to look to the trial of police chief John A. Gustafson, who was tried in July 1921 for neglect of duty during the riot. During Gustafson's trial the police commissioner, Jim Adkison, discussed what happened in the police station. Men came to offer their services, and after a conference with the chief, the chief decided to make the men special officers. The commissions were handed out without sufficient care. In response to a question whether Adkison believed that police officers had engaged in arson, he admitted, he did not know:

There was no testimony that uniformed men were bearing the torch. It was all about men wearing stars. Many of the men who were commissioned that night were given old police stars. We were unable to limit the commissions to our choice. I usually talked to the men and those I thought would remain cool-headed I commissioned. But some of those men might have lost their heads — they might have applied the torch, but it was positively in contradiction to orders. My orders, the chief's orders, Colonel Rooney's orders were to disarm everyone not properly commissioned and absolutely prevent looting and burning.<sup>115</sup>

Adkison's testimony carries several important messages. First, that the highest city officials charged law enforcement distributed commissions. Secondly, that those commissions were distributed without care. And finally, the city officials ordered everyone who was not a deputy to be disarmed. The *Redfearn* case picks up the story of how those deputies behaved the next morning with testimony from Green E. Smith.

Green Smith, who lived in Muskogee and was in town for a few days to install a cooling system in the Dreamland Theater, testified to events in Greenwood. Smith went to the Dreamland around five o'clock in the morning. He wanted to install a fan, then catch a train back to Muskogee by nine. After the whistle blew at five, Smith heard shooting and watched out of the window. The shooting varied in

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114. *Id.*

115. *Inefficiency of Police is Denied*, TULSA WORLD, July 19, 1921, at 1, 7. The author is indebted to Robert Norris for this citation. See also Testimony of Laurel Buck 30, Attorney General's Civil Case Files, RG 1-2, A-G Case No. 1062, Box 25 (Oklahoma State Archives) (discussing instructions given to Laurel Buck, a white man, to "get a gun, and get busy and try to get a nigger."). According to pleadings in a suit filed by a black riot victim, one deputy officer gave instructions to "Go out and kill you a d\_\_mn nigger." Petition in *Robinson v. Evans, et al*, Tulsa County District Court, No. 23,399, May 31, 1923.

For an in-depth analysis of Gustafson's trial, see Eli Hellman, *The Trial of John Gustafson* (2000) (unpublished honors thesis, Oklahoma City University) (on file with author).

intensity. By nine-thirty, "a gang came down the street knocking on the doors and setting the buildings afire."<sup>116</sup> Here Smith's testimony becomes exciting:

Q. Who were they?

A. Policemen, I guess.

Q. Were they white or black?

A. White.<sup>117</sup>

On cross-examination, Redfearn's attorney established the basis for Smith's belief that the gang were policemen. Smith did not know the men by face (he knew only the black officers), but they "had on what they call special police and deputy sheriff's badges."<sup>118</sup> How could Smith have seen the badges? "They came and taken fifty dollars of money, and I was looking right at them."<sup>119</sup> He had been close enough to them to "read the badge[s]."<sup>120</sup> He saw "ten or twelve of them. Some *Special Police*, and others would be *Deputy Sheriff*. Some had ribbons and some of them had *regular stars*."<sup>121</sup> Not all of the approximately fifteen men along Greenwood were wearing badges; some had "home guard[]" uniforms.<sup>122</sup>

Smith testified that the special deputies knocked on doors, went into buildings, and then set them afire.<sup>123</sup> In simple, direct prose, Smith told how the gang worked:

Q. And did you see them knock at any doors?

A. Yes, sir.

Q. What happened to the building after they [the occupant] come out — did the men go inside?

A. Yes, sir.

Q. What did the men do?

A. Went inside.

Q. After they came out, what happened?

A. A few minutes afterwards you could see smoke.<sup>124</sup>

Smith saw the same scenario repeated for many buildings along Greenwood.<sup>125</sup> He stayed at the Dreamland Theater until the men set it on fire and then he left the building and was arrested.<sup>126</sup> He was released at four o'clock that afternoon and returned to Muskogee.

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116. Plaintiff's Brief at 65, *Redfearn* (No. 15,851).

117. *Id.*

118. *Id.* at 61.

119. *Id.* at 62.

120. *Id.*

121. *Id.*

122. *Id.* at 63.

123. *Id.* at 58.

124. *Id.* at 56-57.

125. *Id.* at 60.

126. *Id.*



Other witnesses also testified to the organized fashion in which the arrests took place. O.W. Gurley, owner of the Gurley Hotel, which was burned during the riot, told how he was ousted from his hotel by men wearing suits:

Those were white men, they was wearing khaki suits, all of them, and they saw me standing there and they said, 'You better get out of that hotel because we are going to burn all of 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.<sup>127</sup>

Gurley does not testify as to whom burned his property, but only that the men who ousted him threatened to burn it.<sup>128</sup> The picture that emerges is one of coordination in the arrests of Greenwood residents and then burning, perhaps under instructions (but perhaps not), by men who had been deputized.

The insurance company advanced a story about the riot that hewed more closely to the grand jury's account. It painted a picture of an angry, excited crowd in Greenwood. Even William Redfearn, the company's lawyer argued, was uncomfortable staying there.<sup>129</sup> The insurance company's lawyer employed emotion-laden questions of Redfearn:

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?

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

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

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

And that was because you realized there would be trouble if they did?<sup>130</sup>

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127. *Id.* at 50. Based on testimony in the trial of Police Chief John Gustafson, we know the rest of Gurley's day. After leaving the Gurley Hotel, he ran three blocks to the Dunbar School, where he hid in the basement. On his way to the school, he saw one other man. "I saw him because he was running faster than I was and passed me." That man was shot. *Witness Says Cop Urged Him to Kill Black*, TULSA TRIB., July 15, 1921, at 1, 9. He stayed there until the school was set on fire and was then taken to the ballpark. *Id.*

128. Similarly, Susie Williams, who lived in Greenwood at the time of the riot, saw two groups of men set fire to her house. *Id.* at 65-66. Williams did not mention whether the men were wearing badges or not. Her testimony shows the organized nature of the burning, not who did the burning.

129. Defendant's Brief at 41, *Redfearn* (No. 15,851).

130. *Id.* at 43-44. While the power of narrative is strong and holds the potential to remake law, it also has extraordinary power to hold us to established patterns of thought. While abolitionists like Harriet

The insurance company continued to lay blame for the riot on Greenwood residents. It turned to testimony that Redfearn gave at the Fire Marshal's investigation around June 3, 1921. Redfearn has testified about "the sentiment and feeling of the Negro, population of that part of Tulsa towards the white people of Tulsa."<sup>131</sup> Those sentiments were not good, according to Redfearn:

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 . . . part of the city raised objections and protested against colored citizens spending their money up town with white business men, claiming that they should patronize their race. The race proposition in my opinion was carried into the churches, lodges and schools.<sup>132</sup>

Later, Redfearn testified to the role of radical literature circulating in the Greenwood community in contributing to the riot:

There has been newspapers and literature circulated and sold in that part of the city pertaining to supposed outrages committed in other states

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Beecher Stowe sought to use sentimental stories to remake cold legal logic, there were many instances in which sentiment might exercise the opposite influence. See Brophy, *supra* note 37, at 1132-37 (discussing Stowe's appeals to sentiment); Alfred L. Brophy, *Reason and Sentiment: The Moral Worlds and Modes of Reasoning of Antebellum Jurists*, 79 B.U. L. REV. 1161, 1193-96 (1999) (discussing ways that appeal to sentiment could be harnessed by both pro- and anti-slavery forces). Even powerful antislavery appeals to sentiment, like *Uncle Tom's Cabin*, failed to remake the matrix of law. See Brophy, *supra* note 37, at 1160 (concluding that Stowe's pessimism "may be a result of her realization that the magical powers of sentimental literature were limited . . ."). Those occupying positions outside the mainstream of American law might remake the law, as Quakers did in the seventeenth century. See Alfred L. Brophy, *Ingenium est Fateri per quos profeceris: Francis Daniel Pastorius' Young Country Clerk's Collection and Anglo-American Law, 1680-1716*, 3 U. CHI. L. SCH. ROUNDTABLE 637-734 (1996). But much more frequent are the times when reformers' visions are rejected by courts, legislatures, and juries. See Brophy, *Reason and Sentiment, supra* (exploring ways that precedent and middle class values constrained the options of antebellum jurists when they faced new questions); see also Charles Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 59, 65 (1979) (exploring factors impelling legal change).

American Central's appeals to the "traditional" interpretation of the riot's causes is an example of the conservative power of trial narratives. See MARY FRANCES BERRY, *THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT* (1999); cf. Derrick Bell, *The Power of Narrative*, 23 L. STUDIES FORUM 315, 317 (1999) (focusing on subversive power of narrative).

131. Defendant's Brief at 47, *Redfearn* (No. 15,581).

132. *Id.* at 47-48.

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 Defend[er]" published in Chicago and another pamphlet called "The Crisis."<sup>133</sup>

Redfearn suggested that the Fire Marshal obtain copies of those papers to use as evidence. *The Crisis* was frequently blamed for stirring up trouble. In a debate over anti-lynching legislation, one representative asked his audience to "look and listen" to editorials from the June 1921 issue of *The Crisis*, which represented "the type of propaganda going on in the camp of foolish Negro agitators, and eventuating at last in the sentimental hysteria and the campaign promise which brought this bill before Congress."<sup>134</sup>

By itself Redfearn's testimony did not free the insurance company from liability. The insurance company's theory of the case rested on showing that Greenwood residents precipitated the trouble — thus casting claims for damage to Greenwood in a bad light. Once the riot began, it led to damage to Redfearn's property. The insurance company argued that the fires were not set in order to arrest anyone; instead, they were simply part of a larger riot.<sup>135</sup> The insurance company depicted in jarring language the motives behind the riot:

[T]here 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.<sup>136</sup>

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133. *Id.* at 60.

134. 62 CONG. REC. 1550 (daily ed. Jan. 21, 1922) (statement of Rep. Upshaw).

135. *Am. Cent. Ins. Co. v. Stearns Lumber Co.*, 140 S.W. 148 (Ky. 1911). *Stearns Lumber*, limited the riot exclusion clause by pointing out that the burning of the building was the *illegal* action of the sheriff's deputies. *See id.* In *Redfearn*, the insurance company merely stated that the damage was caused by riot, without addressing whether the special deputies who were doing the burning were acting pursuant to orders of city officials. In fact, Green Smith, whose testimony was central to showing the involvement of the special deputies, was a witness for the insurance company. *See* Defendant's Brief at 191-92, *Redfearn* (No. 15,851) (referring to Smith's testimony that he saw men set fire to Redfearn's property). Redfearn brought out the involvement of the special deputies on cross-examination. *See* Plaintiff's Brief at 61-62, *Redfearn* (No. 15,851).

136. Defendant's Brief at 208, *Redfearn* (No. 15,851).

The briefs in *Redfearn* illustrate the ways that trials crystalize issues. Because there was an incentive for Redfearn to show the involvement of the city, that issue received more scrutiny than in any other report, when there was incentive to limit the exposure of the city. For the grand jury the psychological pressures to blame an outside group — in this case some of Tulsa's black men — for the damage, easily overcame any sentiments they might have had to offer a full exploration of the riot.

#### *IV. Interpreting the Nature of the Riot: The Oklahoma Supreme Court's Opinion*

When the case reached the Oklahoma Supreme Court, the issues in the case centered around the cause of the damage and the scope of the riot exclusion clause.<sup>137</sup> Commissioner Ray wrote the opinion for the Court.<sup>138</sup> He described the origin and progress of the riot. It began with a rumor that a black man would be lynched that night.<sup>139</sup> Then the "Negroes residing in the northeast part of the city of Tulsa, known as the Negro section, became excited over the rumored lynching, and a great many of them armed themselves for the declared purpose of preventing the lynching."<sup>140</sup> By ten o'clock that evening, there were many whites around the courthouse. At that point:

[A]rmed Negroes in automobiles drove around the courthouse two or three times and drove away. They returned, parked their cars, and marched single file down west of the courthouse. As they neared the courthouse a shot was fired, following which there were a great many shots fired and one white man was killed.<sup>141</sup>

Commissioner Ray went on to describe the subsequent events: white men broke into downtown Tulsa stores to get guns and two or three hundred of them gathered at the police station.<sup>142</sup> They "were sent out to different parts of the town ostensibly to guard the town."<sup>143</sup>

From that point until around ten o'clock the next morning, there was shooting. Fires broke out beginning around two o'clock and the fire department could not put them out.<sup>144</sup> Ray then described the destruction of Greenwood. At five a.m.:

137. See Plaintiff's Brief at 93-94, *Redfearn* (No. 15,851) (discussing issues on appeal). "[A]ll of the witnesses who had been able to give any information concerning the destruction of the buildings, claim that the circumstances were such as to indicate certain men who were acting as peace officers, destroyed these buildings by fire." *Id.* at 100-01.

138. Commissioners acted as special masters for the Oklahoma Supreme Court; their opinions could then be adopted by the Court, as happened in *Redfearn*.

139. See *Redfearn v. Am. Cent. Ins. Co.*, 243 P. 929, 929 (Okla. 1926).

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. The court described the scene:

From that time until about 9 or 10 o'clock the following day there was a great deal of shooting, especially in the Negro section of the city, and a number of men were killed.

at the sound of a whistle, shooting became rather general and continued for some time. Armed white men, described as traveling in groups of from a dozen to twenty, rounded up the Negroes found in the section where the fires were burning and took, or sent, them to the convention hall where they appear to have been detained. A number of witnesses testified that these groups of white men, many of them wearing police badges and badges indicating that they were deputy sheriffs, after removing the Negroes from buildings, went inside the buildings, and, after they left, fires broke out inside the buildings.<sup>145</sup>

Having described the riot, Ray then turned to the legal issues. The Kentucky Court of Appeals opinion in *Stearns Lumber* was central to Redfearn's claim that he should be able to recover, despite the seemingly broad riot exclusion clause. Where Redfearn argued for coverage because the buildings were burned by police officers, the Oklahoma Supreme Court had a different, narrower interpretation of *Stearns Lumber*. It distinguished *Stearns* from Redfearn's situation in two ways. First, by noting that the men wearing police and sheriff's badges who burned down Redfearn's property were not doing so "in order to make an arrest."<sup>146</sup> Ray acknowledged that "the evidence shows that a great number of men engaged in arresting the Negroes found in the Negro section wore police badges, or badges indicating they were deputy sheriffs, and in some instances were dressed in soldier's clothes and represented to the Negroes that they were soldiers . . ."<sup>147</sup> But because there was "no evidence that any Negro ever resisted arrest, or that any fire was started in order to make such arrest,"<sup>148</sup> he thought the fires were part of the riot. "The only evidence contained in the record tending to show that any person wearing a police or deputy sheriff's badge, or in any way pretending to act in an official capacity, set fire to any building, was after the arrest had been made or where no arrest was being made or attempted."<sup>149</sup>

*Stearns* held that a fire started (wrongfully and without authority) to arrest rioters was not caused (even indirectly) by the riot.<sup>150</sup> The Oklahoma Supreme Court, however, thought that a fire started by deputies after the people inside the buildings

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Beginning about 2 o'clock in the morning of June 1st, fires began to break out in the Negro section of the city. The fire department, in attempting to respond to calls coming in from the Negro section, found the streets full of armed white men, who, with pointed guns, refused to permit the firemen to connect the hose, and forced them to return to the fire stations without rendering any service in extinguishing the fires. After a few attempts to reach the fire, the chief of the fire department directed the men to respond to no more calls until morning.

*Id.*

145. *Id.* at 929-30.

146. *Id.* at 931.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Stearns*, 140 S.W. at 150.

were arrested was caused at least indirectly by the riot.<sup>151</sup> Comparing the two cases, one reaches the somewhat counterintuitive conclusion that if law enforcement officials burn a building to end a riot, the insured receives compensation, but if officials burn the building for their own malicious purposes, without trying to affect an arrest, then the insured receives no compensation. The Oklahoma Supreme Court appears to have grasped for some distinction between *Stearns Lumber* and *Redfearn's* case, because the distinction it articulated made little sense. The Kentucky court emphasized that the officials' actions were unlawful.<sup>152</sup> That same unlawful behavior appeared in the Tulsa riot.

