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Summons.

(Filed February 3, 1917.)

New Jersey Supreme Court.

MERCER COUNTY.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation, Plaintiff, *v.* BROCK'S GARAGE, INCORPORATED, a corporation, Defendant.	Action at Law

10

The State of New Jersey to Brock's Garage, Incorporated: 20

You are hereby summoned to answer the annexed complaint of Fidelity & Deposit Company of Maryland, a corporation, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 30

Witness, William S. Gummere, Esquire, Chief Justice of the Supreme Court, at Trenton, this twenty-seventh day of January, nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

Dickinson & Bodine, 40
Attorneys.

Complaint.

(Filed February 3, 1917.)

NEW JERSEY SUPREME COURT,

MERCER COUNTY.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation, Plaintiff, *v.* BROCK'S GARAGE, INCORPORATED, a corporation, Defendant.	Action at Law

10

20

Plaintiff, a corporation organized and existing under and by virtue of the laws of the State of Maryland, and authorized to conduct an insurance and surety business within the State of New Jersey, by the laws of this State, says that:

FIRST COUNT.

1. The defendant is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, and is and has been engaged in the conduct of a garage business in said State, on Canal Street, north of East State Street, in the City of Trenton.

30

2. On or about March 1, 1915, the plaintiff, at the special instance and request of the defendant, issued and delivered to it a certain paper writing, a copy of which is hereto annexed and marked Schedule A-1, known as Fidelity & Deposit Company of Maryland, Policy No. 1,552,-958, wherein and whereby the plaintiff, for a

40

certain sum of money therein stipulated to be paid by the defendant, agreed, for a period of one year from the first day of March, 1915, to the first day of March, 1916, to indemnify Brock's Garage, Incorporated, against loss from the liability imposed by law upon it for damages on account of bodily injuries or death suffered as the result of accident while said policy was in force by any person or persons and caused by the maintenance or use of the automobile or automobiles described in statement No. 7 of the schedule annexed to said policy, while within the limits of the United States or Canada, or by the loading or unloading of said automobile or automobiles provided for the transportation of merchandise, as in said policy and statement specified, and to defend in the name or on behalf of Brock's Garage, Incorporated, any suit brought against it to enforce a claim covered by said policy, whether groundless or not, and finally to pay all expenses irrespective of the limits expressed in statement No. 4 affixed to said policy incurred by the defendant in defending any suit, including any costs taxed against the defendant and interest accruing on that part of the verdict or judgment, not in excess of the policy limits. And did further agree to do all manner of things in said policy more particularly and at length mentioned.

3. The defendant, in consideration of the issuance and delivery to it of said policy, agreed to pay for the same in accordance with certain schedules and provisions in said policy provided for, and particularly in acordance with the rates in said policy set forth, which were as follows:

The premium for this policy is based on a fixed sum of $1,500 per annum for each proprietor, member of firm or officer of corporation actively

engaged in the business, and $1,500 per annum for each salesman working on a commission basis, plus the entire compensation earned during the policy period by all other employees of the assured engaged in the operation of the business as described in the preceding paragraph. For the purpose of this insurance the compensation for the policy period is estimated at $10,000, the premium rate being $3 on each $100 on a compensation not in excess of $10,000 and for that portion of compensation in excess of $10,000 and not in excess of $25,000, $2.25 for each $100 of such excess.

4. The said policy also provided that in consideration of an additional premium, to be determined by audit at the expiration of the policy period at the rate of $3 per each $100 of livery earnings, it was understood and agreed that the policy should cover all cars of the defendant while used for livery purposes, subject to the policy's terms and provisions.

5. The defendant paid plaintiff on account of said policy and as a deposit premium the sum of $300.

6. The plaintiff did all things stipulated and provided for it to be done in and by said policy and in accordance with the provisions thereof caused an examination of the defendant's books to be made, and it appears therefrom that in accordance with the provisions of said policy the plaintiff is entitled to the additional sum of $318.25, by reason of the issuance of said policy. The said additional sum was determined as set forth in Schedule A2 hereto annexed and made a part hereof.

7. The defendant owes the plaintiff upon said policy, in accordance with the contract and agreement thereby entered into, the sum of $318.25.

SECOND COUNT.

1. The plaintiff repeats the allegations contained in the First paragraph of the First Count of this complaint. 10

2. On or about March 1, 1915, the plaintiff, at the special instance and request of the defendant, issued and delivered to it a certain paper writing, a copy of which is hereto annexed and marked Schedule B1, known as Fidelity & Deposit Co. of Maryland policy No. 1,225,492, wherein and whereby the plaintiff, for a certain sum of money therein stipulated to be paid by the defendant, agreed, for a period of one year 20 from the first day of March, 1915, to the first day of March, 1916, to indemnify Brock's Garage, Incorporated, against loss from the liability imposed by law upon it for damages on account of bodily injuries or death suffered, as the result of an accident occurring while the said policy was in force, by any employee or employees of the said defendant engaged in the prosecution of the work described and at the location named in Statement 30 No. 7 of the schedule annexed to said policy, including chauffeurs, drivers and their helpers, wherever they might be in the service of the defendant, and to defend in the name and on behalf of the defendant any suit brought against the defendant to enforce a claim covered by said policy, whether groundless or not, and finally to pay all expenses, irrespective of the limits expressed in statement No. 4 affixed to said policy, incurred by the 40 defendant in defending any suit, including any costs taxed against the defendant, and the inter-

est accruing on that part of the verdict or judgment not in excess of the policy limits. And did further agree to do all manner of things in said policy more particularly and at length mentioned.

3. The defendant, in consideration of the issuance and delivery to it of said policy, agreed to pay for the same, in accordance with the rates
10 therein set forth, a certain sum of money or premium, based on the entire payroll of all employees covered under said policy, which said rates were as follows:

Kind of Work	Estimated Compensation for Period of Policy	Premium Rate per $100 of Compensation
Garage employees, excluding Chauffeurs & Clerical force	$8000	.76
Clerical employees,	2000	.07
Chauffeurs, if any,		1.36

20

4. The defendant paid plaintiff on account of said policy and as a deposit premium the sum of $62.20.

5. The plaintiff did all things stipulated and provided for it to be done in and by said policy
30 and in accordance with the provisions thereof caused an examination of the defendant's books to be made, and it appears therefrom that in accordance with the provisions of said policy the plaintiff is entitled to the additional sum of $85.22, by reason of the issuance of said policy. The said additional sum was determined as set forth in Schedule B2 hereto annexed and made a part hereof.

40

6. The defendant owes the plaintiff upon said policy, in accordance with the contract and

agreement thereby entered into, the sum of $85.22.

THIRD COUNT.

1. The plaintiff repeates the allegations contained in the first paragraph of the first count of this complaint.

2. On or about March 1, 1916, the plaintiff, at the special instance and request of the defendant, issued and delivered to it a certain paper writing, a copy of which is hereto annexed and marked Schedule C1, known as Fidelity & Deposit Company of Maryland policy No. 1,567,891, wherein and whereby the plaintiff, for a certain sum of money therein stipulated to be paid by the defendant, agreed, for a period of one year from March 1, 1916, to March 1, 1917, to indemnify Brock's Garage, Incorpoorated, against loss from the liability imposed by law upon it for damages on account of bodily injuries or death suffered, as the result of an accident occurring while said policy was in force, by any person or persons and caused by the maintenance or use of the automobile or automobiles described in statement No. 7 of the schedule annexed to said policy while within the limits of the United States or Canada, or by the loading or unloading of said automobiles provided for the transportation of merchindise, as in said policy and statement specified, and to defend in the name or on behalf of Brock's Garage, Incorporated, any suit brought against it to enforce a claim covered by said policy, whether groundless or not, and finally to pay all expenses, irrespective of the limits expressed in statement No. 4 affixed to policy incurred by the defendant in defending any suit, including any costs taxed against the defendant and interest

accruing on that part of the verdict or judgment not in excess of the policy limits. And did further agree to do all manner of things in said policy more particularly and at length mentioned.

3. The defendant, in consideration of the issuance and delivery to it of said policy, agreed
10 to pay for the same in accordance with certain schedules and provisions in said policy provided for, and particularly in accordance with the rates in said policy set forth, which were as follows:

The premium for this policy is based on a fixed sum of $1,500 per annum for each proprietor, member of firm or officer of corporation actively engaged in the business, and $1,500 per annum
20 for each salesman working on a commission basis, plus the entire compensation earned during the policy period by all other employees of the assured engaged in the operation of the business as described in the preceding paragraph. For the purpose of this insurance the compensation for the policy period is estimated at $10,000, the premium rate being $3 on each $100 on a compensation not in excess of $10,000, and for
30 that portion of the compensation in excess of $10,000 and not in excess of $25,000, $2.25 for each $100 of such excess.

4. The said policy also provided that in consideration of an additional premium, to be determined by audit at the expiration of the policy period, at the rate of $5 per each $100 of livery earnings, it was understood and agreed that the policy should cover all cars of the de-
40 fendant while used for livery purposes, subject to the policy's terms and provisions.

5. The said policy also provided that in consideration of an additional premium of $50 it was understood and agreed that the said policy should be extended to cover one freight elevator while being used by the employees of the assured.

6. That on or about November 4, 1916, defendant notified plaintiff that it had cancelled said policy and returned the same to the plaintiff. 10

7. The plaintiff did all things stipulated and provided for it to be done in and by said policy, and in accordance with the provisions thereof caused an examination of the defendant's books to be made, and it appears therefrom that in accordance with the provisions of said policy the plaintiff is entitled to the sum of $523.92 by reason of the issuance of said policy. The said sum was determined as set forth in Schedule C2 hereto annexed and made a part hereof. 20

8. The defendant owes the plaintiff upon said policy, in accordance with the contract and agreement thereby entered into, the sum of $523.92.

FOURTH COUNT. 30

1. The plaintiff repeats the allegations contained in the first paragraph of the first count of this complaint.

2. On or about March 1, 1916, the plaintiff, at the special instance and request of the defendant, issued and delivered to it a certain paper writing, a copy of which is hereto annexed and marked Schedule D1, known as Fidelity & Deposit Company of Maryland, policy No. 6,301,-390; wherein and whereby the plaintiff, for a 40

certain sum of money therein stipulated to be paid by the defendant, agreed for a period of one year from March 1, 1916 to March 1, 1917, to indemnify Brock's Garage, Incorporated, for loss from liability imposed by law upon it for damages on account of bodily injuries or death suffered by any employee or employees of the defendant and resulting from an accident occurring during the period said policy was in force, and to defend in the name and on behalf of the defendant any suit brought against it to enforce a claim covered by said policy, whether groundless or not, and finally to pay all expenses incurred in defending any suit, including the interest on any verdict or judgment and any costs taxed against the defendant. And did further agree to do all manner of things in said policy more particularly and at length mentioned.

3. The defendant, in consideration of the issuance and delivery to it of said policy, agreed to pay for the same, in accordance with the rates therein set forth, a certain sum of money or premium, based on the entire payroll of all employees covered under said policy, which said rates were as follows:

Kind of Work	Estimated Payroll for Policy Period	Premium Rate per $100 of Payroll
Garage employees, excluding chauffeurs and clerical employees	$8000	.62
Drivers and helpers, wherever engaged	2000	.07
Chauffeurs and helpers, wherever engaged, if any,		

4. That on or about November 4, 1916, de-

fendant notified plaintiff that it had cancelled said policy and returned the same to the plaintiff.

5. The plaintiff did all things stipulated and provided for it to be done in and by said policy, and in accordance with the provisions thereof caused an examination of the defendant's books to be made, and it appears therefrom that in acordance with the provisions of said policy the plaintiff is entitled to the sum of $101.56 by reason of the issuance of said policy. The said sum was determined as set forth in Schedule D2 hereto annexed and made a part thereof.

6. The defendant owes the plaintiff upon said policy, in accordance with the contract and agreement thereby entered into, the sum of $101.56.

Plaintiff demands:

1. On the first count, $318.25 damages, with interest from November 22, 1916.

2. On the second count, $85.22 damages, with interest from November 22, 1916.

3. On the third count, $523.92 damages, with interest from March 1, 1916.

4. On the fourth count, $100.56 damages, with interest from March 1, 1916.

DICKINSON & BODINE,
Attorneys of Plaintiff.

Schedule A1.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Home Office, Baltimore, Md.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Herein Called the Company)

10 IN CONSIDERATION OF the premium and statements which are set forth in the Schedule of Statements, and which statements the Assured makes and warrants to be true by the acceptance of this Policy.

DOES HEREBY AGREE

(1) TO INDEMNIFY the person, firm or corporation named in Statement No. 1 of the Schedule 20 of Statements, herein called the Assured, AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries or death suffered, as the result of an accident occurring while this Policy is in force, by any person or persons and caused by the maintenance or use of the automobile or automobiles, described in Statement numbered 7 of the said Schedule, while with-30 in the limits of the United States or Canada or by the loading and unloading of such automobile or automobiles provided for the transportation of merchandise as are specified in Statement numbered 7 of the said Schedule.

(2) TO DEFEND in the name and on behalf of the Assured any suit brought against the Assured to enforce a claim covered by the Policy, whether groundless or not, for damages on account 40 of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons un-

der the circumstances and at the place or places described in the preceding paragraph and resulting from an accident occurring during the period this Policy is in force.

(3) TO PAY all expenses, irrespective of the limits expressed in Statement numbered 4 of the Schedule of Statements, incurred by the Company in defending any suit, including any costs taxed against the Assured and the interest accruing on that part of the verdict or judgment not in excess of the Policy limits. 10

SUBJECT TO THE FOLLOWING CONDITIONS:

A: Upon the occurrence of an accident the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company at its Home Office in Baltimore, Maryland, or its authorized representative. If a claim is made on account of such an accident the Assured shall give like notice thereof with full particulars. If thereafter any suit is brought against the Assured to enforce such a claim, the Assured shall immediately forward to the Company at its Home Office every summons or other process as soon as the same shall have been served on him. The Company reserves the right to settle any claim or suit. Whenever requested by the Company, the Assured shall aid in securing information, evidence, and the attendance of witnesses; in effecting settlements; and in prosecuting appeal. The Assured shall at all times render to the Company all co-operation and assistance within his power. 20 30

B: This Policy does not cover loss from liability for, or any suit based on, bodily injuries or death caused by such automobile or automobiles— 40

(1) while being driven or operated by any person contrary to the statutory age limit of any State or under the age of sixteen (16) years where there is no age limit; (2) while being driven or operated in any race or speed test; (3) while being used or operated for any purpose other than specified in Statement numbered 7 of the Schedule of Statements.

C: This Policy does not cover any obligation assumed by or imposed upon the Assured by any Workmen's or Employee's Compensation agreement, plan or law, unless the Policy is extended by endorsement to cover such obligation.

D: The Assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the Company on account of any claim; nor except at his own cost, settle any claim, nor without written consent of the Company previously given, incur any expense; *except that he may provide at the time of the accident, and at the cost of the Company, such immediate surgical relief as is imperative.*

E: Without prejudice to the rights of the Assured as respects anything that has occurred during the time the Policy has been in force, either party may cancel this Policy by giving not less than five (5) days' written notice to the other, mailed under registered cover, stating when cancellation shall be effective. The Assured may cancel this Policy by like notice to the Company. If cancelled by the Company the Company shall be entitled to the earned premium, *pro rata,* when determined. If canceled by the Assured, the Company shall be entitled to the earned premium calculated on the basis of the short-rate table set forth hereon, but in no event shall the earned premium be less than the minimum premium specified

in Statement numbered 6 of the Schedule of Statements. The Company's check served on the Assured, or sent by registered mail to the Assured at the address given herein, shall be a sufficient tender of any unearned premium.

F: The Company or any of its duly authorized representatives shall have the right and opportunity at all reasonable times during the policy period to inspect any of the automobiles described herein. 10

G: No assignment of interest under this Policy shall be valid unless the consent of the Company is secured and endorsed hereon.

H: No action shall be brought against the Company under or by reason of this Policy unless it shall be brought by the Assured for a loss, defined hereunder, after final judgment has been rendered in a suit, described hereunder, and within two years from the date of such judgment, to wit: for a loss that the Assured has actually sustained by the Assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the Assured for damages on account of the negligence of the Assured; (b) of the expenses, excluding any payment in settlement of a suit or judgment) incurred by the Assured in the defense of a suit against the Assured for damages on account of the negligence or alleged negligence of the Assured. The Company does not prejudice by this condition any defenses against such action that it may be entitled to make under this Policy. 20 30

I: If the limit of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, and in force in the State in which this Policy is issued, such specific statutory 40

provision shall supersede any condition in this contract inconsistent therewith.

J: In case of payment of loss or expense under this Policy, the Company shall be subrogated to the amount of such payment to all of the Assured's rights of recovery for such loss or expense against persons, corporations or estates, and the
10 Assured shall execute any and all papers required and shall co-operate with the Company to secure to the Company such rights.

K: If the Assured carries a Policy of another insurer against a loss covered by this Policy, the Assured shall not be entitled to recover from this Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of insurance applicable thereto, whether
20 valid or not.

L: No erasure or change appearing on this Policy as originally printed and no change or waiver of any of its terms or conditions or statements, whether made before or after the date of this Policy, shall be valid unless set forth in an endorsement added hereto and signed by the President, Vice-President or Secretary of the Company. Notice given to or the knowledge of any
30 agent or any other person, whether received or acquired before or after the date of this Policy, shall not be held to waive any of the terms or conditions or statements of this Policy, or to preclude the Company from asserting any defense under said terms, conditions and statements, unless set forth in an endorsement added hereto and signed by the President, Vice-President or Secretary of the Company.
40

M: The limit of the Company's liability for each person injured or killed and the limit of the

Company's total liability for more than one person injured or killed in the same accident, the estimated premium, the minimum premium and the term of the Policy are all set forth in the Schedule of Statements and are made conditions of this Policy.

SCHEDULE OF STATEMENTS.

Div....Class.... Pol. No....H. O. No. 1552958 10

STATEMENT 1: Name of Assured, Brock's Garage, Inc.

STATEMENT 2: Address of Assured, Canal St. N. of E. State St.

STATEMENT 3: Assured is Corporation.

STATEMENT 4: The Company's liability for loss from an accident resulting in bodily injuries to 20 or in the death of one person is limited to Five thousand Dollars ($5,000.00), and subject to the same limit for each person, the Company's total liabilty for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten thousand Dollars ($10,000).

STATEMENT 5: The term of this Policy begins at noon on the 1st day of March, 1915, and ends 30 at noon on the 1st day of March, 1916, standard time, at the Assured's address set forth herein.

STATEMENT 6: The estimated premium for this Policy is Three hundred and 00/100 Dollars ($300.00) and the minimum premium is Ninety Dollars ($90.00).

STATEMENT 7: The following Schedule contains a 40 full description of Automobiles to be covered by this Policy.

Descriptive Trade Names	Factory Number	Year Built	Power — Kind	Power — Horse Power	Type	The purpose for which Automobiles are to be used	Premium
Varies		Varies	Varies		Varies	See endorsement attached	See endorsement attached

End #600 and Ends. similar to Nos. 40923 and 40924.

STATEMENT 8: The Assured's occupation is automobile garage.

STATEMENT 9: The number of chauffeurs employed by Assured is varies.

STATEMENT 10: The Automobiles are principally used at U. S. Of America.

STATEMENT 11: The Automobiles are principally kept at Trenton, N. J.

STATEMENT 12: None of the above described Automobiles will be rented to others, or used to carry passengers for a consideration, except as follows: **See endorsement attached.**

STATEMENT 13: No claim has ever been made against Assured for personal injury caused by any Automobile driven or for Assured, except as follows: No exception.

STATEMENT 14: No company during the past two years has issued Automobile insurance to the Assured, except as follows: Commercial Casualty Co. & F. & D. Co.

STATEMENT 15: No company has cancelled or refused to issue Automobile insurance to Assured, except as follows: No exception.

Brock's Garage,
Assured.

AUTOMOBILE LIABILITY POLICY.

Renewal of {Pol. No. 1536826.
H. O. No. 206231.

Mgr. or Genl. Agt. The Van Horn Co., Inc.
Agent or Broker........................

COPY

Duplicate. No. 12372 10

FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Automobile Garage-General Liability Endorsement.

In Consideration of the warranties contained in the policy to which this endorsement is attached and subject otherwise to all the policy terms, limits and conditions, the Fidelity and Deposit Company of Maryland (herein called the Company) 20

DOES HEREBY AGREE TO INDEMNIFY

the Assured against loss from the liability imposed by law upon the Assured for damages on account of bodily injuries or death accidentally suffered by any person or persons by reason of the maintenance and operation of an automobile sales room, garage, station or repair shop located at Canal St. North of E. State St., Trenton, Mercer Co., N. J., or upon the sidewalk or other ways immediately adjacent thereto. 30

This policy does not cover loss from liability for or any suit based on injuries or death suffered by any person or persons (1) while in, entering or leaving any elevator or hoist, or by reason of the existence of the well, shaft or hoistway of any such elevator or hoist, or because of the machinery, not generating power, used solely in the 40

operation of any such elevator or hoist. (2) In connection with, or as the result wholly or partly of, repairing, altering, constructing or wrecking any structure or plant; but ordinary repairs made by the employees of the Assured are covered hereunder. (3) By reason of the manufacture of any material used or intended for use as an explosive; (4) before the premises are fully completed and ready for occupancy.

The premium for this policy is based on a fixed sum of Fifteen hundred dollars ($1500) per annum for each proprietor, member of firm or officer of corporation actively engaged in the business and Fifteen hundred dollars ($1500) per annum for each salesman working on a commission basis plus the entire compensation earned during the policy period by all other employees of the Assured engaged in the operation of the business as described in the preceding paragraph.

The Company shall have the right and opportunity, whenever it so desires within the period of this policy and within one year from termination of this policy, to examine the books and records of the Assured as respects the compensation earned by all employes of the Assured and the Assured shall render reasonable assistance. The Assured shall, whenever the Company so requests, file with the Company a written statement of the amount of compensation earned by the Assured's employees during any part of the period of the policy and at the end of the said period, the Assured shall file with the Company such a statement covering the full period of the policy. The rendering of any estimate or statement, or the making of any settlement, shall not bar the examination herein provided for nor the right of the Company to an additional premium. If such entire compensation exceeds the estimate set forth

below, the Assured shall immediately pay the Company the additional premium; if such entire compensation is less than the estimate set forth below, the Company will return the unearned premium when determined; but the Company shall be entitled to not less than the minimum premium which under this policy is Ninety and 00/100 dollars ($90.00). 10

For the purpose of this insurance the compensation for the policy period is hereby estimated at Ten thousand dollars ($10,000), the premium rate being Three dollars ($3.00) per each one hundred dollars ($100.00) of compensation not in excess of ten thousand dollars ($10,000.00) and for that portion of such compensation in excess of ten thousand dollars and not in excess of twenty-five thousand dollars two and 25/100 dollars ($2.25) per each one hundred dollars ($100.00) of such excess. 20

Attached to and forming part of Policy No. 1552958 issued by the Fidelity and Deposit Company of Maryland to Brock's Garage, Inc., of Trenton, N. J., and shall take effect at noon on the 1st day of March, 1915, and expire at noon on the 1st day of March, 1916, standard time, at the address set forth above.

Countersigned at.............. 30
this......day of..........191....
....
Duly Authorized Agent.

EDWARD WARFIELD,
President.

40

COPY

Duplicate No. 10026

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

Automobile—Employee Elimination

In consideration of the reduced rate at which
10 this policy is written, it is hereby understood and
agreed, subject otherwise to all the policy terms,
limits and conditions, that this policy does not
cover loss from liability for, or any suit based on,
injuries or death suffered by any employe or em-
ployes of the Assured while engaged in operating
or caring for the automobiles described under
Statement No. 7 of the Schedule of Statements.

Attached to and forms part of Automobile Li-
20 ability Policy No. 1552958 of the FIDELITY AND
DEPOSIT COMPANY OF MARYLAND, issued
to Brock's Garage, Inc., of Trenton, N. J.

Dated at........this....day of........19....

Not valid until countersigned by

....

Duly Authorized Agent.

EDWARD WARFIELD,
30 President.

ENDORSEMENT.

No. A61309

It is hereby Understood and Agreed (Otherwise
subject to all the terms, limits and conditions of
this policy) that

In consideration of an additional premium of
Twelve and 50/100 ($12.50) dollars, it is hereby
40 understood and agreed that the policy to which
the endorsement is attached is extended to cover

one freight elevator while being used by the employees of the Assured. It is further understood and agreed that the Company will not be liable for any accidents to persons not in the employ of the Assured, while entering, riding in, or upon this elevator or hoist.

Attached to and forming part of Policy No. 1552958 issued by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND. 10

To

Brock's Garage, Inc.

EDWARD WARFIELD,
President.

Dated at......this......day of........191....

Countersigned....................

Authorized Representative. 20

ENDORSEMENT.

No. A61411

It is hereby Understood and Agreed (Otherwise subject to all the terms, limits and conditions of this policy) that

In consideration of an additional premium to be determined by audit at expiration of the policy period at a rate of $5.00 per each $100.00 of livery earnings, it is hereby understood and agreed, subject, otherwise to all the policy terms, limits and 30 conditions that the undermentioned policy covers all cars of the assured while being used for livery purposes. It is further understood and agreed that the assured will keep a separate account for all earnings obtained from the livery uses of his cars.

Attached to and forming part of Policy No. Automobile #1552958 issued by the FIDELITY 40 AND DEPOSIT COMPANY OF MARYLAND.

To
Brock's Garage, Inc.

EDWARD WARFIELD,
President.

Dated at......this......day of........191....
Countersigned....................

Authorized Representative.

10

ENDORSEMENT.

No. 61410

It is hereby Understood and Agreed (Otherwise subject to all the terms, limits and conditions of this policy) that

It is hereby understood and agreed, subject otherwise to all the policy terms, limits and conditions, that the policy to which this endorsement
20 is attached covers all work incidental and necessary to the conduct of the Assured's business, including the operation of any style, type or make of automobile, for all purposes including the renting and hiring of automobiles except taxicabs, for the use of individuals, co-partnerships and corporations other than the Assured, whether such use involves the carrying of either passengers or property and also such transportation and deliv-
30 ery of goods or merchandise for prospective purchasers as is strictly incidental to the

Attached to and forming part of Policy No. 1552958 issued by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

To
Brock's Garage, Inc.

EDWARD WARFIELD,
President.

40

Dated at......this......day of........191....
Countersigned....................

Authorized Representative.

Schedule A2.

BROCK'S GARAGE, INCORPORATED,

To

FIDELITY & DEPOSIT COMPANY OF MARYLAND, DR.

To Premiums Developed by Audit as follows:

Policy 1552958. March 1, 1915 to March 1, 1916. 10

First	$10,000.00	at $3.00 E. P.	$300.00
Balance	13,921.92	" 2.25 E. P.	313.25
Livery earnings	100.00	" 5.00 E. P.	5.00
	Total earned premium,		$618.25
	Deposit premium,		300.00
	Additional premium,		318.25

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Schedule B1.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Home Office, Baltimore, Md.

(Herein Called the Company.)

In consideration of the premium and statements which are set forth in the Schedule of Statements, and which statements the assured makes and warrants to be true by the acceptance of this policy. 30

DUPLICATE.

WORKMEN'S COMPENSATION ENDORSEMENT.

No. 14,905.

Date March 1st, 1915. 40

1. It is hereby understood and agreed that

any claim or suit against the Assured under the New Jersey Workmen's Compensation Law, namely, Chapter 95 of the New Jersey Laws of 1911, as amended by Chapter 174, Laws of 1913, excluding the paragraphs of the said law specified below as excluded, shall be deemed a claim or suit against the Assured for damages on acount of bodily injuries or death, and any loss sustained by the
10 Assured under the provisions of said law shall be deemed a loss from the liability imposed by law upon the Assured for damages on account of bodily injuries or death.

2. The following paragraphs of the Act referred to are excluded from the operation of this endorsement and no claim, suit or loss under the said paragraphs shall be covered under this en-
20 dorsement or policy, namely: "No exceptions."

3. This endorsement shall not apply to any injuries or death suffered as the result of an accident occurring prior to the date of this indorsement.

This indorsement when countersigned by a duly authorized agent of the Company and attached to Policy No. 1235492, issued to Brock's Garage, Inc., of Trenton, N. J., shall be valid and shall form
30 part of said Policy.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.
Edward Warfield,
President.