The Oklahoma Supreme Court drew one other distinction. It questioned whether the men wearing police badges or sheriff's badges were in fact such officers or acting in an official capacity.<sup>153</sup> If those men were, indeed, not police or deputy sheriffs, then there would be no analogy to *Stearns Lumber*. That statement indicates Commissioner Ray's pro-police bias. The case was appealed from a directed verdict against *Redfearn*, which meant that the trial judge concluded there was no evidence from which a jury could conclude that the men wearing badges were officers.<sup>154</sup> Yet cases involving resisting arrest routinely conclude that a police badge indicates one's authority to arrest. Simply put, if one of the blacks involved in the riot resisted one of the men wearing a badge, he could have been prosecuted for resisting arrest. Commissioner Ray could have insulated the insurance company from liability with the statement that, even assuming the men wearing badges were police officers, that they were acting beyond their authority and were thus acting as rioters. Ray's inconsistency in applying precedent suggests that his motive was not solely impartial decision of the case before him, but the insulation of the police department and Tulsa from liability.

### Conclusion

The *Redfearn* case, which revolved around the scope of a riot exclusion clause for a fire insurance policy, crystallized issues of how the Tulsa Race Riot of 1921 evolved. The testimony illuminated ideas about equality in black and white Tulsa; the progress of the riot from confrontation at the courthouse until the next morning when black Tulsa was consumed in fire. The Oklahoma Supreme Court's opinion in *Redfearn*, which is the least biased of the contemporaneous "official" reports of the riot, harmonizes the testimony with Oklahoma precedent. It acknowledges the culpability of Tulsa police department special deputies in the destruction of riot, but insulates the insurance company and the city of Tulsa from liability. The *Redfearn* testimony, which runs to several hundred pages in the briefs, provides an important — and as yet underutilized — resource for recovering the riot.

The testimony helps us recover, in detail previously unimaginable, the riot's genesis and progress. It will be valuable as the Oklahoma legislature debates

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151. *Redfearn*, 243 P. at 931.

152. *Stearns*, 140 S.W. at 199 ("The marshal's posse, acting under his orders, were not rioters.").

153. *Redfearn*, 242 P. at 931.

154. *See id.*

reparations for riot victims, for from it we can formulate our own understanding of the causes of the riot. A careful reading of the record tells us that the Tulsa riot was a product of the conflicting ideas of equality and status in black and white Tulsa and that the city was intimately involved in the destruction.<sup>155</sup> We can quickly get to the point where recovery of unpleasant details is disheartening.<sup>156</sup> Yet, in the process of recovery — for which the previously unstudied (and until recently completely forgotten) *Redfearn* testimony is crucial — we can understand something about how it is that we arrived where we are. And maybe even think about where to go from here.

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155. The issues at trial, shaped as they were by legal doctrine, allow us to break from the biased interpretations of Tulsans at the time. Cf. William W. Fisher, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065, 1084-86 (1997) (discussing use of trials as "sites" for viewing ideology). The Tulsa court and, even more importantly, the Oklahoma Supreme Court provided a fuller exploration of the causes and progress of the riot than the grand jury allowed. Particularly when powerful interests — like William Redfearn's — were aligned with the interests of Greenwood residents, there might be more hope than usual for justice. Cf. *Looking Thru*, BLACK DISPATCH, Jan. 26, 1922, at 4 (pointing out that prosecution of lynchers was motivated by desire to protect strike breakers, not blacks).

Oklahoma's exploration of the issues is more searching than the more famous contemporary trial of the *Scottsboro* case. See generally JAMES E. GOODMAN, *STORIES OF SCOTTSBORO* (1994); RALPH ELLISON, *Perspective of Literature*, in *ESSAYS OF ELLISON*, *supra* note 36, at 769 ("As I saw it, the trial was a macabre circus, a kangaroo proceeding that would be soon followed by an enactment of the gory rite of lynching, the ultimate form of racial victimage."). It suggests that in the courts there might, on occasion, be some justice. The Tulsa district court's invalidation of the zoning ordinance, which required the use of fire-proof material in rebuilding Greenwood, is another example of the triumph of legal justice. See *Cannot Enforce Fire Ordinance, Court Holds Unconstitutional Act Against the Burned District*, TULSA WORLD, Sept. 2, 1921, at 1; *Kill Ordinance!*, BLACK DISPATCH, Sept. 9, 1921, at 1.

156. RALPH ELLISON, *Roscoe Dungee and the American Language*, in *ESSAYS OF ELLISON*, *supra* note 36, at 594.

## APPENDIX

THE SUPREME COURT OF THE  
STATE OF OKLAHOMA

WILLIAM REDFEARN,	)	
<i>Plaintiff in Error,</i>	)	
	)	
vs.	)	No. 15, 851
	)	
AMERICAN CENTRAL INSUR-	)	
ANCE COMPANY, a Corporation,	)	
<i>Defendant in Error.</i>	)	

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BRIEF OF PLAINTIFF IN ERROR

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## Preliminary Statement.

On May 31, 1922, William Redfearn, the plaintiff in error, filed his petition against the American Central Insurance Company, a corporation, in the District Court of Tulsa County, Oklahoma, seeking to recover the sum of \$19,000.00 for the destruction of certain [1<sup>57</sup>] buildings owned by the plaintiff in error in Tulsa, Oklahoma, alleging that on the first day of June, 1921, he suffered a loss by having certain buildings destroyed by fire, upon which the defendant in error, American Central Insurance Company, had written three policies of insurance; one for \$4,000.00, one for \$5,000.00, and one for \$10,000.00. The plaintiff alleging in his petition that he had paid all of the premiums and that said insurance was in force on the day of the fire, and that on the first day of June, 1921, his buildings had been destroyed by fire; that the cause of the fire was to him unknown; that he had given due notice and made due proof of loss to the defendant company, and that the fire did not occur by reason of any exceptions in the policy; and that the defendant company had failed and refused to pay for said loss.

The plaintiff attached copies of his three insurance policies to his petition, marked them respectively, "A," "B," and "C." Which policies were in form known as the standard form under the laws of the State of Oklahoma, and contained therein what is known as the riot clause, which was 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

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157. The text before the bracket appears on page one; the text after the bracket appears on page 2.



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 prop[2]erty is endangered by fire in neighboring premises; or (unless fire insures, 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 then prayed for judgment for the am of \$19,000.00 in the aggregate on his three causes of action.

To the petition of the plaintiff, the defendant filed its answer, which consisted of a general denial, except as to such matters as were specifically admitted. The defendant admitted the execution and issuance of the policies, and the payment of the premiums, but denied that the plaintiff was entitled to recover from the defendant on account of a riot that occurred in the city of Tulsa, on May 31, and June 1, 1921; at which time it was alleged that the property of the plaintiff was destroyed by fire, and the defendant further claiming that it was relieved from any liability on the policies sued upon, for the reason that the plaintiff's property was destroyed by fire caused directly or indirectly by a riot which it is alleged obtained in the vicinity of his property on May 31, and June 1, 1921. The defendant then tenders the amount of the premium paid by the plaintiff, together with interest, and prays that the plaintiff take nothing by his suit, and that it recover its costs expended.[3]

The plaintiff filed its reply which consisted of a general denial.

The trial was begun on the 16th day of April, 1924, in the District Court in and for Tulsa County, Oklahoma, before the Honorable Edwin R. McNeill, one of the judges of said court. The plaintiff introduced his testimony and rested. The defendant thereupon demurred to the testimony, which demurrer was overruled and exception saved. The defendant then introduced its testimony and rested, and the plaintiff introduced his rebuttal testimony and rested. Thereupon the defendant moved that the Court direct a verdict for the defendant, which motion was sustained and exception allowed to the plaintiff. Thereupon the plaintiff filed his motion for new trial, which was overruled and exception allowed, and he has appealed to the Supreme Court of the State of Oklahoma, seeking to reverse the judgment of the Court in said cause.[4]

Abstract of the Record.  
THE PETITION.

The petition, aside from its formal parts, and together with the exhibits attached thereto, is found (C.-M. pp. 2 to 56 inclusive). We deem it unnecessary to set out the petition in full, but will set out the petition as to Count No. 1, the other Counts, 2 and 3, being stibstantially the same except as to dates, description of property and amounts, is as follows:

"The defendant is and was at the times hereinafter mentioned, an insurance corporation, duly organized and existing under the laws of the State of Missouri, for

the purpose of insuring property against loss by fire and lawfully engaged in the business of &e insurance within this state.

"The plaintiff was, at all times hereinafter mentioned, a citizen and resident of Tulsa County, State of Oklahoma.

"COUNT 1.

"That on the 12th day of September, 1920, in consideration of the payment by plaintiff to the defendant of the premium of Ninety-eight Dollars and Fifty Cents (\$98.50), the defendant, by its agents, duly authorized thereto, made its policy of insurance in writing, a copy of which is annexed to and made a part of this complaint, marked Exhibit "A," and thereby insured the plaintiff against loss and damage by fire, to the amount of Five Thousand Dollars (\$5,000.00), upon his brick and steel theater and store[5] building, situated at Nos. 118-120 North Greenwood Avenue, on part of Lot One (1), Block Forty-six (46), in the City of Tulsa, Oklahoma, according to the Official Plat thereof, and described in said policy as Risk No. 3712.

"That at the time of making said Insurance, and from then until the fire hereafter mentioned, plaintiff was the owner in fee of said property so insured, except that at the time of the making of said insurance and at the time of the fire hereafter mentioned, the said premises were mortgaged to secure certain indebtedness owing by the plaintiff to the Farm & Home Savings & Loan Association of Missouri, which said mortgage has since been paid and discharged by the plaintiff.

"That on the 1st day of June, 1921, and while said policy was still in force, the said theater and store building were totally destroyed by fire, which did not happen from any of the causes excepted in said policy. That the said building when so destroyed was of the value of FORTY THOUSAND DOLLARS (\$40,000.00).

"That plaintiff duly fulfilled all the conditions of said insurance on his part, and immediately gave notice in writing to the defendant of the loss suffered by him by reason of said fire, and within sixty (60) days after the said fire rendered a statement to the defendant, signed and sworn to by the insured, and thereby gave to the defendant due notice and proof of the fire and loss aforesaid, as required by said policy, and thereafter defendant, without specifying any defect or requiring additional data, within the knowledge of the plaintiff not contained in said notice and proof of loss aforesaid, disclaimed any liability under or by reason of said insurance policy and contract, and,[6] notwithstanding said proof of loss was made up in accordance with the directions of the agent of the defendant for the State of Oklahoma, and no requests were made for any other or different information not contained therein within the knowledge of plaintiff, which constituted a waiver of any objection thereto, the defendant refused to adjust said loss and negotiate a settlement thereof, in accordance with the terms of said policy. That plaintiff had upon said property, in addition to said policy of the defendant, insurance amounting to the sum of Four Thousand Dollars (\$4,000.00), and no more. That no part of said sum has been paid, and the same is now due from the defendant to the plaintiff.

"Wherefore, plaintiff prays judgment against defendant on this, the first count of his petition, in the sum of Five Thousand Dollars (\$5,000.00)."

As above stated, the Exhibits "A," "B," and "C," to the petition are copies of the policies sued upon; which are the standard form of policy as provided by the laws of the State of Oklahoma, and contain what is known as the "riot clause," and we deem it unnecessary to set out the full policy in this brief, but only that portion upon which the defense is predicated.

#### THE ANSWER.

The answer has been gone into quite fully in the Preliminary Statement and is found (C.-M. pp. 58 to 74 inclusive), and as in the petition, we will only set forth the answer to Count 1, the answer to Count Nos. 2 and 3 being an adoption of all material things[7] set forth in Count No. 1; which answer aside from its formal parts, is as follows:

"Comes now the defendant, American Central Insurance Company, a corporation by its attorneys, Rittenhouse & Rittenhouse, and for its answer to the petition and the several counts thereof of plaintiff, William Redfearn, filed in the above entitled and numbered cause in the above named court, alleges and states:

#### "ANSWER TO 'COUNT 1.'

"For its answer to the petition and 'Count 1' thereof, defendant alleges and states:

"1. That defendant specifically denies each and every allegation and statement made and contained in said petition and 'Count 1' thereof, save and except only such allegations thereof as are hereinafter specifically admitted to be true.

"2. Defendant admits that it is and was at the times in said petition mentioned an insurance corporation duly organized and existing under the laws of the State of Missouri for the purpose of insuring property against loss by fire, and lawfully engaged in the business of fire insurance within this state.

"3. Defendant further admits that it executed and delivered to plaintiff its policy, No. 6112 whereby it insured plaintiff against all direct loss or damage by fire, except as in said policy provided, to the property in said petition and 'Count 1' thereof in said policy described.

"4. Defendant further admits that there is attached to and forming a part of said policy a mort[8]gage clause whereby loss, if any, is payable to Farm & Home Savings & Loan Association of Missouri, mortgagee, as in said clause provided.

"5. Defendant alleges and states that by reason of said mortgage clause the said mortgagee claims to have some right and interest in said policy, No. 6112 and the proceeds thereof and that it should be made a party to this action and required to set up herein whatever rights it may claim to have in said policy or proceeds under said mortgage clause in order that the rights of all parties claiming any interest in said policy, may be adjudicated in this action.

"G. Defendant further alleges and states that the only policies it has issued to plaintiff covering the property in said 'Count 1' described is its said policy, No. 6112 and its policy, No. 6205.

"7. Wherefore having thus fully answered the petition of the plaintiff herein and 'Count 1' thereof, defendant prays that Farm & Home Savings & Loan Association of Missouri be made a party to this action required to set up whatever right it may claim aid mortgage clause and that plaintiff and mortgagee take nothing by said petition or said policy, No. 6112 of this action and that defendant lave and recover

judgment against the plaintiff for costs and be given and granted all such other and further relief both legal and equitable as it may be en, titled to in the premises."

"For further answer and as its second defense to said petition and 'Count 1' thereof, defendant alleges and states:

"1. That defendant here repleads all of the allegations, statements and admissions made and con[10]tained in paragraphs Numbered 1, 2, 8, 4, 5 and 6 of its foregoing first defense in this answer to said petition and 'Count 1' thereof, numbered '1' hereof and makes the same a part of this, its second defense with the same force and effect and to all intents and purposes as if the same were here written out in full and in the same words and figures.

"2. Defendant further alleges and states that the fire in plaintiff's petition and 'Count 1' thereof mentioned, which damaged the property in said petition and 'Count 1' thereof and in said policy, No. 6112 described, occurred during the night of May 31, 1921 and the morning and day of June 1, 1921.

"3. Defendant further alleges and states; that during the night of May 31, 1921, and the morning and day of June 1, 1921, there was a race riot between the white and colored races, engaged in by hundreds of persons of both said races, prevailing and taking place in the city of Tulsa, Oklahoma, and in the vicinity, locality and neighborhood of, and upon the premises where the property described in said policy was then located and upon adjoining and adjacent premises. And that during all the time aforementioned, there were there and then assembled, combined, confederated, joined and met together three persons or more of their own authority and acting together and in concert and without authority of law, armed with fire arms and other weapons and supplied with matches and other materials for setting fire to and burning property, with the common intent mutually to assist one another against all who should oppose them in the execution of their objects, enterprises and mission for the carrying out of which they were so assembled, combined, confederated, joined and met together of unlawfully with common intent creating a great commotion, riot and tumultuous dis[10]turbance of the peace of engaging in fighting, shouting, the discharge of fire arms, assault, burglary, theft, robbery, larceny, murder, arson and incendiarism, by the use of force and violence while acting together without authority of law, in a violent, turbulent and tumultuous manner to the terror of the people and civil authorities, and with a common intent to unlawfully set fire to and burn the property in said policy described and to set fire to and burn other property in the city of Tulsa, Oklahoma, and in the vicinity and neighborhood of the premises where the property described in said policy was then situated, and adjoining and adjacent property from which fire would be communicated to the property in said policy described, which would burn and destroy the same, all while said three persons or more were assembled together as aforesaid and in the manner and for the purposes aforementioned.

"4. Defendant further alleges and states; that said three persons or more, then and there assembled, combined, confederated, joined and met together, as aforesaid, did then and there proceed to and did carry out their said common objects, enterprise and mission for the carrying out of which they were so assembled, combined, confederated, joined and met together as aforesaid and did then and[11] there, of

their own authority and acting together and in concert and without authority of law and with common intent mutually assisting one another against all who opposed them, unlawfully create a great commotion, riot, and tumultuous disturbance of the peace by engaging in fighting, shouting, the discharge of fire arms, assault, burglary, theft, robbery, larceny, murder, arson and incendiarism by the use of force and violence while so acting together without authority of law, in a violent, turbulent and tumultuous manner to the terror of the people and civil authorities, and did then and there, with common intent unlawfully set fire to and burn the property in said policy described, and set fire to and burn other property in the city of Tulsa, Oklahoma, and in the vicinity and neighborhood of the premises where the property described in said policy was then situated, and adjoining and adjacent property, from which other property so set fire to, fire was communicated to the property in said policy described whereby it was burned and damaged and destroyed by said fire so communicated as aforesaid all while and during the time the said three persons or more were assembled together and acting as aforesaid and in the manner and for the purpose aforementioned.

"5. Defendant further alleges and states; that while and during the time said three persons or more were assembled together and acting as aforesaid and in the manner and for the purposes aforementioned and at the place and places aforementioned, they did shoot, wound and kill many persons, and did set fire to and burn and destroy hundreds of thousands of dollars worth of property in said city of Tulsa, Oklahoma, being at the time of setting fire to and burning of all of the aforementioned property, including that in said policy described, beyond the control of the police department of the city of Tulsa, Oklahoma, and the sheriff's force of the county of Tulsa, Oklahoma, and the civil authorities of said city and county, and did threaten, put in fear, intimidate, overawe and overpower the said police and sheriff's force and the said civil authorities and prevent them from performing their duties and from protecting persons and property, including the property in said policy described and including all the property so set fire to and burned as aforesaid and intimidated and drove away the fire department of the said city of Tulsa, Oklahoma, and prevented them from going to or extinguishing the fires so ignited, kindled and set as aforesaid, during all the time aforementioned including the time at which the property in said policy described was set fire to, caught fire, became ignited and burned, as aforesaid, and said riot so continued until upon the request of said civil authorities of said county and city, the Governor of the State of Oklahoma, declared martial law in said city and county of Tulsa, Oklahoma, and thereafter quelled said riot and restored order and civil authority in said city and county by means of the use of the military and armed forces of the State of Oklahoma.

"6. Defendant further alleges and states; that the destruction, loss and damage to the property in plaintiff's petition and said policy described by fire, was caused directly or indirectly by said riot, and that but for said riot the said fire and the said destruction, damage and loss of said property thereby would not have occurred or happened, and the said property would not have been lost or damaged by fire.

"7. Defendant further alleges and states; that the policy sued upon herein, contains the following valid and binding provisions, conditions, stipulations and agreements, to wit:

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

"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[13] 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.

"If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

"8. Defendant further alleges and states; that by reason of said property in said policy described being lost or damaged by a fire, caused directly or indirectly by said riot as aforesaid, and by causes for which this company shall not be liable, as aforesaid, this defendant under and by virtue of the above set out conditions of said policy sued upon herein, is expressly excepted from all liability on said policy for the said loss or damage of said property and is not liable to the plaintiff in any sum or amount whatsoever by reason of said loss or damage of said property by the fire in said petition mentioned, or by reason of the policy sued upon herein.

"9. Defendant further alleges and states; that the said policy conforms in all respects with all the requirements of Article 2 of Chapter 28 of the Revised Laws of Oklahoma, 1910, and that the form of said policy and of the riders, endorsements and attached slips on or attached to said policy, and forming a part thereof, were duly approved as required by law and said article before the execution and delivery of said policy, and that all the provisions, conditions, stipulations, agreements, exceptions and exclusions of said policy are provided for and allowed by law and are[14] valid and binding upon the plaintiff and that upon the execution of said policy it was delivered to plaintiff and was accepted by plaintiff subject to all the provisions and conditions thereof and the exceptions and exclusions therein contained; and that plaintiff agreed to be and is bound thereby; and that plaintiff knew and was bound to know of the contents of said policy; and that the same contains and constitutes the entire contract between the plaintiff and defendant with reference to said insurance of the property therein described.

"10. Defendant further alleges and states; that reason of all the matters and things aforementioned, the plaintiff is barred and estopped by his said contract and the provisions, conditions, and terms thereof from either alleging or proving that the provisions, conditions, stipulations, agreements, exceptions and exclusions of said policy are not binding upon plaintiff; or that plaintiff did not accept said policy subject thereto including the provisions thereof that "This company shall not be

liable for loss caused directly or indirectly by ----- riot,' ----- ; or that plaintiff did not agree to be or is not bound thereby; or that plaintiff did not know all of the contents of said policy; or that said policy does not contain, or does not constitute the entire contract between plaintiff and defendant with reference to the insurance of the property therein described; or that defendant has waived any of the conditions, agreements, provisions or stipulations in said policy or the breach thereof in another form or manner than is provided In said policy for such waiver.

"11. Defendant further alleges and states; that by reason of the loss and damage of the property in said policy described being caused directly or indirectly by riot, or other causes in said policy men[15]tioned, for which said low and damage this company shall not be liable under the conditions of said policy, this defendant before the bringing of this action tendered to plaintiff the full amount of the premium received for said policy together with interest thereon at the legal rate from the date of said policy, but that plaintiff refused and still refuses to accept such tender. That at the time of making said tender, and ever since that time, and at the present time, defendant was and is able, willing and ready to pay the amount thereof to plaintiff, and here and now tenders into the court for the use and benefit of plaintiff the full amount of such premium together with the interest thereon at the legal rate from the date of said policy.

"12. Wherefore having thus fully answered the petition herein and 'Count 1' thereof, defendant prays that said mortgagee, Farm & Home Savings & Loan Association of Missouri be made a party to this action and be required to set up whatever rights it may claim under said policies and the proceeds thereof under said mortgage clause and that it be found, ordered, adjudged and decreed that the plaintiff and said mortgagee. be and are barred and estopped from either pleading or proving any of the matters or things against which an estoppel is plead herein as aforesaid and that it be further found, adjudged and decreed that the alleged loss and damage by fire to said property was caused directly or indirectly by riot, or by causes for which defendant shall not be and is not liable on said policy or said mortgage clause therefor and that the plaintiff and said mortgagee take nothing by said petition, or this action, or said policy, or mortgage clause and that defendant have and recover judgment against the plaintiff for costs and be given and granted all such other and further relief both[16] legal and equitable as it may be entitled to in the premises."

#### THE REPLY.

The reply consisted of a general denial, which aside from its formal parts, is as follows: (C.-M. .76).

"Comes now the plaintiff above named and for his reply to the answer of the defendant herein, alleges and states:

"I.

"That he denies each and every material allegation made in defendant's answer except such allegations as are admitted in plaintiff's petition filed in this cause."

#### THE TRIAL

A jury was duly empanelled and the trial began on April 16, 1924 (C.-M. p. 79). The plaintiff introduced his testimony and rested (C.-M. pp. 87 to 325 Inclusive).

Thereupon the defendant demurred to the testimony of the plaintiff, which demurrer is found at (C.-M. p. 325) and is 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 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[17] is known as the riot clause, which says that the company shall not be liable for loss caused directly 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 the defendant under any of the three policies sued on. Now, if the Court please I want to be heard on that."

Which demurrer was overruled and exception taken (C.-M. p. 326), as follows:

"THE COURT: Let the record show that the demurrer is overruled.

MR. RITTENHOUSE: Save us an exception."

Thereupon the defendant introduced its testimony and rested, which testimony is found (C.-M. pp. 327 to 622 inclusive). Thereupon the plaintiff introduced his testimony in rebuttal, which testimony is found (C.-M. pp. 623 to 676 inclusive). Thereupon the defendant moved the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff, which motion to direct a verdict is found (C.-M. pp. 676 to 678 inclusive) and is as follows:

"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[18] insuring part the policy reads as follows: 'In consideration of the stipulations 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 Number 6112; and policy Number 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 of March, 1921, to the 15th of March, 1922, and policy 6122 contains the same provision except a premium charge of One Hundred and Eleven Dollars and Twenty 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 authorities; 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 the 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 1, 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[19] 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 of the 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 Honor please, I want to be heard on that.”

Which was duly argued to the Court, and was by the Court sustained and exception duly taken; and the proceedings upon the sustaining of said motion to direct a verdict is found at (C.-M. pp. 679 and 680), and is as follows:

"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[10] a directed verdict in this matter; a form has been prepared and one of your number will sign the same as your foreman and return a verdict for the defendant in this case."

Whereupon the foreman of the Jury signs the verdict.

"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."

Whereupon Court took a short recess, during which time the plaintiff filed his motion for new trial, after which Court was reconvened and the following proceedings were had.

"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 to the Supreme Court of the State of Oklahoma, and asks that the same be noted upon the trial docket.[21]

MR. RITTENHOUSE: Which is accordingly noted.

MR. HAYSON: Which is accordingly noted, and whereupon the plaintiff asks for time to make and serve case made for appeal to the Supreme Court of the State of Oklahoma, and the Court thereupon grants the plaintiff ninety days to make and serve case made, three days to suggest amendments and the same to be settled upon three days notice.

THE COURT: Let the same be granted."

#### MOTION FOR NEW TRIAL.

The motion for new trial, aside from its formal parts is as follows: (C.-M. pp. 776 and 777).

"Comes now the plaintiff in the above and foregoing cause and files this his Motion for a New Trial and as reasons and grounds therefor alleges and states:

First: That there was irregularity in the proceedings of the Court which prevented the plaintiff from having a fair and impartial trial.

Second: That there was an abuse of discretion upon the part of the Court which prevented the plaintiff from having a fair and impartial trial.

Third: That the Court committed errors of law in the trial, which were duly excepted to by the plaintiff, which prevented the plaintiff from having a fair and impartial trial.

Fourth: That the Court erred in sustaining the motion of the defendant for a directed verdict, which, was excepted to at the time by the plaintiff.[22]

Fifth: That the verdict and the judgment of the Court are contrary to the evidence.

Sixth: That the verdict and the judgment of the Court are contrary to the law.

Seventh: That the verdict and judgment of the Court are contrary to the law and the evidence.

WHEREFORE, the plaintiff prays that a new trial may be granted herein."

#### THE JOURNAL ENTRY OF JUDGMENT.

The Journal Entry of Judgment aside from its formal parts is as follows: (C.-M. pp. 778 to 780 inclusive).

"BE IT REMEMBERED, That on this 16th day of April, 1924, that being one of the regular judicial days of the District Court of Tulsa County, Oklahoma, and that being the date upon which this cause was set for trial on the docket of said Court, said cause comes on for trial. The plaintiff is present in person and by his attorneys, Fred Ptak, John W. Hayson and John Ward, and the defendant is present by its State Agent, H. C. Seitz And its attorneys, Rittenhouse & Rittenhouse. Both sides announce ready for trial.

Thereupon a jury of twelve men was duly empanelled and sworn to try the above cause.

Thereupon the plaintiff introduced his evidence and testimony and rested, and the defendant thereupon interposed a demurrer to the evidence of the[23] plaintiff, which demurrer to the evidence was by the Court overruled and exceptions allowed.

Thereupon the defendant offered its evidence and testimony and rested. And thereupon the plaintiff offered additional testimony and rested, and at the close of all of the testimony in the case the defendant moved the Court to instruct the jury to return a verdict in favor of the defendant and against the plaintiff, and the Court after hearing the argument of counsel and duly considering all of the evidence and testimony in the case, finds that said motion should be sustained, and that the jury should be instructed to return a verdict in favor of the defendant, American Central Insurance Company, and against the plaintiff, William Redfearn, and thereupon the jury was so instructed, to which order and ruling of the Court the plaintiff, William Redfearn, duly excepted.

Thereupon the jury, on the 19th day of April, 1924, returned its verdict duly signed by the foreman, in favor of the defendant and against the plaintiff, which verdict was received and filed in said cause.

Thereupon and on the same date, to-wit: the 19th day of April, 1924, the plaintiff filed his motion for a new trial which motion was by the Court duly considered and after such consideration was by the Court overruled, to which the plaintiff, William Redfearn, duly excepted.

It is therefore considered, ordered and adjudged by the Court that the plaintiff take nothing by reason of this action, and that the defendant, American Central Insurance Company, a corporation, recover its costs herein expended. To all of which judgment of the Court the plaintiff duly excepts.[24]

It is further considered, ordered and adjudged by the Court that the plaintiff's motion for a new trial and the same is hereby overruled, to which ruling the Court the plaintiff, William Redfearn duly excepts.

Thereupon the plaintiff in open Court gave notice appeal to the Supreme Court of the State of Oklahoma, which notice of appeal was duly entered in the proper dockets of said Court in the manner provided by law.

Upon application, and for cause shown, the plaintiff, William Redfearn, is granted an extension of time of ninety days in which to make and serve case-made, the defendant to have ten days thereafter in which to suggest amendments. Said case-made to be settled and signed on five days written notice by either party.

EDWIN R. McNEILL, Judge."[25]

Argument and Brief of Authorities.

We desire to take up Assignments of Error under the petition in error, as follows: We desire to incorporate Assignments of Error Nos. 3, 4, 5, 6, 7 and 8, under a general heading, as follows:

PROPOSITION I.

"THE COURT ERRED IN SUSTAINING THE MOTION OF THE DEFENDANT IN ERROR FOR A DIRECTED VERDICT."

In arguing this proposition it becomes necessary to take up the evidence introduced in this cause, which we shall take up in its order.

First, we desire to take up the testimony of the plaintiff, William Redfearn (C.-M. pp. 87 to 108 inclusive — and 173 to 324 inclusive). The plaintiff testified in substance, as follows:

That he was a citizen of Tulsa, Oklahoma, residing at 416 South Madison street; that he had lived in Tulsa since 1907 and that he owned the property covered by insurance, known as the Dixie Theatre and the Red Wing hotel. That he had taken out the insurance policies sued upon, with the American Central Insurance Company, the defendant in this case, and had paid the premiums upon the policies, and that the policies covered his property to the amount of[26] \$19,000.00. That the property was located in a section of the City of Tulsa, known as the "negro section;" that the property which was covered by said policies was destroyed by fire on the 1st day of June, 1921, somewhere between 10:30 o'clock A. M., and 12:00 o'clock noon; the Dixie Theatre being burned first, and the Red Wing hotel at a later time, and that the cause of the fire was to this witness unknown. That the defendant insurance company had failed and refused to pay the insurance as provided by the policies, and that all premiums had been paid, and that due notice and proof of loss had been made to the company prior to the bringing of suit. That the theatre building was of the value of \$35,000.00, not including equipment; and that the Red Wing hotel was of the value of \$40,000.00, and that the total value of the property was \$75,000.00, not including the equipment in the theatre. We desire to quote excerpts from the testimony, as follows: (C.-M. pp. 102,103 and 104).

"Q Was it in existence at the time of this loss on June 1, 1921?

A. It was.

Q. And in force?

A. Yes, sir.

Q. You were still the owner of this property at that time?

A. I was.[27]

Q. Was this property destroyed?

A. Yes, sir.

Q. If so how and when?

A. By fire; about eleven forty-five or twelve o'clock.

Q. On what day.

A. On June 1, 1921.

Q. What year?

A. 1921.

Q. Did you see that property destroyed?

- A. I seen the greater part of it destroyed, yes sir.
- Q. Were you down there at that time?
- A. I was.
- Q. Referring to policy Number 6205, same being for the sum of Four Thousand Dollars and covering the property located at 118 and 120 North Greenwood Avenue, did you pay the premium on that policy?
- A. I did.
- Q. Was it in force on June 1, 1921?
- (Argument of counsel.)
- A. Yes, sir.
- (Argument of counsel.)
- Q. That property was destroyed when?[28]
- A. About ten-thirty on the morning of June 1, 1921.
- Q. Did you see it destroyed?
- A. I seen it burn, yes, sir.
- Q. How was it destroyed?
- A. By fire.
- Q. Do you know how it caught fire?[29]
- A. I do not.
- Q. Did you make demand for the payment of this money under this policy?
- A. Demanded payment of all of them, proved up my loss.
- Q. Did you receive any money on this policy or either of the other two?
- A. No, sir.
- Q. Have you been paid any amount on the policies sued for in this action ?
- A. No.
- Q. By this defendant or anyone representing them?
- A. No, sir.
- Q. You stated I believe that you saw the hotel building catch on fire.
- A. I saw it when it was on fire.
- Q. Do you know how it caught fire?
- A. No, sir, I do not.
- Q. Was it a total loss?
- A. Absolutely.