(1) TO IDEMNIFY the person, firm or corporation named in Statement No. 1 of the Schedule of Statements, herein called the Assured,
40 AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries or death

suffered, as the result of an accident occurring while this Policy is in force, by any employee or employees of the Assured engaged in the prosecution of the work described and at the location named in Statement numbered 7 of the said Schedule, including chauffeurs, drivers and their helpers (not covered by Automobile and/or Teams insurance in this Company) wherever they may be in the service of the Assured. 10

(2) TO DEFEND in the name and on behalf of the Assured any suit brought against the Assured to enforce a claim covered by the Policy, whether groundless or not, for damages on account of injuries or death suffered or alleged to have been suffered, by any employee or employees of the Assured at the location and under the circumstances described in the preceding paragraph and resulting from an accident occurring during the period this Policy is in force. 20

(3) TO PAY all expenses, irrespective of the limits expressed in Statement numbered 4 of the Schedule of Statements, incurred by the Company in defending any suit, including any costs taxed against the Assured and the interest accruing on that part of the verdict or judgment not in excess of the Policy limits. 30

SUBJECT TO THE FOLLOWING CONDITIONS:

A: Upon the occurrence of an accident the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company at its Home Office in Baltimore, Maryland, or to its authorized representative. If a claim is made on account of such an accident the Assured shall give like notice thereof with full particulars. If thereafter any suit is 40

brought against the Assured to enforce such a claim, the Assured shall immediately forward to the Company at its Home Office every summons or other process as soon as the same shall have been served on him. The Company reserves the right to settle any claim or suit. Whenever requested by the Company, the Assured shall aid in securing information, evidence, and the attendance of witnesses; in effecting settlements; and in prosecuting appeals. The Assured shall at all times render to the Company all co-operation and assistance within his power.

B: This policy does not cover loss from liability for, or any suit based on, injuries or death—(1) suffered by any person unless his compensation is included in the estimate set forth in the Schedule (but this exclusion shall not apply to injuries or death suffered by chauffeurs, drivers or their helpers covered by Automobile and/or Teams insurance in this Company while such employees are engaged in duties other than those of a chauffeur, driver or helper); (2) suffered or caused by any child employed by the Assured contrary to law or under fourteen years of age in any State in which there is no law restricting the age of employment in the Assured's trade or business; (3) suffered or caused by a contract-convict laborer.

C: This Policy does not cover any obligation assumed by or imposed upon the Assured by any Workmen's or Employee's compensation agreement, plan or law, unless the Policy is extended by endorsement to cover such obligation.

D: The Assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the Company

on account of any claim; nor, except at its own cost, settle any claim; nor without the written consent of the Company previously given, incur any expense.

E: Without prejudice to the right of the Assured as respects anything that has occurred during the time the Policy has been in force, either party may cancel this Policy by giving not less than 10 five (5) days' written notice to the other, mailed under registered cover, stating when cancellation shall be effective. If cancelled by the Company, or by the Assured on retiring from business, the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured at any time other than when retiring from business, the Company shall be entitled to the earned premium calculated on the basis of 20 short-rate table set forth hereon. The earned premium shall be computed on the entire compensation for the year as indicated by the actual compensation earned by the employees of the Assured during the time the Policy has been in force. In any case where cancellation is at the request of the Assured, the Company shall be entitled to not less than the minimum premium specified in Statement numbered 6 of the 30 Schedule of Statements. The Company's check served on the Assured, or sent by registered mail to the Assured at the address given herein, shall be a sufficient tender of any unearned premium; but no unearned premium shall be payable until the Assured has filed with the Company a statement of the actual compensation earned by all the employees of the Assured covered hereunder during the period the Policy 40 was in force.

F: The Company shall have the right and opportunity, whenever it so desires within the

period of this Policy and within one year from the termination of this Policy, to examine the books and records of the Assured as respects the compensation earned by the employees of the Assured, and the Assured shall render reasonable assistance. The Assured shall, whenever the Company so requests, file with the Company a written statement of the amount of compensation earned 10 by the Assured's employees during any part of the period of the Policy, and at the end of the said period the Assured shall file with the Company such a statement covering the full period of the Policy. The rendering of any estimate or statement or the making of any settlement shall not bar the examination herein provided for, nor the right of the Company to an additional premium.

20 G: The premium is based on the entire compensation of which an estimate is given in the Schedule. If such entire compensation exceeds the estimate set forth in the Schedule the Assured shall immediately pay the Company the additional earned premium; if such entire compensation is less than the estimate set forth in the Schedule, the Company will return the unearned premium when determined; but the Com- 30 pany shall be entitled to not less than the minimum premium specified in Statement numbered 6 of the Schedule of Statements.

H: The Company shall have the right and opportunity, whenever it so desires, to inspect the plant, works, machinery and appliances of the Assured: and the Company or any of its inspectors may suspend this insurance as respects the entire risk or as respects any part thereof 40 by a written notice served on the Assured, or mailed to the Assured at the address given herein.

Reinstatement of the insurance in any such case must be in writing signed by the President, Vice-President, or Secretary of the Company, or by one of the Company's regular inspectors.

I: No assignment of interest under this Policy shall be valid unless the consent of the Company is secured and endorsed hereon.

J: No action shall be brought against the Company under or by reason of this Policy unless it shall be brought by the Assured for a loss, defined hereunder, after final judgment has been rendered in a suit, described hereunder, and within two years from the date of such judgment, to wit: for a loss that the Assured has actually sustained by the Assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the Assured for damages on account of the negligence of the Assured; (b) of the expenses (excluding any payment in settlement of a suit or judgment) incurred by the Assured in the defense of a suit against the Assured for damages on account of the negligence or alleged negligence of the Assured. The Company does not prejudice by this condition, any defenses against such action that it may be entitled to make under this Policy.

K: If the limit of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, and in force in the State in which this Policy is issued, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

L: In case of payment of loss or expense under this Policy, the Company shall be subrogated to the amount of such payment to all the Assured's

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rights of recovery for such loss or expense against persons, corporation or estates, and the Assured shall execute any and all papers required and shall co-operate with the Company to secure to the Company such rights.

M: If the Assured carries the policy of another insurer against a loss covered by this 10 Policy, the Assured shall not be entitled to recover from this Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of insurance applicable thereto, whether valid or not.

N: No erasure or change appearing on this Policy as originally printed and no change or waiver of any of its terms or conditions or statements, whether made before or after the date of 20 this policy, shall be valid unless set forth in an endorsement added hereto and signed by the President, Vice-President or Secretary of the Company. Notice given to or the knowledge of any agent or any other person, whether received or acquired before or after the date of this Policy, shall not be held to waive any of the terms or conditions or statements of this Policy, or to preclude the Company from asserting any defense under said terms, 30 conditions, and statements, unless set forth in an endorsement added hereto and signed by the President, Vice-President or Secretary of the Company.

O: The limit of the Company's liability for each person injured or killed, and the limit of the Company's total liability for more than one person injured or killed in the same accident, the estimated permium, the minimum premium and the term of the policy are all set forth in the 40 Schedule of Statements and are made conditions of this Policy.

SCHEDULE OF STATEMENTS.

Div.....Class.... H. O. No. 2762 Pol. No. 1225492

STATEMENT 1: Name of Assured, Brock's Garage, Inc.

STATEMENT 2: Address of Assured, Canal Street North of E. State St., Mercer Co., N. J.

STATEMENT 3: Assured is Corporation. 10

STATEMENT 4: The Company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to unlimited Dollars ($........), and subject to the same limit for each person, the Company's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to................ Dollars ($........). 20

STATEMENT 5: The term of this Policy begins at noon on the 1st day of March, 1915, and ends at noon on the 1st day of March, 1916, standard time, at the Assured's address set forth herein.

STATEMENT 6: The estimated premium for this Policy is Sixty-two and 20/100 Dollars ($62.20) and the minimum premium is Ten & 00/100 Dollars ($10.00). 30

STATEMENT 7: The description of the Assured's work, the location where such work is to be done, and the estimated compensation of employees for the period of the Policy are given in the following table:

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Kind of Work	Estimated Compensation for Period of Policy	Premium Rate per $100 of Compensation	Estimated Amount of Premium	Location Where Work is to Be Done
Garage employees excluding Chauffeurs & Clerical force	$8000	$0.76	$60.80	Canal St. N. of E. State Street, Trenton, N. J.
Employees—Clerical	2000	.07	1.40	and elsewhere in
Chauffeurs if any		1.36		State of N. J.

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STATEMENT 8: The estimated compensation set forth in Statement 7, covers the compensation of any nature whatsoever, including all allowances, whether paid in cash, board, store certificates, merchandise, credits or in any other way, of all employees engaged in the work described in the said statement as carried on by the Assured at the locations given therein; the compensation of the President, Vice-President, Secretary, Treasurer, excepting only the compensation of the persons described in Statement 9.

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STATEMENT 9: Pursuant to the above statment, the compensation of the following persons is excluded from the estimated compensation: contractors other than piece-workers, No exception.

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STATEMENT 10: No business operations similar to those described in Statement 7 are conducted by the Assured at any location not designated therein, except as follows: No exception.

STATEMENT 11: No wrecking or demolition is done, except as follows: No exception.

STATEMENT 12: No explosives are used, except as follows: Incidental to business.

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STATEMENT 13: The Assured does not operate a railroad in connection with the work described

in the schedule, except as follows: No exceptions.

STATEMENT 14: Of the kinds of insurance named in the following table, the Assured carries such as he designates by the name of the company. Auto Liability, F. & D. Co. Workmen's Collective, None.

STATEMENT 15: No company during the past three years has canceled or refused to issue to the Assured any Liability insurance, except as follows: No exceptions. 10

STATEMENT 16: No company during the past two years has issued Liability insurance to the Assured, except as follows: Commercial Casualty Co. F. & D. Co.

STATEMENT 17: The entire compensation earned by all employees of the Assured during the year ending December 31, last, was $10,000. 20

BROCK'S GARAGE, INC.,
Assured.

CONTRACTOR'S EMPOYERS' LIABILITY POLICY.

Renewal of

Pol. No. 1222898.
H. O. No. 206239. 30

The Van Horn Co., Inc.,
Mgr. or Genl. Agt.

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Schedule B2.

Brock's Garage, Incorporated,
To
Fidelity & Deposit Company of Maryland, Dr.

TO PREMIUMS DEVELOPED BY AUDIT AS FOLLOWS:

10 Policy 1225492. March 1, 1915, to March 1, 1916.

Garage	$13466.		
Store	4700.		
Salesman	760.		
	$18926.	at $ .76 E. P.	$143.84
Clerical	1976.		
Brock, Sr.	1500.		
Brock, Jr.	1300.		
	$ 4776.	at .07 E. P.	3.34
Chauffeurs	18.	" 1.36 E. P.	.24
		Total Earned Premium	$147.42
		Deposit Premium	62.20
		Additional Premium	$85.22

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Schedule C1.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Home Office, Baltimore, M. D.

(Herein called the Company)

IN CONSIDERATION OF the premium and statements which are set forth in the Schedule
40 of Statements, and which statements the Assured

makes and warrants to be true by the acceptance of this Policy,

DOES HEREBY AGREE

(1) TO INDEMNIFY the person, firm or corporation named in Statement No. 1 of the Schedule of Statements, herein called the Assured, AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries or death suffered, as the result of an accident occurring while this Policy is in force, by any person or persons and caused by the maintenance or use of the automobile or automobiles, described in Statement numbered 7 of the said Schedule, while within the limits of the United States or Canada or by the loading and unloading of such automobile or automobiles provided for the transportation of merchandise as are specified in Statement numbered 7 of the said Schedule.

(2) TO DEFEND in the name and on behalf of the Assured any suit brought against the Assured to enforce a claim covered by the Policy, whether groundless or not, for damages on account of bodily injuries or death suffered, or alleged to have been suffered, by any person or persons under the circumstances and at the place or places described in the preceding paragraph and resulting from an accident occurring during the period this Policy is in force.

(3) TO PAY all expenses, irrespective of the limits expressed in Statement numbered 4 of the Schedule of Statements, incurred by the Company in defending any suit, including any costs taxed against the Assured and the interest accruing on that part of the verdict or judgment not in excess of the Policy limits.

SUBJECT TO THE FOLLOWING CONDITIONS:

A: Upon the occurrence of an accident the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company at its Home Office in Baltimore, Maryland, or its authorized repre-
10 sentative. If a claim is made on account of such an accident the Assured shall give like notice thereof with full particulars. If thereafter any suit is brought against the Assured to enforce such a claim, the Assured shall immediately forward to the Company at its Home Office every summons or other process as soon as the same shall have been served on him. The Company reserves the right to settle any claim or
20 suit. Whenever requested by the Company, the Assured shall aid in securing information, evidence, and the attendance of witnesses; in effecting settlements; and in prosecuting appeals. The Assured shall at all times render to the Company all co-operation and assistance within his power.

B: This Policy does not cover loss from liability for, or any suit based on, bodily injuries or death caused by such automobile or automobiles—(1)
30 while being driven or operated by any person contrary to the statutory age limit of any State or under the age of sixteen (16) years where there is no age limit; (2) while being driven or operated in any race or speed test; (3) while being used or operated for any purpose other than specified in Statement number 7 of the Schedule of Statements.

C: This Policy does not cover any obliga-
40 tion assumed by or imposed upon the Assured by any Workmen's or Employee's Compensation

agreement, plan or law, unless the Policy is extended by endorsement to cover such obligation.

D: The Assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the Company on account of any claim; nor except at his own cost, settle any claim, nor without written consent of the Company previously given, incur any expense; except that he may provide at the time of the accident, and at the cost of the Company, such immediate surgical relief as is imperative. 10

E: Without prejudice to the rights of the Assured as respects anything that has occurred during the time the policy has been in force, either party may cancel this Policy by giving not less than five (5) days' written notice to the other, mailed under registered cover, stating when cancellation shall be effective. The Assured may cancel this Policy by like notice to the Company. If cancelled by the Company the Company shall be entitled to the earned premium, pro rata, when determined. If cancelled by the Assured, the Company shall be entitled to the earned premium calculated on the basis of the short-rate table set forth hereon, but in no event shall the earned premium be less than the minimum premium specified in Statement numbered 6 of the Schedule of Statements. The Company's check served on the Assured, or sent by registered mail to the Assured at the address given herein, shall be a sufficient tender of any unearned premium. 20 30

F: The Company or any of its duly authorized representatives shall have the right and opportunity at all reasonable times during the policy period to inspect any of the automobiles described herein. 40

G: No assignment of interest under this Policy shall be valid unless the consent of the Company is secured and endorsed hereon.

H: No action shall be brought against the Company under or by reason of this Policy unless it shall be brought by the Assured for a loss, defined hereunder, after final judgment has been
10 rendered in a suit, described hereunder, and within two years from the date of such judgment, to wit: for a loss that the Assured has actually sustained by the Assured's payment in money—(a) of a final judgment rendered after a trial in a suit against the Assured for damages on account of the negligence of the Assured; (b) of the expenses (excluding any payment in settlement of a suit or judgment) incurred by the As-
20 sured in the defense of a suit against the Assured for damages on account of the negligence or alleged negligence of the Assured. The Company does not prejudice by this condition any defenses against such action that it may be entitled to make under this Policy.

I: If the limit of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in
30 relation thereto, and in force in the State in which this Policy is issued, such specific statutory provision shall supersede any condition in this contract inconsistent therewith.

J: In case of payment of loss or expense under this Policy, the Company shall be subrogated to the amount of such payment to all of the Assured's rights of recovery for such loss or expense against persons, corporations or estates, and
40 the Assured shall execute any and all papers re-

quired and shall co-operate with the Company to secure to the Company such rights.

K: If the Assured carries a Policy of another insurer against a loss covered by this Policy, the Assured shall not be entitled to recover from this Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of insurance applicable thereto, whether valid or not. 10

L: No erasure or change appearing on this Policy as originally printed and no change or waiver of any of its terms or conditions or statements, whether made before or after the date of this Policy, shall be valid unless set forth in an endorsement added hereto and signed by the President, Vice-President or Secretary of the Company. Notice given to or the knowledge of any 20 agent or any other person, whether received or acquired before or after the date of this Policy, shall not be held to waive any of the terms or conditions or statements of this Policy, or to preclude the Company from asserting any defense under said terms, conditions and statements, unless set forth in an endorsement added hereto and signed by the President, Vice-President or Secretary of the Company. 30

M: The limit of the Company's liability for each person injured or killed and the limit of the Company's total liability for more than one person injured or killed in the same accident, the estimated premium, the minimum premium and the term of the Policy are all set forth in the Schedule of Statements and are made conditions of this Policy.

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SCHEDULE OF STATEMENTS.

Pol. No. 3325 H. O. No. 1567891

Statement 1.—Name of Assured Brock's Garage, Inc.

Statement 2.—Address of Assured Canal St. North of E. State St. Trenton, N. J.

Statement 3.—Assured is a Corporation.

Statement 4.—The Company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to five thousand dollars ($5,000) and, subject to the same limit for each person, the Company's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten thousand Dollars ($10,000).

Statement 5.—The term of this Policy begins at noon on the 1st day of March, 1916, and ends at noon on the 1st day of March, 1917, standard time, at the Assured's address set forth herein.

Statement 6.—The estimated premium for this Policy is Three hundred and 00/100 Dollars ($300.00) and the minimum premium is One hundred Dollars ($100.00).

Statement 7.—The following Schedule contains a full description of Automobiles to be covered by this Policy.

Descriptive Trade Names	Factory Number	Year Built	Power — Kind	Power — Horse Power	Type	The purpose for which Automobiles are to be used	Premium
Varies	Vs.	Vs.	Vs.	Vs.	Vs.	See endorsement attached	

Statement 8.—The Assured's occupation is Automobile garage.

Statement 9.—The number of chauffeurs employed by Assured varies.

Statement 10.—The Automobiles are principally used at U. S. of America.

Statement 11.—The Automobiles are principally kept at Trenton, N. J. 10

Statement 12.—None of the above described Automobiles will be rented to others, or used to carry passengers for a consideration, except as follows: See endorsement attached.

Statement 13.—No claim has ever been made against Assured for personal injury caused by any Automobile driven by or for Assured, except as follows: No exception. 20

Statement 14.—No company during the past two years has issued Austomobile insurance to the Assured, except as follows: Commercial Casualty Co. & F. & D. Co.

Statement 15.—No company has cancelled or refused to issue Automobile insurance to Assured, except as follows: No exceptions.

BROCK'S GARAGE, INC., 30
Assured.

AUTOMOBILE LIABILITY POLICY.

Renewal of { Pol. No. 1552958
H. O. No. 276211

Mgr. or Genl. Agt. The Van Horn Co. Inc.

ENDORSEMENT.

No. A77334 40

It is hereby Understood and Agreed (Otherwise

subject to all the terms, limits and conditions of this policy) that

In consideration of an additional premium of Fifty and 00/100 ($50.00) Dollars, it is hereby understood and agreed that the policy to which this endorsement is attached is extended to cover one freight elevator while being used by the employees of the Assured. It is further understood and agreed that the Company will not be liable for any accidents to persons not in the employ of the Assured, while entering, riding in, or upon this elevator or hoist.

Attached to and forming part of Policy No. 1567891 issued by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

To Brock's Garage, Inc.

EDWARD WARFIELD,
President.

Dated at....................this..........day of....................191..

Countersigned......................
Authorized Representative.

ENDORSEMENT.

No. A77323

It is hereby Understood and Agreed (Otherwise subject to all the terms, limits and conditions of this policy) that

In consideration of an additional premium to be determined by audit at expiration of the policy period at a rate of $5.00 per each $100 of livery earnings, it is hereby understood and agreed, subject otherwise to all the policy terms, limits and conditions that the undermentioned policy covers all cars of the Assured while being used for livery purposes. It is further understood and

agreed that the Assured will keep a separate account of all earnings obtained from the livery uses of his cars.

Attached to and forming part of Policy No. 1567891 issued by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

To Brock's Garage, Inc.

EDWARD WARFIELD,
President. 10

Dated at..................this..........day of..................191..

Countersigned.....................
Authorized Representative.

ENDORSEMENT.

No. A77325 20

It is hereby Understood and Agreed (Otherwise subject to all the terms, limits and conditions of this policy) that

It is hereby understood and agreed (Otherwise subject to all the terms, limits and conditions of this policy) that the undermentioned policy covers all work incidental and necessary to the conduct of the Assured's business of operating automobile garages, sales agency and service station including the operation of any style, type or make of automobile for all purposes in such business, transportation or delivery of goods or merchandise and the demonstration and sale of Commercial cars and for pleasure use, but not the renting or hiring of automobiles for the use of individuals co-partnership, corporations other than Assured when such use involves the carrying of passengers. 30 40

Attached to and forming part of Policy No. 1567891 issued by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

To Brock's Garage, Inc.

EDWARD WARFIELD,
President.

Dated at....................this..........day
10 of....................191..

Countersigned.....................
Authorized Representative.

ENDORSEMENT.

77326

It is hereby Understood and Agreed (Otherwise
20 subject to all the terms, limits and conditions of this policy) that

It is hereby understood and agreed (Otherwise subject to the terms, limits and conditions of this policy) that the remuneration of the clerical force not exposed to the operative or mechanical hazard of the business, but whose duties are solely confined to office duties only, is excluded from the estimated payroll on which the premium of this
30 policy is determined.

Attached to and forming part of Policy No. 1567891 issued by the FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

To Brock's Garage, Inc.

EDWARD WARFIELD,
President.

Dated at....................this..........day
of....................191..

40 Countersigned.....................
Authorized Representative.

ORIGINAL. No. 13151

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Automobile Garage-General Liability Endorsement.

In Consideration of the warranties contained in the policy to which this endorsement is attached and subject otherwise to all the policy terms, limits and conditions, the Fidelity and Deposit Company of Maryland (herein called the Company) 10

Does hereby agree to Indemnify

the Assured against loss from the liability imposed by law upon the Assured for damages on account of bodily injuries or death accidentally suffered by any person or persons by reason of the maintenance and operation of an automobile sales room, garage, station or repair shop located at Canal St. North of E. State St., Trenton, Mercer Co., N. J., or upon the sidewalk or other ways immediately adjacent thereto. 20

This policy does not cover loss from liability for or any suit based on injuries or death suffered by any person or persons (1) while in, entering or leaving any elevator or hoist, or by reason of the existence of the well, shaft or hoistway of any such elevator or hoist, or because of the machinery, not generating power, used solely in the operation of any such elevator or hoist. (2) In connection with, or as the result wholly or partly of, repairing, altering, constructing or wrecking any structure or plant; but ordinary repairs made by the employees of the Assured are covered hereunder. (3) By reason of the manufacture of any material used or intended for use 30 40

as an explosive; (4) before the premises are fully completed and ready for occupancy.

The premium for this policy is based on a fixed sum of Fifteen hundred and 00/100 dollars ($1500.00) per annum for each proprietor, member of firm or officer of corporation actively engaged in the business and Fifteen hundred and 00/100 dollars ($1500.00) per annum for each
10 salesman working on a commission basis plus the entire compensation earned during the policy period by all other employees of the Assured engaged in the operation of the business as described in the preceding paragraph.

The company shall have the right and opportunity, whenever it so desires within the period of this policy and within one year from termination of this policy, to examine the books and
20 records of the Assured as respects the compensation earned by all employees of the Assured and the Assured shall render reasonable assistance. The Assured shall, whenever the Company so requests, file with the Company a written statement of the amount of compensation earned by the Assured's employees during any part of the period of the policy and at the end of the said period, the Assured shall file with the Company
30 such a statement covering the full period of the policy. The rendering of any estimate or statement, or the making of any settlement, shall not bar the examination herein provided for nor the right of the Company to an additional premium. If such entire compensation exceeds the estimate set forth below, the Assured shall immediately pay the Company the additional premium; if such entire compensation is less than the estimate
40 set forth below, the Company will return the unearned premium when determined; but the Company shall be entitled to not less than the mini-

mum premium which under this policy is One hundred and 00/100 dollars ($100.00).

For the purpose of this insurance the compensation for the policy period is hereby estimated at Ten thousand dollars ($10,000), the premium rate being Three dollars ($3.00) per each one hundred dollars ($100.00) of compensation not in excess of ten thousand dollars ($10,000.00) and for that portion of such compensation in excess of ten thousand dollars and not in excess of twenty-five thousand dollars Two and 25/100 dollars ($2.25) per each one hundred dollars ($100.00) of such excess.

Attached to and forming part of Policy No. 1567891 issued by the Fidelity and Deposit Company of Maryland to Brock's Garage, Inc., of Trenton, N. J., and shall take effect at noon on the 1st day of March, 1916, and expire at noon on the 1st day of March, 1917, standard time, at the address set forth above.

Countersigned at............................
this.......................day of.............191..

....
Duly Authorized Agent.

EDWARD WARFIELD,
President.

Schedule C2.

Brock's Garage, Incorporated,

To

Fidelity & Deposit Company of Maryland, Dr.

TO PREMIUMS DEVELOPED BY AUDIT AS FOLLOWS:

10 Policy 1567891. March 1, 1916 to November 1, 1916.

Policy in force 245 days—80% S. R.

Actual wages—$15027.80

22385.45 (Yearly basis)

First—$10000 at $3.00—E. P.	$300.00
Balance—7908.36 at $2.25—E. P.	177.94
Elevator—50.00 at 80% S/R	40.00
Livery E—100.00 at 5.00 S/R	5.98
Total Earned Premium	$523.92

20

Schedule D1.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

Home Office, Baltimore, M. D.

30 (Herein called the Company)

IN CONSIDERATION of the person, firm or corporation named in Statement numbered 1 of the Declarations, herein called the Assured, having or presumed to have elected to pay compensation to his or its employees as provided by the Laws of the State named in Statement numbered 6 of the Declarations and in further considera-

40 tion of the premium and statements which are set forth in the Declarations, which the Assured

makes and represents as the basis of this insurance.

DOES HEREBY AGREE

(1) TO COMPENSATE the employees of the Assured, or their dependents, on account of bodily injuries or death resulting therefrom, sustained by any of said employees in the course of their employment during the period this Policy is in force, as provided by the Laws of the State named in Statement numbered 6 of the Declarations. 10

(2) TO INDEMNIFY the Assured for loss from liability imposed by law upon the Assured for damages on account of bodily injuries or death suffered by any employee or employees of the Assured and resulting from an accident occurring during the period this Policy is in force, providing the insurance of such loss is not prohibted by the Laws of the State named in Statement numbered 6 of the Declarations. 20

(3) TO DEFEND in the name and on behalf of the Assured any suit brought against the Assured to enforce a claim covered by this Policy, whether groundless or not.

(4) TO PAY all expenses incurred by the Company in defending any suit, including the interest on any verdict or judgment and any costs taxed against the Assured. 30

SUBJECT TO THE FOLLOWING CONDITIONS:

A: If the Assured does work at the location covered hereunder and not described in Statement numbered 7 of the Declarations, he shall pay a premium for such work based on the Company's rates in force at the time such work was done. 40

B: Upon the occurrence of an accident the Assured shall, as promptly as possible, forward written notice thereof to the Home Office of the Company at Baltimore, or to its authorized representative. If thereafter any suit or proceeding is brought or claim for compensation is made the Assured shall promptly send to the Company, or its authorized representative, every summons, 10 notice or other process served on him. The Assured shall at all times render to the Company all cooperation and assistance within his power.

C: The Company shall have the right to handle any claim covered by this Policy, and the Assured shall not interfere in any negotiation or legal proceedings conducted by the Company on account of any such claim; nor, except at the Assured's own cost settle any such claim; nor, without the 20 written consent of the Company, incur any expense other than that provided by the Laws of the State named in Statement numbered 6 of the Declarations for the payment of medicines and medical, surgical and hospital services.

D: Either the Company or the Assured may cancel this Policy by giving ten days' written notice served on the other or sent by registered mail to the address as given herein, and when 30 required by law, copy of such cancellation notice shall be filed with the proper State officials. If the Policy is cancelled by the Company the premium shall be calculated on a prorata basis; if cancelled by the Assured, at any time other than when retiring from business, the earned premium shall be calculated on the basis of the short rate table set forth hereon. The earned premium shall be calculated on the entire payroll of the 40 employees covered hereunder for the year as indicated by the actual wages earned by such

employees during the time the Policy has been in force. In any case, when cancellation is at the request of the Assured, the Company shall be entitled to not less than the minimum premium specified in Statement numbered 5 of the Declarations.