He further testifies (C.-M. pp. 160 to 163 inclusive), that he closed his business about nine or nine-thirty o'clock on the evening of May 31st; that he closed it because there was a colored girl came into the theatre and was going from one person to another, telling them something, and he looked out into the street and saw several men in the street talking and bunched up, and upon inquiry as to what was wrong, someone said there was going to be a lynching and that was the reason they had come over there.

That he closed up his theatre and went from there to the Court House, and someone inquired of him if he would go back to the colored section, and try to prevent the people there from coming up town, and in pursuance to that request he did go, but was unable to prevent them from coming up town. That there was a bunch of men standing in front of the police station and across the street when he

arrived at that place; that there was probably fifty or sixty men in front of the police station.

A. J. Hamel, then testified concerning the condition of the mortgage on the premises, and the manner[30] in which the loan was handled when the buildings were subsequently rebuilt.

The plaintiff was recalled for further cross-examination (C.-M. p. 173). He testifies that when he got to the negro section from the police station, that the street was full of negroes, and that a number of [them] were armed and were standing in groups talking, and that there seemed to be considerable excitement, and that he advised them not to go to the Court House; that he had been assured at the Court House that there was not going to be a lynching. That he then went back up to Baker's Drug Store, on Main street, and that he then went home. That he heard some shots fired while he was standing in front of Baker's Drug Store, apparently in front of the Court House. That he didn't hear any further shooting after he had gotten home. That he lived three-quarters of a mile from the negro Section of the city.

The witness testified further on cross-examination beginning (C.-M. 202) that a few days after the fire he had given testimony at a hearing before the Fire Marshal, and told of the condition as it existed in the negro section prior to the time of the fire, he testifying as follows: (C.-M. p. 206).

"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[31] beginning of the fire?' Were you asked that? question and did you make that answer?

(Argument of counsel.)

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 when you got there and what happened while you were there,' 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 I mean 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 about half way down 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?[32]

(Argument of counsel.)

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

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

(Argument of counsel.)

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 know?

(Argument of counsel.)

A. I understand there was.

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

(Argument of counsel.)

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

\* \* \* \* \*

And again at (C.-M. pp. 210 to 212) as follows:

"Q. You want to change it and say now that you didn't hear shooting that morning?

(Argument of counsel.)

A. I want to say I didn't hear considerable shooting over here 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.[33]

Q. The night before?

A. Yes, sir.

Q. You didn't hear any shooting during the night?

(Argument of counsel.)

A. No, sir.

Q. You don't now remember hearing the shooting you told the fire marshall about on the 3rd day of June?

(Argument of counsel.)

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?

(Argument of counsel.)

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?

(Argument of counsel.)

- A. I was trying or attempting to cover the en[34]tire thing in a general way that happened on May 31st and June the 1st, in my statement to the fire marshal; I was trying to cover the entire thing in a general manner and a general way."

\* \* \* \* \*

And again at (C.-M. p. 225) on Cross-Examination, the witness testified, as follows:

"Q. You saw them break open the front doors of those buildings along there?

(Argument of counsel.)

A. No, I did not.

Q. Were they all on fire?

A. No, they were not all on fire.

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

(Argument of counsel.)

A. Well, I figure there was 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 and the Phillips property; the Woods was fifty feet and the Phillips was seventy-five, and Cherry had a little place in there of twelve or fifteen feet. I think that that and possibly one other building was all that was afire on 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.[35]

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

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

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

A. That was around about twelve o'clock, yes sir.

(Argument of counsel.)

Q. And on the 3rd day of June when you gave the statement to the Fire Marshal, you were also asked this question 'Do you know how that fire was started' and you answered 'Of my own personal knowledge, I do not?'

(Argument of counsel.)

A. I made that statement, I did not know.

Q. Of your own personal knowledge?

A. Or any other knowledge, I didn't know; I had no other knowledge."

\* \* \* \* \*

And again beginning with (C.-M. p. 318) the witness testified that he caused his attorneys to file a petition on May 31, 1923, seeking to recover from the City of Tulsa, the balance of his loss on his property, describing the same property, and the same fire. And the petition was introduced in the evidence and made a part of the case-made, found (C.-M. p. 749).[36] The witness testifies that the petition was drawn by his counsel; that he didn't know whether the allegations contained in the petition could be proven or not.



At the conclusion of the testimony, demurrer to the evidence was interposed, and argued, and by the Court overruled.

Then followed the testimony of the defendant. We shall give in narrative form the testimony as concisely as we can, and as fairly as we can.

C. F. Gabe, colored man, testified in substance, as follows:

That he lived at 422 East Easton street, in Tulsa, Oklahoma, and had lived there for fifteen years; that he was in Tulsa on the 31st day of May, and the 1st day of June, 1921; that there was a disturbance occurred in Tulsa at that time, that he would call a riot, this statement being stricken out, however, by the Court; that about six-thirty of the evening of May 31, 1921, he was on Cameron and Frankfort streets about two blocks from where he lived, visiting a friend, when he was informed by someone that they were threatening to lynch a boy that night, and the party informing him suggested that they go up and see about it; that he went home and pulled off his gun and went to the Court House. That at the time he got to the Court House there were seven or eight hundred people possibly, who had gathered, men, women and[47] children; that when he came to the Court House, he saw Barney Cleaver and Mr. Gurley; that his attention was attracted by someone asking him to get the "niggers" away from there, and that down the steps on Boulder, straight across the street was a carload of colored boys; that as he went down there was a drove of young men across the street coming toward him and asked him if he had a gun and was told he had better go home and fetch one, and others were yelling, "Get these niggers away from here." That he succeeded in getting the boys to go, and they drove on; that as they were going back toward Boston street, he walked beside the car, and he thought there were nine men in the car; that he saw one man had a gun on his knee, and that was the first gun he had seen. That someone said "Let's go to the Armory;" that the ones who said, "Let's go to the Armory," were white boys. That later on he saw three carloads of black men coming; that he got out in front of them and warned them to go back; that one of the men pointed a gun at him and told him to get out of the street, and that he got out of the way, and then he went down to Boston and Archer, and that in his judgment there was five thousand folks down there; that he had never seen the like of colored folks; says there could have been less and there could have been more. That he got into a car then and came back to the Court House and some white man told him to get away from there; that he got in a car with someone[38] and went down to Third street, and as he got down to Boston street he heard a shot fired and soon heard that a man had been killed at the Court House, and that then the shooting began; that he heard a large amount of shooting; that as he was going down Sixth street, two men came out of the alley and one of these men threatened to shoot; that when he got down to Cheyenne street he heard that a negro had been killed. That he then met Mr. Jim Adkinson, a police commissioner, who told him to get away from there that he was going to get hurt; that he then went down to Detroit street and met Mr. Smitherman, a deputy sheriff, and that Smitherman asked him to help stop the thing; that he then went to see a Mr. Stratford with a view of getting him to help him, but Stratford refused to go down. That he then went to Archer and Cincinnati street; and he could hear glass breaking on Main street, and

he met a man who said they were breaking into a store and the man suggested that he go with him and get some guns, which he refused to do. He states that at that time someone fired a shot, while he was on Cincinnati, and he thought they had killed a man; that he knew they shot him because he hollered. That he then tried to hide, but was unsuccessful; that he saw a man shooting out the lights at the Frisco depot and every once in a while he would hear someone holler or see one pick up a man. That he then started home. That on his way home, he saw some people over on Boston street with a light in[39] their hands going toward an old shack; that someone shot the first one that started toward it, and that he saw someone coming out with another torch, and something happened to him before he got there, and that a third fellow came along and set the little house on fire; that was near eleven-thirty or twelve o'clock and that he then went home and went to bed.

That he was awakened next morning about five o'clock by the blow of a whistle, and that when the whistle blew shooting began everywhere in town. That they fired into his house and hit his piano; that he got up and went to the door and two white men came toward the house, one of them came toward the door, and said, "Come out," and the man recognized him and advised him to go back and get behind the piano. That these white men walked on up the street and as they got by a telephone pole somebody shot both of them. That an airplane then came over, which looked like it was about fifty feet above the ground and someone shot at the airplane and hit it; that two more men came across the street and made him come out of the house; one said to the other, "Kill him," and the other said, "No, he hasn't a gun, don't hurt him," and said, "Get on up with the crowd." And that he then went and they had a lot of negroes lined up and was brought to the Convention Hall. At (C-M. p. 343) when he was going to the Convention Hall, from what he could discern it seemed to him[40] that a fire was burning about at Gurley's place. That during the trouble he saw about eight men that had been killed.

On cross-examination he states that it must have been about seven-thirty or eight when he thought Gurley's building was on fire; but that he didn't know of his own knowledge when Gurley's building burned; that he only thought he saw it on fire.

The next witness offered by the defendant, was Henry C. Sowders beginning with (C.-M. p. 348). He testified that he lived in Tulsa, at 219 West Easton Court. That he had lived in Tulsa ten years; that he was a moving picture operator, and was working on May 31, 1921, for Mrs. J. W. Williams, in her theatre, located on North Greenwood, in Tulsa, Oklahoma, which was in the negro section, called, "Little Africa," directly across the street from the Dixie Theatre; which is one of the properties owned by the plaintiff, William Redfearn, being directly across the street and about two doors south of the Dixie Theatre; and that the Red Wing hotel was across the street and north on the corner from where he worked. That he was running the moving picture machine on that evening about seven-thirty; that he noticed a gathering on the streets; when the second show came on at about ten o'clock or ten-thirty, the local manager came in and asked him to cut the lights back on, and he noticed that the local manager, a Mr. Cotton, was[41] armed. That Mr. Cotton was a negro; that the witness asked him what he was doing with a gun

on him and he said protecting himself — looking out for Number One. That he asked what the trouble was, and he said there was a little excitement out on the street. That he noticed soon after, a bunch of guns at the side door, and that someone hollered for them to come out and get their guns — four or five men rushed in, whom he thought were negroes, and said, "Quick, come out and get your guns;" that the house holds about six or seven hundred people, and that it was emptied in some three to five minutes. That the witness then went out to see what was going on and pushed out to where he had a car standing; that when he got outside, he asked Cotton what was going on, and he said there was fighting over there. He then thought that he would leave, and noticed that his car was full of negroes; that they had turned the top back and were standing up in the back seat, there being about nine in all — That he asked them for the car, and a big husky negro picked him up and set him over on a Ford truck and told him to stay there; that he laid there and didn't move, and the big negro handed a piece of money to another one and instructed him to hurry and get the witness to the station; that the party driving the Ford, got him through the crowd, and that the street was packed with negroes; that in his judgment all of them were armed, that he never saw a soul[42] among them that didn't have arms. That he noticed as he crossed the railroad track that a Mr. Pack was holding back three negroes; that Pack was an officer, and was advising the negroes to stay where they were, but that the negroes kept going across. That when they got near Cincinnati they nearly ran over a negro standing in the middle of the street shooting, and that he noticed two others lying in the street, he didn't know whether they were wounded or dead. That he went up Main street and saw people getting arms out of Dick Bardon's shop; that he made inquiry as to what was going on, and was told he had better get on home to his family, if he had one, or else get some arms, for the thing was coming on. That he then went to the station and reported the loss of his car, and went home and stayed the rest of the night.

The next witness offered by the defendant, was Barney Cleaver, colored, whose testimony begins (C.-M. p. 363). He stated he lived at 508 North Greenwood, Tulsa, Oklahoma; that he had lived in Tulsa since 1908; that he was living in Tulsa on the 31st day of May, 1921, and the 1st day of June, 1921, and was a deputy sheriff; that he was in Tulsa on the night of May 31, 1921, and remembered the disturbance that took place on that night.

That he was on Greenwood street when he first heard of the trouble; that a doctor came and told him[43] to go to the Court House, that they were fixing to, lynch a boy up there. That he got in his car and went up to the Court House about seven o'clock, and stayed. He asked the sheriff about the lynching and was informed that there was nothing to it, and that he informed those who were with him that there was nothing to it. That after he had been there about half an hour, there were about twenty-five or thirty colored people came up there, and he was told to go out and see what they wanted, and they informed him they had come to see about the lynching; that he told them that the boy was upstairs in the cage, locked up, and that there was no one going to get him, and to go on back, and they turned and went back on Boulder. That pretty soon a lawyer came in and said there were a lot of

negroes up there with guns, and that he went with the sheriff and there were quite a few colored people out there and some white folks; that there were some women and children, and that the negroes were starting back down to Boston street when a gun was fired; that the colored boys had guns, and when the shooting began the people began to run, and he came back into the Court House, and that was the last he heard of the boys that night; that the crowd dispersed and he stayed at the Court House the balance of the night. That he left about four o'clock the next morning and went back down to Greenwood. That he with two other fellows, went back to Greenwood, and that quite a few cars ran up to him, loaded with white[44] people who were armed and they asked him where he had been and where he was going and he said he was going home, and was informed the boys would kill him if he got out there. That he went on up to Greenwood and they met fifteen or twenty boys with guns, who asked him had they lynched the boy, and he informed them they had not, and for them to go home and go to bed, and someone made the remark that he was a white man lover. That he went on down the street and he met two or three other people. That there was no shooting at that time. That he went on home and concluded he would take some of his people to his place out in the country. That he noticed some colored people out in the yard with guns and he told them to get out of the yard, and they went into a hall upstairs. That he went on up into the hall, and at about five o'clock the whistle blew, and that shooting started — that they began shooting every way, that he guessed it was white people and black people — that it wasn't very long until people began shooting out of the hall windows; that he tried to stop them; that the hall was a Masons and Odd Fellows hall; that he saw one man shot out of the window; that he fell on to the sidewalk down below. That the others then ran up the street and there were some white folks up there shooting, and that they ducked back to the hall and were all arrested, AND BY AND BY THE OFFICERS CAME, A POLICE OFFICER AND OTHER MEN WITH GUNS, AND, *he went on out, and the*[45] *policeman says: "Barney what are you going to do," and he said, "I do not know what do, I hate for my place to get burned up," and he said "I will help you take your stuff out and put it out on the street."* The witness then states that he stayed there until it got so hot he had to leave and that he came back to the Court House. That he and the sheriff and another man went away outside of town by the road house and the people were burning houses and things out there, and that they stayed out there until, "We got our way." And when he came back to town his house was burning; that he saw someone with his wife's clothes and was pointed to a truck and informed that the truck had the rest of his stuff. That his house was burning about nine o'clock. The witness states that there was a fire somewhere near the Gurley hotel, and the Red Wing at that time; that the fire seemed to be on the east side of Archer; that he saw sixteen colored, and three white people afterwards, who had been killed in the trouble. That he never heard any shooting in the morning until after the whistle blew. That the shooting didn't continue more than half an hour. That at nine o'clock he could not see Redfearn's house; that he was not in a position to see the buildings and could not tell whether they were on fire or not. That he did not return to the section until one o'clock, and that at that time both the Red Wing hotel

and the Dixie theatre had been burned, or rather that they were both[46] burning at that time; that is, that they were burned inside, but that the walls hadn't fallen in.

The defendant, next introduced O. W. Gurley, as a witness, who testified in substance, as follows: Beginning (C.-M. p. 390 and closing at p. 416).

The witness testified that he was fifty-four years of age, and remembered the occasion of the trouble, commencing on the night of May 31, 1921. That he resided at the time he was called as a witness, in California. That he had some property in the colored district in the city of Tulsa, Oklahoma, at the time, which was destroyed by fire; the building he owned being used as a hotel. That the Dixie theatre belonging to the plaintiff, was located about twenty-five feet north of his place, and describes the location of buildings in the vicinity of the property of the plaintiff, which was destroyed by fire.

He testifies that on the night of May 31, 1921, he was home at his hotel; that about four or five o'clock in the evening of May 31st, his attention was called by Dr. Bryant, to the fact that there was some talk of lynching a boy who was charged with some kind of an offense, and the witness states that he volunteered to see Barney Cleaver, who was a deputy sheriff, and that he did get hold of Barney Cleaver, who informed him that there was nothing to it. That the rumor began to spread and a crowd began gathering around[47] and began talking and pushing. That the crowd began to gather in his judgment, about six or six-thirty; that they were assembling in front of his place, and in front of the Star office, and that someone in the crowd suggested that one of their number go to the sheriff, and that the witness and a Mr. Webb came to the Court House and talked to the sheriff concerning the lynching of the boy, and the sheriff informed him there would be no lynching if the witness could keep his folks away from the Court House there wouldn't be any trouble. That the witness and Mr. Webb then went back and made the report, and quite a crowd had gathered when he went back to make his report, and one fellow said, "You are a damn liar," that they had taken a white man out of jail a few weeks before that, and that they were going to take this negro out. That when the witness made his report, this party drew a winchester on him, and was stopped by a negro lawyer named Spears. The witness says he believes he made another trip to the Court House; that when he got back to the Court House, there was quite a crowd of folks, probably five or six thousand had gathered, and someone was making a speech, and someone suggested to the chief of police to call the fire department and pour water on the people and disperse the crowd. That some white man was making a speech and advised the people to go home, stating that the negroes were riding around with high powered revolvers and guns down town — that the speech had some effect and the[48] crowd started to disperse, but would soon come back; that while this man was speaking the witness noticed "some colored men coming from Main street; that when the machine was up in front of the Court House, the people there closed in around that bunch of men, and that when they got mixed up a pistol went off, "but the crowd soon dispersed, and he didn't know whether anyone was killed or not. That the witness then went home. That he met the plaintiff, Mr. Redfearn, who asked him what was going on, and the witness stated, "Hell has broke loose." That when he got back to his home quite

a few negroes had congregated there, probably three or four hundred; that some had guns, some had sticks, some had brick bats and some had different things, and the witness stated, "They were just running around." That he went upstairs at his place and stayed until the next morning. That he saw negroes leaving in automobiles that evening. That during the evening sometime, he met an automobile full of colored men, among whom was a friend of his, named Ed Howard, and he told these men that they had better go back, and attempted to persuade his friend to go back with him, but that his friend wouldn't do it. That he talked to different people, in different places trying to keep trouble down. The witness states that he left the hotel next morning at about eight-thirty o'clock, that at that time there was a building burning south of him, which belonged to Mrs. Partee. He states that he was[49] watching this fire, trying to see whether his hotel was going to catch fire from that building, and suggested to his wife that they had better escape before his building caught fire. That while he was standing at a window or a door on the west end of the building, men came from the Pyro property across the railroad; that these men were white men; the answer as to the question of whether they were white men or black, being found at (C.-M. p. 403), a part of which is as follows:

*"Those were white men, they was wearing khaki suits, all of them, add they saw me standing there and they said, 'You better get out of that hotel because we are going to burn all of 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."*

The witness then states that he left the hotel and went south on Greenwood to Archer, and as he and his wife were going along, he met two people who came out from behind a building and shot toward them, his wife fell (but the witness states at another place in his testimony she was not hurt), and the witness ran and left her. That he finally went over to the school; that some people were shooting from the Oklahoma[50] Iron Works, and the man that was with him was killed. The witness states that he then got under the school and that he remained under the school probably two hours and a half. That while he was there someone came and said for him to come out, that they saw him go in, and that the party then stuck a gun under there and fired, but that he was not hit. That someone went through the school building, and that later on he discovered the building was on fire. Then the witness decided to come out — that he then left the building, he saw on the Santa Fe Railroad probably fifteen colored men and one white man, and the white man hollered and told him to throw up his hands, and that he obeyed, and was told to come over there, which he also did, where he was searched, and was told to get in the crowd with the other colored men and was conducted to the Convention Hall. The witness testified that at the time, he saw three or four men coming from another building and start toward his. The building was on fire, and that he saw a fire in a very few minutes after he was told to get out of the hotel; that his property

was burned at that time. That it wasn't burning when he left, but when he was released from the place they kept him, he went back on Green and he didn't have anything left.

That he had been living in Los Angeles, California, at the time he testified, for a year and a half. He testified on cross-examination that he was re[51]quested to make the trip back to Tulsa, and that his expenses and per diem were being paid by the defendant; that he also had insurance with the defendant company; that he had \$25,000.00 insurance on his place, that he would like to get.

The next witness introduced by the defendant was H. C. Pack, whose testimony is found (C.-M., pp. 416 to 435 inclusive). The witness testified in substance, as follows:

That he lives at 603 East Archer Street, Tulsa, Oklahoma; that he is a colored man; that he has lived in Tulsa since 1916. That he was an officer of the City of Tulsa, on the 31st day of May, 1921, and was in Tulsa on June 1, 1921; that he had been working on the police force on May 31, 1921, and that he had been asleep in the afternoon of, May 31, 1921, until about seven-thirty or eight o'clock. That upon getting up, that he went to a store — and he heard that there was going to be a lynching, and that he rushed up to the police station. That at that time he saw a bunch of people gathering together talking, down on Greenwood, that he didn't see any of them armed at the time. That when he arrived at the police station the Chief of Police sent him up to the Court House but that he didn't get quite to the Court House when he met Mr. Adkinson, Police Commissioner, with a bunch of people; that the Police Commissioner told him to go back down on Greenwood and take care of[52] the colored people. That when he got to the Frisco station he met two other colored officers, who informed him that they were all to report back to the Station; that they went back to the Station and were sent to the Court House; that when they got to the Court there were no other colored people there, and that they went on down the alley and back to the Police Station and so reported. And about that time the Chief of Police told them to go over on Boston, and that when they went over on Boston there was no one over there and they went on back to the Frisco station. That when they got there he met a lot of colored people standing around and concluded there was no trouble and went on down back to Greenwood. That while he was standing, and talking he saw a fire; that there was a little house down there on Boston and it was set on fire, which must have been along about ten o'clock at night. That everything got quiet then, and that he went ahead and walked his beat. That he heard some shooting over on Main street, and that he heard a sound like breaking into a store, and some more shooting started. He states that the next morning he started about four-thirty or five o'clock to the Police Station to check out, he being due to check out at seven o'clock; that when he got to Archer and Elgin streets, some people commenced shooting from over by the Frisco tracks, that he turned and started back to Greenwood and he met a man by the name of[53] Charlie Williams, who just as he met him got shot in the right arm; that he stayed to look at William's arm, saw another man get killed, and that at that, the police bell began to ring; that by the time could answer it the police chief asked him if he could stop the shooting and he informed him that he could not. That the shooting

kept up, and that he looked down toward the Sand Springs track and saw some houses burning about the Katy somewhere. That he went over behind the Methodist church and saw a lot of people coming out of Stratford's Hotel. That he didn't see any fires set out. That after he got to Archer street he saw quite a lot of fire on Greenwood. That he saw several white men there, about fifty or sixty; that they were shooting into the crowd; that it must have been about eight or eight-thirty o'clock when he got to Hartford. That he didn't go back the district for about two days afterward, and that when he came back the district was burned up. The witness states that he knows where the Red Wing and the Dixie theatre, the plaintiff's property, were located on the 1st of June, 1921, and that when he returned to the district those places were burned.

This witness further testified (C.-M. p. 434) that since the time of the trouble, he had been working for the defendant insurance company, and was employed by the day, and received \$7.00 per day. That all together the time he had worked for the company had probably extended over two months. [54]

The next witness introduced, by the defendant was Green E. Smith, who testifies in substance as follows (C.-M. pp. 435 to 471, inclusive):

The witness testified that he was a colored man, forty-seven years of age, and lived in Muskogee, and that his business was, a carpenter, and that he was in the City of Tulsa on May 31st, and June 1, 1921, that he was installing a fan in the Williams theatre, on North Greenwood street; that he had built the Williams theatre; that he was installing a cooling system that time. That he was down in the negro section on May 31, 1921; that he heard some talk about somebody going to be lynched. That he went to his room and went to bed; that he went to his room about ten o'clock. That he saw quite a lot of colored folks gathering down on Greenwood — that he was staying on Archer street, next to Williams' garage. That he got up the next morning about five o'clock, which was on June 1, 1921; that when he got up he went to Williams' theatre — that he went there for the purpose of changing a wheel on the fan; that he wanted to catch the train out to Muskogee at nine o'clock. That while he was in the theatre, a whistle blew, about five o'clock, and that after the whistle blew he stayed there in the theatre and watched out of the window and heard a lot of shooting. That about seven-thirty or eight-thirty the shooting was pretty heavy, and then it began to stop a little bit.[55]

We quote in full from the record (C.-M. pp. 440, 441, 442, 443, 445, 446, 447, 448, 449 and 450) as follows:

Q. From five until seven-thirty or eight o'clock in the morning?

(Argument of counsel.)

A. Yes, sir; then it began to stop a little bit they began shooting pretty good about nine-thirty, and there was a gang came down the street knocking on the doors and setting the buildings afire.

Q. Who were they?

(Argument of counsel.)

A. Policemen, I guess.

Q. Were they white or black?

(Argument of counsel.)



A. White.

Q. And did you see them knock at any doors?

(Argument of counsel.)

A. Yes, sir.

Q. On what side of Greenwood did you see them knock in the doors?

(Argument of counsel.)

A. I could see from the Williams corner, from Archer down to where I was at.

Q. What corner was that?

[56]

(Argument of counsel.)

A. Corner of Greenwood and Archer.

Q. Did you see them knock in the front of the Williams confectionery at the corner of Greenwood and Archer?

(Argument of counsel.)

A. Yes, sir.

(Argument of counsel.)

Q. What happened to the building after they come out — did the men go inside?

(Argument of counsel.)

A. Yes, sir.

(Argument of counsel.)

Q. What did the men do?

(Argument of counsel.)

A. Went inside.

Q. After they came out, what happened?

(Argument of counsel.)

A. A few minutes afterwards you could see smoke.

Q. See any flames ?

(Argument of counsel.)

A. Could see the smoke coming out of the building, couldn't see the flame immediately, but could thirty or forty minutes after that. [57]

Q. What did the men do to the next building?

(Argument of counsel.)

A. Did the same thing, went in every building on that side of the street.

Q. Did you know where the Dixie theatre was?

(Argument of counsel.)

A. Yes, sir.

Q. Where was the Dixie theatre with reference to the Williams theatre where you were?

(Argument of counsel.)

A. It was a little bit south on the west side of the street.

Q. What did the men do when they reached building?

(Argument of counsel.)

A. Knocked the doors in and went in.

Q. When they came out what happened?

(Argument of counsel.)

A. You could see smoke.

Q. And after a little while what occurred?

(Argument of counsel.)

A. Blaze.

Q. Do you know where the Red Wing Hotel was located with reference to the Williams theater? [58]

(Argument of counsel.)

A. Yes, sir.

Q. Where was that?

(Argument of counsel.)

A. It was a little bit north and across the street.

Q. And when the men reached that place, what did they do?

(Argument of counsel.)

A. The same thing, knocked the doors, and half went upstairs and in the drug store.

Q. When they came out what happened?

(Argument of counsel.)

A. You could see smoke and fire.

Q. Where were you located in that theatre building?

(Argument of counsel.)

A. Part of the time upstairs and the other part I was down in the theatre.

Q. Did the Dixie theatre and the Red Wing hotel burn at that time?

(Argument of counsel.)

A. They were burning.

Q. You saw them burning?

(Argument of counsel.)

\* \* \* \* \*

[59]

Q. What happened after those buildings were set across the street, what about—

(Argument of counsel.)

Q. After those men knocked in the door came out and you saw those buildings on fire, what happened to you?

(Argument of counsel.)

A. Why, I stayed in the building until they set the Williams building afire?

Q. How long after that?

(Argument of counsel.)

A. About ten minutes, I guess.

Q. Did you see them set the Williams building afire ?

(Argument of counsel.)

A. Yes, sir.

Q. How did they set it?

(Argument of counsel.)

A. Set the curtains in the rear afire, right in the fly loft.

Q. What did you do?

(Argument of counsel.)

A. I come out, come down.

Q. What happened after that?

(Argument of counsel.)

[60]

A. I went out and went to the door and they arrested me then, and then taken me and marched me up 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 and then brought us from there down to the Midland Valley tracks and the Frisco and out by the Tulsa Hotel to the baseball park.

Q. And when were you released?

(Argument of counsel.)

A. That evening about four o'clock.

Q. Where did you go after that?

(Argument of counsel.)

A. To Muskogee."

\* \* \* \* \*

The witness further testified that he had heard some shooting during the night, but had paid no attention to it, and at (C.-M. p. 466) testified on cross-examination, as follows:

"Q. Now, you say you saw the policeman coming in the building?

A. Yes, sir.

Q. Did you know the policeman that you saw going in the building?

A. No, I don't know him.

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's badges.

[61]

Q. Now, you got close enough to them at five o'clock in the morning to see those badges?

A. They came and taken fifty dollars of 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 *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.

Q. Now, at the time you first saw them down there on Archer and Greenwood, what time would you say that was?

A. Must have been eight or nine o'clock.

Q. Where were you at?

A. I was in the theatre.

Q. Inside, upstairs or down?

[62]

A. Upstairs.

Q. What end of the building?

A. West end.

Q. How long did you stay there after seeing these?

A. I couldn't say just exactly how long I stayed there.

Q. I guess there was twenty or thirty men came around there.

A. There was more than any twenty or thirty men, all the people around there.

\* \* \* \* \*

Q. How many people were on the corner near Archer?

A. I couldn't say; I say about ten or twelve of those men come down the street knocking those windows in and doors, maybe fifteen, might have been more than that.

Q. And all of them wore police badges?

A. I wouldn't say all of them.

Q. Wasn't all of them?

A. No, sir.

Q. How many of them did?

A. I couldn't say how many had the badges on, some of them had uniforms looked like home guards."

\* \* \* \* \*

[63]

Again at page 470, the witness testifies as follows:

"Q. That building had not been set afire or had not caught afire at the time you left?

A. It was burning when I left, I got out because it was burning.

Q. And you went finally to the ball park and then got excused and discharged. that afternoon?

A. They taken me to the ball park, I didn't go, they carried me down there.

Q. You have been convicted of a felony, haven't you?

A. Yes, sir.

Q. Muskogee county?

A. No.

Q. What county?

A. Wagoner county.

Q. Stealing?

A. No, sir.

Q. What was it?

A. They claimed I held a man up?

Q. At the point of a gun?

A. Yes, sir.

Q. How many times have you been convicted?

A. Once."

[64]

The next witness offered by the defendant was Susie Williams, whose testimony is found (C.-M. pp. 471 to 484, inclusive). The witness states that she is a colored woman, and she lives at 906 North Denver street, Tulsa, Oklahoma. That she lived in Tulsa six years, and was living in Tulsa at the time of the trouble on May 31st and June 1, 1921. That she was living, at the time of the trouble, at 318 East Archer street; that she was home on the night of May 31, 1921. That she saw none of the trouble that night; that the next morning she saw people shooting and running and coming there and making her and others come out of their houses. That they came there and took her husband out and went on in the house and searched, and asked if they had any guns in there, and that the first crew came, and then went on, and that another crew came on and went in and searched the house, and set it on fire — that she got a tub of water and put it out; and that they went in and set the next house on fire; and that one man came back and said: "Come out here, we set this house to burn," and made her come out. That they went ahead and set three houses on fire, and that they burned down. That she and her folks stayed around there until about ten-thirty trying get some things, and then left and went to the Convention hall — that they were taken to the Convention hall. That the shooting started between six and seven[65] o'clock, that there was quite a lot of shooting around in the morning, but wasn't up near where she; that she saw one man killed — that she saw him fall; that was about seven-thirty. That there was about or sixteen white men in the first crew that came, and about twenty in the next crew; that they were not shooting. That she saw about sixteen in one crew that was shooting, but she saw no one shoot, just heard it. That the first building she saw burning was the Midway; that she couldn't see Greenwood street, but could see smoke over that way. That all the houses on Greenwood had been burned two days after that when she returned. That she had heard some shooting around up in town during the night, but didn't hear any in the vicinity of her house until six or seven o'clock the next morning.

The next witness offered by the defendant was C. W. Kern, whose testimony is found (C.-M., pp. 485 to 494, inclusive), which testimony was in substance, as follows:

The witness testified that he is a white man, age sixty-five. That he lived in Tulsa, at 213 East Fairview; that there was both white and negro people living in that vicinity. "That he was living there on the 31st day of May, 1921, and was at home on that evening. That along in the evening there was a man came along and said that they were sure having a time [66] down town. The witness stated he could hear shooting down there, and later on considerable shooting in south and southeast of him; that between nine and ten o'clock he heard some fellow over east of him say: "Come on, boys; bring your guns, bring your guns"; that he then turned his lights out and stayed up all night and never took his clothes off; that he heard some more shooting down town. That the next morning as it was just getting good clear daylight, the witness heard someone hollering and looked out the east window and

pretty soon there was a tall man came walking up the street, shouting: "Come out of here, make your getaway and make it snappy," and the next thing he heard a car on the street, and right in front of his house was a truck loaded with men and they began jumping off there, and they all had guns — that they were white men, and they said to the witness: "Get your family where they are safe," and the witness replied: "My family is safe." That shortly thereafter a whistle blew and at about the same time shooting began down toward the Frisco tracks, then shooting all around, and the witness states that he could see smoke soon afterwards. That he didn't see anybody set anything on fire, but saw buildings burning.