E: The Company shall have the right and opportunity, whenever it so desires, within the period of this Policy and within one year from the termination of this Policy, to examine the books and records of the Assured as respects the wages earned by the employees covered hereunder, including employees of contractors and sub-contractors to whom the Assured may be liable under the terms of the Laws of the State named in Statement numbered 6 of the Declarations unless such contractors or subcontractors are insured in an authorized company, association or State Fund and the Assured shall render reasonable assistance in connection therewith. The Assured shall file with the Company a written statement of the amount of wages earned by such employees during the period of this Policy and if impossible to secure wages of contractor's or sub-contractor's employees covered hereunder then one-third (1/3) of the contract price shall be taken as the amount of such wages. The rendering of any estimate or statement or the making of any settlement shall not bar the examination herein provided for, nor the right of the Company to an additional premium.

F: The premium is based on the entire payroll of all employees covered hereunder of which an estimate is given in the Declarations. If such entire payroll exceeds the estimate set forth in the Declarations, the Assured shall immediately pay the Company the additional earned premium; if such entire payroll is less than the estimate

set forth in the Declarations, the Company will return the unearned premium when determined; but the Company shall be entitled to not less than the minimum premium specified in Statement numbered 5 of the Declarations.

G: The Company shall have the right and opportunity, whenever it so desires, to inspect the
10 buildings, plant, works, machinery and appliances of the Assured.

H: No assignment of interest under this Policy shall be valid unless the consent of the Company is secured and endorsed hereon.

I: In case of payment of loss and/or expense under this Policy, the Company shall be subrogated to the amount of such payment to all of the
20 Assured's rights of recovery for such loss or expense against persons, corporations or estates, and the Assured shall execute any and all papers required, and shall cooperate with the Company to secure to the Company such rights.

J: If the Assured carries a Policy of another insurer against a loss covered by this Policy, the Company shall only be liable for its proportionate share of such loss.
30
K: No erasure or change appearing on this Policy as originally printed and no change or waiver of any of its terms or conditions or statements, whether made before or after the date of this Policy, shall be valid, unless set forth in an endorsement added hereto and signed by the President, Vice-President or Secretary of the Company. Notice given to or the knowledge of any agent or any other persons, whether received or
40 acquired before or after the date of this Policy, shall not be held to waive any of the terms or conditions or statements of this Policy, or to pre-

clude the Company from asserting any defense under said terms, conditions and statements, unless set forth in an endorsement added hereto and signed by the President, Vice-President or Secretary of the Company.

L: The estimated premium, the minimum premium, the Laws of the State to which this Policy applies and the term of the Policy are all set forth in the Declarations and are made conditions of this Policy. 10

Open Form. W. C.

DECLARATIONS.

Pol. No. 6301390 No. 332519

Statement 1.—Name of Assured, Brock's Garage, Inc. 20

Statement 2.—Address of Assured, Canal St., N. of E. State St., Trenton, Mercer Co. N. J.

Statement 3.—Assured is Corporation.

Statement 4.—The term of this Policy begins at noon on the 1st day of March, 1916, and ends at noon on the 1st day of March, 1917, standard time, at the Assured's address set forth herein.

Statement 5.—The estimated premium for this Policy is Fifty-one and 00/100 Dollars ($51.00), and the minimum premium is Ten and 00/100 Dollars ($10.00). 30

Statement 6.—This Policy is issued subject to the terms and provisions of Chapter 95, Laws of 1911, amended in accordance with Chapter 174, Laws of 1913 of the State of New Jersey, known as the New Jersey's Workmen's Compensation Law. 40

Statement 7.—The description of Assured's trade, business or work; place where such work is carried on; and estimated payroll of employees for the period of the Policy are given in the following table:

Assured's Trade, Business or Work	Place Where Trade, Business or Work is Carried On	Estimated Number of Employees	Estimated Pay-roll for Policy Period	Premium Rate per $100 of Pay-roll	Estimated Amount of Premium
Garage employees excluding chauffeurs and clerical employees	Canal St. North of E. State St. Trenton N. J. and elsewhere in State of N. J.		8000	.62	49.60
Clerical force—office duties only					
Drivers and helpers—wherever engaged			2000	.07	1.40
Chauffeurs and helpers—wherever engaged	If any				

Statement 8.—The estimated payroll set forth in Statement 7 covers the wages of any nature, whatsoever, including all allowances, whether paid in cash, board, store certificates, merchandise, credits, or in any other way, of all employees engaged in the trade, business or work described in the said Statement are carried on by the Assured at the place given therein.

Statement 9.—The remuneration of the President, Vice-President, Secretary or Treasurer, not exposed to the operative or mechanical hazard of the trade, business or work, is excluded from the estimated pay roll, except as follows: No exceptions.

Statement 10.—The number and kind of elvators in use: No exceptions.

Statement 11.—No business operations similar to those described in Statement 7 are conducted

by the Assured at any place not designated therein, except as follows: No exceptions.

Statement 12.—No wrecking or demolition is done, except as follows:

Statement 13.—No explosives are used, except as follows: Incidental to business.

Statment 14.—The Assured does not operate a railroad in connection with the work described in the schedule, except as follows: No exceptions. 10

Statement 15.—No part of the work described in Statement 7 is sub-contracted, directly or indirectly, except as follows: No exceptions.

Statement 16.—No company during the past three years has canceled or refused to issue to the Assured any Liability or Compensation insurance, except as follows: No exceptions. 20

Statement 17.—No company during the past two years has issued Liability or Compensation insurance to the Assured, except as follows: Commercial Casualty Co. and F. & D. Co.

Statement 18.—The entire wages earned by all employees of the Assured during the year ending December 31, last, was $10000.

BROCK'S GARAGE, INC., 30
Assured.

WORKMEN'S COMPENSATION POLICY.

(Open Form.)

Renewal of
Pol. No. 1225492.
H. O. No. 276240.
Mgr. of Genl. Agt. The Van Horn Co.

40

Schedule D2.

Brock's Garage, Incorporated,
To
Fidelity & Deposit Co. of Maryland, Dr.

TO PREMIUMS DEVELOPED BY AUDIT AS FOLLOWS:

10 Policy 6301390. March 1, 1916 to November 1, 1916.

Policy in Force—245 days—80% S. R.

Garage	Store	Clerical	Ex. Off.	Sales-man	Chauf-feur
3327.43	1050	532	938	420	6.00
5678.39	1972	836	420	660	12.00
			1760		
			660		
$9005.82	$3022	$1368	$3778	$1080	$18.00

20

Garage	$9005.82		
Store	3022.00		
Salesman	1080.00		
	$13107.82	at 62c. Earned Prem.	$97.04 S/R.
Clerical	1368.00		
Ex. Office	3778.00		
	$5146.00	at .07 E. P.	4.30 S/R.
Chauffeur	18.00	at 1.07 E. P.	.22
Total Earned Premium			$101.56

30

40

Affidavit of Merits.

(Filed March 6, 1917.)

State of New Jersey, }
County of Mercer, } ss.:

John L. Brock, of full age, being duly sworn on his oath, deposes and says that he is the President of the defendant company, and as such President is familiar with all of the details of the business of defendant corporation; that he verily believes that the defendant has a just and legal defense to the action on the merits of the case.

10

JOHN L. BROCK.

Sworn and subscribed to before me }
this 21st day of February, A. D. 1917. }

J. C. Slack,

[SEAL.] Notary Public.

20

Answer.

(Filed March 6, 1917.)

The defendant corporation, through its President, John L. Brock, says that:

Defense to First Count:

30

1. Defendant admits the matters and facts set forth in paragraph one.

2. Defendant admits that on or about March 1, 1915, that it took out Policy No. 1,552,959 from the Fidelity and Deposit Company of Maryland, through J. Chauncey Van Horn of the Van Horn Company, said Van Horn being the duly authorized agent of plaintiff.

40

3. Defendant admits that the policy mentioned in paragraph three of the first count was issued

to it, but says that it was issued to it by J. Chauncey Van Horn of the Van Horn Company, and that said policy will speak for itself.

4. The defendant says that the policy itself will determine the liability mentioned thereunder.

5. Defendant admits that it paid J. Chauncey Van Horn of the Van Horn Company the sum of three hundred dollars as a deposit premium.

10

6. Defendant denies that plaintiff is entitled to the sum of $318.25, as this defendant's accounting shows a balance of $7,245.92, instead of the balance amounting to the sum of $13,921.92 as found by plaintiff; in other words there should be a deduction of $6,676.00 for clerical work; and defendant further says that the true balance after deducting the sum of $300.00, as specified in paragraph five, should be the sum of $168.03.

20

7. Defendant denies that it owes plaintiff upon said policy the sum of $318.25.

Defense to Second Count:

1. Defendant admits the allegations contained in the first paragraph of the first count of this complaint.

30

2. Defendant admits that on or about March 1, 1915, that it took out Policy No. 1,225,492 from the Fidelity and Deposit Company of Maryland, through J. Chauncey Van Horn of the Van Horn Company, said Van Horn being the duly authorized agent of plaintiff.

3. Defendant denies that the estimated compensation for the period of the policy is correct.

40

4. Defendant admits that it has paid the sum of $62.20, but says that said sum of money was

paid to J. Chauncey Van Horn of the Van Horn Company.

5. Defendant denies that it owes plaintiff the sum of $85.22 on said policy.

6. Defendant denies that it owes plaintiff the sum of $85.22.

Defense to Third Count:

10

1. Defendant admits the matters and facts set forth in paragraph one.

2. Defendant admits that on or about March 1, 1916, that J. Chauncey Van Horn of the Van Horn Company issued to it and delivered to it a certain paper writing, known as Fidelity & Deposit Company of Maryland policy No. 1,567,-891, but says that said policy was cancelled by the Fidelity and Deposit Company of Maryland on Monday, June 4, 1916, in accordance with communication from said company dated May 31st, 1916.

20

3. Defendant admits the matters and things set forth in paragraph three of the third count, in so far as the premium rate is concerned.

4. Defendant admits the matters and things set forth in paragraph four of the third count.

30

5. Defendant admits the matters and things set forth in paragraph five of the third count.

6. Defendant denies the matters and things set forth in paragraph six of the third count.

7. Defendant denies that the sum of $523.92 is due by it to plaintiff.

8. Defendant denies that it owes plaintiff the sum of $523.92.

40

Defense to Fourth Count:

1. Defendant admits the matters and facts set forth in paragraph one.

2. Defendant admits that on or about March 1, 1916, that J. Chauncey VanHorn of the Van Horn Company issued to it and delivered to it a certain paper writing, known as Fidelity & Deposit Company of Maryland, Policy No. 6,301,-390, but says that said policy was cancelled by the Fidelity and Deposit Company of Maryland on Monday, June 4, 1916, in accordance with communication from said company dated May 31st, 1916.

3. Defendant admits the matters and things set forth in paragraph three of the fourth count, in so far as the premium rate is concerned.

4. Defendant admits the matters and things set forth in paragraph four of the fourth count.

5. Defendant admits the matters and things set forth in paragraph five of the fourth count.

Defendant denies that it owes the plaintiff the sum of $318.25 damages, with interest from November 22, 1916.

Defendant denies that it owes the plaintiff the sum of $85.22 damages, with interest from November 22, 1916.

Defendant denies that it owes the plaintiff the sum of $523.92 damages, with interest from March 1, 1916.

Defendant denies that it owes the plaintiff the sum of $101.56 damages, with interest from March 1, 1916.

And defendant further says that it had no business whatsoever with the Fidelity and Deposit Company of Maryland; that all of its said busi-

ness was conducted through J. Chauncey Van-Horn of the VanHorn Company, and with the said VanHorn alone, with full knowledge of the Fidelity and Deposit Company of Maryland, as shown by a letter of said Fidelity & Deposit Company of Maryland, addressed to the VanHorn Company of Trenton, New Jersey, dated March 1st, 1916. 10

HERVEY S. MOORE,
Attorney for Defendant,
Brock's Garage, Inc.

Reply.

(Filed March 14, 1917.)

1. Plaintiff says, as to the second paragraph of the defense to the first and second counts, that 20 such relation of agency or otherwise as existed between the Fidelity and Deposit Company of Maryland and the VanHorn Company on or about March 1, 1915, is evidenced by a written contract or agreement between it and the VanHorn Company, which it is ready to produce at such time and place as this Court may direct.

2. As to the second paragraph of the defense to third and fourth counts: Plaintiff denies that 30 J. Chauncey VanHorn or the VanHorn Company issued to the defendant the polices therein referred to, but says that they were its policies, duly issued, and that the same were not cancelled on Monday, June 4, 1916, but that the same remained in existence as good, valid and subsisting policies of insurance until November 4, 1916, when they were cancelled upon notice from the defendant in accordance with the provisions of 40 said policies.

3. Plaintiff denies each and every allegation of the defendant's answer inconsistent with the matters and things alleged in the complaint.

DICKINSON & BODINE,
Attorneys of Plaintiff.

Transcript of shorthand notes of testimony, etc., taken in the above stated matter before Hon.
10 Frank T. Lloyd, Circuit Court Judge, and a jury, at the Court house, Trenton, New Jersey, on Tuesday, May 22, 1917, at one thirty o'clock in the afternoon.

APPEARANCES:

JOSEPH L. BODINE, Esq. (DICKINSON & BODINE), for the Plaintiff.

HERVEY S. MOORE, Esq., and JOHN A. HARTPENCE, Esq., for the Defendant.

20

Jury called and sworn.

Counsel opened.

Mr. Bodine: I ask that the agency agreement between the Fidelity & Deposit Company of Maryland and the Van Horn Company be marked as an exhibit for the plaintiff numbered one.

Marked Exhibit P1.

30 Mr. Bodine: It is stipulated and agreed that the policies annexed to the bill of complaint in this case, copies of which are affixed to the transcript in the hands of the Court, are the policies delivered by the Fidelity & Deposit Company of Maryland to Brock's Garage.

Mr. Moore: We are satisfied to admit that.

Mr. Bodine: I ask they be marked in the order in which they are upon the transcript in your
40 Honor's hands, two, three, four and five.

Policies marked, respectively, Exhibit P2, Exhibit P3, Exhibit P4 and Exhibit P5.

Mr. Moore: There are four policies.

Mr. Bodine: Now, there is no dispute as to the amount paid by Mr. Brock? Mr. Brock has paid—Maybe we had better have proof on that.

The Court: Gentlemen, is there any one of these policies that you agree on as to the claim on it? 10

Mr. Bodine, Now, I think not. I think we are very far apart.

JAMES MESSLER, sworn for the plaintiff.

Direct examination by Mr. Bodine:

Q. Mr. Messler, you reside in the city of Trenton? A. I do.

Q. You were appointed in May of last year Receiver of the Van Horn Company, in bankruptcy, by the United States District Court for this district? A. Yes, sir. 20

Q. And you were subsequently elected Trustee of that bankrupt estate? A. Yes, sir.

Q. As Trustee did the books of account of the Van Horn Company come into your hands? A. They did.

Q. Have you the books of original entries of the Van Horn Company before you? A. Some of them, yes. 30

Q. Will you turn to those books and turn to the account of Brock's Garage, Incorporated? A. (Witness produces books.)

Q. Is there any entry therein with respect to a policy of the Fidelity & Deposit Company of Maryland, No. 1,552,959, or 958? A. Yes; 1,552,958.

Q. What is the entry with respect to that policy? A. Brock's Garage is charged with pre- 40

mium on that policy March 1st, 1915, amounting to $312.50.

Q. And the books show that that premium was paid? A. Paid to whom?

Q. To the Van Horn Company. A. The books show the premium was offset, not paid in cash.

Q. What was it offset with? A. Bills for service and materials; supplies delivered to the Van Horn Company by Brock's Garage.

10

Q. Now, will you turn to the books and see if there is any entry made with respect to the Fidelity & Deposit Company of Maryland, No. 1,225,492? A. There is.

Q. What is the entry? A. The same date, March 1st, 1915, premium. $62.50.

Q. And what appears with respect to that premium? A. The same as the other policy. It is offset.

20

Q. It is offset by materials? A. Yes.

Q. Is there any entry in these books with respect to a policy of the Fidelity & Deposit Company of Maryland, No. 1,567,891? A. Yes.

Q. What is the charge? A. $350.00.

Q. Does it appear that that was paid in any way? A. That is partially offset, the same as the others.

30

Q. Does it appear what it is offset by? A. There has no balance been struck since these charges were made. There is an allowance made on insurance premiums which goes to offset the premium. The other offsets are made up by the invoices.

Q. Now, is there any entry made with respect to the Fidelity & Deposit Company of Maryland Policy No. 6301390? A. Yes.

40

Q. What is the entry? A. March 1st, 1916, premium charge to Brock's Garage, $51.

Q. Is there any corresponding entry on the other

side of the ledger? A. No specific offset to that, only the total of the other entries.

Mr. Bodine: That is all.

Cross examination by Mr. Moore.

Q. Mr. Messler, do the last two accounts balance?

Mr. Bodine: I object to that as immaterial. It makes no difference whether the accounts balance or not. 10

The Court: It may not, but I do not see why the evidence is offered concerning the books if it is not intended to show something by it.

Mr. Bodine: This question goes to the general account.

The Court: Very true. The witness already remarked there is no specific item against this last account, but the whole charge is put against it. 20

The Witness: Partially offset; not in full.

Q. What is the balance, if any, Mr. Messler, which the books show that at the time of the appointment of the Receiver Brock's Garage owed the Van Horn Company? A. $232.34. 30

Q. And that all the rest of these various accounts were offset by either allowances on premiums unearned or by services or materials or garage service? A. Yes.

By the Court:

Q. What was that balance? A. $232.34.

By Mr. Moore:

40

Q. When were you appointed Receiver, Mr. Messler? A. May 12, 1916.

Q. When did the Van Horn Company go in bankruptcy if you know? A. May 12.

Q. Did any representative of the Fidelity & Deposit Company come to see you? A. They did.

Mr. Bodine: I object to that question.

The Court: I do not see that that is cross examination, Mr. Moore.

10

Q. Did you have any communications by letter with representatives of the Fidelity & Deposit Company relative to the size of the estate of the Van Horn Company?

Mr. Bodine: Same objection.

The Court: Same ruling. You see his attention has not been called to anything except these books and what they show.

20

Mr. Moore: I will take him as my own witness, if the Court please.

The Court: Well, it is better not to do it at this time.

Mr. Moore: All right. I thought it would save time; that is all.

Mr. Bodine: I think we had better have the books marked in evidence.

Mr. Moore: I suppose the pages should be designated as showing the Brock accounts.

30

The Court: Have you gone over it?

Mr. Moore: We admit we owe $227. It might be five or six dollars more or less, to the Van Horn Company.

Mr. Bodine: Do not argue the case in the hearing of the jury.

Mr. Moore: I am simply trying to answer the Court's question.

40

The Court: Do you admit the witness has accurately stated the facts?

Mr. Moore: We are perfectly satisfied. That is as close as we could figure the liability insurance premium for those set off.

The Court: Then there is no use keeping the books here, is there?

Mr. Bodine: Well, no.

The Court: Mr. Moore, my inquiry was directed to both sides of the account, of course. That is to say, that the charges were properly stated, and the credits were properly stated, by the witness. 10

Mr. Moore: So far as we know, yes. I have our account right here from our books.

The Court: They substantially agree, do they?

Mr. Moore: The items themselves may not agree, but the net result is practically correct. 20

The Court: So you are willing to accept that.

Mr. Moore: Yes, willing to accept the net result.

Mr. Bodine: Just at this moment I want to make clear the contention of the Fidelity & Deposit Company, and that is, that their charge for insurance cannot be offset. 30

The Court: I suppose you have in mind that these were not payments.

WILLIAM M. BAKER, sworn for the plaintiff.

Direct examination by Mr. Bodine:

Q. Mr. Baker, where do you live? A. Baltimore, Maryland. 40

Q. What is your business? A. I am the payroll auditor for the Fidelity & Deposit Company of Baltimore, Maryland.

Q. How long have you been such payroll auditor? A. About five years.

Q. Did you, in the Fall of last year, examine the books of Brock's garage, as payroll auditor of the Fidelity & Deposit Company of Maryland? A. I did.

Q. When did you make that examination? A. On November 17, 1916.

10 Q. Who was present? A. Mr. Brock and I went over the records together.

Q. Mr. John L. Brock? A. Yes, sir.

Q. Did you examine the payroll of Brock's garage during the period of March 1st, 1915, to March 1st, 1916? A. Yes, sir.

Q. And what did you find with respect to the payroll during that period? A. Do you mean how the records were or how they were kept?

20 Q. What did you find was the payroll?

The Court: What is the amount of it, do you mean?

Mr. Bodine: What was the amount of the payroll.

The Court: In dollars and cents?

The Witness: In dollars and cents?

The Court: Yes.

Witness examines papers.

30 The Court: What does the policy call for; an average payroll or what?

Mr. Bodine (reading): "The premium for this policy is based on a fixed sum of $1,500 per annum for each proprietor, member of firm or officer of corporation actively engaged in the business and $1,500 per annum for each salesman working on a commission basis plus the entire compensa-
40 tion earned during the policy period by all other employees of the assured engaged

in the operation of the business as described in the preceding paragraph."

Then, "For the purpose of this insurance the compensation for the policy period is hereby estimated as $10,000, the premium rate being three dollars per each one hundred dollars of compensation not in excess of $10,000, and for that portion of such compensation in excess of $10,000, and not in excess of $25,000, $2.25 for each one hundred dollars of such excess." 10

Then there is also an endorsement that provides for the payment of $12.50 to cover one freight elevator while being used by the employees; and then five dollars for each one hundred dollars of livery earnings and so forth.

The Court: The payroll is a variant thing, is it not? When is it determined? 20

Mr. Bodine: On the entire compensation earned during the policy period by the employees; that is, $1,500 for the proprietor and $1,500 for the salesmen and all the earnings of all the employees during the period of March 1st, 1915, to 1916.

The Court: Go on and answer the question. What is the total? 30

The Witness: The total was $23,921.92, and $100 extra for livery earnings.

By the Court:

Q. What is the livery earning? A. That is in case Brock would hire an automobile. For instance, people who come here and want to go to Princeton to see a football game or something like that.

40

By Mr. Bodine:

Q. Now, Mr. Baker, did you figure the earned premiums on that policy, based upon the payroll? A. Yes, sir.

Q. In accordance with the provisions of the policy with respect to the premiums which I have just read? A. Yes, sir.

Q. Now will you state what were the amounts of earned premiums as figured by you in accordance with the terms of that policy which has been marked 2 in evidence? A. Well, the total amount of the earned premiums on this policy was $618.25. The total that I read was $23,921.92. $10,000 of that amount was figured on three dollars per hundred. The balance, that is $13,922, was figured on a rate of $2.25 a hundred.

Q. And the livery earning? A. The livery earnings were figured on five dollars a hundred, and these three totals amount to $618.25.

Q. Was there a credit given to Brock's garage for $300 by reason of a premium for that policy? A. As far as the records I have here show there was $300 deducted from this $618.25, but my records do not show whether Mr. Brock paid that or not.

Mr. Bodine: A balance of $318.25 is all we claim as to that policy.

Mr. Moore: Yes.

Mr. Bodine: And you do not dispute that has not been paid? You deny it has been paid.

Mr. Moore: We deny we owe the Fidelity & Deposit Company of Maryland anything. We say, if we owe anything we owe it to the Van Horn Company, and if any money is due at all on any of these pre-

miums it is due by the Van Horn Company to the Fidelity & Deposit Company.

The Court: Your contract is with the Fidelity & Deposit Company, is it not?

Mr. Moore: Yes, but all the business is done through the Van Horn Company.

The Court: How can you get rid of the contract with somebody else by paying it through someone else? Is not this a contract with the insurance company in which they, in consideration of your paying so much premium, give you insurance? 10

Mr. Moore: Every bit of this business, if the Court please, was done through the Van Horn Company right from the inception of it.

The Court: Yes, but your contract is not with the Van Horn Company. 20

Mr. Moore: Right from the inception of it Van Horn did business with us and we did business with him.

The Court: That may be true. I do not suppose one man in a thousand knows the insurance company he insures in, but it is all the same, he would have to pay the premium, I should think.

Mr. Moore: Well, it is the duty of the company to look to the agents for the money. 30

The Court (after discussion): The question now is whether the item of $618.25 is denied as a proper charge.

Mr. Moore: We say that the proper amount due, if any there is, is the sum of $168.03.

The Court: That is by reason of the payment of the $300? 40

Mr. Moore: Not only by reason of that,

but by reason of the fact that the $13,921.-92 should read $7,245.92. We say there is a difference there of $6,676.00.

The Court: What is the total claim, on this policy?

Mr. Bodine: $318.25.

The Court: Then the credit of $300 is admitted?

10

Mr. Bodine: That is admitted. We received cash for that. The trade account does not come until the last two policies.

By the Court:

Q. That is right, is it, that the balance on that is $318.25? A. Yes, sir.

By Mr. Bodine:

20

Q. Now, Mr. Baker, in figuring the total payroll, what did you include therein?

The Court: Which policy was that?

Mr. Bodine: That is No. 1 or No. 2 in evidence, 1552958.

Q. Can you tell what you included in the payroll of $23,921.92? A. You want the figures?

Q. Yes. A. I have garage employees, $13,466.-16; two executive officers of $1,500 each, $3,000; one salesman, $779.76.

30

Q. Yes. A. Store clerks, $4,700.

Q. Yes. A. Office clerks, $1,976.

Q. Did you also examine the payroll, Mr. Baker, at the same time with respect to the premium due upon the policy which has been marked P3 in evidence, which provides as follows: "The premium is based on the entire compensation of which an estimate is given in the schedules. If that entire compensation exceeds the estimate set forth in the schedules the assured shall immedi-

40

ately pay the company the additional earned premium; if such entire compensation is less than the estimate set forth in the schedules the company will return the unearned premium when determined; but the company shall be entitled to not less than the minimum premium specified in statement numbered 6 of the schedule of statements." The schedule's statements provide: "Garage employees, excluding chauffeurs and clerical force of employees, at 76c. a hundred; clerical force at 7c. a hundred, and chauffeurs at $1.36 a hundred." A. I examined the records for that policy.

Q. What did you find as the amount of the payroll during the period from March 1st, 1915, to March 1st, 1916, as paid to garage employees, excluding chauffeurs and clerical employees? A. $18,926, at 76c. a hundred.

Q. Did that exclude the store employees? A. No, sir; that included store employees.

Q. Did it exclude the clerical help? A. It excluded the clerical help.

Q. Did it exclude chauffeurs? A. Yes, sir; chauffeurs is under a separate rate.

Q. Now, figuring the premium of the rates given in the schedule hereto annexed at 76c. a hundred, what was the amount which you found to be due by reason of the payroll of $18,926? A. $143.84.

Q. What did you find was the payroll of the clerical employees of Brock's Garage, Incorporated, during the period of March 1st, 1915, to March 1st, 1916? A. $3.34 premium.

Q. And that was based upon a payroll of how much? A. $4,776, at 7c. a hundred.

Q. What did you find was the payroll of chauffeurs, if any, during that period? A. The pay-

roll of chauffeurs was $18 at $1.36 a hundred, which figured 24c. premium.

Q. What did you find was the total earned premium upon the policy P3 in evidence? A. $147.42.

Q. And that was subject to a credit of the deposit premium of $62.20? A. Yes.

10 Q. You at the time examined the books of Brock's Garage with respect to the payroll for the period from March 1st, 1916, to November 2nd, 1916? A. November 1st, 1916.

Q. Mr. Baker, the policy which has been marked P4 in evidence provides: "For the purpose of this insurance, the compensation for the policy period is hereby estimated at $10,000, the premium rate being $3.00 per each one hundred dollars of compensation not in excess of $10,-
20 000, and for that portion of such compensation in excess of $10,000 and not in excess of $25,000, $2.25 per each one hundred dollars of such excess." And the policy also provides that the payroll shall be figured on the entire compensation earned during the policy period by the employees of the assured engaged in the operation of the business as described in the preceding paragraph. The policy also provides that in
30 the event it is cancelled by the assured that the premium shall be calculated on the basis of the short rate table of the insurance company? A. Yes, sir.

Q. Now, with the question of the compensation earned by the employees of Brock's Garage during the period of the policy from March 1st, 1916, to March 1st, 1917, and in view of the fact that you were making an examination of
40 the books showing the payroll from March 1st, 1916, to November 1st, 1916, did you figure the premiums earned with respect to that policy

marked P4 in evidence on the basis of the cancellation as to the short rate up to November 1st, 1916? A. Yes, sir.