The defendant then offered the testimony of Wesley Bush, whose testimony is found (C.-M. pp. 494 to 521, inclusive), and was in substance, as follows: [67]

That his name is Wesley Bush; that he lived 418 South Lansing Street, Tulsa, Oklahoma; that he had lived there about eight months; that he was Chief of the Fire Department of the City of Tulsa, and was living in Tulsa in 1921, and was Fire Marshal at that time; that he was appointed Fire Marshal in May, 1921, and was Fire Marshal at the time of the disturbance in the City of Tulsa on the night of May 31st and June 1, 1921, and was at Tulsa on the night of May 31, 1921; that he was home part of the night; that he heard a conversation that caused him to go up town; that he went directly to the police station, at 15 West Second street; that there was several white people around the police station when he arrived; that the people were standing around the station and out in the street, bunches all up and down the streets, that the station was practically full of people, and that the people were armed; that there would *see bunches of men go out of the police station, but he didn't know where they would go; that they would leave the police station and go out, and come back — they were out and in, all of them, that they were in squads, several of them together.* That it was after ten o'clock at night when he went to the station; he stayed at the fire station and the police station until morning. That he could see men running around in cars all the time, and could hear shots fired; that it lasted until way up in the morning. That in the [68] morning there was shooting and firing, and fires, buildings burning — that he saw no one set any buildings on fire. That he saw the armed men and heard shooting and saw buildings burning; that it was sometime on June 1st, when the fires were stopped; that the fires were in the negro section of the city. That in the afternoon of June 1st, when he went down there, the section was pretty well burned up, including the buildings of the plaintiff, known as the Red Wing Hotel, and the Dixie theatre. That he got down to that section in the morning of June 1st, a little after daylight and stayed until in the evening and saw the district while it was burning. That the west part of the district was burned first; and the north and northeast burned last. That there was quite a little bit of shooting in the section after he got down there, in this locality of the section; that the shooting down there probably lasted about two hours that morning. That he saw no one shot or killed. That he had lived in the City of Tulsa twenty-three years. That martial law was declared in Tulsa on June 1, 1921, and the headquarters were in the Police and Fire Commissioners office, in the City Hall.

The next witness offered by the defendant was J. A. Norris, whose testimony is found (C.-M. pp. 521 to 534, inclusive), who testifies in substance, as follows:

That his name is J. A. Norris; that he resides at 720 South St. Louis street, in the city of Tulsa. That [69] he had resided in Tulsa about seventeen years; that he is superintendent of the Fire Alarm System in the City of Tulsa, which position he had held for sixteen years and that he was superintendent of the Fire System in Tulsa at the time of the disturbance, May 31st and June 1, 1921. That on the night of May 31st he was at home; that he heard some shooting during the night, which seemed to be toward the business section first, and then off toward the Frisco to the north. That he noticed the shooting about midnight, and that the shooting continued until the next day sometime. That the next morning he came up to No 4 Fire Station first, then to No. 2 Fire Station and he went over on Detroit and Easton, and then went down to fort, where the large negro church is; that he saw a great many people armed on those trips, both white and negroes; and that he heard shooting; that he got to town that morning, about six o'clock — that the shooting he would judge ceased about nine o'clock that day. That he saw two dead bodies, both negroes. That he saw a fire in the negro section of town the next morning, buildings of all descriptions were burning. That he saw no fires set except someone throw a match into a trunk; that three or four men came along in a bunch and broke the trunk open and threw a match or lighted paper, or something in it. He says that at about nine o'clock that day he went through Greenwood street and took out the fire alarm boxes, [70] what was left of them, and the boxes that were burned — that at was on June 1, 1921.

The next witness offered by the defendant was B. J. Johnson, whose testimony appears (C.-M., pp. 535 to 552, inclusive); this witness testified in substance, as follows:

That his name is B. J. Johnson; that he is captain at No. 7 Fire Station, and lieutenant of No. 2 Fire Station; that on May 31st, and June 1, 1921, he was on duty at No. 2 Fire Station; that the station received a call for fire during the night or rather in the morning; that there had been some shooting and trouble during the night, and that people were driving by the station in cars, and there was a lot of shooting down south of the Katy depot. That he heard the first shots along about ten o'clock and that it continued all the rest of the night, until probably three or four o'clock the next day. That when the call came at two o'clock on June 1st, he started for the fire; that the alarm, had come in from Archer and Boston; that when he came near Main and Archer, he ordered one of the men to catch the plug, which is situated on the southeast corner — that about that time everybody in the crowd that was there, began shooting; that the street was full of men, and that some of the crowd pointed their guns at him and his driver and told them to go no further. That he had the car stopped and went around [71] to the back end, where one of the men was on the back and told him to disconnect the hose, and then went back to the station. That he received another call about six or seven o'clock, at that time they went out Main to Brady street, and east on Brady to Cincinnati, and caught a plug at Cincinnati, and run about 1,100 feet of hose, and began trying to protect property that was on fire — some dwellings and a hospital was on fire. That the people were shooting around there, the colored people were north of him, and the white people south of him, bullets coming from both directions. That about fifteen

minutes after they got there, the houses began to burn; that they put out three distinct fires at the hospital. That there were several men around there; men going in every direction. That along about nine-thirty he looked over, toward Greenwood and it looked like the whole street was on fire. That he knew at that time where the Dixie theatre was and the Red Wing Hotel, the property of the plaintiff, and that those buildings were burned at that time; that in his judgment the Red Wing Hotel was burning at about nine-thirty or ten o'clock; that there were two or more of the fire departments there. That he saw some fire fighting west of the Red Wing Hotel, that he was relieved at twelve o'clock on June 1, 1921, and that to his best judgment the Red Wing Hotel burned about ten o'clock; that he was not disturbed about putting out fire, except at two [72] o'clock on the morning of June 1st — that he didn't know how any of the places caught fire.

The next witness offered by the defense was C. H. Moore, whose testimony is found (C.-M., pp. 553 to 574 inclusive), whose testimony in substance, was as follows:

That he lives at 2540 East Fourth Place, in Tulsa, Oklahoma; that he had lived in Tulsa, Oklahoma, better than four years; that he was in the fire department and was a fireman during the trouble in May and June, 1921; that he was the driver of a wagon or fire truck, and was on duty on May 31, 1921. That he heard some shooting during the night of May 31, 1921, and saw a few armed men. That they were just going up and down the street in cars. That he doesn't know how long the shooting continued; that he went to sleep about three o'clock and the shooting was still going on. That he responded to the fire alarm with the witness, Johnson, who just preceded him on the stand. That they went down to the place of the fire and laid about one hundred feet of hose, and that was at Archer and Boston, that they were stopped there; that he didn't know the parties that ordered him to stop, that there were several men around in the street and that they seemed to be armed, that they just told the witness to get away or someone would get killed. And the witness states they disconnected the hose and went back to the station. That there was another fire alarm, [73] but:they didn't respond to, it, because they had orders not to. That they responded to another alarm about seven-thirty, which was over on Brady and Detroit; that there was some shooting going on, and that he saw armed men on the street at that time. That there was a big bunch of men going along there all morning — that he heard considerable shooting all during the morning. That they were principally protecting a wholesale house and a lumber yard. That he laid the line to save the lumber yard — that he laid three strings of hose; that he saw fires all over the colored section while he was there, that he couldn't see Greenwood street from where he was, but that there was fire over there.

On cross-examination (C.-M. p. 568) the witness testifies as follows:

"Q. You say after you responded to the first alarm, that then you had orders not to respond to any other alarms?

A. Over in that part, until further orders.

Q. Who issued those orders to you?

A. The Chief of the Fire Department.

Q. Who was he?



- A. Chief Adler, R. C. Adler.  
 Q. And you paid no further attention — did you hear Mr. Adler himself issue the order?"

\* \* \* \* \*

[74]

And again at (C.-M., p. 569), the witness states as follows:

"Q. And who lifted that order?

A. Chief of the Fire Department.

Q. Then you went over there and you laid three strings of hose?

A. Yes, sir.

Q. And where did you run those three strings of hose?

A. One from Brady street and Cincinnati, another from Detroit and Brady, and another from Elgin and Brady.

Q. Did you handle one of the strings of hose yourself ?

A. Yes, sir.

Q. And which one did you handle?

A. The one on Elgin and Brady.

Q. Is that the lumber yard?

A. Yes, sir.

Q. Was the lumber yard on fire?

A. Yes, sir.

Q. You put that out, didn't you?

A. Yes, sir.

Q. WHICH WAY AND DIRECTION WAS THE WIND ON THAT DAY?

[75]

A. IT WAS FROM THE SOUTHWEST, I BELIEVE.

Q. The lumber yard was pretty well under way wasn't it, when you got to it there?

A. Well, there was one or two piles of lumber caught outside, was all.

Q. And there was some cars of coal on fire there, wasn't there, on the tracks?

A. Well I think there was some moved by there.

Q. You didn't attempt to put that out, did you?

A. No; I didn't have hose enough.

Q. Do you know of any other fire department, being over there that did attempt to put those cars of coal out?

A. No; I don't know anything about it.

Q. You personally worked at the lumber yard, and put that fire out?

A. (Affirmative nod.)

Q. That is just across the tracks west of the Red Wing Hotel, isn't it?

A. Yes; it is west of the Red Wing.

Q. And you were not molested down there after seven-thirty, were you?

A. No.

Q. Nobody stopped you or attempted to stop you?.

[76]

A. (Negative nod.)

Q. Did your best to control the fire there?

A. Yes, sir.

Q. Now, of your own personal knowledge, do you know how those places were set or caught afire?

A. No, sir."

\* \* \* \* \*

"Q. Where did those fires seem to start in reference to the building, was it on the inside or on the outside?

(Argument of counsel.)

Q. Answer the question?

A. Well, the best I judge, they started inside."

\* \* \* \* \*

Q. As a matter of fact you folks answered an alarm at two o'clock?

A. Yes, sir.

Q. Then had orders not to answer any more alarms down there until seven-thirty, about seven-thirty?

A. Until further orders.

Q. I say, then about seven-thirty that was lifted and you answered an alarm down there and at that time there was quite a fire in that district all around, wasn't there?

A. Well, I don't think it was all around; from Brady back south toward Archer street there were quite a few fires."

[77]

The defendant then offered as the next witness J. L. Daley, whose testimony is found (C. m., pp. 574 to 606, inclusive), and which is in substance, as follows:

The witness states his name is J. L. Daley, that he lives at 150 North Florence street, that he had lived in the City of Tulsa for twelve years; that his business was driving a truck for the City, and that he was in that business on May 31st and June 1, 1921, when a disturbance occurred in Tulsa. That at that time he was doubling for the night man. That he was at Station No. 4 — that he went on duty that morning a eight o'clock, and was working on into the night; that he saw some armed negroes passing the station in the evening; that a carload passed the station. That they were going in the direction of the Court House, that he saw some negroes walking, that some of them were armed, and were brought to the Police Station and were put in jail. That was along about ten-thirty or maybe a quarter of eleven. That he saw the cars go by about ten or ten-thirty, or eleven, that later in the night he saw some white men armed, and that they were armed around the police station. That he saw them come out of Joe MaGee's with arms, whose place was across in front of the station. That they got arms there of every description, from twenty-two rifles up. That later on, there must have been at least three hundred men armed there. That he heard some shooting during that evening; that the shooting continued [78] practically all of the night. That he was called to answer a fire alarm something near two o'clock in the morning. That he responded to the call and went to Archer and Boston. That there was four or five of them on the truck and when he got down there it looked to him as if there was about a thousand men down

there, white men, all armed; that it was a negro house on fire, and just as soon as he pulled the truck up to the corner, they ordered him to stop and he did, that they told him to move on, not to stop there; that just as he started to turn the truck around there were some shots fired. That he responded again at three o'clock to Archer and Boston, that there was a mattress or something burning inside a house; that he saw three dead negroes lying there, and that the building was burned up. That he made another trip about five forty-five, but was ordered by the crowd to go back, and a fellow stopped him with a rifle. That he saw a white man killed. That he then turned around and went back to the station — that he was ordered back three different times. That he responded to another call at Cameron and Detroit and was told by the .people to lay a line if he had any hose left to protect the property of the Tulsa Ice Company, and he also drove into where they were firing, and that as he was turning around someone shot at him and hit his truck. That he then went off duty. That it looked to him that over a thousand people were taking part in the shooting.

[79]

The next witness called by the defendant was Luther James, whose testimony is found (C.-M., pp. 606 to 622, inclusive), which testimony is in substance as follows:

The witness states his name is Luther James, and he lives in Tulsa, and has lived in Tulsa fourteen years and is by profession a lawyer; that he remembered the occasion of the trouble in Tulsa on May 31st, and June 1, 1921. That on the evening of May 31, 1921 he was at the Court House about nine o'clock; that when he came there, there was a great number of white people around the Court House, and after he got there a few minutes he noticed one or two truck loads of negroes, who drove around the Court House two or three times and they were yelling and had their guns in the cars and in the trucks and some of the white people were making a good deal of complaint about it. And that some officers came out and requested the negroes to leave, and they drove off and then they came back in a few minutes, and they parked their cars and marched single file down west of the Court House, and as they got along over there the witness states he heard a pistol or a gun shot. That there must have been fifteen hundred people around the Court House; men, women and children, and that after the first shot there must have been fifty other shots; that, that was about nine-thirty or ten o'clock. That he then heard shooting scattered over other places. [80] The witness states that he saw one dead person after that shooting. The witness states that he then went over to the Elks Club and stayed over there a few minutes, and then came away, and after he came away he saw a gang of men standing in front of the Southern Hardware store, and saw them break in; and saw a gang of men in front of Dick Bardon's Pawn Shop, where fire arms are kept, and that the people broke in there, and that he saw several men enter MaGee's place, where they kept fire arms, and that they got guns and ammunition. That these men were white men. That soon thereafter the streets were full of armed people, white people, that the negroes had disappeared from the streets and he could see white people coming from every direction in cars, with guns. The witness states he then went down to the police station; that the police station was

sending men out to different parts of the town to guard the town, armed men — he stayed there a few minutes. That he went to the Elks Club and retired about two o'clock. That the shooting was going on continuously up to the time he retired. That he got up again at four o'clock and saw a lot of armed men going around as before, and that he heard shooting after he got up, over to the north part of town, and that the shooting continued up until about nine or ten o'clock in the morning; that he saw fire and smoke about seven or eight o'clock. That he stood on top of the Tulsa Hotel and viewed the district [81] from there, and it looked like the whole section of from Cincinnati to Greenwood was on fire in the negro district. That he saw several different fires, probably thirty or forty, at different places, in that section. That he saw some dead bodies later on brought to the street on a truck. The witness states, the time he was viewing the fire from the Tulsa Hotel, was about nine o'clock in the morning of June 1, 1921.

This concludes the testimony for the defendant. The plaintiff then offered three witnesses in rebuttal.

The first witness was F. T. Smith, whose testimony is found (C.-M., pp. 623 to 654, inclusive). This witness testifies in substance, as follows:

That his name is F. T. Smith; that he lives at 920 East Indianapolis; that he was a porter at the National Bank of Commerce. That he had lived in Tulsa since July 22, 1912; that he remembered the occasion of the fire on the 1st day of June, 1921; that he was living at the Gurley Hotel, which was located on Greenwood avenue, which property was destroyed by fire that day. That he knows the location of the Dixie theatre, and the Red Wing Hotel; that there were some buildings between the Gurley Hotel and the Dixie theatre; that the Dixie theatre, the Gurley Hotel, and the Red Wing Hotel were all on the same side of the street. That he left the Gurley Hotel on June 1, 1921, about ten-thirty or ten forty-five; that he was there [82] when O. W. Gurley left the hotel. That the last he saw of Gurley on that day was about one hour before the witness left the hotel; that Gurley left about nine-thirty or nine forty-five. That the Gurley Hotel was standing at the time he left it, and that the Dixie theatre and the Red Wing Hotel were still standing at the time he left the Gurley Hotel. The witness states how he came to leave the Gurley Hotel (C.-M., pp. 626, 627, 628, and 629), which we set out in full, as follows:

"Q. Just tell the court and jury how you happened to leave the Gurley Hotel?