Q. Now, what did you find was the payroll of Brock's Garage during the period on which you made the examination? A. The actual figures were $15,027.80.

Q. That was for a period of how many days? A. Well, eight months. 10

Q. Then what did you do? A. Then we had to figure yearly basis figures, and after we arrived at the yearly basis figured, then we were compelled to take eighty per cent. of the yearly basis.

Q. Why did you take eighty per cent. of the yearly basis? A. That is the short rate table that has been gotten up by the actuary.

Q. And it is referred to in the policy marked P4 in evidence as the basis for cancellation where the policy has been in existence for some two hundred and forty-five days? A. Cancelled by the insured. 20

Q. What did you find was the payroll upon the yearly basis? A. $22,385.45.

Q. Now, applying the premium rate mentioned in the policy which I have just read to you of $3 on the first $10,000 and $2.25 on the next $10,000, and up to $25,000, what did you find was the earned premium on the policy P4 in evidence from March 1st, 1916, to November 1st, 1916? A. $526.75. 30

Q. Now, how did you find those figures, Mr. Baker? A. I don't quite understand that question.

Q. How did you arrive at these figures? A. By going over his payroll books. 40

Q. Now, on the first $10,000 it was how much? A. $3.00 a hundred.

Q. What was the amount upon the balance? A. $2.25 a hundred.

Q. And what did that amount to? A. The $2.25 was on $8,033.36. That amounted to $180.-75 in premiums.

The Court: There is a slight discrepency there, Mr. Bodine.

10 Mr. Bodine: Yes. Our figures are below those of Mr. Baker's, so we will let our figures stand.

The Court: Then they stand at $523.92. That would be the total premium rather than $526.75.

Q. Now, Mr. Baker, did you also make an examination of the books of Brock's garage in respect to the earned premium upon the policy P5

20 in evidence, which was the workmen's compensation policy, for the date March 1st, 1916, to March 1st, 1917? A. Yes, sir.

Q. Now that policy provides that: "The premium shall be for garage employees and chauffeurs at the rate of 62c. a hundred and for clerical employees at the rate of 7c. per hundred." What did you find was the total payroll for garage employees for the period from March 1st, 1916,

30 to November 1st, 1916? A. $13,107.82.

Q. And that payroll was for a period of how long? A. Eight months.

Q. And was that the actual payroll? A. Yes, sir.

Q. And did you figure anything on the short rate, as you had on the previous policy? A. Yes, sir.

Q. What was the short rate which you figured

40 on this policy as in the previous policy? What was your short rate? A. Eighty per cent.

Q. What was the total payroll of garage em-

ployees exclusive of clerical help? A. The actual figures you want?

Q. Yes. A. $13,107.82.

Q. And on the 62c. premium rate that amounted to how much? A. The earned premium was $121.90.

Q. And you took eight per cent. of that? A. Yes.

Q. And that aounted to how much? A. $97.04. 10

Q. How much was the clerical employees' payroll? A. $3,368.

Q. Was that the actual payroll? A. Yes, sir.

Q. And at the premium rate of 7c. per one hundred how much did that amount to? A. The earned premium amounted to $3.00.

By the Court:

Q. Did you say three thousand? A. $3,368. 20

Q. It is one thousand here. What would be the premium on three thousand? A. At the short rate of eighty per cent. it would be—

Q. Then this is a mistake; it ought to be $3,368? A. According to the figures I have here.

By Mr. Bodine:

Q. What was the total earned premium on this policy, Exhibit P5? A. $100.56.

The Court: It is a dollar less than the statement calls for. 30

Mr. Bodine: Yes. Take the witness.

Cross examination by Mr. Moore:

Q. Is it customary when you have made your audit to have the assured sign the same? A. Yes.

Q. Did Mr. Brock sign your audit? A. He refused to sign it.

Q. Did he tell you he thought your figures were excessive so far as the amount was concerned? A. No. 40

Mr. Bodine: I object to any conversation between Mr. Brock and this witness as binding on the Fidelity & Deposit Company. I suppose that is the purpose of it.

The Court: I suppose it is not binding you. Whether it is cross examination or not is another examination. You have examined this witness as to the examination of the defendant's books. I suppose if you want to ask him any question about his conversation, unless it is for the purpose of discrediting him in some way—

Mr. Moore: I established the fact that it was customary to have the assured sign that audit.

The Court: Yes, and he said Mr. Brock did not.

Mr. Moore: Now I am trying to find why Mr. Brock would not sign.

The Court: That is irrelevant here.

Mr. Moore: We want to show that Mr. Brock took exception to this man's figures. If the plaintiff admits that I am satisfied to let it go.

Q. Now you found a cerdit of $300 on policy No. 1559958?

Mr. Bodine: Is that number 2?

Mr. Moore: I think it is No. 1.

Mr. Bodine: It is No. P2.

Q. You gave Mr. Brock credit for that payment? A. Yes.

Q. Did you find from the books of the Van Horn Company that Mr. Brock had paid this amount? A. I have never gone over the books of the Van Horn Company.

Q. From what books did you get the credit of $300? A. When I made up the figures I for-

warded them to Baltimore, and they go in the accounting department and find how much is owed by Brock's garage, for instance, and they give credit for the sum that has been paid.

Q. Then this credit came directly from the books of the company at Baltimore? A. I presume so.

Q. Now, in policy 1,225,492—

Mr. Bodine: That is P2.

10

Q. —did you find a credit there, Mr. Baker? A. A deposit premium credit of $62.20.

Q. Where did you get that from? A. Why, that was gotten from the accounting department. I do not know personally where they got it from.

Q. It came in the same course as the others to you?

The Court: You do not dispute the credits, do you, Mr. Moore?

20

Mr. Moore: Not a bit of it.

Q. Do you find any other credits there on Policy 1,567,891, or the fourth policy? A. Well, there is a deposit permium here of $350 which has been deducted from the earned premium of $526.75, my figures were, but they were a little different. I believe your Honor has $523.75, or something to that effect.

30

Q. What was the deposit premium there? A. $320.

Mr. Bodine: There is nothing in this section with respect to deposit premium.

The Court: This witness has testified to credits.

Mr. Bodine: Not as to this policy, on direct examination.

40

The Court: No, but he has been ex-

amined as to credit, and I suppose that opened the door.

Q. Haven't you found the credit of $350? A. No, sir, I did not find any credit. As far as the records I have here go to show the $350 was deducted from the earned premium of five hundred and twenty-three something.

10 Q. That was really a credit in favor of Mr. Brock? A. Well, as far as my figures are concerned, it is a credit.

Q. Where did you get those figures? A. They were gotten from the acounting department.

Q. In Baltimore? A. Yes.

Q. And your figures show a credit of $300, a credit of $102.50, and a credit of $350, all coming from your Baltimore office? A. Yes.

20 Q. Do you find any other credits? A. On the same policy or on another policy?

Q. On any other policy. We have taken care of the policy, the $300, $62.50, and $350. Do you find any other credits? A. Well, on Policy No. 4, or 6,301,390, the total earned premium figured $100.56. Now, the record I have here shows $51.00 deposit premium.

Q. Where did you get that figure? A. That was from the accounting department at Baltimore.

30 Q. So that is a credit of $300, $62.50, $350, and what was the last one? A. $51.00.

By the Court:

Q. That is not given credit for in your statement of the balance? A. I cannot tell you that. In the statement you have there?

Q. Yes. No, in the figures you have—

40 Mr. Bodine: No, it is not, if the Court please.

The Court: That would leave $50.56 on that, if the credit is proper.

The Witness: There is a dollar's difference, so far as my record shows; it is $49.56.

By Mr. Moore:

Q. (Showing witness paper): Did you make up that statement? A. No, sir. 10

Q. Did you have anything to do with the making of it? A. No, sir.

Mr. Moore: That is all.

Redirect examination by Mr. Bodine:

Q. Mr. Baker, you have spoken of certin sums of money, of which counsel has put the names into your mouth of credits, appearing on policy P4 and P5. What do you mean with respect to those statements? A. Well, as far as the records I have here, where it is figured up, the total earned premium, the deposit premium has been deducted, leaving a balance of an additional premium. 20

Q. You know as a fact whether the Fidelity & Deposit Company of Maryland has or has not received those deposit premiums on policies marked P4 and P5 in evidence? A. I do not, sir. 30

The Court: Mr. Moore, what do you contend these two items are?

Mr. Moore: This item of $350 and $51?

The Court: Yes.

Mr. Moore: As a matter of fact, I contend they must be credit.

The Court: Your client knows whether he has paid it.

Mr. Moore: We have paid everything— 40

either $227 and some odd cents or $232 and some odd cents.

Mr. Bodine: Let me call Mr. Brock and I will ask what he has done.

Recross examination by Mr. Moore:

Q. You do not know whether they have received the sum of $350 or $51? A. No, sir; I do
10 not.

Q. But when you made up this report were you not advised that they had credited these two accounts to Mr. Brock?

Mr. Bodine: I object to that as not cross examination and not binding and not material.

The Court: He may answer.

20 A. No, sir.

Q. You were not advised? A. No, sir.

Q. Were you advised anything with reference to these two items, Mr. Baker? A. No, sir.

Q. How did you give a credit of two items on that account then? A. The deposit premium and the additional premium are two separate items, as far as the accounting department of our company are concerned. For instance, the
30 deposit premium may be $100 and the earned premium $50, and the total he owes, $150. The deposit premium is the first premium the company accepts for the policy.

Q. That is paid in advance? A. It is supposed to be paid.

Mr. Bodine: I object to that question as calling for the general course of business, and not material and not relevant to
40 the issue.

The Court: I think he should refer to what the balance is that counsel has read,

and find out whether that balance is correct or not, and in ascertaining that it necessarily involves the question as to what the credit has been.

Q. So that, Mr. Baker, you received an item of these two accounts, namely, $350 and $51 from the home office, didn't you? A. I did not receive any items at all. The records I have show that that $350—for instance, is that the first one? 10

Q. Yes. A. That $350 was the deposit premium on the policy.

Q. And the $51 was another deposit premium on the other policy? A. Yes.

Q. Did that come to you in the same course as the deposit premium, amounting to $300 on No. 1552958? A. Merely as a record. Not as if it had been paid or not paid; merely as a record. 20

Q. It came to you merely as a record to give you a light in fixing up the account between the Fidelity & Deposit Company and Brock's Garage? A. No, sir; it merely came to me to show what the deposit premiums were and what the earned premiums were, because, as I said before, they were two separate items, as far as the accounting department is concerned.

Q. Then why did you take from No. 1552958 the premium of $300 and then fail to deduct it on the second policy? 30

By the Court:

Q. Mr. Baker, let me ask you this: Is there any difference in the paper you got, between the item of $300 on the first policy and the items of $350 and $51 on the other policy? Is there any difference in the papers that were handed to you by your company, between these several items, some of which you have credied and some of 40

which you have not? A. The only difference I notice on one policy they claim the $300 is paid.

Q. Does that appear on the papers given to you? A. That would not appear on my papers; no, sir; as being paid or not being paid.

Q. Then why did you put down the $300 had been paid on the one? A. I did not say it has been paid.

10

Mr. Bodine: It is admitted in evidence that the $300 and the $62 on the first two policies were paid. It is maintained that the other deposit premiums were not paid. I think we can show that by Mr. Messler and Mr. Brock.

The Court: I am only trying to get at how this $300 in the one case comes to be credited and not in the other.

20

Mr. Moore: Yes, that is what I am trying to get at. It is admitted the $300 and the $62.50 were paid to the Fidelity & Deposit Company by the Van Horn Company. Is that your contention?

Mr. Bodine: We are not charging them with deposit premiums on the first two policies, and I think that is what Mr. Baker means when he says he understands it. He don't know it, but he understands it from me.

30

By Mr. Moore:

Q. Do you know why the credit of $350 and the credit of $51 were not allowed on this balance of $1,028.95? A. No, sir.

Q. But you did know that you had the item of those two amounts? A. What are the amounts again?

40

Q. $350 and $51. A. Both are deposit premiums.

Q. In the same class as the deposit premium of $300, and the deposit premium of $62.50? A. They are all called deposit premiums.

JAMES MESSLER recalled for the plaintiff.

The Court: Mr. Messler has been called, Mr. Bodine.

Mr. Bodine: Yes. 10

The Court: You cannot call a witness back without some good reason.

Mr. Bodine: I wish to examine him about some other part of the case. I wish to take his testimony with respect to the deposit premiums.

The Court: It is something that was omitted?

Mr. Bodine: Yes. I want to clear up that point, as to the deposit premiums. 20

The Court: All right. You may call him.

Direct examination by Mr. Bodine:

Q. Mr. Messler, will you turn to the account of the Van Horn Company with the Fidelity & Deposit Company of Maryland? A. Yes, sir.

Q. What appears thereupon with respect to the deposit premium of $350 on Policy No. 1,567,891? 30

The Court: What number is that in the statement?

Mr. Bodine: The third in the statement and the fourth in the exhibits.

The Court: Well, the third in the statement. Let us not get it confused with your exhibits.

A. (Witness refers to book): That amount is 40

included in the account credited to the Fidelity & Deposit Company by the Van Horn Company.

Q. Does it appear that that was paid by the Van Horn Company to the Fidelity & Deposit Company of Maryland? A. It was not paid.

Q. Does that item also appear in the account of the Van Horn Company wtih Brock's Garage? A. It does.

10 Q. Does it appear that that amount was paid by Brock's Garage to the Van Horn Company? A. That amount was partially offset, but it was not paid.

Q. It was partially offset with what? A. With merchandise and invoices.

Q. Merchandise purchased by the Van Horn Company? A. Yes.

Q. Will you turn to the books and see what

20 appears with respect to the deposit premium of $51 on Policy No. 6,301,390? A. It has been credited to the Fidelity & Deposit Company in the March account and has not been paid by the Van Horn Company.

Q. Does that appear on the account of the Van Horn Company with Brock's Garage? A. It does.

Q. And does it appear to have been paid by

30 Brock's Garage? A. Not paid, no.

Q. Is there any offset at all? A. There is an offset.

Q. What is the offset? A. It is partially offset by invoices for goods furnished the Van Horn Company.

By the Court:

Q. Are those offsets simply charges of Brock's

40 Garage against the Van Horn Company? A. Yes.

Q. The accounts are not closed by them? A. No, the accounts are not closed.

Q. Nor are they credited on the accounts? A. They are credited to Brock's Garage in the Van Horn Company's books.

Q. On the Van Horn Company books are those items of insurance charges? A. The insurance charges are used to offset the credits of Brock's Garage for supplies.

Q. Or the other way about, I suppose, either one? A. Yes. 10

Q. But only on the books of the Van Horn Company? A. Yes, sir.

Mr. Bodine: Do I have to call Mr. Brock for the signature of these letters?

Mr. Moore: We admit two of the letters, but we take exception to the admission of the third letter.

Mr. Bodine: Let us show it to the Court and not make an argument for the jury. 20

Court and Counsel Confer.

Mr. Bodine: It is stipulated and agreed that the policies three and four in the complaint, and P4 and 5 in evidence were cancelled under instructions from Mr. Brock, November 1st, 1916. Then I offer in evidence a letter of May 27th and a letter of July 20th, 1916, from Mr. Brock to the Fidelity and Deposit Company of Maryland, and ask that they be marked in evidence. 30

Papers referred to are marked respectively Exhibit P6 and P7.

By Mr. Moore:

Q. Did any representative of the Fidelity and Deposit Company come to see you right after the appointment of the Receiver? 40

Mr. Bodine: Objected to.

The Court: That is not cross examination.

Mr. Moore: I will make him my own witness.

The Court: It is not time yet.

Mr. Bodine: Plaintiff rests.

Mr. Moore: I will call him as my first witness.

10

Q. Did you have a visit from any representative of the Fidelity and Deposit Company shortly after you were appointed Receiver of the Van Horn Company? A. Yes, sir.

Q. How soon thereafter? A. Either the following day or two days later.

Mr. Bodine: I think this line of questions are irrelevant.

20

The Court: We haven't got very far yet.

Mr. Bodine: I cannot see how the representative can do anything to bind the company until it is shown how and why and where he was a representative, and how he had any rights.

The Court: Gentlemen, if you want me to be very direct, I think a great deal of this testimony is totally incompetent, but having introduced incompetent evidence, it is pretty hard to exclude anything on that same line on the other side. None of Van Horn's books are competent here at all.

30

Q. I will ask you what, if anything, was said to you by this representative with reference to the existence of the Van Horn estate? A. Well, only a general discussion of his affairs.

Q. Did he ask you how much of a dividend this estate would pay? A. He asked me if I had any idea how much dividend it would pay.

40

Q. Did you tell him? A. I told him I had not formed any idea.

Q. Did you tell him it would be large or small? A. I told him that according to the bankruptcy schedules that were filed there would be a reasonable dividend.

Q. Did the company file a claim with you against the Van Horn Company? A. The claims were not filed with me. 10

> Mr. Bodine: The claim was filed with the referee in bankruptcy, Mr. Moore. I will produce him if you want me to.

JOHN L. BROCK, sworn for the defendant.

Direct examination by Mr. Moore:

Q. Are you connected with the defendant corporation? A. I am. 20

Q. In what capacity? A. President.

Q. Has the defendant corporation had any business dealings with the Van Horn Company? A. We have.

Q. Over what period of time?

> Mr. Bodine: I object to the question as not binding on the Fidelity and Deposit Company of Maryland. 30
>
> The Court: This cannot do any harm. I do not know what it is leading up to.
>
> Mr. Moore: This agency certificate has been presented in evidence by the plaintiff, showing the Van Horn Company was general agents of this concern, with power to appoint sub-agents.
>
> The Court: All right.

40

A. Four or five years.

Q. During that time has the Van Horn Com-

pany been the medium of writing your insurance? A. They have.

Q. Liability insurance? A. Yes.

Q. Will you explain to the Court and jury the nature of the settlements of these various accounts, if any, between yourself and the Van Horn Company?

10

Mr. Bodine: If the Court please, I think this has no binding force upon the plaintiff in this suit. Here is a course of business between—

The Court: I suppose it is intended to establish that here is a course of business of which the plaintiff would presumably have knowledge.

20

Mr. Bodine: The knowledge must be actually brought home before the evidence can be introduced.

The Court: Sometimes the course of dealing is relied upon to establish that. There is a very recent case on that in a suit against a municipality, in one of the last Atlantic reporters.

Mr. Bodine: I pray an exception to it, if the Court please.

30

The Court: In addition to that, is the fact that this man was the general agent.

Mr. Moore: Yes, sir.

Mr. Bodine: The agreement speaks for itself.

The Court: It is competent, is it not, for the defendant to show there was a course of dealing, with recognized authority to receive payments in this way?

40

Mr. Bodine: The agreement itself states how payment shall be made to the agent, and what he shall do with payments.

After discussion.

The Court: Go on with your case.

Q. Over what period of time was it you and Brock's Garage and the Van Horn Company had these dealings?

Mr. Bodine: For the purpose of the record, may I have my exception for the reasons that it is not binding upon the Fidelity and Deposit Company of Maryland, and is irrelevant to the issue. 10

The Court: Well, Mr. Bodine, if it establishes nothing against your client, it goes for nothing. You cannot say when the defendant offers to prove a course of conduct which apprised the plaintiff of the relations, that it is inadmissible because all the steps are not complete in themselves. 20 He can only go one step at a time. If the entire chain is not there, then it falls to the ground. If it is, it becomes effective, maybe.

Mr. Bodine: I wanted to preserve my rights on the record, and I thought that if I made mention of the fact at this time it would save the Court the annoyance of having me bob up and down from time to 30 time when the question is presented.

The Court: Is not the question, whether the defendant completes it? If he establishes it it must be recognized that it would be binding upon the insurance company. If it does not establish it, that is the end of it and he has failed. That is all.

Q. (Last question read.) A. Four or five years. 40

Q. Will you explain to the Court and Jury, Mr.

Brock, just how these accounts were settled? A. By counter-accounts in merchandise.

Q. Between Brock's Garage and the Van Horn Company? A. Yes.

Q. I show you what purports to be a statement—

By the Court:

10 Q. Were the other insurance policies with the same company? Back of this for four or five years, you say you have been dealing with Van Horn? A. We have had other insurance besides these four.

Q. With the same company? A. With other companies.

The Court: Oh, well, that does not mean anything, Mr. Moore.

20 By Mr. Moore:

Q. (Showing witness a paper.) Did you receive this communication from Mr. Bodine? A. Yes.

Q. Was this enclosed in an envelope? A. I believe so.

Q. I call your attention to an item on the first policy, deposit premium, $300.00. Was that paid

30 by your company in cash to the Van Horn Company? A. No.

The Court: Mr. Moore, the witness says his dealings with the Van Horn Company prior to this, with other companies—

The Witness: I do not know just at present whether we have had previous Fidelity and Deposit Company policies or not. I could not say. We have had previ-

40 ous insurance, but I do not remember the company.

Q. Can you say all your Fidelity and Deposit Company business had been done with the Van Horn Company? A. Yes.

Q. During the past how many years? A. With Van Horn?

Q. Yes. A. Whatever policies we have had, we have been dealing with Van Horn four or five years, and whatever Fidelity Policies we got were from him because he was their agent . 10

Q. I call your attention to that statement and ask if that three hundred dollars was paid by cash or in merchandise? A. By merchandise.

Q. I call your attention to the deposit premium of $62.20, and ask you if that was paid by you in cash or merchandise? A. In merchandise.

Q. You heard Mr. Baker testify that the deposit premium of $350.00 had been placed upon his list, and I ask you whether you paid that in cash 20 or by merchandise to the Van Horn Company? A. Merchandise.

Q. I call your attention to the testimony of Mr. Baker, in which he said $51.00 was a deposit premium. Was that paid in cash or merchandise? A. In merchandise.

Q. Now, I call your attention to policy number 1552958. Have you the books of your company here? A. Well, those figures were all taken from 30 my payroll book. Their auditor got this.

Q. I call your attention to this paper and ask you whether those items were made by you from the books of your company? A. They were.

> Mr. Bodine: If the Court please, the books of the company will speak for themselves.

Q. Are these items contained in this book, Mr. 40 Brock? A. They are all in that book.

Q. Will you turn to the book—

New Jersey State Library

The Court: Mr. Bodine, is it quite fair to get your own evidence in on that same basis and then repudiate the same method when it comes to the other side? You have offered a witness to prove the contents of Mr. Brock's books, as to his payroll, and have given it in great detail, and there has not been a sign of the books up to this moment produced in Court. I recognize your right to do it, but do you think you ought to do it? Here is a man who presumably knows his own books.

10

Mr. Bodine: I assumed when I introduced that proof, that they were going into cross examination of my auditor to show that he had made mistakes in taking off his figures from those books. If I had been trying the case for the defendant, I would have—

20

By the Court:

Q. Are you a bookkeeper? A. I've had some experience in it.

Q. Are you the bookkeeper for the company? A. No, sir.

Mr. Moore: I did not object to the offering of Mr. Baker as a witness to testify to these books. I do not believe in taking any technical advantage of anybody. We are here to find out how much we owe. We say we owe so much and they say it is so much more. Now, I think Mr. Brock can show what he took from the books, just as Mr. Baker testified what he took from the books. If I had invoked the rule on him, he would not have had any case.

30

40

The Court: What do you say, Mr. Bodine?

Mr. Bodine: I should say it was a matter of the cross examination of the auditor.

The Court: I shall be inclined, then, to throw this case out of court, if that course is taken. I feel that the other side ought to have a chance, and if you are going to take that course of getting in evidence things that are not properly admissible at all, as even Van Horn's books were not admissible, or the contents were not admissible, I think I will give the defendants a full chance, or I may deal differently with it than that. If you have no other proof here, I may compel you to begin again.

Mr. Bodine: It has not been my purpose to transcend any of the rules—

The Court: Then I will exercise the prerogative of the Court, and strike—or I may rather strike out the testimony as to these books, which will leave you without any testimony, as incompetent.

Mr. Bodine: I would like to have this matter entered on the record, and Mr. Moore is at liberty to proceed with his examination. I wish this matter on the record, and I consent to Mr. Moore proceeding with the examination of Mr. Brock.

The Court: All right.

By Mr. Moore:

Q. I will ask if this list was taken from the books of your company and from the same books Mr. Baker's figures were taken from? A. It was.

Q. With reference to Policy Number 1552958, will you kindly read the items?

10

20

30

40

Mr. Bodine: The items of what?

Mr. Moore: The items on the policy taken from the books.

A. The first item was $10,000 at $3.00; that makes $300, and the balance, $7,245.92 at $2.25 is $163.03, and the livery $100, at $5.00 is $5.00; making a total of $468.03, less the deposit pre-
10 mium of $300, making a balance due on that policy of $168.03.

Q. I call your attention to Policy Number 1235492—

The Court: What is the balance you claim as due on this policy?

Mr. Moore: $168.03.

The Court: That makes a difference of $150.00, about. Is that right?

20 The Witness: Yes, sir.

The Court: I understand the witness now is giving the figures from the books corresponding with those given by Mr. Baker, namely, what is the proper basis of payment for these policies, predicated upon the pay-roll.

Q. Now, Policy Number 1,235,492? A. Garage, $13,466.00; salesman, $760.00, making a total of
30 $14,226.00 at 76 cents, $108.12. Clerical $6,676.00, Brock, Sr., $1,500.00; Brock, Jr., $1,500.00, making a total of $9,676.00, at seven cents; that is $6.77. And chauffeurs, $18.00, at $1.36; 24 cents, making a total of $115.13, less deposit, $62.20, leaving a balance of $52.93.

Q. Now, I call your attention to policy—

The Court: Does that correspond?

40 Mr. Moore: No; $85.22 is the plaintiff's claim.

The Court: Are the credits given in each case the same?

Mr. Moore: Exactly $300.00 in one case, and $62.20 in the other.

Q. Now, Policy 1,567,891, will you read that? A. Actual wages, $4,540.39 at $3.00 is $136.21; elevators $12.50, and the balance is $149.96.

By the Court:

Q. That is the amount you claim, the balance? A. That is the amount that policy amounts to. 10

The Court: Plus the $350.00 or what?

The Witness: No; the $350.00 is the deposit premium, the same as the other case, and should be deducted. This policy did not run its full time.

Q. What does this $149.96 stand for? A. That is the earned premium on a certain policy, 1,567,891. 20

Q. $149.96? A. Yes.

Q. That is the total earned premium, is it? A. That is the total earned premium according to my record.

By Mr. Moore:

Q. As against $523.92. Now, Mr. Brock, I will call your attention to Policy 6,301,390. A. That shows the garage at $3,327.43, salesman, $404.32, 30 making a total of $3,731.75, at 62 cents, is $23.14. And the clerical at $532.00, and Brock, Sr., $404.32, and Brock, Jr., $404.32. The total is $2,960.47 at seven cents; that is $1.67, and chauffeurs, $4.50, at $1.07 is five cents, making the total due on that policy, $24.86.

Q. Have you the accounts between yourself and the Van Horn Company? A. Right here.

Q. Can you tell from those acounts whether you 40 owe the Van Horn Company on these premiums or whether the Van Horn Company is in your

company's debt? A. We owe the Van Horn Company $232.34.

Q. Are there any credits? A. In that charge there is a charge for these two last policies as a deposit premium on that. The total of these two last policies is $174.82. There is a deposit made on them of $401.00, so we are entitled to that credit, and we gave them—that amounts to
10 $232.34.

Q. So that, Mr. Brock, your statement from your books shows that you owe $395.78 with an additional account of $232.34 to the Van Horn Company, and a credit of $401.00 on deposit premiums which were not eaten up, is that correct? A. That is right.

Q. What does that leave your net balance due the Van Horn Company on these policies? A.
20 $227.12.

By the Court:

Q. In that you have taken credit for the various merchandise accounts? A. Yes, sir.

Q. What are those merhandise credits all told, do you know? A. Not without I sift them out. Do you mean the amounts?

Q. Yes, approximately. Can't you tell me what
30 the total is you have attempted to offset against this account? A. Yes, sir, in just a minute. (After examining papers): I should say about $2,000.00.

Q. How is it you figure that, if your total premiums were— A. That is on this whole statement. This goes back to 1914.

Q. You are going back to other company's accounts? A. That is the whole Van Horn account;
40 about the $2,000.00 worth of merchandise.

By Mr. Moore:

Q. Mr. Brock, was any suit started against you in any other Court than this for the collection of any other premiums?

Mr. Bodine: A suit was started in the District Court of Trenton and discontinued.

Q. For what was the suit started? 10

Mr. Bodine: For $500.00.

Q. Were any other claims from this company sent you for any other amounts than the one now being sued upon? A. Yes, there was a compromise—

Q. No. Was there any other bill rendered you outside of the one Mr. Bodine speaks of in the District Court for $500.00, and this one, over $1,000.00? A. These are the only two suits we have had. 20

Q. Was there any other bill rendered you? A. I think there was a bill rendered for the short term of the policy. The bill they are suing on now is based on the long term, or the term they are choosing to cancel it.

Mr. Bodine: If your Honor please, I think these matters are all incompetent. 30

Q. When did you notify the firm to cancel the policies? A. I cannot tell you from memory.

Mr. Bodine: It was stipulated it was November 1st, but that stipulation ought to be withdrawn if he is going into the evidence.

Q. When, if you know, did you cancel or order the company to cancel these policies? 40

Mr. Bodine: If the Court please—

The Court: If you have stipulated this, Mr. Moore, that concludes it in the case.

Mr. Moore: I did know it was stipulated.

Mr. Bodine: I am willing to withdraw the stipulation.

Mr. Moore: When was it stipulated?

Mr. Bodine: When I closed the case
10 I turned and made the stipulation of the record.

Mr. Moore: I think my answer shows there is a difference there.

The Court: Do you mean to say—when do you say it was?

Mr. Moore: Sometime previous to the first of November.

The Witness: There is what I based my
20 figures on.

The Court: Are these figures given here based upon an earlier cancellation?

The Witness: Yes, sir.

Mr. Bodine: Prove it as a fact, then. I suppose the Court will indulge me to the extent of proving it on my case, after withdrawal of the stipulation, the cancellation date? That is part of my case.

30 Q. Mr. Brock, subsequent to June 4th, 1916, did you have any accident which required the payment of any sum of money by the Fidelity and Deposit Company?

Mr. Bodine: I object to the question as incompetent and irrelevant.

The Court: When?

Mr. Moore: Subsequent to June 4th, the date of the cancellation of this policy.
40
The Court: I suppose it is on the as-

sumption the policy was cancelled in June, Mr. Bodine?

Mr. Bodine: I still think it is incompetent, because there is only one way provided in the policy for cancellation, and I think we can show it was not done until a certain given date. I would have shown it on my direct case, but I assumed that the stipulation was binding. 10

Mr. Moore: If the Court please, I did not understand Mr. Bodine's stipulation.

The Court: I did not hear any stipulation. I heard the statement made of November 1st (after examining papers). Here it is.

Q. Mr. Brock, from what date did you consider this policy cancelled? A. June 4th. 20

Q. From that time until November 1st, did you have occasion to pay out any money on any injury which might have been covered by any of these policies? A. I did.

Q. To whom? A. Mr. Belting.

Q. Did you receive a receipt from him? A. I did.

Q. I show you what purports to be a receipt and ask you if you know that is Dr. Belting's signature? A. To the best of my knowledge, it is. 30

Mr. Moore: I would like to offer that in evidence to show the defendant considered this policy cancelled at the time this trouble was.

Marked Exhibit D1.

Q. I show you a letter dated May 31st, 1916, and ask if you received that from the Fidelity and Deposit Company of Maryland? A. Yes. 40

Paper referred to is marked Exhibit D2.

Q. Did you pay this premium or any amount by June 4th, 1916? A. No.

Cross examination by Mr. Bodine:

Q. Mr. Brock, when did you mail the policies of insurance in the Fidelity and Deposit Company of Maryland to that company for cancellation? A. I don't know that I did mail them.

10

Q. I show you this letter. Is that your signature? A. Yes.

Q. Now, will you look at that letter and see whether it refreshes your recollection? A. I know what it is.

Q. Now, referring to that letter before you, can you tell me when you mailed the two policies in the Fidelity and Deposit Company of Maryland, written on or about March 1st, 1916, to that company for cancellation? A. I say I have no record of mailing the policies. That does not show they were enclosed.

20

Q. It says they were enclosed, but it says nothing about mailing them? A. It does not say there that the policies were enclosed.

Q. Do you want these gentlemen to have the best recollection that you have as to when you sent those policies to Baltimore? A. To the best of my knowledge, Mr. Bodine, the policies did not go to Baltimore from me. I did not know that they ever went there. I did not say I sent the policies. I say I sent a check. I have no recollection of sending the policies.

30

Q. Have you ever seen these policies before (showing witness papers)? A. I cannot say as to that. I do not know whether I have or not.

40

Q. This is the policy 1567891 in the Fidelity and Deposit Company, Automobile Liability Pol-

icy. Was there such a policy written covering your business? A. What is the number?

Q. 1567891. A. Yes.

Q. Such a policy was written? A. Yes.

Q. On or about March 1st, 1916, in the Fidelity and Deposit Company of Baltimore, Maryland? A. Yes, sir.

Q. And also their policy 6301390 ? A. Yes.

Q. And on November 1st, 1916, you wrote to the Fidelity and Deposit Company of Maryland, a letter saying, "Enclosed herewith find check"?

10

Mr. Moore: Objected to.

Q. "—in full of our account to date, as we desire to cancel the policies enclosed herewith, 1567891, and 6301390." That is a letter over your signature.

Mr. Moore: Do not answer that. I object to that question. There had been considerable correspondence in this case, and Mr. Brock desired to quit the whole thing, and he offered it as a compromise.

20

Mr. Bodine: I do not want it as a compromise.

After discussion.

The Court: There is no presumption of law that he offered the money as a compromise. It may be a recognition of indebtedness. I cannot exclude the use of the paper for a legitimate purpose. Proceed.

30

Q. That is your signature? A. Yes. It says the policies were enclosed practically.

Q. But when you first looked at that letter it did not refresh your recollection that you had enclosed the policies November 1st? A. I do not think I did enclose them.

40

Q. But they were sent in November 1st? A. Yes.

Q. And that was the time that you asked them to cancel those policies?

The Court: The letter shows that, Mr. Bodine?

Mr. Bodine: I would like an answer, yes or no.

A. I will read the letter, if you want me to.

Q. Answer the question, yes or no. You asked them to cancel these policies on November 1st? A. That is what the letter says, yes.

Q. Had you ever asked them to reach a compromise or cancel those policies before that time? A. Not to my recollection.

Q. Well, had you or had you not? A. I would have to go over all my correspondence and see if anything refers to it. I don't know that I did.

Q. How did you happen to do it on November first? A. Oh, I suppose I wanted it cancelled sometime. They had threatened to cancel them and they did not do it. I didn't know whether they had or not, and I think at that time you started suit.

Q. That was about time that I had started suit in the District Court in the City of Trenton that you made up your mind that you were going to get rid of the Fidelity and Deposit Company policies, and you sent them to Baltimore to be cancelled on November 1st, and that was the first time you had taken that course, and you did that after consulting your attorney about it? A. I cannot say I had consulted the attorney about it.

Q. But you had consulted attorneys about that time? A. I think I took it up with an attorney after you declined to accept the check. Then I think I referred it to an attorney.

Q. It was after that that Mr. Baker came to your place of business, was it not, to Brock's Garage? A. The date of his examination will prove that. I don't know just what date it was.

Q. November 17th, he testified on direct examination, was the time that he made the examination of your books. Do you recall my coming out to your garage on North Canal Street with Mr. Baker in pursuance of an arrangement I had made to go over your books? A. Yes. 10

Q. And it was about two-thirty in the afternoon. How long was Mr. Baker there? A. Two or three hours, I guess.

Q. What did he do? A. Went over the pay-roll book.

Q. Have you that book there before you? A. Right there (indicating).

Q. That covers what years? A. Well, this covers from 1915. 20

Q. The period of the policy was from March 1st, 1915, to March 1st, 1916, was it not? A. Well, I would have to refresh my memory by looking at the policy.

Q. Assuming what I said to you is true, and that is that the first policy was from March 1st, 1915, to March 1st, 1916, will you turn to your pay-roll book for the first entry after March 1st, 1915? A. I cannot do it. I notice here this starts in May. 30

Q. Of what year? A. 1915; and those two or three months are in another pay-roll and I did not notice that until I got this here.

Q. Will you have that other pay-roll book here to-morow? A. Yes.

Q. Now, turn to that pay-roll book starting March 1st, 1916. That is there, isn't it? A. There is the payroll that ended March 2nd. 40

Q. Where is the one that starts March 3rd? A. Right here. That ends March 9th.

Q. How many employees did you have in your business during the year of March 1st, 1916, to March 1st, 1917? Look at the book and refresh your recollection as to the employees that you had? A. Twenty-eight.

10 Q. What wages were paid by you to those twenty-eight employees during the year March 1st, 1916, to March 1st, 1917? What was the total? A. I would have to go all over that.

Q. Didn't you take off figures from that book to see what the total payroll was from the period of March 1st, 1916, to March 1st, 1917? A. No.

20 Q. Then what were your figures based on with respect to the policies marked P4 and P5 in evidence, the third and fourth on the complaint, in which you testified as to certain things appearing as to the amount of payroll? Was that figure on yearly basis? A. My figures?

Q. Yes. A. They did not come up to March 1st, 1916. They ended June 4th, 1916.

30 Q. And in calculating the amount due on these policies of insurance, you figured the rate on the payroll for the entire year because you were authorized to cancel under the terms of that policy, on what they call the "short rates" which are prevailing, which are provided for in Sections E, F, G, in the policies which are in evidence, where the policy has been in existence for 245 days, as this policy was, from March 1st, to November 1st, at 80% of the annual rate. Now, how can you find the annual rate without being able to tell me what your total payroll was during the period from March 1st, 1916, to March 1st, 1917? A.

40 At the time that statement was made March 1st, 1917, was not here. How could I figure it?

Q. You could estimate what your payroll was

going to be. That statement was taken off November 17th, was it not, and eight months had passed, had they not? A. When I made my statement?

Q. Yes. A. You understand, my statement ended June 4th. I did not make any attempt to furnish a year's statement.

By the Court:

Q. Mr. Brock, what would be the result if you had carried it on until November 1st? A. In the amount of premiums, do you mean? 10

Q. Yes. A. The amount of payroll involved would be about the same but it would vary as to the class.

Q. What would be the difference between their figures and yours, do you know? A. No; I don't believe I can tell you that.

Q. Suppose you examine it and let us know in the morning? 20

Mr. Bodine: If there is only one question now involved in this case after the amounts to be recovered on the policies, on the payroll basis, under the terms of the policies, as a matter of mathematical calculation Mr. Brock's books and so on, I think there is an easier way of arriving at that than before the jury. 30

The Court: What is that?

Mr. Bodine: If it were a proper case to refer to—what are they called in the Circuit Court?

The Court: A referee?

Mr. Bodine: A referee or someone to state the account, beause I apprehend this is a matter of insurance accounting; it is a matter of dollars and cents. For instance, what I say to the witness and what the witness says to me as to figures does 40

not mean anything except as I get it down, and I am just a little bit familiar with it. I do not know whether the jury can grasp it quickly or not.

The Court: Mr. Bodine, would not that cost more than the difference would be if you took it to a referee? It would cost a lot of money for a hearing and you would probably each one reserve your questions for a jury trial.

Q. Do you know approximately how much the difference would be?

Mr. Moore: The total statement is $1,028.95, and we claim we owe $227.12.

Q. Now, leaving out entirely the question of these credits other than those given to you already, what do you figure there would be due according to this account if it had been carried to November 1st?

Mr. Moore: That is something I could not tell if the Court please.

A. I can give you a pretty fair idea, I think, according to my own figures.

Mr. Bodine: That is on an eighty per cent. rate.

Q. Let me ask you this, do the figures on payrolls seriously differ, between yours and the plaintiff? A. No, sir.

Q. Then the result would be approximately the same? A. Well, the difference between the rates. They classify all of it at a higher rate, and I claim the policy shows a distinction, a part of it, that was put in at a lower rate.

Q. Suppose you figure that out by morning and give us the benefit of it then?

Mr. Bodine: May we have copies of Mr. Brock's figures made?

The Court: I do not believe you will gain much by going to a referee. It will cost more than the thing will amount to.

I think, Mr. Moore, this cancellation is on November 1st.

Mr. Moore: We have a letter from Mr. Bodine which probably might explain the check proposition. 10

The Witness: When they wrote me the policy would be cancelled June 4th, I presumed it was and I did not take advantage of the policy afterwards. We had one little accident which goes to show that. Then when I was brought in court on this I thought I better cancel the policies even then rather than let them run any longer. 20 That much time had elapsed. I could not cancel them before.

The Court: The minds of the parties have never met on the cancellation, nor has the prerogative in the contract been exercised.

Mr. Moore: It seems to me that would be a question for the jury to determine, as to whether or not this was cancelled June 30 4th or November 1st.

Mr. Bodine: The policies themselves provide as to the notice to be given.

Adjourned until Wednesday, May 23rd, 1917, at ten fifteen o'clock in the forenoon.

40

Trenton, N. J., Wednesday, May 23rd, 1917.

Case resumed pursuant to adjournment.

Appearances as before noted.

JOHN L. BROCK resumes the stand:

Cross examination (continued) by Mr. Bodine:

Q. Mr. Brock, can you let me know the total
10 payroll of Brock's Garage, Incorporated, from March 1st, 1916, to March 1st, 1917, for employees employed in the maintenance and operation of an automobile salesroom, garage, station, or repair shop, located at Canal Street, north of East State Street, Trenton, New Jersey? A. Do you want to know what that is?

Q. Yes. A. I would have to figure that up.

Q. I thought you were going to figure that
20 total payroll from March 1st, 1916, to March 1st, 1917? A. I did not think I was asked that.

The Court: I asked the witness whether or not there was any difference due to the character of the employment and he said some of it had been charged to one class of liability when it ought to be charged to another, and I asked what would be the difference between his June 4th calculation
30 and the November 1st calculation.

Mr. Bodine: I should like that answer to my question, as part of my cross examination.

The Court: Yes; undoubtedly, if he can answer it, but the witness said he has not that information.

The Witness: I can figure it up. The payrolls are here.

40 The Court: Well, it will have to be done out of the court's time.

The Witness: I might say our payroll figures agree with Mr. Baker's. There is not much difference there; it is largely a matter of classification.

The Court: Well, Mr. Bodine, the witness says that total can be accepted as correct, as to the total payroll; but you have improperly in different years incorporated a portion of one which belongs in another. 10

Q. Mr. Baker says, when he made an examination of your payroll books on March 17, 1916, that your estimated yearly payroll for employees in the establishment of Brock's Garage, engaged in the maintenance and operation of an automobile salesroom, garage, station, or repair shop, located at Canal Street, north of East State Street, Trenton, New Jersey, would amount to $22,385.45. Is that correct? A. Whatever figures are on that statement are correct. Mr. Baker and I went over that. 20

Q. I just want to know whether those figures represent the estimated payroll of Brock's Garage for men employed in that business during the period from March 1st, 1916, to March 1st, 1917. A. Are those the figures that are on his statement? 30

Q. Those are the figures that are on Mr. Baker's statement and the figures to which he testified yesterday on the witness stand. A. I have just said that those totals are right. Mr. Baker and I agreed on that at the time he took out the payroll.

Q. Then the total payroll, during the period from March 1st, 1916, to March 1st, 1917, as estimated on a yearly basis, is properly given as $22,385.45? A. He could estimate that to please 40

himself. I suppose he took as a basis the proper month.

Q. Did he properly estimate that? A. I did not estimate it at all.

Q. Are those figures correct or not correct? A. I could not say, because that was done before that time happened and it was merely a matter of knowing the estimate.

10 Q. You have the books before you of Brock's Garage, have you not? A. Yes.

Q. Will you turn to those books and tell me what the actual payroll was for all the employees engaged in the automobile business, salesroom, garage, station and repair shop of Brock's Garage, located on North Canal Street during the period from March 1st, 1916, to March 1st, 1917? A. That can be done if it is necessary to do it.

20 The Court: Why is it important, Mr. Bodine? The witness says that he does not know that your client's figures are incorrect.

Mr. Bodine: The witness' testimony is that actual wages were $4,540 on this policy during that period.

The Court: Yes, but the witness does not say he disputes your totals. What he

30 does dispute is your classification. Why don't you examine him on the question in dispute? I do not understand there is any confusion or difficulty about it. The witness does not dispute your totals.

Mr. Bodine: Then will the witness answer distinctly my question as to the total wages paid these people?

The Court: You have it in your state-

40 ment already.

Mr. Bodine: If he admits it, why can he not say so?

The Court: He has already said so in terms, if you had listened to the question the Court asked. Do you question the figures of the totals of these payrolls?

The Witness: No, sir.

The Court: Is that satisfactory?

Mr Bodine: That is satisfactory

Q That is, for both years, is it not? 10

The Court: You need not answer that. We must reach an end some time.

By Mr. Moore.

Q. I show you a letter and ask you if you received that letter? A. Yes.

Mr. Moore: That is a letter written by Mr. Bodine. 20

Mr. Bodine: I don't think my letters go in evidence.

The Court: Let me see what it is. (After examining paper.) Mr. Moore, this clearly bears upon the question of compromise, in reference to a settlement

Mr. Bodine: Let me look at the letter. (Paper handed to Mr. Bodine.) I do not object.

The Court: All right. Let it be marked. 30

Two papers, fastened together, are marked respectively Exhibit D3 and Exhibit D4.

Q. When did you consider, so far as you were concerned, that these policies had been cancelled?

Mr. Bodine: Is this redirect examination?

A. June 4th. 40

Q. As a result of that did you pay any claims?

Mr. Bodine: If the Court please, this was brought out on direct examination.

The Court: I think it was, Mr. Moore I do not see any need of repeating it.

Mr. Moore: All right, sir. I just wanted to have it clear in the minds of the Court and jury.

10 The Court: I think there was a claim presented yesterday.

Mr. Bodine: I would like to have that letter marked as one of my exhibits. It is a letter identified by Mr. Brock yesterday.

Paper referred to is marked Exhibit P8.

Mr. Moore: Is this part of the actual policy, Mr. Bodine?

Mr. Bodine: I do not know.

20 Mr. Moore: I will have to ask that these papers attached be not included in this offer.

Paper last referred to is marked Exhibit P9.

J. CHAUNCEY VAN HORN, sworn for the defendant.

30 Direct examination by Mr. Moore:

Q. Mr. Van Horn, you were connected with the Van Horn Company? A. I was.

Q. In what capacity? A. President.

Q. You were the agent of the Fidelity & Deposit Company of Maryland? A. General agent.

Mr. Bodine: The agency contract speaks for itself.

40 Q. For what period of time? A Ever since the Van Horn Company was in existence.

Q. How long was it, approximately, if you don't remember the exact date? A. The latter part of 1913.

Q. How long have you been doing business with Brock's Garage, Incorporated? A. The last five or six years.

Mr. Bodine: I still insist, if the Court please, the agency must be proved either by an agreement or contract, other than from the mouth of the agent. 10

The Court: This question is not directed to that, Mr. Bodine.

Mr. Bodine: I should like to move to have the previous question stricken out, and also the reply, on the ground that agency must be proved in some other way than from the mouth of the alleged agent. 20

The Court: Well, the written paper, of course, must control his authority, unless it is explained in some way.

Mr. Bodine: The agreement we have in evidence is the agreement of 1914, January 1st.

The Court: It is a collateral matter, however, and does not concern this case.

Q. Mr. Van Horn, what had been the nature of your dealing as agent of the Fidelity & Deposit Company with Brock's Garage, Incorporated, so far as concerns paying bills by Brock's Garage to you? 30

Mr. Bodine: Objected to.

The Court: You mean as agent for the plaintiff?

Mr. Moore: Yes, sir.

The Court: I think he may answer that. 40

Mr Bodine: May I have an opportunity to state my objection to that?

The Court: Yes, surely.

Mr. Bodine: For the reason that the course of business cannot be controlling upon the plaintiff in this case; that the question is incompetent in that Mr. Van Horn cannot testify as to what his course of business was so as to have the course of business binding upon the plaintiff com-
10 pany, and for the other reasons stated yesterday when Mr. Moore made his offer with respect to Mr. Brock's testimony.

The Court: What were the other reasons?

Mr. Bodine: That this matter of agency or course of dealing must be brought home, if it can be; and that the question is incompetent and immaterial.

20 The Court: Is it intended to bring this information home to the company, Mr. Moore?

Mr. Moore: Yes, sir, directly in one instance, and indirectly in the rest.

The Court: All right.

Mr. Bodine: Under the law, if the Court please, it must be directly brought home to the principal, and the evidence
30 should be other than the testimony of the former agent.

The Court: Other than the declarations of the former agent.

Mr. Moore: It is not necessary it should be brought directly home to the principal, provided the principal learns of it and subsequently ratifies it.

Mr. Bodine: I must pray an exception
40 to the Court's ruling.

The Court: Note an exception.

Q. Now, will you answer my question? A. Exchange of business.

Q. Now, will you explain to the Court and jury just what you mean by that?

Mr. Bodine: If the Court please, may I have an exception noted to this whole line of testimony? I do not wish to disturb the Court by unnecessarily— 10

The Court: Involving this same question. If there is any new theory comes into your mind you had better make the objections specifically. What is the answer?

Mr. Moore: "Exchange of business."

By the Court:

Q. Do you mean to say that insurance bills have been paid by commodities or service? A. Yes. 20

Q. Do you mean to say that is true of all the insurance you have effected for the defendant? A. Nearly so, I guess. We have paid some cash. I think our bills have run more than we have received. It is not the case of Brock's Garage alone, but it is customary in the business.

By Mr. Moore:

Q. That is a general custom in the insurance business? A. Yes. 30

Q. How long have you been in the insurance business? A. Personally, about twelve years.

Q. And that has been the custom, so far as you have been able to learn, during that time? A. Yes; not only with our business but with all business.

Q. So you and Brock's Garage, Incorporated had counter accounts or exchange accounts? A. Yes. 40

Q. Was there an automobile and accessories for

that automobile, tires, gasolene and so forth, as one of the exchange accounts, one of the items? A. Yes.

Mr. Bodine: I must note another objection to this further line of testimony because the purchases by the Van Horn Company from Brock's Garage of an automobile and accessories, cannot be in any way binding upon the plaintiff company. It is in violation of every well known principle of law—for an agent to pay his own debts with the property of his principal, and testimony of this kind is irrelevant.

The Court: You heard what the witness said some time ago, which seemed to be of some importance, that there is a uniform custom among insurance people—

Mr. Bodine: The custom among thieves cannot be binding upon honest men if the Court, please.

The Court: Mr. Bodine, that remark is wholly uncalled for and unjustified, and the Court has in many cases withdrawn a juror for such remarks.

Mr. Bodine: That is the privilege of the Court.

The Court: Do you want it done in this instance?

Mr. Bodine: I do not ask it, if the Court please.

The Court: Then please do not invite it, and especially it is not necessary to interrupt the Court's statement to make such a remark.

Mr. Bodine: I beg the Court's pardon for doing so discourteous a thing.

The Court: I was continuing to remark

that the witness has said there was a general custom in the insurance business whereby the agents received the payment of premiums in merchandises and services—in answer to the Court's question? Now, is that custom known to the insurance companies?

Mr. Bodine: If the Court please, I pray an exception to testimony with respect to such custom as not binding upon the Fidelity & Deposit Company, and not being evidential in this case, and as altering the general rule of law with respect to agency as established by the decisions in this State. 10

The Court: Note an exception.

By Mr. Moore:

Q. Mr. Van Horn, I show you what purports to be a copy of an application blank or a copy of a policy, and will ask you-- 20

Mr. Bodine: Will you let me see the papers, Mr. Moore?

Mr. Moore: It is your own pleadings, Mr. Bodine.

Q. —and ask you whether that is a copy of the policy upon which this suit is brought, or a copy of the application blank? A. It is a copy of the application blank. 30

Mr. Bodine: I object to the question. if the Court please, for the reason that it was stipulated yesterday—

The Court: I think that is true, Mr. Moore.

Mr. Moore: I simply want to bring out the fact that it was necessary for Mr. Van Horn to sign all these application blanks and all policies as general agent. 40

Q. Is that true, Mr. Van Horn? A. Yes, sir.

Q. Now, examine these papers and tell me when the premium was due to be paid, after taking into consideration—

Mr. Bodine: I object. When the premium was due to be paid has no binding effect on the principal.

10 Q. —taking into consideration the dates of these policies or applications or whatever they might be?

Mr. Bodine: May I have a ruling on the question and objection?

The Court: I do not see, Mr. Moore, how the time becomes important.

Mr. Moore: It does under the fifth paragraph of the agency agreement, which

20 provides the agent shall on or before the 10th of each month render to the company an account current (reads).

Q. Now, this policy is dated March 1, 1915? A. Yes.

Q. The schedule report should have been given to the company on that day, March 1, 1915, or within forty days thereafter the company should have had the money in its possessioon for the

30 business done the preceding month.

The Court: That is all in the policy, is it not?

Mr. Moore: I am asking Mr. Van Horn just when it was due.

The Court: You have already read the terms of it.

Mr. Moore: So the company must have had some knowledge, when it has waited

40 over a year, that Mr. Van Horn was doing this exchange line of business.

The Court: Are you dealing with the agent relation with the company or with the payment of premiums on these policies by the insured?

Mr. Moore: With the payment of premiums on the policy by the insured.

The Court: The terms of the policy determine that.

Mr. Moore: The terms of the policy would not determine the exact time they were paid. 10

The Court: The question is when they were payable and the policy must control that. I will sustain the objection.

Mr. Moore: All right, sir.

Q. Mr. Van Horn, was a deposit premium credited on policy 1552958? 20

Mr. Bodine: Our pleadings set out that that was credited, Mr. Moore.

Q. On that credit, was that paid by cash or merchandise?

Mr. Bodine: I object to the question as incompetent and irrelevant, that it makes no difference in this case whether the premium was paid to Mr. Van Horn 30 or the Van Horn Company in money or merchandise, when credit is given by the Fidelity & Deposit Company to the insured with respect to that payment.

The Court: The objection is overruled and an exception allowed.

Q. Paid by merchandise? A. Yes.

Q. And the $62.20 premium on the second policy, was that paid in cash to you or merchandise? A. The items of insurance with Brock's 40

Garage would be charged to Brock's account, being a counter account, and credited against any items purchased of Brock's Garage.

By the Court:

Q. There was no cash at all paid by Brock? A. No; once a year it was balanced up, and if we owed Brock anything we would send a check or if he owed us anything he would send it to us.

10

Q. Had you had any dealings before March 1st, 1915, with Brock's Garage as agent? A. Yes, the application shows this was a renewal of the policy that we had previous, which would be 1914 and 1915.

Q. What would the company know, if anything, about your course of dealing with Brock? A. Through their superintendent.

20

Mr. Bodine: I think the testimony of the witness on that point is not binding on the company.

The Court: It may not be. Note an exception.

A. The liability superintendent who often visited the agency was the one who went with me first to write up the business. Various representatives of the insurance company would visit the agency from time to time and go around and assist me in closing up these risks, and they were conversant with the method by which we were able to get business. In fact, I think you will find a letter where I secured a renewal of Brock's business. We had strong competition that year for business, and that letter will show where it was necessary to buy an automobile to secure the business; and I think there is a reply in the records where they have acknowledged receipt of the letter.

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40

Mr. Bodine: At this time, if the Court please, I would like to make a motion to strike out the answer given by Mr. Van Horn as in no way binding upon the Fidelity & Deposit Company. The circumstance that various employees of the Fidelity & Deposit Company did certain things with Mr. Van Horn is not evidence which is binding or effective as against the insurance Company. 10

The Court: Motion is denied and an exception allowed.

Mr. Moore: Have you the letter dated February 28, 1916?

Mr. Bodine: I think that copy is a carbon copy, if you are going to offer that in evidence, which I suppose is your purpose.

Mr. Moore: Yes. 20

Mr. Bodine: I must note my objection to the offer for the reason that the statements contained in the agent's letter to the principal cannot become binding upon the principal, and for the further reason that there is nothing in the letter itself which would indicate to a person reading it that the course of business was as testified to by Mr. Van Horn over my objection. 30

Mr. Moore: If the Court please, I will ask Mr. Van Horn if that is a letter he wrote to the Fidelity & Deposit Company, liability department, Baltimore, Maryland, on February 28th, 1916.