A. Well, there was four soldiers came to the hotel and hollered if there was anyone in there, to come out, 'we are soldiers and we will protect your lives.'

Q. And you went down?

A. Yes, sir.

Q. And went with them, did you ?

A. Yes, sir.

Q. Were they soldiers?

(Argument of counsel.)

Q. I will ask you then do you know whether or not they were soldiers?

- A. Well, I knew from what they say, I mean those soldiers said, those four fellows said they were soldiers located out here on Sixth street at the armory.

[83]

- Q. You went with them, did you?  
 A. I did.  
 Q. And went to the corner of Archer and Greenwood?  
 A. Yes, sir.  
 Q. How long did you stay at that corner?  
 A. About thirty or thirty-five minutes.  
 Q. You left the hotel, you say, at ten thirty or ten forty-five and stayed out there at the corner thirty or thirty-five minutes?  
 A. Yes, sir.  
 Q. Well, what were you doing on the corner Greenwood and Archer?  
 A. We were standing there while the soldiers went to the different buildings and knocked on the doors and knocked some of the window out, trying to see if there were any individuals in those buildings.

(Argument of counsel.)

- Q. What did the soldiers do while you were standing there?  
 A. They went to the different buildings and knocked on the windows.  
 Q. I will ask you if they got any other colored people out of any of those buildings?  
 A. One.  
 Q. Do you remember what building that was?

[84]

- A. That was the Phillips' building, where Hardy had his pool hall.  
 Q. Now, about how many people were standing where you were at the corner of Greenwood and Archer at that time, the thirty or thirty-five minutes you say you were there?  
 A. Oh, there was about ten or twelve.  
 Q. How many soldiers stayed with you out there while the other soldiers, if any, went to look for other people?  
 A. At different times there was from two to three, one would go and then two would go.  
 Q. Well, during that time and up until about eleven or after eleven o'clock in the morning of June 1st, were you in a position and did you observe and were you able to view and see North Greenwood street, or Greenwood between Archer and Cameron, as to whether or not any buildings on either side of the street at that time were afire?  
 A. I was.  
 Q. Were any of them on fire up until eleven o'clock that day?  
 A. No, sir.  
 Q. And you left that corner about what time?  
 A. Oh, about eleven five, might have been a little bit later.  
 Q. And you went to convention hall?

A. Yes, sir; didn't go to convention hall direct.

[85]

Q. Well, where did you go?

A. Well, I went from Greenwood street right south across the Frisco track to First street and went on First street to Boulder and then south on Boulder to Second street and turned east on Second street and went about half way between Boulder and Main and there we met the postmaster, or ex-postmaster, Mr. Crutchfield, and he turned us around and said they weren't putting any more in the city jail, they were putting them in convention hall, so we turned and came back west to Boulder and went north on Boulder to Brady and turned west on Brady to the convention hall, and as we started up to the convention hall some individual had a shot gun loaded with bird shot and he jumped off of a truck and the stock of his gun hit the truck and the shotgun went off and one of the shot hit me on the left leg."

The witness states that he slept in the Gruley Hotel on the night of May 31, 1921, and did not leave the place until ten-thirty or ten forty-five. That Gurley left the hotel an hour before he did. The witness states on cross-examination that before he went to bed on the night of May 31, 1921, he didn't know of any trouble between the white and the blacks; that he had heard some of what was going on and there was quite a bunch of negroes down on the street, milling around talking, and they were afraid someone was going to lynch a boy at the Court House. That he went to his room and stayed during the night. That [86] he heard Gurley talking to the negroes that night and telling them to go home.

The next witness offered by the plaintiff in rebuttal, was Abraham Rips, whose testimony is found (C.-M. pp. 655 to 668, inclusive). The witness testified substance, as follows:

That he was living in Tulsa on the 1st day of June, 1921, and that his place of business was at Frankfort and Brady street, which was in the same block as the Red Wing Hotel, one of the properties owned by the plaintiff. That the property of the witness was west on the west corner of the block. The witness describes the block in which his business and the Red Wing Hotel were located, as follows:

"Q. Now, what was between your place of business and the Red Wing Hotel?

A. We had two buildings on Brady, there was a big one on the corner and then a little warehouse in the alley, and then there was next to us two brick buildings, small brick buildings and then the Red Wing Hotel.

Q. Now, then, of what construction was your buildings?

A. Oil well supplies.

Q. No; what construction were the buildings themselves?

A. Oh, frame.

[87]

Q. And what was immediately west of your place?

A. West?

Q. Yes, sir?

A. Well, there was a building there, a two-story building.

Q. That is between you and the tracks.

A. Yes.

Q. And what construction was that?

A. I think that was a stone building.

Q. Now, was there anything between that building and the tracks?

A. That is not west, the tracks were not west of it, the tracks were in front, it was south, I think.

Q. The tracks then were just south of your place?

A. The tracks were on Brady.

Q. Now, what railroad track was that ?

A. That is the Katy."

\* \* \* \* \*

The witness further testified that he was in that part of town on the 1st day of June, 1921; that he went down between eight and nine o'clock; *that the fire department was there at the time he arrived and were putting out fire on some coal cars that were burning; the coal cars b[e]ing in front of his shop; that the wind [88] was blowing east, that is the wind was coming from the west.* That at the time he arrived his building had just started to burn; that he requested the firemen to turn the hose on his building, but was informed by that they couldn't do it. That he was in that section of town about half an hour. That when he left the section of town the Red Wing Hotel was not burning, and was not on fire. The witness states that he was in that vicinity about from a half to three-quarters of an hour; that he heard no shots being fired that time. The witness states that he had heard some shooting in front of his house during the night; that he lived in Wheeling street, in another part of town. The witness states, however, that he heard, shots fired all during the night and up until twelve o'clock e following day, and that when he arrived in the vicinity of his place of business, that the only firemen he saw were those throwing water on the coal cars.

The next witness offered in rebuttal by the plaintiff was Henry Hale, whose testimony is found (C.-M.,pp. 668 to 675, inclusive), whose testimony is in substance as follows:

The witness testified that he lived at 415 South Lansing Street, Tulsa, Oklahoma; that he had lived in Tulsa fifteen years; that he was living in Tulsa on the 1st day of June, 1921; that his business was salesman for the Nicholas Hardware Company, and he was [89] working for those people on that day. That he was acquainted with the location of the Dixie theatre and the Red Wing Hotel, owned by the plaintiff, that he was over in that section of the town that day, the first time being between eight-thirty and nine o'clock. That he was on the Katy tracks and Brady street; that there was no shooting going on at that time in that vicinity, and that the Red Wing Hotel or the Dixie theatre were not on fire at that time. The witness states that he stayed there about an hour at that time. That he returned to that section of the town about ten o'clock or a quarter of eleven and that at that time he went down Brady street to Greenwood and passed the red Wing Hotel, and was right at the side of the hotel and that it was not on fire at that time; that there was no shooting at that time. That he left that section of town about a quarter after eleven, and that the Dixie

theatre was then on fire, and he also saw some smoke coming out of the end of the Red Wing Hotel. That he left the district about eleven-thirty.

The witness testifies that when he arrived at the place he worked, at seven o'clock that morning, that the front windows had been broken out and that some of the ammunition was gone and some of it scattered over the floor, and that the guns were gone; that he had heard shooting during the night; that there was some shooting down in that vicinity that morning. [90]

The witness stated that he was a little bit interested in noticing the property of the plaintiff, having worked for the plaintiff some time prior to that time, for a long while — that he worked for the plaintiff eleven years, but had not worked for him for four years prior to that time. The witness states that he didn't see any one setting fires to buildings; that he saw some firemen down there putting out fires.

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This concludes the testimony in the case. In analyzing the testimony it seems to us that it is about follows:

The plaintiff proves that he had these three insurance policies upon his property. That the premiums were paid. That the property was destroyed by fire on the 1st day of June, 1921, at anywhere between ten-thirty and twelve-thirty o'clock; that he did not know the actual cause of the fire, and that he suffered a total loss of his property, valued at somewhere near \$75,000. That he had given due notice and proof of loss, and that the defendant had refused to pay his claim.

The testimony of the defendant's witnesses tended to prove that on the 31st day of May, 1921, a negro boy was in jail at Tulsa, Oklahoma, and there was a rumor that the boy was to be lynched. That the negroes in the negro section of town became excited about it and determined that the boy should not be lynched. That [91] they proceeded to arm themselves and came up to the Court House to ascertain the true condition of affairs. That the white people had also gathered around the Court House, and that there was considerable excitement. That during the excitement a gun was fired and from that time on there was considerable disturbance and fighting and some people killed and some property burned. That the fire department was not permitted in some instances during the night, to fight fire in the negro section of the town. That numbers of men were being sworn in at the police station, and arms procured for them, and that they were leaving the station in squads presumably to quell the disturbance. That along about twelve o'clock that night, matters became quiet. That at about six o'clock the morning a whistle blew which was apparently a signal for an organized force to go into the negro section of the town and arrest all negroes, which were divided in groups and taken to the Convention hall. The testimony produced by the defendant discloses that these people were organized, wearing police badges and were officers of some character, some of them dressed in soldier uniform; one witness testifying for the defendant that all of them had on police badges. That these men would break in doors and windows of buildings in the negro section, call the negroes out of their houses and take charge of those who seemed peaceable, taking them to the Convention hall, and [92] would return and set the buildings on fire. A large part of the testimony of the witnesses of the defendant, who were present and able to



ascertain just what was going on, indicating that these men were all officials. It also indicated that some of the negroes were organized and were in a hall, and that the firing was between these and the whites in that vicinity.

The plaintiff in rebuttal established that the property of the plaintiff took fire anywhere from ten-thirty about twelve o'clock. That there was some buildings between the Red Wing Hotel and the railroad track; that the railroad track was south and west of the Red Wing Hotel, and that there was a train of cars on fire at that place, and that the wind was in an easterly direction. No witness in the entire case testifies that they know how the plaintiff's buildings caught fire; the inference that they caught fire by reason of the disturbance being purely of a circumstantial character, and under these facts it is contended by the plaintiff that the court erred in directing a verdict and taking upon himself the authority of deciding the case for three reasons.

FIRST, we contend it was purely a question of fact for the jury to determine under proper instructions from the court whether the [damage to the] property of the plaintiff was caused directly or indirectly from a cause excepted in the policy, such as riot, invasion, etc.[93]

SECOND, it was the duty of the court to submit the issue under proper instructions, as to whether the property was destroyed by fire by persons engaged in the disturbance, whether one would call it a merely a disturbance, or whether the fire was caused by officers of the law in seeking to suppress the disturbance.

THIRD, we contend that it was the duty of court to submit to the jury, under proper instructions, the issue as to whether or not the fire may not have been caused by other causes that were wholly disconnected with the disturbance.

All of these matters in our judgment b[e]ing purely within the province of the jury to determine.

In support of our contentions, we desire to quote from the authorities.

It will be observed from the language of Court (C.-M. p. 679) that the Court passed upon the question of fact when he said:

"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."

Here is clearly a case of the Court passing upon the very question that should have been submitted a jury and invading the province of the jury in so do[94]ing. The Supreme Court of the State of Oklahoma has passed numerous times upon the proposition and we will quote from a few of the authorities.

We desire first to call the attention of the Court to the case of *Kenney v. Grooms*, 163 Pac. page 531, 63 Okla. page 164, in which the Court laid down the rule, 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 any 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."

And again, in *Gregory v. Harper et al*, 152 Pac. 70, 51 Okla., page 419, the Supreme Court of the State of Oklahoma, says:

"When a defendant moves the Court to instruct a verdict in its favor, the evidence must be considered in its aspects most favorable to the plaintiff's contention and if the evidence adduced, together with all the reasonable deductions and inferences to be legitimately drawn from it, fairly tends to prove plaintiff's cause of action, the motion for an instructed verdict should be denied."

The Court again passes upon the question involved, in the case of *Kelly v. Hamilton*, 189 Pac. page 535, 78 Okla. page 179, as follows:

[95]

"Where the evidence is conflicting and the Court is asked to direct a verdict, all facts and inferences in conflict with the evidence against which the action should be taken must be eliminated entirely from consideration and totally disregarded, leaving for consideration, that evidence only, which is favorable to the parties against whom the motion is leveled."

The Court will observe that in the case cited the question to be determined, was whether a house was completed in a certain way, and the evidence was conflicting, therefore, the Court held it a question of fact to be determined by the jury.

The rule is again announced, in the case of *Ferris v. Jones*, 189 Pac. 527, 78 Okla. page 154, where Supreme Court of Oklahoma said:

"The trial court is not justified in directing a verdict in a personal injury suit for damages, wherein negligence is alleged, if there is any evidence reasonably tending to prove the negligence alleged and the resulting injury."

In *Waldrep v. Exchange State Bank of Kiefer*, 197 Pac. 509, 81 Okla., page 162, the Supreme Court, of the State of Oklahoma, again says:

"When the facts are undisputed and are capable of more than one inference, and being such inferences as reasonable men may draw from said facts, and some of which may be favorable to one party and some favorable to the other party to the suit, then in that event a court is not justified [96] in sustaining a demurrer to the evidence or in giving an instructed verdict, and it is reversible error to do so."

At page 512, of the 197 Pacific, in the same case, the Court in its opinion said:

"The evidential facts in this case do not seem to be in dispute, but as to the inferences to be drawn from said facts reasonable minds may differ. It is well established in this state, that, even though the testimony is undisputed it should be so convincing that all reasonable minds must draw the same conclusion from the facts proven, before the Court is authorized to sustain a demurrer to the evidence, or direct a verdict."

And again, in the opinion on the same page, the court said:

It is only where the evidence and all inferences to be drawn from it, will not justify a verdict for one party that the court should give a peremptory instruction to find for the other \* \* \*. The rule as to the weight of the

evidence governing trial courts in the matter of directing a verdict is fully set out in the first syllabus in the case of *Cooper v. Flesner, Supra*, as follows:

"The question presented to a trial court on a motion to direct a verdict or which presents itself in the consideration of such action on its own motion is whether, admitting the truth of all the evidence which has been given in favor of the party against whom the action is contemplated, together with such inferences and conclusions as may be reasonably drawn from it, there is enough [97]competent evidence to reasonably sustain a verdict should the jury find in accordance therewith. Where the evidence is conflicting, and the court is asked, or on its own motion considers the direction of a verdict, all facts and inferences in conflict with the evidence against which the action is to be taken must be eliminated entirely from consideration, which is favorable to the party against whom the action is leveled, and totally disregarded, leaving solely the evidence for consideration, which is favorable to the against whom such action is leveled."

In the case of *Muskogee Electric Traction Company v. Jackson*, 212 Pac. 416, ---- Okla., page -----, the Supreme Court of Oklahoma, said:

"The evidence is conflicting, that on behalf, the plaintiff tending to support the allegations of negligence on the part of the defendant's employers, while the evidence on behalf of the defendant is in conflict therewith. It is only the evidence with all the inferences which be reasonably drawn therefrom would be insufficient to sustain a verdict for the plaintiff, if a verdict in her favor had been returned, the court would be justified in directing a verdict the defendant."

And again the rule is announced in, *Central Coal Company v. Jones*, 212 Pac. page 606, ---- Okla., page -----. At page 607 of the report the Supreme Court of the State of Oklahoma, said:

"The rule is well established that the trial court is unauthorized to direct a verdict in ac[98]tion triable to a jury, where there is competent evidence sufficient to reasonably sustain a verdict in favor of the party against whom the court is requested to instruct the jury."

In the case of *Oklahoma Automobile Company v. Goulding*, 176 Pac. page 400,---- - Okla., page -----, the Supreme Court of Oklahoma said:

"It is only where the evidence and all inferences to be drawn from it, will not justify a verdict for the plaintiff, that the trial court should give a peremptory instruction to find for the defendant."

The rule is again announced in *Matthews et al, v. Mounts*, 197 Pac. 708, 81 Okla., page 245, in which the Supreme Court of Oklahoma, said, in syllabus No. 2 and No. 3:

"2. When any competent evidence has been presented for the consideration of the jury reasonably tending to prove the issues, the court should deny a motion for a peremptory instruction, and under proper instructions from the court, the cause should be submitted to the jury for their determination.