The Witness: That is not a letter I wrote, but it is written by the secretary of the company.

The Court: Of your company? 40

The Witness: Yes, sir.

Mr. Bodine: Then I object to the letter

for the further reason that it is not properly proven.

The Court: It must be shown that it was communicated to the plaintiff, Mr. Moore.

Mr. Moore: Yes.

Q. As the result of that letter being sent, did you receive a reply? A. Yes, sir; and I might add that this letter was written at my suggestion.

10

Q. I show you what purports to be a letter signed by the superintendent of the Fidelity & Deposit Company of Maryland, dated March 1st, two days after this letter, and ask if that is a reply your company received in pursuance of sending this letter? A. Yes, sir.

Mr. Bodine: I object to that.

20

The Court: It is too late for an objection.

Mr. Bodine: If the Court please, I was quite prompt with my effort to address the Court, and I cannot make an objection until I am recognized, and I would like to note an objection on the record that an opportunity was not afforded me to make my objection.

30

The Court: Well, I cannot agree with that statement at all.

Mr. Bodine: I hardly expected your Honor would.

The Court: Go on, Mr. Moore.

Mr. Moore: I offer these two letters in evidence.

Mr. Bodine: I object to the offer for the reason which I have stated with respect to the fact that the letters are not proved, as binding upon the principal, that they are not evidence against the principal in the

40

transaction, and that they are inconsequently and irrelevant and of no consequence.

The Court: Objection overruled and an exception allowed.

Papers referred to are marked respectively Exhibit D5 and Exhibit D6.

Q. On how many occasions did a representative of the Fidelity & Deposit Company of Maryland, accompany you to Brock's Garage? 10

Mr. Bodine: I object to that question as not material or evidential, who accompanied Mr. Van Horn to Brock's Garage, or anything that occurred there, as not binding on the insurance company.

The Court: Objection overruled and excepton allowed.

Q. How many times, Mr. Van Horn? A. I cannot recall. 20

Q. Was it more than one? A. Yes, sir.

By the Court:

Q. Before or after this particular insurance was effective? A. Before and after. The auditors would come up and I would go down with the auditors or the inspectors would come up, or the superintendent of the liability department, who looked after the classifying of the risk, and we had particular trouble in classifying this risk, and he insisted on a home office representative coming on. 30

By the Court:

Q. Mr. Van Horn, what was the position of the gentleman who had charge of your course of dealing with Mr. Brock? A. It was Mr. Cruett. 40

Q. What was his position? A. He was the head of the liability department and he was the man who effected that contract you have there. He

was the man I had all my dealings with. He was the head man of the company.

By Mr. Moore:

Q. From the home office? A. Yes, sir; right from Baltimore.

Q. And he was present when you discussed with Mr. Brock or Brock's Garage, Incorporated, the
10 counter account?

Mr. Bodine: I must here object to the introduction of this sort of hearsay evidence if it is intended to be binding on the company. Admissions of or knowledge of statements cannot be binding in any way upon the corporation. There is no evidence of the extent of authority of the alleged officer present. The introduction of such testimony
20 opens the door for hearsay evidence which cannot be binding upon a corporation defendant. There must certainly be some proof of the agency or some proof that the agent was capable of making the admission, and some proof of knowledge. Merely stating that somebody was present at a given time and that certain things happened, as I think this is the foundation
30 for, were said, cannot be binding upon the corporation.

The Court: Objection overruled and exception allowed.

Q. Mr. Van Horn, you were the general agent of this company? A. Yes.

Q. With power to appoint sub-agents? A. Yes, and I did appoint sub-agents.

40 Mr. Bodine: That has been testified to and an exception taken to it.

Q. Your company went into bankruptcy? A. Yes.

Q. What was the date of that? A. May 12, 1916.

Q. Was any claim filed against your company by the Fidelity & Deposit Company?

Mr. Bodine: If the Court please, I must object to that question, because the circumstances of a claim being filed or not filed cannot affect this case. The testimony of Mr. Messler, the witness called by the plaintiff yesterday, was that there was a claim filed with him as Trustee. 10

The Court: Gentlemen, is there any dispute about that? I thought there was an admission yesterday by Messler that the claim was first filed with the referee in bankruptcy. 20

Mr. Moore: The referee in bankruptcy did not produce the claim, and I wanted to find out whether or not Mr. Van Horn knew just what that claim contained.

Mr. Bodine: Is the referee in bankruptcy under subpœna in this Court?

Mr. Moore: No.

Q. Do you know why the Fidelity & Deposit Company of Maryland waited from March 1st, 1915, which is the date of this application, to May 18th, 1916, before trying to secure payment of this policy? 30

Mr. Bodine: If the Court please—

The Court: Objection sustained. You need not make an objection to that.

Mr. Moore: Cross examine.

Mr. Bodine: No questions. 40

By the Court:

Q. At these interviews with the superintendent that you have spoken about, prior to and during the running of these accounts, was or was not he informed of the way in which you were taking payments? A. Yes, sir, and I might add a little instance, that this very superintendent, Mr. Cruett, had a charge made for merchandise from one of the stores, not Brock's Garage; it was in town. It was somewhere around $40.00, for some purchases he made, and it was charged against the insurance account that we had with that particular merchant.

Q. And credit given by the company? A. No; he later on adjusted it with the Van Horn Company. When he purchased it, it was charged then against the Van Horn Company, and there was a counterclaim with the same merchant for insurance, and later on the superintendent sent me his check for it.

Mr. Moore: If the Court please, I was under the impression yesterday that the pleadings contained the copies of the policies, but I find the pleadings contain simply the application blanks. Now, if possible, I would like the plaintiff to produce the original policies.

The Court: Do they differ?

Mr. Bodine: So far as I have them, they are not. I wrote to Baltimore at the time I drew my pleadings and asked them for complete copies of the policies. I affixed those copies to the complaint, and I was assured by their letter that they would have the complete copies. I have here two of the policies which I subpœnaed Mr. Brock to produce, and so far as I have examined them they are identical to the other two.

The Court: Gentlemen, is there any substan-

tial difference? It has already been admitted that—

Mr. Moore: We will rest, if the Court please.

The Court: Proceed, Mr. Bodine; have you anything further?

Mr. Bodine: Nothing further, if the Court please.

The Court: Proceed to the jury.

Mr. Bodine: I would like to move for a direction of verdict for the plaintiff for the whole amount involved. 10

The Court: Mr. Moore, I may say to you, that there is, on one thory in this case, a total absence of any proof of the impropriety of the classification.

Mr. Moore: We have shown, if the Court please, by Mr. Brock's testimony, that the company's figures are $6,676 out of the way. 20

The Court: No, no. Mr. Brock testified that he based his calculations upon the June date of expiration of the policy, and he also testified that during the year 1915, there was a period at which these premiums should have been so and so, and he said there was a difference in the classification but not a difference in the total. But he did not in any way indicate how those different classifications were made up. 30

Mr. Moore: I think if the Court would find the record you would see that it is.

The Court: There has been nothing offered in evidence as to the record.

Mr. Moore: This is the paper Mr. Brock was examined on.

The Court: It was not offered in evidence.

Mr. Moore: We could not get it in evidence because Mr. Bodine objected. 40

The Court: Yes, but it is not in evidence. There was testimony of a discrepancy by reason

of the classification, but not testimony, as I recall, as to how that classification by the plaintiff was erroneous. However, I suppose it becomes a question for the jury. Make your motion, Mr. Bodine.

Mr. Moore: The policies would show, if they were produced here, if the Court please.

Mr. Bodine: If the Court please, I move for 10 a direction of verdict for the plaintiff for the full amount claimed in the complaint for the reason that the evidence shows the policies in question were delivered by the Fidelity & Deposit Company of Maryland to Brock's Garage, and that the amounts set out in the policies are the amounts of the deposit premiums still remaining unpaid, and the estimated premiums based upon the total payroll of Brock's Garage 20 as admitted during the period covered by the respective policies, and as testified to by the plaintiff's witness, Mr. Baker. For the further reason that the defense as to those deposit premiums for which the Van Horn Company took property belonging to Brock's Garage and offset that upon its books so as to show a balance due by the Van Horn Company to Brock's Garage, cannot be recorded as a payment to the Fidelity 30 & Deposit Company of premiums for insurance written by them. The general principle of law governing this case is that an agent has no power to give up his principal's property, either money, insurance policies or other obligations, and receive therefor property for his own use, and that the plaintiff is entitled to recover for the two deposit premiums that were not paid by Brock's Garage to the Van Horn Company as 40 agent of the Fidelity & Deposit Company and for which the Van Horn Company received property for its own use. Then, for the further rea-

son that there is no evidence bringing home to the principal knowledge of these illegal transactions which can be sufficient to form a basis for the theory of a ratification on the part of the lilegal acts done, by the principal.

I have embodied my objections in a written statement which I also make as plaintiff's requests to charge, and I should like to note on the record that my motion for a direction of verdict contains the reasons set out in my requests as well as those which I have given orally. 10

The Court: Motion denied and exception allowed.

Counsel summed up.

The Court: Mr. Bodine, won't you and Mr. Moore come here just a moment?

Court and counsel confer.

The Court: The calculation of the defendant as made here is based upon the cancellation of this policy on June 4th, as I understand, and that construction of the testimony I cannot agree with. I think it conclusively appears in this case that the policy ran until at least November 1st, 1916. Now, what amount of money do you concede would be due to the plaintiff upon that construction and that theory? 20

Mr. Moore: Upon that construction, if the Court rules that the policy was in existence and alive until November 1st, Mr. Brock has testified that $290 additional, less $6.00, which we paid for a claim, would have been earned. 30

The Court: Unfortunately the $6.00 was not presented as a claim against the company.

Mr. Moore: We thought the policy had expired.

The Court: Yes, but that is a risk you took. 40

Plaintiff's counsel requested the Court to charge as follows:

1. Plaintiff is entitled to recover, under the terms of the policies written by it for defendant, Brock's Garage, Incorporated, the premiums therein stated to be due, based upon the payolls during the periods of the respective policies, as
10 shown at the time of the examination of defendant's books by the plaintiff's auditor, Mr. Baker, amounting to the following sums:

1st policy, $318.25.
2nd policy, 85.22.
3rd policy, 523.92.
4th policy, 101.56.
With interest from March 1, 1916.

20 2. The Van Horn Company was the agent of the Fidelity & Deposit Company of Maryland and as such agent had no authority in law to receive property for its own account in settlement of the claim of the principal.

3. The defendant, Brock's Garage, Incorporated, knew that the Van Horn Company was the agent of the Fidelity & Deposit Company of Maryland, and could not discharge their debt to
30 the Fidelity & Deposit Company by delivering property to the Van Horn Company, the agent of the Fidelity & Deposit Company.

4. The Fidelity & Deposit Company of Maryland does not lose its right to recover premiums due upon the insurance policies written by it through its agent, the Van Horn Company, for Brock's Garage, Incorporated, by reason of any transactions between the Van Horn Company and
40 Brock's Garage, Incorporated, short of payment by Brock's Garage, Incorporated, to the Van Horn Company of the premiums due the Fidelity & Deposit Company of Maryland.

5. The Fidelity & Deposit Company of Maryland cannot have been deemed to have ratified the transactions between Brock's Garage, Incorporated, and the Van Horn Company with respect to the transfer by Brock's Garage, Incorporated, to the Van Horn Company of an automobile in payment of the premiums of the Fidelity & Deposit Company of Maryland due for insurance written, until the Fidelity & Deposit Company of Maryland were notified of the transaction and acquiesced therein, when, and in such case only, they might be deemed to have ratified the unauthorized act of the agent, the Van Horn Company.

10

6. The mere statement of the Van Horn Company made to the Fidelity & Deposit Company of Maryland or any of its officers, that the Van Horn Company had purchased from Brock's Garage, Incorporated, an automobile and thereby secured a continuance of the policies of the Fidelity & Deposit Company of Maryland, cannot be taken as a ratification of the unauthorizel act of the Van Horn Company in delivering the policies of insurance, as agents of the Fidelity & Deposit Company of Maryland, to Brock's Garage, Incorporated, for an automobile to be used in the business of the Van Horn Company.

20

30

Charge.

The Court (J.): Gentlemen of the Jury: The case that you are trying is one that is possibly somewhat complicated. It is an action by an Insurance Company to recover premiums upon four insurance policies. Part of the premiums upon some of the policies have undoubtedly been paid and acknowledged by the Insurance Company, but the claim here is for the balance of

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premiums amounting to the sum of $1,027.95, with interest from March 1, 1916. I suppose there would be slightly more interest, but the request sets forth March 1, 1916.

Mr. Bodine: That is the date we take.

The Court: Yes; the defense is two-fold: First, that the classification of the employees was not correctly made by the Insurance Company in figuring the amounts finally found to be due. You will understand that these are two kinds of insurance, one covering Brock's Garage against liability to its employees, the other covering Brock's Garage against liability to third persons by reason of Brock's Garage employees. That, in a general way, is a statement of the two sets of policies.

The defendant's claim, as I have said, is that there have been included in these classifications by the company men who were not in the class at a higher rate, but should be in the lower rate, and the defendant has figured on an obligation to pay a sum less than the amount that the complainant contends for. In addition to that the defendant sets up that there has been payment of some part of the account; that there was a course of dealing between Brock's Garage and the agent of the plaintiff company whereby Brock's Garage had been in the habit of paying for their insurance premiums with supplies Now, it is the law and it must be quite reasonably obvious to you, that where I am appointed an agent by another to collect money I cannot take all sorts of merchandise in payment, and if all that appeared in this case were the testimony of actual transference of merchandise to the agents and the crediting on this account of that merchandise by the agents, on the insurance account, the Court would be obliged to say to you that it

could not be so credited. But the defendant contends that there was authority in this agent to receive payment in that form, and quite considerable evidence has been introduced along such lines. It is only upon the theory that the agent was authorized to receive the payment in merchandise, authorized by the company, that you can find any credit to the defendant upon that kind of payment. 10

The policies ran until November 1, 1916. The calculation of Mr. Brock was based upon the policy expiring on June 4, 1916, which is clearly erroneous, because the testimony in the case shows that there was no cancellation of the policies until November 1st. So that even if you find Brock's contention is right as to the classification, you are obliged to add to that the period running until November 1st from June 20 4th of last year. It has been stated by defendant's counsel that on that theory of the case there would be an admitted amount of $517.12, but you will have to ascertain the facts from the whole testimony in the case.

Your verdict, under the circumstances, cannot be for a less sum than $517.12. Whether it shall be for more depends upon other findings in the case which I have already suggested to you. 30

I am asked to charge you some requests, by the plaintiff company:

> "4. The Fidelity & Deposit Company of Maryland does not lose its right to recover premiums due upon the insurance policies written by it through its agent, the Van Horn Company, for Rock's Garage, Incorporated, by reason of any transactions between the Van Horn Company and 40 Brock's Garage, Incorporated, short of payment by Brock's Garage, Incorporated, to

the Van Horn Company of the premiums due the Fidelity & Deposit Company of Maryland."

That is true. It must be payment. Whether the payment had to be in cash, or whether it was permissible to pay it in merchandise, is a question for you.

10 "5. The Fidelity & Deposit Company of Maryland cannot have been deemed to have ratified the transactions between Brock's Garage, Incorporated, and the Van Horn Company with respect to the transfer by Brock's Garage, Incorporated, to the Van Horn Company of an automobile in payment of the premiums of the Fidelity & Deposit Company of Maryland due for in-
20 surance written, until the Fidelity & Deposit Company of Maryland were notified of the transaction and acquiesced therein, when, and in such case only, they might be deemed to have ratified the unauthorized act of the agent, the Van Horn Company."

That is true.

"6. The mere statement of the Van Horn
30 Company made to the Fidelity & Deposit Company of Maryland or any of its officers, that the Van Horn Company had purchased from Brock's Garage, Incorporated, an automobile and thereby secured a continuance of the policies of the Fidelity & Deposit Company of Maryland, cannot be taken as a ratification of the unauthorized act of the Van Horn Company in delivering the policies of insurance, as agents
40 of the Fidelity & Deposit Company of Maryland, to Brock's Garage, Incorporated,

for an automobile to be used in the business of the Van Horn Company."

Standing alone that is true, but taken in connection with the other testimony in the case you will determine whether there was authority in Van Horn to receive payment in merchandise.

You may retire.

Mr. Bodine: I would like to reserve on the record my exception to the charge with respect to the evidence, according to my theory erroneously introduced, as to the course of dealing. 10

The Court: Yes; all right.

Postea.

(Filed May 24, 1917.)

This case was tried before Judge Frank T. Lloyd with a jury, at the Mercer Circuit of the Supreme Court, on May 22, 1917. 20

The jury rendered a general verdict against the defendant, Brock's Garage, Incorporated, and in favor of the plaintiff, Fidelity and Deposit Company of Maryland, for five hundred and seventeen 12/100 dollars.

FRANK T. LLOYD,
Judge. 30

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Exhibit P1.

Casualty Form No. 666. Dec. 1913. (General Agents)

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

HOME OFFICE; BALTIMORE, MARYLAND.

AGENCY AGREEMENT.

1 THIS AGREEMENT, made this fifth day of January, 1914,
2 between THE VAN HORN COMPANY,
3 { (office address—street and number) State and Warren Streets,
4 of { Town Trenton, County Mercer, State New Jersey,
10 5 (hereinafter called the Agent) and the FIDELITY AND DEPOSIT COMPANY OF MARYLAND
6 (hereinafter called the Company).
7 WITNESSETH, that the said parties, in consideration of the mutual covenants and agreements here-
8 inafter mentioned, hereby mutually agree with each other as follows:
9 The Company does hereby appoint the said THE VAN HORN COMPANY,
10 as its Agent for the branches of its business hereinafter specified in lines numbered 47 to
11 63 inclusive...................., in the territory described as follows:
12 Hunterdon County, (excluding Lambertville), Middlesex County, (ex-
13 cluding New Brunswick and Perth Amboy), Monmouth County, (exclud-
14 ing Asbury Park), Somerset, Ocean, Mercer and Burlington counties
15 in the State of New Jersey,..
16 this appointment being made upon the following terms and conditions:
20 17 FIRST: The Agent shall give his best efforts to the procuring of business for the Company in the
18 territory allotted to him, and to the appointment of sub-agents therein, subject to the approval of the Com-
19 pany, and to the prompt collection and remittance of all premiums payable for such business.
20 SECOND: It is understood and agreed that the Agent shall strictly adhere to the Classification Manual
21 as used by the Company, and, under no circumstances whatever, shall the Agent deviate therefrom, unless by
22 written consent of the Home Office; and the Agent shall otherwise well and faithfully perform his duties as
23 Agent without fraud or delay, and comply with all instructions and rules of said Company.
24 THIRD: The Company agrees to furnish the Agent with all policy forms, policy registers, and such
25 other stationery as it usually furnishes its Agents, and the Agent agrees to keep a faithful and correct record
26 in the policy register of all business written by him, which record shall be considered the property of the Com-
27 pany, and shall be returned to it upon its demand.
28 FOURTH: The Agent shall each day send to the Home Office of the Company the applications for
30 29 all policies and renewals issued by him.
30 FIFTH: The Agent shall, on or before the tenth day of each month, render to the Company an account
31 current, reporting all policies and renewals issued by him or his Sub-Agents during the preceding month,
32 and shall also include in this account current all additional premiums as shown by pay roll reports or
33 audits of which he has been notified by the Company, and at the close of said month the Agent shall
34 remit in full to the Company for balance due Company as per account current.
35 SIXTH: The Company agrees to allow the Agent full returned premiums for all policies and renewals
36 returned to it, provided the Agent is unable to collect any premium thereon; it being understood, however,
37 that such policies and renewals shall be returned to the Company within thirty (30) days from their issu-
38 ance, and that all policies and renewals not returned within said period shall be paid for pro rata by the Agent
39 from the effective date of the policy.
40 SEVENTH: The Company agrees to pay the Agent commissions on the lines designated below as fol-
40 41 lows: Lines No. 47 to 63 inclusive..
42 The said commission shall be in full payment for all services rendered and all expenses incurred by the Agent.
43 The said commission as respects each of the said branches of the Company's business shall be based at the rate

44 specified in the following table, upon the net cash premiums, namely, the gross premiums actually received by
45 the Company, less the amount returned to the Assured on account of the alteration, suspension, cancellation,
46 or abatement of any policies:

47	Personal Accident	Thirty-five	(35%)	per cent.
48	Health	" "	(35%)	"
49	Plate Glass	" "	(35%)	"
50	Burglary, Bankers	" "	(35%)	"
51	Burglary, Residence (Burglary or Theft)	" "	(35%)	"
52	Burglary, Robbery	" "	(35%)	"
53	Burglary, Safe (Stores and Offices)	" "	(35%)	"
54	Burglary, Store	" "	(35%)	"
55	Automobile Liability	Twenty-five	(25%)	"
56	Druggists' Liability	" "	(25%)	"
57	Elevator	" "	(25%)	"
58	Employers' Liability	Seventeen and one-half	(17½%)	"
58½	Prop. Damage & Collision—	Twenty-five	(25%)	"
59	General Liability	" "	(25%)	"
60	Physicians' Liability	" "	(25%)	"
61	Teams' Liability	" "	(25%)	"
62	Workmen's Compensation	Seventeen and one-half	(17½%)	"
63	Workmen's Liability	" " "	(17½%)	"

64 It being understood that all premiums paid to the Agent are to be considered the property of the Com-
65 pany, and that the commission which the Company agrees to pay the Agent shall be considered a debt due
66 by the Company to the Agent, and shall not be construed in any way as giving the Agent a lien or claim
67 on the Company, and in case the Company allows the Agent to deduct their commission from
68 premiums collected by them for the purpose of facilitating the handling of its business, it shall in
69 no sense be construed as a waiver of the rights of the Company to its ownership of the premiums.
70 EIGHTH: For the purpose of this agreement, (in so far as Liability and Workmen's Compensation
71 are concerned), an Additional Premium is understood to be a premium due the Company as shown
72 by the pay roll statement furnished the Company by the Assured at the expiration of a policy term. An
73 Excess Premium is a premium disclosed by the Company's own auditors and is a premium due in excess
74 of the additional premium above defined.
75 NINTH: It is expressly understood and agreed that the Agent shall be entitled to the commission
76 provided for herein on Additional Premiums found due and owing the Company from any Assured accord-
77 ing to the provisions of any of its policies written while this contract is in force. Where the Company's
78 own paid auditors disclose an Excess Premium due the Company over the premium due as shown by
79 the Assured's payroll reports, the Company shall allow no commission on such Excess Premium unless
80 said Excess Premium is Twenty-five dollars ($25.00) or more.
81 TENTH: It is expressly understood and agreed that the Agent shall be entitled to the commission
82 provided for herein on Additional Premiums found due and owing the Company from any Assured accord-
83 ing to the provisions of any of its policies, after the termination of this contract, when collected from said
84 Assured by the Company, less the expenses of such collections; except in case this agreement is terminated
85 for violation of its terms. After the termination of this contract, the Agent shall, on demand, refund to
86 the Company all commissions paid the Agent on premiums due or on premiums returned by the Com-
87 pany to any Assured by reason of the provision of any policy.
88 ELEVENTH: The Agent shall refund to the Company on any returned premium allowed by the
89 Company on any policies written through the Agent the same rate of commission as above specified.
90 TWELFTH: It is agreed that the Agent shall represent no other company in so far as the several
91 classes or kinds of insurance included in this contract are concerned.

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92 THIRTEENTH: The Company reserves the right to detach from the territory of the Agent any
93 portion or portions of said territory named herein or to appoint additional Agents, and also to terminate
94 his agency as to any class or classes of insurance named herein, and to appoint another agent or agents
95 in his stead for the detached territory, or for the class or classes of insurance for which his agency may
96 have been terminated.
97 FOURTEENTH: The Company reserves the right to reject any application for a policy which may
98 be submitted by the Agent .
99 FIFTEENTH: This Agreement annuls all previous Agreements which may have been entered into
100 with the Agent by the Company, so far as the classes or kinds of insurance included in this contract are
101 concerned.
10 102 SIXTEENTH: This contract cannot be assigned without the consent of the Company.
103 SEVENTEENTH: This Agreement to take effect October 1st, 1913,
104 and to continue in force until terminated by either party, which can be done on ten (10) days' notice by
105 either party, or instanter for cause.
106 IN WITNESS WHEREOF, the parties to this Agreement have hereto subscribed the same, the day
107 and year first above written.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By FRED S. AXTELL,
Vice-President.
J. D. MAHON,
Assistant Secretary.
THE VAN HORN CO.,
General Agents.
20
J. C. VAN HORN,
President.
Attest: W. J. GLADEN, Sec'y.

30

40

Exhibit P6.

BROCK'S GARAGE, Inc.
Wholesale and Retail
Automobiles and Supplies
Repairing, Electric Charging
Canal Street at State

Phone 5700

Trenton, N. J.
May 27th, 1916.

10

Fidelity & Deposit Co.,
Baltimore, Md.

Gentlemen:

Replying to yours of the 26th, beg to inform you we wrote you on the 22d, advising statements referred to were partly taken care of by contra charges between the Van Horn Company and ourselves.

20

The invoice of $6.00 the writer sent you check for yesterday, as that was a personal matter.

Yours truly,
BROCK'S GARAGE, INC.,
John L. Brock.

JLB/T

Stamped: Rec'd May 29, 1916. Contract Dept.

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Exhibit P7.

BROCK'S GARAGE, Inc.
Wholesale and Retail
Automobiles and Supplies
Repairing, Electric Charging
Canal Street at State

Phone 5700

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Trenton, N. J.
July 20, 1916.

The Fidelity & Deposit Company of Maryland,
Baltimore, Md.

Mr. E. Milton Smith.

Gentlemen:

Replying to yours of the 18th, as before stated, part of your account was taken care of by accounts of the Van Horn Company and we are ready and willing to adjust our account accordingly. Otherwise, it is your privilege to adopt whatever means you consider most expeditious to make your collection. Your representative called here the other day for the purpose of going over our roll, but unless you are willing to allow our settlement as above, we will decline to look any further into the matter, for the present at least. In fact, some time ago you advised us you would cancel our policies. At the present writing we are a little uncertain as to where you stand.

We are willing, however, to pay you whatever is due but will not pay something which has already been paid to the Van Horn Company.

Yours truly,
BROCK'S GARAGE, INC.,
John L. Brock.

JLB/M

Exhibit P8.

BROCK'S GARAGE, Inc.
Wholesale and Retail
Automobiles and Supplies
Repairing, Electric Charging
Canal Street at State

Phone 5700

Trenton, N. J. 10
November 1st, 1916.

Fidelity & Deposit Co. of Maryland,
Baltimore, Maryland.

Gentlemen:

Enclosed herewith find check for $320.80, in full for our account to date, as we desire to cancel the policies enclosed herewith #1567891 and #6301390. 20

Yours truly,
BROCK'S GARAGE, INC.,
John L. Brock.

JLB/T
Enc—

Stamped: Cash in hands of Treasurer.

Exhibit D1.

A. W. BELTING, M. D. 30
Aleda Apartments
Trenton, New Jersey

September 2, 1916.

The following represents services rendered to Mr. Harry Ploe.

40

August, 8, 1916, Surgical Treatment & Dressing $2.00
August 9, 1916, Surgical dressing 1.00
August 11, 1916, Surgical dressing 1.00
August 12, 1916, Surgical dressing 1.00
August 14, 1916, Surgical dressing 1.00

Total $6.00

10 Rec'd Paym't

A. W. BELTING

12/27/16

Exhibit D2.

EDWIN WARFIELD,
President.

20 FIDELITY AND DEPOSIT COMPANY OF MARYLAND

Home Office, Baltimore

Accounting Department,

ROLAND BENJAMIN
Comptroller

EMS/RG

Baltimore, May 31st, 1916.

30

Brock's Garage,
Canal Street,
Trenton, New Jersey.

Gentlemen:—

Under date of the 18th instant we forwarded you a statement as per copy enclosed and asked you to verify same against your records advising
40 us to that effect. Under date of the 26th instant as we had no reply, we wrote you again asking you to advise in regard to this matter, but

we have not heard from you up to this time in regard to the premiums on these policies.

The writer when he was in Trenton went over your account on the books of the Van Horn Company, our former agents in Trenton and investigated same thoroughly. As you know your account with Mr. Van Horn was what was termed as "Trading" account, that is to say, Mr. Van Horn bought things for his own personal use from you, which were applied against premiums due on your insurance policies. We take this opportunity to advise you that the Fidelity & Deposit Company does not recognize any such transactions and any amount that Mr. Van Horn may owe you will be settled with you through the receiver. But we will look to you for settlement on premiums on your policies direct to the Home Office.

If we do not hear from you by Monday June 4th in reference to this matter we will cancel your policies and charge you with an earned premium for Liability assumed up until the time these policies are cancelled. We trust, however, that we will not have to take this drastic step as we are anxious to keep your insurance, but if we do not hear from you by the time set we will be compelled to cancel your policies.

Trusting to have a favorable reply from you by return mail, I am,

Yours very truly,

E. MILTON SMITH,

Traveling Auditor.

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Exhibit D3.

VROOM, DICKINSON & BODINE
Counsellors at Law
Mechanics Bank Building
Trenton, N. J.

John M. Dickinson
Joseph L. Bodine

10

January 4, 1917.

Mr. John L. Brock,
Trenton, N. J.

Dear Sir:

The Fidelity & Deposit Co. of Maryland have noted your letter to me of December 28th, enclosing a statement of premiums on policies in that company held by you. My instructions are that unless I receive from you a check for the amount earned upon the policies in question, as shown by the statement made by the Fidelity & Deposit Co. as of November 1st, that suit be instituted against you, unless you be willing, without prejudice, to settle the matter by the payment of the amount due as shown by the figures of the Fidelity & Deposit Co. as of June 4, 1916, plus a compromise of the difference between the June 4th amount and the November amount, in accordance with the suggestions made by me to you at the time you called upon me in respect to this matter.

20

30

Very truly yours,
J. L. BODINE.

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Exhibit D4.

Jan. 5, 1916.

Joseph L. Bodine,
City.

Dear Sir:—

Replying to yours of the 4th, we regret the Fidelity & Deposit Company is not willing to accept our settlement, to which we feel we are justly entitled, especially the reduction of the first policy for clerical work. 10

Yours truly,
BROCK'S GARAGE, INC.

JLB/T.

Exhibit D5.

20

Edwin Warfield,
President.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

Home Office Baltimore
The Van Horn Company,
General Agents
135 E. State Street

30

Across face: Approved for Filing. H. D. Horner.

Trenton, N. J., February 28, 1916.

Fidelity & Deposit Co.,
Liability Department,
Baltimore, Md.

Gentlemen:

RE: BROCK'S GARAGE, INC.—COMPENSATION. 40

Kindly prepare and forward policy to us as per attached application.

We can consider ourselves very fortunate in being able to retain this risk in the face of very strenuous competition on the part of the Commercial Casualty Co. of Newark. The Commercial quoted a rate of 70c. for compensation against our rate of 76c.

On the general liability policy they quoted elevator at $45.00 against our $50.00 rate. The worst
10 competition was their quotation of their rate of $2.80 against our rate of $3.00 on the P. L.

Incidentally we might state that the way we retained the risk was through the purchase of an automobile. If any of you boys in the Home Office contemplate buying an automobile, don't forget to let us know, and perhaps we can land another garage risk through reciprocity.

Kindly let the policy come through by return
20 mail.

Yours very truly,
THE VAN HORN COMPANY,
Insurance Dept.

RL/Enc.

Stamped: Received Feb. 29, 1916. Liability Underwriting Department.

30

40

Exhibit D6.

Edwin Warfield,
President.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

Home Office Baltimore

Liability Department
R. W. Forsyth,
Superintendent

10

Baltimore, March 1st, 1916.

The Van Horn Company,
Trenton, N. J.

Gentlemen:

IN RE: BROCK'S GARAGE, INC.—COMPENSATION.

20

Your favor of the 28th advising us that you have been successful in holding this line has been received with much pleasure, although we must admit that if it is necessary to purchase an automobile in order to secure every risk of this nature, it will prove a rather expensive proposition.

You will notice when you receive the Compensation policy for the above assured that we have written all employees other than clerical force and chauffeurs at a rate of 62c., which rate went into effect in your State on the 21st inst. Further, you will notice that we have set forth the rate for chauffeurs at $1.07, which rate became effective in your State as of the 4th inst. We trust these small reductions will be of some help, as we have beaten the Commercial Casualty Company at their own game in this one instance.

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40

Very truly yours,
R. W. FORSYTH,
Superintendent.

4/IMB

Notice of Appeal.

(Filed June 28th, 1917.)

To

Hervery S. Moore, Esquire,
Attorney of Defendant:

Take notice that the plaintiff appeals to the
10 Court of Errors and Appeals from the whole of
the judgment entered in this cause.

DICKINSON & BODINE,
Attorneys of Plaintiff.

Dated June 6, 1917.

Grounds of Appeal.

To

20 Hervey S. Moore, Esq., and
John A. Hartpence, Esq.,
Attorneys of Defendant-Respondent.

Sirs:

Take notice that the folowing are the grounds of appeal from the whole of the judgment entered in this cause in the Supreme Court:

1. The Court permitted the defendant's wit-
30 ness John L. Brock, over objection, to testify as to the course of business between himself and the Van Horn Company and the nature of the settlement of various accounts between themselves. The question was "Will you explain to the Court and jury the nature of the settlement of these various accounts, if any, between yourself and the Van Horn Company"? and also the question "Over what period of time was it you and Brock's Garage
40 and the Van Horn Company had these dealings"?

2. The Court permitted the defendant's witness John L. Brock, over objection, to testify from a paper alleged to be taken from the books of Brock's Garage, Incorporated, with respect to the amount of payroll, when the books were in Court, without producing the same in evidence. The question admitted was "I will ask you if this list was taken from the books of your company (meaning thereby the books of Brock's Garage, Incorporated), and from the same books Mr. Baker's figures were taken from." 10

3. The Court admitted improper evidence, to wit, testimony from a statement alleged to be taken from the books of Brock's Garage, Incorporated, without the production of the books in Court, which books were in the defendant's custody, and stripped the plaintiff's counsel of the right to object to the admission thereof and of his legal exception to the unlawful admission thereof, by means of prejudicial and extraordinary language, couched as follows: "Then I will exercise the prerogative of the Court, and strike—or I may rather strike out the testimony as to these books, which will leave you without any testimony, as competent." "Is it quite fair to get your own evidence in on that basis and then repudiate the same method when it comes to the other side? You have offered a witness to prove the contents of Mr. Brock's books, as to his payroll, and have given it with great detail, and there has not been a sign of the books up to this moment produced in Court." * * * "I shall be inclined to throw this case out of court if that course is pursued (*i. e.*, the persistence in the right to object to the introduction of illegal testimony in the course of the trial)." 20 30 40

4. The Court admitted improper evidence, the

common law shield to safeguard the interests of the plaintiff and to preserve in usual form errors in law for this Court being shattered, as particularized in Assignments 2 and 3, with respect to the figures of John L. Brock as taken by him from his books, which figures, as it subsequently developed at the trial, were not taken from the books on the basis provided in the
10 contracts of insurance, nor for the periods determined by the Court; which action of the trial judge confused the minds of the jury, counsel for the defense and the Court, and tended to embarrass a fair trial of the issues involved, and resulted in the presence in this Court of a record stripped of common law, exactness and particularity required by the usual and orderly course of the trial of an action at law, and resulted finally
20 in the direction of a verdict by the trial judge for an amount of money not based upon any legal evidence in the case, and not founded in reason, in the terms of the policies or the law of the land.

5. The Court permitted the defendant's witness, J. Chauncey Van Horn, over objection, to testify as to the nature of his dealings as agent of the Fidelity & Deposit Company of Maryland
30 with Brock's Garage, Incorporated, so far as concerned the payment by Brock's Garage, Incorporated to himself. The question objected to was "Mr. Van Horn, what had been the nature of your dealings as agent of the Fidelity & Deposit Company of Maryland with Brock's Garage, Incorporated, so far as concerns paying bills by Brock's Garage to you?"

40 6. The Court permitted the defendant's witness, J. Chauncey Van Horn to testify, over objection, with reference to an exchange of business

between himself and Brock's Garage, Incorporated. The question admitted was, "Will you explain to the Court and jury just what you mean by that (exchange of business)?"

7. The Court permitted the defendant's witness, J. Chauncey Van Horn, over objection, to testify as to the general custom in the insurance business with respect to the exchange of business. 10

8. The Court permitted the defendant's witness, J. Chauncey Van Horn, over objection, to testify as to an exchange account for an automobile, accessories, tires, gasoline, and so forth. The question admitted was, "Was there an automobile and accessories for that automobile, tires, gasoline and so forth, as one of the exhange accounts, one of the items?"

20

9. The Court permitted the defendant's witness, J. Chauncey Van Horn, over objection, to testify as to the credit of a deposit premium on one of the policies in suit. The question admitted was, "Mr. Van Horn, was a deposit premium credited on Policy 1552958?"

10. The Court permitted the defendant's witness, J. Chauncey Van Horn, over objection, to testify with respect to the question of whether the Fidelity & Deposit Company of Maryland would know anything with respect to the course of dealings between himself and Brock's Garage, Incorporated. The question admitted was, "What would the company know, if anything, about your course of dealing with Brock?" 30

11. The Court refused to strike out a voluntary statement made by the defendant's witness J. Chauncey Van Horn, not responsive to any question asked by counsel for the defendant. The voluntary statement was as follows: 40

"The liability superintendent who often visited the agency was the one who went with me first to write up the business. Various representatives of the insurance company would visit the agency from time to time and go around and assist me in closing up these risks, and they were conversant with the method by which we were
10
able to get business. In fact, I think you will find a letter where I secured a renewal of Brock's business. We had strong competition that year for business, and that letter will show where it was necessary to buy an automobile to secure the business; and I think there is a reply in the records where they have acknowledged receipt of the letter."

20

12. The Court permitted, over objection, the defendant's witness J. Chauncey Van Horn to testify as to an alleged visit by an alleged representative of the Fidelity & Deposit Company of Maryland, not named, to Brock's Garage, Incorporated, in company with Mr. Van Horn, at the time when the transaction was disclosed to this anonymous, nameless representative.

30

13. The Court permitted, over objection, the introduction into evidence of a letter purporting to be from the Van Horn Company to the Fidelity & Deposit Company of Maryland, dated February 28th, and marked Exhibit D5.

14. The Court permitted the defendant's witness, over objection, to testify with respect to the number of occasions on which an alleged representative of the Fidelity & Deposit Company accompanied him to Brock's Garage. The
40
question admitted was "On how many occa-

sions did a representative of the Fidelity and Deposit Company of Maryland accompany you to Brock's Garage."

15. The Court permitted, over objection, the introduction into evidence of a letter purporting to be signed by the superintendent of the Fidelity & Deposit Company of Maryland, dated March 1st, marked Exhibit D6. 10

16. The Court permitted the defendant's witness J. Chauncey Van Horn, over objection, to testify with respect to the presence of an alleged representative of the Fidelity & Deposit Company of Maryland when he had discussed with Mr. Brock of Brock's Garage the counter-account. The question admitted was "And he was present when you discussed with Mr. Brock of Brock's Garage, Incorporated, the counter- 20 account?"

17. The Court permitted the defendant's witness J. Chauncey Van Horn, over objection, to testify with respect to the filing of a claim against the Van Horn Company by the Fidelity & Deposit Company of Maryland. The question admitted was "Was any claim filed against your company by the Fidelity & Deposit Company?" 30

18. The Court refused to direct a verdict for the plaintiff for the full amount claimed, there being no evidence in the case that the Van Horn Company were authorized by the Fidelity & Deposit Company of Maryland to accept property for its own account in payment of the bills of the principal.

19. The Court refused to direct a verdict for 40 the plaintiff for the full amount claimed, there being no legal evidence in the case bringing home

to the principal knowledge of the illegal transactions between the agent and the person or corporation contracting with the principal.

20. The Court refused to direct a verdict for the plaintiff for the full amount claimed, when the evidence clearly showed that the plaintiff was entitled to recover the full amount due on
10 the policies and there was no legal evidence to controvert this proposition.

21. The Court refused to direct a verdict for the plaintiff for the full amount claimed, when as a matter of law the debt to the principal, the Fidelity & Deposit Company of Maryland, could not as a matter of law and by the terms of the written agency contract, be discharged by an exchange of accounts between the agent and
20 the third party dealing with the agent.

22. The Court charged the jury that there had been payment of some part of the account, that is, that there was a course of dealing between Brock's Garage and the agent for the plaintiff whereby Brock's Garage had been in the habit of paying for the insurance premiums with supplies, and permitted the jury to determine whether there was this authority in the Van
30 Horn Company, when there was not an iota of legal testimony in the case with respect to such authority, when the written agency contract in evidence did not permit it, and when the only testimony upon the matter was the illegal testimony of J. Chauncey Van Horn, practically the Van Horn Company, with respect to knowledge of his principal.

23. The Court charged the jury that their
40 verdict should not be for a less sum than $517.12, there being no evidence in the case at all with

respect to these figures, they were arrived at merely by a statement of defendant's counsel that he admitted liability to that extent.

All of which admissions of testimony, failures to charge and charges actually made to the jury, were prejudicial, embarrased a fair trial, were erroneous, and exception duly taken thereto.

DICKINSON & BODINE,
Attorneys for the Plaintiff-in-Error.

JOSEPH L. BODINE,
Of Counsel.

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New Jersey Court of Errors and Appeals

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a corporation, Plaintiff-Appellant, vs. BROCKS GARAGE, INC., a corporation, Defendant-Respondent.	Action at Law.

The above action was brought in the Supreme Court and was tried before the Hon. Frank T. Lloyd and a jury in the Mercer County Circuit Court, and resulted in a verdict for the plaintiff for $517.12, from which verdict the plaintiff appealed. The plaintiff sought to recover the premiums upon four certain policies of insurance written by it for the defendant company.

The first policy was dated March 1, 1915, and insured the defendant against the risk of injury to persons incident to the conduct of its business. The premium to be paid for this policy was to be determined on the basis of the defendant's pay roll. A deposit premium of $300 was paid by the defendant. An audit revealed the fact that the defendant should have paid an additional premium under the terms of the policy of $318.25. A copy of the policy was annexed to the complaint and is set forth on page 17 of the case.

The second policy was written March 1, 1915, and insured the defendant against loss from injuries to

employees in the prosecution of defendant's business. The policy provided for payment of a fixed premium of $62.20, which was paid and an additional premium based upon the defendant's pay roll as revealed by an audit to be made. The audit showed that the defendant was further indebted in the sum of $85.22.

The third policy was like the first. The plaintiff sought to recover upon this policy, the sum of $523.92, the audit revealing that this was the earned premium upon the policy. On this policy, no deposit premium had been paid to the plaintiff.

The fourth policy was like the second policy, and the plaintiff sought to recover the sum of $101.56 upon this policy.

The third and fourth policies were written March 1, 1916, and were for a period of a year. The defendant cancelled these policies November 1, 1916, and the figures above given as to the earned premiums for these policies were based upon the provisions of the policies themselves.

The Court submitted three questions to the jury, **First,** as to whether the VanHorn Company, the agents of the Fidelity & Deposit Company were authorized to accept merchandise, such as automobiles for moneys due the Insurance Company, **Secondly,** as to whether the Fidelity & Deposit Company had made the proper classifications of employees with respect to determining the compensation earned on the policies, and **Thirdly,** that at all events, the verdict must not be for a less sum than $517.12; see Case, 137.

Statement of the Case.

The Fidelity & Deposit Company of Maryland is engaged in the insurance business and is authorized to conduct its business within the State of New Jersey.

On January 5, 1914, it constituted the VanHorn Company, a New Jersey corporation, its agent in Mercer and adjoining counties to secure insurance business for it, the agent to receive certain fixed commissions on all policies written. The agency agreement was offered in evidence, Exhibit P, 1, Case, p. 140. In pursuance of this agency contract, the VanHorn Company wrote the four policies above referred to for Brocks Garage.

The VanHorn Company became bankrupt. Mr. James S. Messler of Trenton was appointed receiver.

The books of the VanHorn Company showed that the Fidelity & Deposit Company of Maryland, policy ♯1,552,958 was not paid for in cash, that it was offset by bills for services and materials supplied and delivered to the VanHorn Company by Brocks Garage. The same course of business was followed with respect to policy ♯1,225,492, which was also written March 1, 1915, and with respect to the two policies written March 1, 1916 (Case, p. 66).

Mr. William N. Baker, a traveling pay roll auditor for the Fidelity & Deposit Company of Maryland (Case, p. 69), on November 17, 1916, in the presence of Mr. John L. Brock, the president of Brocks Garage made an examination of the pay roll of Brocks Garage during the period from March 1, 1915, to March 1, 1916, and from March 1, 1916, to November 1, 1916 (Case, p. 70).

The first policy **♯1,552,958,** which is set forth at length (Case, p. 12), provided for the payment of an estimated premium of $300 (Case, p. 17, line 35) and provided also (Case, p. 20, line 12) for a premium on a fixed sum of $1,500 for each proprietor, member of firm or officer of a corporation, actively engaged in the business, and $1,500 per annum for each salesman working on a commission basis, plus the entire compensation earned during the policy period by all other employees of the insured engaged in the operation of the business.

The premium rate (Case, p. 21, line 10) was $3.00 per $100 of compensation, not in excess of $10,000 and $2.25 per $100 of compensation in excess of $10,000 and not in excess of $25,000.

Attached to the policy was an endorsement (Case, p. 23, line 20) providing for an additional premium of $5.00 for each $100 of livery earnings.

Mr. Baker testified that from his examination of the books of Brocks Garage, he found that the total compensation of all employees during the period from March 1, 1915, to March 1, 1916, plus an allowance of $1,500 for each officer of the corporation and a like amount for each salesman working on a commission basis was $23,921.92 and that the livery earnings amounted to $100 (Case, p. 71, line 31). The total earned premiums upon this policy, in accordance with the provisions of the policy, were then shown by Mr. Baker to have amounted to **$618.25** (Case, p. 72, line 22). After deducting the $300, the deposit premium, which the Insurance Company had received from the VanHorn Company, there was a balance due upon this policy as a result of the audit of **$318.25.** This was the sum of money sought to be recovered in the First Count of the complaint.

The second policy, **#1,225,492** (Case, p. 25), provided for a premium (Case, p. 30, line 21), based upon the entire compensation at the rate of premium given in the schedule annexed. The schedule provided for a premium rate of $.76 per $100 of compensation paid garage employees excluding chauffeurs and clerical force. A premium rate of $.07 per $100 of compensation paid clerical employees and a premium rate of $100 of compensation paid chauffeurs, if any (Case, p. 34). Mr. Baker testified that he found for the year from March 1, 1915, to March 1, 1916, that the garage employees were paid $13,-466.16, that there were two executive officers paid $1,500 each; a salesman receiving $779.76; while

store clerks were receiving $4,700 and office clerks $1,976; that he had found that during the period in question, employees, excluding chauffeurs and clerical employees had received $18,926 at the $.76 rate upon the compensation paid such employees, a premium was due of $143.84; that the premium rate of $.07 a hundred required an additional payment of $3.34 upon a pay roll showing $4,776 paid to office clerks and proprietor (Case, p. 75). The pay roll of chauffeurs during the period amounted to $18. The premium for this pay roll figured $.24, making a total premium upon this policy of **$147.42,** deducting from which the deposit premium of $62.22 received by the Insurance Company. There was an additional premium due of **$85.22,** which it was sought to be recovered in the Second Count of the complaint (Case, p. 76).

The third policy (Case, p. 36) was similar to the first policy and provided for premiums upon the same basis as has been previously outlined with respect to that policy. An elevator was included, however, in this policy for which insurance a fixed premium of $50 was provided.

Mr. Baker found that the actual pay roll from March 1, 1916, to November 1, 1916, was $15,027.80 a period of eight months. In arriving at his figures, he estimated the annual pay roll at $22,385.45 (Case, p. 77, line 8 and line 28).

The policy provided for cancellation by the insured upon payment of premiums figured upon the short rate table (Case, p. 77, line 18). The short rate table for the period during which the policy was in existence provided for the payment of 80 per cent of the yearly premium (Case, p. 77, line 12). The total premiums so figured, in accordance with the terms of the policy, amounted to **$523.92** (Case, p. 78, line 13). This was the amount sought to be recovered in the Third Count of the complaint.

Mr. Baker testified with respect to *the fourth policy* $1,225,492, which resembled the second policy, that the premium based upon the factors of the short rate, the earned compensation and the rates given in the schedules referred to in the policy (Case, p. 56, line 10) amounted to $100.56 (Case, p. 79, line 30). This was the amount sought to be recovered in the Fourth Count.

The amount sought to be recovered on the first and second policies was not determined until after the bankruptcy of the VanHorn Company and the audit of the books of the Brocks Garage by Mr. Baker. The deposit premiums on the first two policies, the sum of $300 and $62 respectively were credited by the Insurance Company and were not sought to be recovered. The deposit premiums at $350 and $51, respectively, on the third and fourth policies were offset upon the books of the VanHorn Company by credits to the Brocks Garage for merchandise and services rendered the VanHorn Company (Case, p. 88, line 16). These deposit premiums as well as the additional premiums based on the audit were sought to be recovered.

It is submitted that the proofs at the close of the plaintiff's case showed that they were absolutely entitled to the sum of $318.25 upon the *first policy,* the earned premiums based on Mr. Baker's figures as taken from the books of Brocks Garage and the terms of the policy itself as introduced in evidence; on the *second policy* to the sum of $85.22, established in the same way as the sum due on the first policy; on the *third policy* to the sum of $523.92 determined upon the basis of the compensation earned as provided in the policy and the short rate table and on the *fourth policy* to the sum of $100.56, making a total of $1,027.95. Mr. Baker was not cross-examined as to the acts done by him in determining the aggregate pay roll, or as to his application thereto of the provisions of the policies with respect to the

rates. Apparently the only question open was the legal question with respect to the allowance of the trade account between Brocks Garage and the Van-Horn Company, the agents. The amount involved on this phase of the case was the sum of **$350,** the deposit premium on the third policy and the sum of **$50,** the deposit premium on the fourth policy. The additional sums of money all became due as a result of the audit which was not made until after the bankruptcy of the VanHorn Company.

It is apparent that the alleged different classification, which the defendant contended for and which was submitted to the jury as a question for them to determine, was more illusory than real, if the Court will compare Mr. Baker's testimony (Case, p. 72), which has been summarized below for ease in examination, with Mr. Brock's testimony.

Tabulating Mr. Baker's testimony for convenience to show his method of figuring the amount due on the first policy and comparing it with Mr. Brock's testimony (Case, p. 72):

First	$10,000	at	$3.00	per	$100	$300.
Balance	13,921	at	2.25	per	100	313.25
	23,921					
Livery earnings	$100	at	5.00			5.
	Total earned premium					618.25
	Deposit premium					300.
						$318.25

Mr. Brock's testimony (Case, p. 98).

First	10,000 at	3.00	300.
	7,245 at	2.25	163.03
	17,245		
Livery earnings $100 at 5.00			5.00
	Total earned premium		468.63
	Deposit premium		300.

Clearly the difference was one of totals. Mr. Brock said that the difference was not one of total pay rolls. The totals he said were the same (Case, p. 113). Since under the terms of the policies the total pay rolls governed, there was no question of any kind except that the plaintiff was entitled to $318.-25.

And so also Mr. Baker's testimony as to the 2nd policy (Case, p. 74) was as follows:

Employees in garage	$13,466.16
Executive officers	3,000.
Saleman	779.76
Store clerks	4,700.
Office clerks	1,976.
	$23,921.92

Employees excluding chauffeurs and clerical employees

Garage	$13,466.16
Salesman	779.76
Store	4,700.
	$18,945.92

$18,945.92 at 76¢ a $100 $143.84

Clerical:

Executive	$3,000		
Office clerks	1,976		
	$4,976	at 7¢ a $100	3.34
Chauffeurs $18 at $1.36			.24
Total Premium			147.42
Credit Premium			62.20
			$85.23

Mr. Brock's testimony as to the 2nd policy (Case, p. 98) was as follows:

Employees in garage	$13,466		
Salesman	760		
	$14,226	at 76¢	108.12
Clerical	$6,676		
Executives	3,000		
	$9,676	at 7¢	6.77
Chauffeurs $18.00 at $1.36			.24
Total Premium Brock's figures			$115.13
Credit Deposit Premium			62.20
			$52.93

The difference in the premium between Mr. Baker's figures and Mr. Brock's figures was $32.30. On this policy the different classification of employees made this difference, and this difference was due to charging the store employees as clerical employees an obvious error.

On the third policy as in the first policy, the premiums were based upon the total pay rolls, about which there were no disputes (Case, p. 113).

On the fourth policy Mr. Baker figured the total earned premium at $100.56 (Case, p. 79, line 30) and Mr. Brock at $24.86 (Case, p. 99, line 38), but Mr. Brock's figures as to this policy were based upon the June date of cancellation when as a fact the policies were not cancelled until November.

From the foregoing it is apparent that even had the jury found that Mr. Baker's classification was not proper, a verdict should have been found for the plaintiff for only some $57.16 less than claimed.

It is thus apparent from the foregoing that the defense that the classification of the Insurance Company was wrong was more illusory than real. The legal error in the submission of this question arose by reason of the Trial Court's improper coercion in prohibiting under a penalty objections to Mr. Brock's testimony with respect to figures taken from a paper before him. Had Mr. Baker made any mistake in his classification, which seems improbable, because of the phraseology of the policies, this mistake could have been corrected. Had Mr. Brock made any mistake, this could have been shown from the books of the garage, but to permit Mr. Brock to testify from a paper before him was merely to substitute that paper for proper legal evidence, which could only result in confusion and error.

The second question involved in the case and which no doubt was considered by the jury was with respect to the question of payment in part for the policies by transference of merchandise to the agents and the crediting on their account of that merchandise. For discussion, this question may be considered under the heading first.

Was there legal evidence showing the authority of the agent to take such action?

Secondly, as a matter of law can authority be implied for an agent of an insurance company to accept

payment of premiums in merchandise purchased for his own account in settlement of charges for the account of his principle.

The First question submitted to the jury, as before indicated, involved the question of whether the VanHorn Co., the agents of the Fidelity & Deposit Co., were authorized to accept merchandise, such as automobiles, for money due the insurance company. For the discussion of this question it has seemed more convenient to consider it upon the basis of the erroneous admission of evidence and conduct of the case. First, there was error in permitting Mr. Brock to testify from a paper before him as to his books and the contents of them, when the books were in court and any mistake or error made by Mr. Baker in his statements from those books or his classification of employees could have been rectified by the introduction of the best evidence. Incidentally involved in the error complained of was the assertion by the Trial Court of the novel and preposterous prerogative of the Trial Judge to so control the plaintiff's case after once rested as to strip it of vitality by striking out the testimony once received without objection.

Secondly, the error in the admission of improper and incompetent evidence, with the view of beclouding the issue and suggesting to the jury the question of the authority of the agent to offset the claims of his principal with claims against the agent. Upon this second error it is believed that there are two questions of law involved; *first,* upon the question of whether there was legal evidence in the case to show such authority in the agent, and *secondly,* whether in the absence of proof of such express authority, such power could be inferred as a matter of law.

Taking up the questions involved in the case in the order above indicated:

The case shows (p. 95) that Mr. Brock was on the witness stand and was being asked certain questions tending to controvert the figures given by Mr. Baker, the travelling auditor, with respect to the amount due upon the policies. The following excerpt from the case shows the method by which the issue became beclouded.

Examination by Mr. Moore (Case, p. 95, line 32):

> "Q. I call your attention to this paper and ask you whether those items were made by you from the books of your company? A. They were.
>
> "Mr. Bodine: If the Court please, the books of the company will speak for themselves.
>
> "Q. Are these items contained in this book, Mr. Brock? A. They are all in that book.
>
> "Q. Will you turn to the book—
>
> "The Court: Mr. Bodine, is it quite fair to get your own evidence in on that same basis and then repudiate the same method when it comes to the other side? You have offered a witness to prove the contents of Mr. Brock's books, as to his pay roll, and have given it in great detail, and there has not been a sign of the books up to this moment produced in court. I recognize your right to do it, but do you think you ought to do it? Here is a man who presumably knows his own books.
>
> "Mr. Bodine: I assumed when I introduced that proof, that they were going into cross-examination of my auditor to show that he had made mistakes in taking off his figures from those books. If I had been trying the case for the defendant, I would have—
>
> "By the Court:
>
> "Q. Are you a bookkeeper? A. I've had some experience in it.
>
> "Q. Are you the bookkeeper for the company? A. No, sir."

and on page 97:

"The Court: What do you say, Mr. Bodine?