"3. The trial court should not direct a verdict where it is necessary to weigh the evidence to determine where the preponderance lies."

In this case, the evidence of the plaintiff discloses that he did not know how his buildings caught fire. There is no evidence of any witness in the case who [99] testifies that they saw these buildings set on fire. The whole testimony concerning the probable cause of the fire is circumstantial, and under the light of the authorities we have cited, we still insist that it was purely a question of fact for the jury to determine under proper instructions from the Court, whether the fire which destroyed the property of the plaintiff was caused directly or indirectly from a cause excepted in the policy.

We next contend that it was the duty of the Court to submit the issue under proper instructions as whether the property was destroyed by fire direct or indirectly by persons engaged in the disturbance, whether one would call it a riot or merely a disturbance, or whether the fire was caused by officers of the law in seeking to suppress the disturbance.

It will be observed that under the undisputed testimony, the property of the plaintiff was destroyed by fire on the 1st day of June, 1921, no witness placing the time of the destruction of the property of the plaintiff earlier than nine-thirty, and the greater weight of the testimony, it appears to us, indicated that the Dixie theatre was destroyed by fire somewhere between nine-thirty and ten-thirty o'clock, and the Red Wing hotel was destroyed between eleven-thirty and twelve-thirty o'clock; and all of the witnesses who had been able to give any information concerning the destruction of the buildings, claim that [100] the circumstances were such as to indicate certain men who were acting as peace officers, destroyed these buildings by fire.

The defendant company met a somewhat similar situation, in fact we think it is a parallel case in principle, in the state of Kentucky, the case being entitled, *American Central Insurance Co., Appt. v. Stearns Lumber Company*, which is reported in 36 L. R. A. (N. S.) page 566; 145 Ky. page 255; 140 S. W. page 148; in which a building was destroyed by fire under circumstances somewhat similar to the conditions in the case at bar, and the Court laid down the rule, as follows:

"The unauthorized burning of a building, by a deputy United States marshal, to effect the arrest of persons who had taken refuge therein and were holding the authorities at bay with firearms, does not come within a provision of a policy of insurance upon the building, exempting the insurer from liability for loss caused directly or indirectly by riot or by order of any civil authority, for, although the fugitives were guilty of a riot, their acts were not the cause of the loss, which was due to the unlawful acts of the marshal."

We desire to quote from page 568 of 36 L. R. A. (N. S.), where the Court in the opinion in this cause makes the following statement:

"The deputy marshal in the case before us had no more authority to set the house on fire than the [101] sheriff in the case cited. The loss of the house was not due, directly or indirectly, to the order of any civil authority; for the marshal had no authority to burn the house. He was not a civil authority for this purpose. The rioters were in the house; the marshal's posse, acting, under

his orders, were not rioters. The loss of the house was not due, directly or indirectly, to the riot carried on by the men within the house. It was due directly to the wrongful act of the marshal in setting fire to the house without authority. The riot within the house was the occasion of his wrongful act, but the loss of the house was not the proximate result of their unlawful acts. The loss of the house was the direct result of another lawful act, which intervened 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. It necessarily follows that the insurance company was not released from liability by the clause of the policy above quoted. Judgment affirmed."

This case, it seems to us is a parallel case with the one at bar.

In the case just cited an injunction had been sued against striking miners. The injunction was disobeyed by one certain miner and a warrant of arrest was issued against him for contempt of court. The deputy marshal failed to arrest the party who was violating the injunction, and made a report that party had a gang of armed men with him who prevented the arrest. Other warrants were issued for the arrest of the men who were assisting the party [102] against whom the first warrant was direct, and a day or so thereafter the deputy marshal returned for the purpose of executing the warrants, taking with him a number of persons to assist him, upon his arrival there, summoned others to his aid. The deputy marshal and those with him were all armed with guns and pistols. The men were intrenched in a hotel building; the marshal with his posse surrounded the hotel, one of the deputy marshals going upon the porch and attempting to open the front door, when he was shot and killed by one of the men inside the hotel building. Shots were then fired both from the inside of the hotel and by the posse on the outside of the hotel; two of the posse were wounded. The shooting continued for some minutes, then there was a cessation, during which time the women and children came out of the hotel, the deputy marshal announcing that he would burn the house. The marshal then got some dynamite and attempted to blow up the building, but could not use the dynamite because it was frozen. The shooting from the inside and the outside of the building was resumed and continued for an hour or two. The deputy marshal then made a fagot, soaked it in oil, which was turned over to a member of the posse, who under his command applied the torch to the building and it was burned. While the building was burning the men on the inside of the hotel rushed out, one was arrested; one was killed; and a third escaped. During all of the time the three men were inside of the hotel [103] building, and while the shooting was going on, there was much excitement throughout the town. Business was practically suspended, several hundred shots were fired, and many persons on account of the excitement took refuge behind buildings or in their homes.

The American Central, Insurance Company had written a policy on the building; suit was brought against the company by the owner, to recover the loss of the property. The company defended upon the same grounds that they are defending upon in the case at bar, but upon this state of facts, at the trial the plaintiff recovered. The insurance company appealed and the judgment was affirmed.

We claim that under the state of facts in the case at bar, that it was a question of fact to be determined by the jury, under proper instructions, as to whether the fire was caused by rioters, or by people engaged in a riot; or, was caused by officers of the law in attempting to arrest rioters or suppress a riot.

We contend that the burden of proof rested upon the defendant to show that the property was destroyed either directly or indirectly by a riot. In support of our contention we desire to call the attention of the Court to the case of *Sovereign Camp of Woodman of the World v. Hutchins*, 159 Pac. 920, ---- Okla., page ----, and quote as follows: [104]

"Where, in an action on a benefit certificate, liability is denied on the ground that a false statement was made by the assured in the application for certificate, which by its terms voided the same, and it was denied that the assured executed the application or made the false statement, HELD, that it was not error for the court to instruct the jury that the burden was on the defendant to prove the execution of the application and the alleged false statement therein."

The State of California, in the case of *Rossini v. St. Paul Fire & Marine Ins. Co. of St. Paul, Minn.*, 188 Pac. 564, in the fourth syllabus states the law, as follows:

"Where a fire policy exempted from liability for explosion, the insurer has the burden, fire and loss having been shown, to prove that the loss falls within the exemption, but, if such burden is sustained, and it is shown that an explosion occurred prior to the fire, the insured is called upon to show the damage suffered from the resulting"

The State of New York, in the case of *Western Assurance Company of Toronto v. J. H. Mohlman Company*, reported in 40 L. R. A. (O. S.) page 561; 51 U. S. App. 577; 83 Fed. Rep., 811, lays down the rule as follows:

"A STIPULATION THAT IN CASE OF THE FALL OF THE BUILDING ALL INSURANCE BY THIS POLICY SHALL IMMEDIATELY CEASE is a condition subsequent, and not an ex[105]ception, and the burden of showing that it became operative before loss is upon the insurer — especially where it is not in the descriptive part of the policy, but is among the provisos; and it is immaterial that the clause 'except as hereinafter provided' is inserted in the descriptive part of policy."

\* \* \* \* \*

"THE BURDEN OF SHOWING THAT THE BUILDING DID NOT FALL before the fire is thrown upon the insured by his allegation that the fire did not happen by reason of any of the excepted clauses, where liability for loss following the fall of the building is removed by a condition subsequent in the policy."

This being the case, it strikes us very forcibly that the issue as to whether the buildings were destroyed by some causes excepted by the policy is one of fact, which fact must be determined by the jury. It will be noted in the cases heretofore cited, that the rule of the Supreme Court of the State of Oklahoma, when a motion to direct a verdict is presented, is for the Court to exclude all testimony favorable to the party making the motion and consider only the testimony favorable to the party against whom the motion is directed. Viewing the case in this light, when the

testimony of the defendant is excluded for the purpose of the motion, you have left the testimony of the plaintiff, which establishes:

"FIRST. That he had these three policies of insurance on his buildings;  
[106]

"SECOND. That the policies were in force on the 1st day of June, 1921;

"THIRD. That on the 1st day of June, 1921, his buildings were destroyed by fire;

"FOURTH. That he had made due proof of loss to the insurer;

"FIFTH. That the cause of the fire was to him unknown."

If the jury finds that this is true, the verdict must be upheld. So, in our judgment the court was purely in error when he undertook to decide the case himself and thus invade the province of the jury.

In connection with the facts as disclosed in this case, we contend that it was the duty of the court to submit to the jury under proper instructions, the issue as to whether the fire may not have been caused by other causes that were wholly disconnected with the disturbance; and in this connection we desire to cite some cases from California, that grew out of the earthquake in 1906.

The first case we desire to cite is the case of *PACIFIC UNION CLUB v. COMMERCIAL UNION ASSURANCE COMPANY*, reported in 107 Pac. 728. The policy of insurance contained this clause:

"This company shall not be liable for loss caused directly or indirectly by invasion, earthquake, riot, civil war or commotion. \* \* \*"

[107]

The insurance company in defending a suit brought for the loss of property by fire, set up as defense that on the 18th day of April, 1906, between the hours of five and six o'clock A. M., the city was visited by a severe earthquake; that other similar shocks followed; that at the time of these shocks, fires broke out; that the city had a fire department fully equipped, sufficient to take care of the fires and extinguish the same, and, had a sufficient water works system, with abundant supply of water for extinguishment of fires; and that the fires could in the usual and ordinary course of events, have been extinguished, but that the earthquake shocks broke the mains and piping, which rendered the water supply useless, and that by reason of the breaking of the pipes, and the shutting off of the water, the fire department was without water to extinguish the fires, and that by reason thereof, the fire spread throughout the city, and destroyed the property of the owner who brought the suit. The defendant claiming that the fire was caused directly or indirectly by an earthquake. A demurrer was filed to the petition. The court there held in the fifth and seventh syllabus, as follows:

"5. A policy insuring against all direct loss by fire except as hereinafter provided, and then declaring that insurer shall not be liable for loss caused directly or indirectly by earthquake, makes insurer liable for loss by fire where an earthquake broke the water mains, causing the [108] water to escape so that the fire department of the city had no water with which to extinguish the fire occurring the next day; the earthquake not being, in legal contemplation, the

cause of the fire, for none of the parties contemplated the earthquake might cut off the water supply.

"7. Exceptions in a fire policy must; be liberally construed in favor of insured and strongly construed against insurer."

The opinion is very exhaustive and cites a large number of authorities.

Again in the case of *Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co. of Brooklyn*, reported in 111 Pac. page 4, the Supreme Court of the State of California, held as follows:

"While an insurance policy, like other contracts, is to be construed and given effect according to its language and terms, its provisos and exceptions are to be strictly construed against the insurer, and liberally in favor of the insured, and any ambiguity or reasonable doubt is to be resolved in favor of insured and against the insurer.

\* \* \* \* \*

"A policy insuring against loss by fire, providing that insurer shall not be liable for loss caused 'directly or indirectly' by either of certain causes, and then, after a semicolon, 'or for loss \* \* \* occasioned by or through \* \* \* earthquake,' except from the policy, as 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 com[109]municated to the insured building through the burning of intermediate buildings."

Here the insurance company claimed that the earthquake caused the fire in the building occupied by Mack & Co., and that this fire caused the fire in an adjoining building, and that the fire spread until it finally reached and burned the building of the plaintiff. Quoting from the opinion at page 5 and 6, the court said:

"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 to plaintiff that he could not recover if the cause of the cause of the cause of the fire was an earthquake. He could understand by reading the policy that if an earthquake should by its violence set his building on fire that he could not recover the loss; but it would be difficult for any one to understand that the plaintiff agreed that the defendant might be exempt from a fire the remote cause of which was an earthquake.

"Suppose a statute should make it a crime for any one to cause a building to be burned. A. becomes the father of a mischievous boy. He buys matches and leaves them on his dining room table. The boy of his own volition takes the matches and sets fire to the building. A. in one sense caused the fire as he was the remote cause of it. He became the father of the boy, he bought the matches, and left them where the boy could find them. Was the fire caused or occasioned by or [110] through A. under such circumstances? According to the theory of the appellant, if a slight shock of earthquake had upset a lamp and thus set fire to a building, and this building should communicate the fire to an adjoining building, and thence from building to building until the whole city had burned, not a dollar of insurance could be recovered if the policies



each contained the clause under discussion. We do not think that either the plaintiff or the defendant ever contemplated making any such contract. It would certainly require the most clear and unambiguous language to justify any court in placing a construction upon a policy of insurance that would have such result. 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 causes caused either 'directly or indirectly' by the things therein enumerated. It then, after a semicolon, used 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 or 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.'"

And again on page 7, of the same report:

"It was said by Judge Seawell of the Superior Court in the case of *Baker & Hamilton* against this same defendant, in construing the same provision in one of the defendant's policies: 'The primary fires may have been due to unskillful or [111] defective wiring, or to improper construction of the buildings in which they were installed, or both. It was known to the parties when they entered, into the contract that the defendant was to be liable for a loss of which fire and not earthquake was the proximate cause. It is unreasonable to hold that in accepting the policy plaintiff should have understood that he assumed the consequences of the negligence of other persons, over whom he had no control, at a point far distant from the insured property.' In another case of, *Baker & Hamilton* against this same defendant (157 Fed. 280), it was said by Judge Whitson, in considering the same clause in a like policy: '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 the 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 furnace, or the like, and this would be an earth-quake-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.' In another case, of *Willard* against this same insurance company, Judge Van Fleet construed the policy in the same way; and his ruling was affirmed in an opinion delivered by the *United States Circuit Court of Appeals*, 164 Fed. [112] 404 (90 C. C. A. 392, 21 L. R. A. N. S. 103. It is not necessary to quote from that case or from other authorities. The cases cited fully support the construction we have given to this policy."

It seems to us that it was a question for the jury to determine from all the facts and circumstances in the case, whether or not the fire which caused the destruction of the plaintiff's buildings, was caused directly or indirectly by riot. It will be observed from the testimony, as has been stated before in this brief, that no witness testifies that he saw these buildings set on fire. Not even the firemen who were fighting the fire on June 1, 1921, testifies that they saw any building set on fire. One man testifies that the night before he saw a building set on fire. A woman testifies that on the morning of June 1, 1921, someone set her building on fire, and she put it out. But these buildings were far removed from the buildings of the plaintiff in this case, and the jury is the sole judge of the weight and credibility of the testimony of the witnesses. It is not the court's province to determine what witnesses are testifying truly, and what witnesses are testifying falsely. It is not the province of the court to determine the weight and credibility to give to the testimony of the witnesses. In the case like the one at bar, he is not the trier of the facts. There is testimony in the record that a train of cars and a lumber yard, were on fire less than a block away in a westerly direction from the property belonging to the plaintiff, that the wind was coming from a southwesterly direction, that the buildings between the lumber yard and the burning train of coal cars, were all consumed by fire. Is there any testimony in the record disclosing how the train of coal cars became ignited, or how the lumber yard became ignited? Is there any testimony in the record by which one might infer that any one connected with the disturbance in the city of Tulsa on May 31, and June 1, 1921, could have any possible object in setting on fire a lumber yard or a train of coal cars? Can any one who views this testimony, say that the plaintiff's property might not have caught fire from the fires spreading from the coal cars or the lumber yard?

There are many causes of fire. Defective electrical wiring, may cause a fire, spontaneous combustion may cause a fire. In the case of either, it may never be definitely known the exact cause of the fire. And where the cause of fire is unknown by the owner of a building, it seems to us that he should not be deprived, of the benefits of his contract of insurance, simply by showing that there were certain causes existing at that time in and about his buildings which *might* have caused the fire, which were excepted in his contract of insurance. But it seems to us that the burden, under the authorities, is upon the insurer to show to the satisfaction of the jury that the fire was caused either directly or indirectly by a cause excepted to in [114] the policy; and that it does not discharge this burden by showing that it might have been caused by some cause excepted in the contract of insurance.

We contend as our second proposition, that:

"THE COURT ERRED IN OVERRULING THE MOTION FOR A NEW TRIAL."

In arguing this proposition, we adopt the argument set forth in arguing the other matters hereinafter set out, and cite the same authorities.

We believe that when all the testimony is taken into consideration, together with the action of the court thereon, in directing a verdict in favor of the defendant, and in failing to submit to the jury the questions of fact involved in the case, under

proper instructions, that it became his duty to grant a new trial in the case, and that his overruling of the same is error in this case such as will cause the court to reverse his decision.