"Mr. Bodine: I should say it was a matter of the cross-examination of the auditor.

"The Court: *I shall be inclined, then, to throw this case out of court, if that course is taken.* I feel that the other side ought to have a chance, and if you are going to take that course of getting in evidence things that are not properly admissible at all, as even Van Horn's books were not admissible, or the contents were not admissible, I think I will give the defendants a full chance, or I may deal differently with it than that. If you have no other proof here, I may compel you to begin again.

"Mr. Bodine: It has not been my purpose to transcend any of the rules—

"The Court: *Then I will exercise the prerogative of the Court, and strike—or I may rather strike out the testimony as to these books, which will leave you without any testimony, as incompetent.*

"Mr. Bodine: I would like to have this matter entered on the record, and Mr. Moore is at liberty to proceed with his examination. I wish this matter on the record, and I consent to Mr. Moore proceeding with the examination of Mr. Brock.

"The Court: All right." (The italics are mine.)

Clearly Mr. Baker's testimony of what he had found as a result of his examination of the books of Brocks Garage was not the best evidence of the contents of those books, but it was **competent evidence** of the contents and was received without objection. He was not even cross-examined with respect to his testimony as to the total pay rolls or his classification of employees and the wages paid them under the policies.

Mr. Brock's testimony as to what his examination revealed added nothing to the elucidation of the controversy at all. The books would quickly and clearly have shown any errors made by Mr. Baker.

I.

A Trial Court has no prerogative to strike out competent evidence once received without objection.

I can find no case in which a Trial Court has stricken out competent evidence, such as Mr. Baker's testimony was, once received and after the party offering the evidence has rested its case. Clearly, a Court may of its own motion interpose its own objection in the same manner and subject to the same rules which govern, with respect to the motions of adverse parties. But once competent evidence is received without objection either from the Court or counsel, it is not subject to the whim of the Trial Court in enforcing some novel and unprecedent rule of alleged fairness in the conduct of a trial. If the rule be otherwise the party who has offered secondary evidence not objected to has no remedy. In the course of the trial of the case at bar, had objection been interposed either by the Court or counsel to Mr. Baker's testimony with respect to the contents of defendant's books, those very books would have been offered in evidence. Mr. Brock was under notice to produce them. The books were in court. The only purpose of the objection to Mr. Brock's testimony as to the contents was to secure the best evidence of the contents and elucidate the question of the total pay rolls and the classification for the jury. The Trial Judge by interposing a novel and ill-considered rule with respect to his prerogative, as is invariably the result of doing violence to the fundamental principles of the common law, beclouded the issue and mixed the case up so badly as to leave a quite unintelligible record, so that it became necessary to direct in part a verdict for the plaintiff founded in nothing in this case.

It is submitted that competent evidence once in cannot be stricken out, after the close of the case of one party or the other, by the Court on its own motion. Clearly it could not be stricken out on motion of adverse counsel. The Court has no greater powers on its own motion than it has on motion of adverse counsel.

In *Berryman v. Graham,* 21 N. J. E. 370, Mr. Justice Van Syckel, speaking for this Court, said (p. 371):

> "Graham, the complainant in the original suit, was sworn as a witness on his own behalf, without objection at the time, and was cross-examined by the defendant's counsel. At the closing of complainant's testimony, and before any evidence had been taken on the part of the defendant, objection was made to the competency of Graham, and testimony was taken after this by both parties. Had objection been made to Graham at the time he offered himself as a witness, there is no doubt that he would have been incompetent. The only question is whether the objection came in time to exclude him.
>
> "The rule that witnesses shall be objected to at the time of their examination is designed, not only to enable the party offering them to remove the incompetency, if practicable, or to supply by other evidence the want of their testimony, as suggested in the case of *Neville v. Demeritt,* 1 Green's Ch. 334, and *Mohawk Bank v. Atwater,* 2 Paige 60, but rests upon another reason of greater cogency, which does not permit the adverse party to sit by and hear the witness examined without objection, and failing to make anything out of him, to interpose the objection to competency. The objection to Graham came too late to avail the defendants, and therefore his testimony cannot be excluded. Any other rule would lead to great unfairness in practice."

There is nothing in the foregoing reasoning which does not apply with equal cogency in the case at bar. There was nothing fair in striking out the plaintiff's case if plaintiff held the defendant to the best evidence. The very prerogative invoked, if there be such a prerogative, **and there is not**, defeated the very purpose of the rule of law that the best evidence should be introduced, and instead of the prerogative, so asserted, working fairly, it lead to nothing except **great unfairness** as the Court in 1869 said it would if invoked by the defendant. There is no rule of logic and certainly none of law, which makes more fair the action of a Trial Court in ruling upon its own motions than in ruling upon motions of counsel.

If the Court had no power on defendant's motion to strike out the plaintiff's case, it had none on its own motion.

The case of *Berryman v. Graham, supra*, does not assert an isolated principle of law, but this Court again, upon a somewhat different state of facts, reasserted the same principle of law.

In *Rowland v. Rowland* (40 N. J. E. 282), Mr. Justice Reed said (p. 283):

> "That parties may be witnesses is now the settled policy of the state. The exception engrafted upon the general competency of all parties, that where one is dead and is represented in the suit, then the living party shall not be permitted to testify, is only a regulation to secure mutuality in the action itself. The admission of such testimony affects no one but the parties, and none but the parties are interested in the exercise of the power given to exclude this testimony.
>
> "It stands upon the same footing of any other testimony which might have been the subject of objection, and which the parties have admitted without objection. Now, the rule is well settled that a party or his coun-

> sel cannot sit by and accept the chance of a witness making evidence in his favor, and then, after ascertaining its force, raise, for the first time, an objection to its competency. The only exception to this rule is where the ground for exclusion was not discovered until after the evidence was in. *If he knows it, or should he know it, at the time the testimony is delivered, the party is presumed to have waived his objection.*"

In conclusion upon this question it is submitted that there was error in the admission over objection of Mr. Brock's testimony from a statement alleged to have been taken from the books of Brocks Garage, as set forth in assignments 2, 3 and 4 (Case, pp. 153 *et seq.*), and in coercing the acquiescence of counsel by the assertion of a prerogative and power over the case obviously unfair and not founded in reason or law.

II.

There was no legal evidence whatever showing the authority of the Van Horn Company, the agent of the Fidelity & Deposit Company of Maryland to accept payment of premiums due the principal in merchandise purchased for its account.

As previously indicated, the VanHorn Company were the agents of the Fidelity & Deposit Company to procure insurance business in Mercer and adjoining counties, the Insurance Company agreeing to pay the VanHorn Company commissions on the business done, in accordance with the schedule of prices shown in the agency agreement (Case, pp. 140 and 141).

The testimony introduced to show the authority of the VanHorn Company to exchange credits with Brocks Garage, in settlement of premiums due for insurance may be summarized as follows:

1. Mr. VanHorn testified over objection that he had settled counter-accounts between Brocks Garage and the VanHorn Company on other occasions (see Assignments of Error 5, 6 and 8; Case, p. 154, Testimony, p. 117).

2. Mr. VanHorn testified over objection that it was the custom among insurance agents to conduct their business upon the basis of an exchange of credits (Assignment 7, Case, p. 155, Testimony, pp. 119 and 121).

3. Mr. VanHorn testified over objection that the conduct of the VanHorn Company, in this particular was made known to certain nameless representatives of the Fidelity & Deposit Company of Maryland and also to their liability superintendent. There was no proof whatsoever of the authority of these nameless representatives to vary the terms of the written agency contract, or to alter its provisions, or to make admissions for the principal (Assignments 10 to 12, 14, 15 and 16, Case, p. 155, etc., Testimony, pp. 154, etc.).

4. The admission in evidence over objection of a letter from the superintendent of the Fidelity & Deposit Company of Maryland, (Assignment 13, Case, p. 156), the pertinent portion of which letter (Case, p. 151) was as follows:

> "Your favor of the 28th advising us that you have been successful in holding this line has been received with much pleasure, although we must admit that if it is necessary to purchase an automobile in order to secure every risk of this nature, it will prove a rather expensive proposition."

This letter refers to a letter of February 28th from the VanHorn Company (Case, p. 150), the pertinent portion of which letter was as follows:

> "Incidentally we might state that the way we retained the risk was through the purchase of an automobile. If any of you boys in the home office contemplate buying an automobile, don't forget to let us know, and perhaps we can land another garage risk through reciprocity."

It is submitted that all that *this correspondence* shows was that the VanHorn Company had bought an automobile and that an officer of the company told the VanHorn Company that it would prove a very expensive proposition to buy an automobile to secure every insurance risk. Neither the letter of the VanHorn Company nor the letter of the Insurance Company indicates in any way that there was knowledge by the Insurance Company that its premiums were to be settled and offset by the VanHorn Company's automobile, and it is inconceivable that anyone would have expected this to occur. Had it not been for the intervening bankruptcy of the VanHorn Company, the VanHorn Company would have settled for the insurance written by them for the Fidelity & Deposit Company of Maryland with cash, as they had previously done.

The testimony of Mr. VanHorn, which was admitted over objection and summarized above under paragraphs 1, 2 and 3 was not legal evidence of the authority of the VanHorn Company to obligate its principal, the Fidelity & Deposit Company of Maryland, in order to secure automobiles and accessories for the use of the VanHorn Company. The testimony had no effect other than to show that the VanHorn Company had previously adjusted matters along the same lines, but there was not any evidence that the Fidelity & Deposit Company of Maryland had not

received full compensation for its policies on previous occasions, and in fact, they did receive full compensations, so the circumstance that the VanHorn Company had previously adjusted accounts with Brocks Garage upon the same basis was evidence of nothing. So, also, the custom among insurance agents to exchange credits with the assured could not be binding upon the principal. Certainly not unless the custom was brought home and made known to the principal. Clearly, the testimony of Mr. VanHorn was inadmissible to enlarge the scope of the agency agreement between him and the insurance company (1900) *Emery v. King*, 64 N. J. L. 529. Further, an exchange of credits between the agent and the assured could not be binding upon the principal unless established by due proof of sufficient power in the agent to make such contract (*Agricultural Insurance Company v. Fritz*, 61 N. J. L. 211).

Agency must be proved by something more than the statement of the agent or his admission, unless it be shown that he had authority to make such statements and admission (*Dowden v. Cryder*, 55 N. J. L. 329, 332; *Ryle v. Manchester Building & Loan Association*, 74 N. J. L. 840, 845).

It is respectfully submitted that the case at bar is controlled by the case of (1893) *Dowden v. Cryder*, 55 N. J. L. 329. In that case, a man named Barnett was the agent for a man named Carmack, whose draft on the defendant had been accepted for Carmack's accommodation. Barnett was authorized to negotiate the draft for cash at a reasonable discount. He transferred it to the plaintiff for part cash and a diamond necklace and absconded. The plaintiff knew that Barnett was not the owner of the draft and held it as agent of Carmack for negotiation. In the case at bar the VanHorn Company were the agents of the Fidelity & Deposit Company to write insurance and collect the premiums. Brocks Garage knew

that the VanHorn Company was the agent of the Insurance Company and had the power to write insurance for certain stipulated premiums. The VanHorn Company did write insurance for Brocks Garage and secured from Brocks Garage, an automobile and accessories. The Insurance Company did not receive premiums due for the insurance written. The delivery of an automobile and accessories to the VanHorn Company was in no sense payment to the principal for the insurance.

In the case of *Dowden v. Cryder, supra,* Mr. Justice Dixon, in speaking for this Court said:

> "It is a universal principle in the law of agency that the powers of the agent are to be exercised for the benefit of the principal and not of the agent or third parties. 1 Am. Lead. Cas. (5th Ed.) 687. Persons dealing with one whom they know to be an agent and to be exercising his authority for his own benefit, acquire no rights against the principal by the transaction. *Stainer v. Tysen,* 3 Hill 279; *Mecutchen v. Kennedy,* 3 Dutcher 230; *Camden Safe Deposit Co. v. Abbott,* 15 Vroom 257; *Union National Bank v. Underhill,* 102 N. Y. 336. Such a transaction is usually and perhaps properly spoken of by the courts as fraudulent, but, however honest the intention of the parties, the agent's act is invalid merely because circumstances known to both prove it to be *ultra vires.* In the present case the plaintiff sought to get rid of the imputation of bad faith by claiming that Barnett had told him he had authority to accept the diamonds in exchange for the draft, but it was not pretended that such authority was supposed to have been given with knowledge that the agent had a personal interest in the redemption of the diamonds. Nothing short of power expressly granted to the agent to deal with the draft for his own benefit would validate such a use of it in favor of one cognizant of the facts."

In conclusion, it is respectfully submitted that on the whole case, there was no testimony justifying the course taken by the Trial Court and that the case should be reversed and a new trial granted because of the refusal of the Trial Judge to direct a verdict for the plaintiff company for the full amount of the claim.

Respectfully,

JOSEPH L. BODINE.

New Jersey Court of Errors and Appeals

FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, *Plaintiff-Appellant,* *vs.* BROCK'S GARAGE, INC., a Corporation, *Defendant-Respondent.*	Action at Law On Appeal from the Supreme Court.

10

BRIEF OF DEFENDANT-RESPONDENT.

The facts are, in the main, as stated in the brief of plaintiff-appellant. But the scope of the agency of the Van Horn Company as set forth by appellant, is too narrow. Reference to the agency agreement (Case p. 140) will show that the agency powers, and consequent authority, were much broader.

20

Appellant's statement that the trial court directed a verdict is also inaccurate. There was no direction. The trial court simply said (Case p. 137), that:

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> "Your verdict under the circumstances cannot be for a less sum than $517.12. Whether it shall be for more depends upon other findings in the case which I have already suggested to you."

Appellant's theory is that it was entitled to recover the full amount claimed, and it contends that this was undeniably established by the evidence of its witness Baker. On the contrary, respondent

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introduced evidence seeking to establish an entirely different amount, based upon its contention that Baker's calculation included an erroneous classification, and that the policies in question were cancelled on June 4, 1916, whereas appellant insisted that the policies were in effect until November 1, 1916, the premiums accruing until that date in accordance with its classification.

Respondent also introduced evidence to show
10 that the entire premium account, except the amount admittedly due, had been paid through the medium of merchandise exchange accounts, including an automobile and automobile supplies, covering a long course of business between it and the Van Horn Company, appellant's agent at Trenton, and also to show that the method of merchandise exchange accounts is usual and customary in the insurance business, and that not only was the custom known to appellant and not disavowed by it,
20 but that in this specific instance it had direct knowledge of the course of business between its agent and the respondent and ratified it.

The deposit premium of $300.00 mentioned in appellant's Brief, was paid with merchandise. The witness, Van Horn, so testified, at page 123 of the Case:

> "Q. Mr. Van Horn, was a deposit premium credited on Policy 1,552,958? On that credit, was that paid by cash or merchandise? Paid
> 30 by merchandise? A. Yes."

And, at the top of p. 124 of the Case, in answer to a question by the Court:

> "Q: There was no cash at all paid by Brock? A: No, once a year it was balanced up and if we owed Brock anything, we would send a check and if he owed us anything he would send it to us.
>
> Q: Had you had any dealings before
> 40 March 1, 1915, with Brock's Garage, as agent?

A: Yes, the application shows that this was a renewal of the policy that we had previous which would be 1914 and 1915."

Appellant's statement that, in any event, the Jury should have found for only some $57.16 less than claimed, is based wholly upon its theory that all the evidence pertaining to the custom, the course of business between respondent and the Van Horn company, appellant's knowledge and 10 ratification thereof, and the testimony from Brock's books offered by respondent, should have been excluded; and entirely fails to take into consideration that these were questions of fact to be determined by the jury. There is legal evidence in the case to show that the Van Horn Company had authority to do just what it did. In this instance it is not necessary to imply the agent's authority. The appellant had direct knowledge of the custom and the course of business, through its 20 superintendent, Cruett, and through the correspondence between it and its agent.

There was no coercion of appellant's counsel by the trial court with regard to the admission of Brock's testimony. It may be true that a trial court has no prerogative to strike out competent evidence; but it is also true that the court can control the trial, and has the power to withdraw a juror at any time in order to prevent a substantial failure of justice. So far as illegal evidence is 30 concerned the trial court could strike that out, even up to the point of the submission of the case to the jury; and could also strike out evidence otherwise competent, if the chain of which it was a link had not been tied up with some ultimate fact essential to warrant its submission to the jury by the court. If, as appellant contends all through its brief, Baker's evidence was competent, then Brock's was competent also. Appellant's counsel was not in a position to complain of the intro- 40

duction of unfair evidence by the respondent, or unfair treatment by the Trial Court, in connection with either his own witness Baker, or with respondent's witness Brock. His own case depended upon like evidence, first offered by himself, and produced from the same source and by the same method as that to which he objected.

There is legal evidence in the case regarding the custom of merchandise exchange accounts. The testimony of Van Horn upon this point was competent, and was admitted as a step in respondent's case, irrespective of its weight and subject to being brought home to the appellant Company. The representative of the Fidelity and Deposit Company through whom it was sought to bring this knowledge home, was not a nameless unidentified person. This is shown in detail in Point 3 of this brief, *infra*. Knowledge was brought directly home to appellant, and the course of business between its agent and respondent was ratified by it; for the policy was issued after the agent's letter advising appellant of its action had been received by appellants and acknowledged by it.

If the correspondence regarding the course of business was ambiguous as suggested by appellant, then it simply raised a question of fact for the jury to determine. There is no evidence in the case on the part of appellant to show that this course of dealing was not sanctioned or acquiesced in by it. Appellant had the opportunity to produce such evidence, but did not do so. Van Horn's testimony of the custom, and the course of business in Brock's case, was at least some evidence to go to the jury, and that is simply what the trial court said about it.

The extent of the Van Horn Company's authority; whether the appellant received payment of the premium through the method employed; whether the delivery of the automobile and accessories was payment; and the balance of the ac-

count in controversy under the conflicting views regarding the classification, the date of cancellation of the policies, and the method of payment employed, were all questions of fact, under the evidence, for the jury. They cannot be brushed aside by the mere statement of appellant that there was no legal evidence in the case to warrant a verdict other than in favor of the plaintiff for the full amount claimed. There were too many questions of fact in the case to justify the Trial 10 Court's taking it from the jury or to exclude the testimony objectionable to appellant.

A verdict was rendered by the jury in favor of the plaintiff for $517.12, and judgment was entered accordingly. The present appeal, therefore, is taken by appellant from the judgment entered in its own favor. Respondent has taken no steps to avoid it, and is in the somewhat unusual position of urging the affirmance of a judgment against itself. 20

Argument.

The brief of appellant (the plaintiff below) deals chiefly with two general grounds of complaint: first, the action of the trial court in permitting the respondent (the defendant below) to introduce testimony taken from its books of account, which appellant contends was incompetent; and, second, the action of the trial court in ad- 30 mitting evidence of the custom among insurance agents, and the course of business between appellant's agent and respondent, regarding the payment of premiums with merchandise.

The contention of the respondent is, that during a period of several years it had been procuring its liability insurance through the Van Horn Company, which was the general agent of the appellant at Trenton, New Jersey; that the premiums were paid by respondent to the Van Horn Com- 40

pany in merchandise and cash; that it is the custom in the insurance business to make payments in that manner; that the appellant, with knowledge of this custom, did not forbid its agents participating in it; that in this specific instance the course of dealing between respondent and the appellant's agent was brought home to appellant both through its agent and head men of the Company and by correspondence between it and its
10 agent; that there was a dispute as to the balance due on the account between the parties, based on conflicting views of the classifications and the duration of the policies; and that these were jury questions, under the facts, which the trial court properly submitted to the jury for determination.

POINT I.

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Payment of premium.

Grounds of Appeal Nos. 1, 5, 6, 8, 9 and 22, all practically pertain to the same subject matter, viz: the admission of evidence and the Court's charge to the jury regarding the course of business between the Van Horn Company and Brock's Garage, the defendant. This merely showed the manner in which the premiums upon the various
30 policies was paid by Brock's Garage to the agent of the plaintiff Insurance Company, and establishes the account between them. This was the best evidence of the transaction. Its legal effect may be another question. If, as a matter of law, payment to the duly authorized agent of the Insurance Company in merchandise was not legal payment, then the Court would have so ruled and instructed the jury or directed a verdict accordingly. Reference to p. 93 of the case discloses the
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Trial Court's attitude in this respect and correctly states the law:

> "The Court: Well, Mr. Bodine, if it establishes nothing against your client, it goes for nothing. You cannot say when the defendant offers to prove a course of conduct which apprised the plaintiff of the relations, that it is inadmissible because all the steps are not complete in themselves. He can only go one step at a time. If the entire chain is not there, then it falls to the ground. If it is, it becomes effective, maybe."
>
> "If he establishes it, it must be recognized that it would be binding upon the Insurance Company. If it does not establish it he has failed. That is all."

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Suppose the course of business between the parties had shown that the insured had paid its accounts in cash but at belated periods, at variance with the time for collection imposed upon the agent by its contract with the Insurance Company? Would it not still have been competent to show the manner and time of payment, leaving its legal effect, if deferred to too remote a period to be valid, to be determined by the Court? All that the testimony objected to in these grounds of appeal did, was to show the manner of payment of the premiums by Brock's Garage to the duly authorized agent of the Fidelity and Deposit Company of Maryland. This seems clearly competent, but with the burden still upon the defendant, perhaps, to render it effective by completing the chain in the manner indicated by the Trial Court, *supra*.

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POINT II.

Custom.

Ground of Appeal No. 7 involves testimony of the custom referred to. There appears to be no specific objection to the testimony of Van Horn as to the general custom in insurance circles with respect to the exchange of business, complained
10 of in this ground of appeal. It might be included in the general exception on p. 119, etc., but that goes more to the business relation between Van Horn and Brock's Garage, rather than to the custom. But, regardless of the technical situation of the failure to note the objection, the custom in this respect was clearly admissible, first, in support of the transaction between Brock's Garage and the Van Horn Company as being of a usual and customary nature; and, second, as
20 tending to establish a ratification by the Insurance Company of such course of business, by sanctioning what they must have known was customary practice, if they were at all alive to the methods employed in the business in which they were engaged, and also as a step in bringing home to the Insurance Company actual knowledge of the particular course pursued in this specific instance between Brock's Garage and the Van Horn Company.
30 Van Horn was adequately qualified to state the custom. His evidence as to a special custom in the insurance business was admissible, as the Court considered him a person of sufficient knowledge to competently testify in this respect, and without controlling motive to misrepresent. Here, also, the binding effect of this testimony may be controlled by the Court, just as in the preceding Point it is shown that the Court could control the legal effect of the course of business between
40 Brock's Garage and the Van Horn Company. It

at least presents *prima facie* a question for the jury.

Baer vs. *Williams,* 75 N. J. Law, 30;
Carr vs. *D. L. & W. R. R. Co.,* 81 N. J. Law, 532.

POINT III.

Bringing the custom home. 10

Grounds of Appeal Nos. 10, 11, 12, 13, 14, 15, 16, 18, and 19 all pertain to the steps taken by respondent to bring the custom and course of business in question home to the appellant. *Arguendo,* the propositions in Points I and II being established, let us admit, for the purpose of the argument, that the weight of the evidence was slight, and that the trial court might either strike it out or instruct the jury to disregard it unless 20 it was brought home to the appellant, or sanctioned or ratified it. Then we submit that the evidence with respect to the appellant's ratification and knowledge is so clear and conclusive that the evidence under discussion in Points I and II. became entirely competent, regardless of its weight, and the defendant was entitled to have it go t othe jury in support of its defense.

Baer vs. *Williams, supra.*
Carr vs. *D. L. & W. R. R. Co., supra.* 30

Appellant's theory in this respect may be gathered from the following colloquy between Court and Appellant's counsel, at p. 120 of the case:

"The Court: You heard what the witness said some time ago, which seemed to be of some importance, that there is a uniform custom among insurance people——

Mr. Bodine: The custom among thieves cannot be binding upon honest men if the 40 Court, please.

New Jersey State Library

The Court: Mr. Bodine, that remark is wholly uncalled for and unjustified, and the Court has in many cases withdrawn a juror for such remarks.

Mr. Bodine: That is the privilege of the Court.

The Court: Do you want it done in this instance?

Mr. Bodine: I do not ask it, if the Court
10 please.

The Court: Then please do not invite it, and especially it is not necessary to interrupt the Court's statement to make such a remark."

And at p. 124, line 20 of the case, the witness Van Horn testified that the Superintendent of the plaintiff Company knew about the course of dealing with the defendant, and said:

20 "The liability superintendent who often visited the agency was the one who went with me first to write up the business. Various representatives of the insurance company would visit the agency from time to time and go around and assist me in closing up these risks, and they were conversant with the method by which we were able to get business. In fact, I think you will find a letter where I secured a renewal of Brock's business. We
30 had strong competion that year for business, and that letter will show where it was necessary to buy an automobile to secure the business; and I think there is a reply in the records where they have acknowledged receipt of the letter."

Again, at pp. 125 and 126 of the Case, it will appear that a letter was sent by the Van Horn Company to the appellant regarding the course
40 of dealing referred to and that a reply thereto

was sent by appellant to the Van Horn Company, to the admission of which no timely objection was made.

(See Exhibits D-5 and D-6, Case, pp. 149, 150 and 151.)

"Mr. Moore: Have you the letter dated February 28, 1916?

Mr. Bodine: I think that copy is a carbon copy, if you are going to offer that in evidence, which I suppose is your purpose. 10

Mr. Moore: Yes.

Mr. Bodine: I must note my objection to the offer for the reason that the statements contained in the agent's letter to the principal cannot become binding upon the principal, and for the further reason that there is nothing in the letter itself which would indicate to a person reading it that the course of business was as testified to by Mr. Van Horn over my objection. 20

Mr. Moore: If the Court please, I will ask Mr. Van Horn if that is a letter he wrote to the Fidelity & Deposit Company, liability department, Baltimore, Maryland, on February 28th, 1916.

The Witness: That is not a letter I wrote, but it is written by the secretary of the company.

The Court: Of your company?

The Witness: Yes, sir. 30

Mr. Bodine: Then I object to the letter for the further reason that it is not properly proven.

The Court: It must be shown that it was communicated to the plaintiff, Mr. Moore.

Mr. Moore: Yes.

Q. As the result of that letter being sent, did you receive a reply? A. Yes, sir; and I might add that this letter was written at my suggestion. 40

Q. I show you what purports to be a letter signed by the superintendent of the Fidelity & Deposit Company of Maryland, dated March 1st, two days after this letter, and ask if that is a reply your company received in pursuance of sending this letter? A. Yes, sir.

Mr. Bodine: I object to that.

The Court: It is too late for an objection.

10 Mr. Bodine: If the Court please, I was quite prompt with my effort to address the Court, and I cannot make an objection until I am recognized, and I would like to note an objection on the record that an opportunity was not afforded me to make my objection.

The Court: Well, I cannot agree with that statement at all.

Mr. Bodine: I hardly expected your Honor would."

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This course of dealing was also brought home to the Company through Mr. Cruett, the head of the liability department, and head man of the Company. (See Case, bottom of p. 127 and top of p. 128.)

By the Court:

Q. Mr. Van Horn, what was the position of the gentleman who had charge of your course of dealing with Mr. Brock? A. *It was*

30 *Mr. Cruett.*

Q. What was his position? A. He was the head of the liability department and he was the man who effected that contract you have there. He was the man I had all my dealings with. He was the head man of the company.

By Mr. Moore:

Q. From the home office? A. Yes, sir; right from Baltimore."

40 This was not objected to by plaintiff's counsel,

nor was any testimony produced by plaintiff to refute it.

Again, at p. 130 of the case, the Court directed this question to Mr. Van Horn:

> "At these interviews with the superintendent that you have spoken about, prior to and during the running of these accounts, was or was not he informed of the way in which you were taking payments? A. Yes, sir; and I might add a little instance, that this very superintendent, Mr. Cruett, had a charge made for merchandise from one of the stores, not Brock's Garage—it was in town. It was somewhere around $40.00, for some purchases he made, and it was charged against the insurance account that we had with that particular merchant.
>
> Q. And credit given by the Company? A. No; he later on adjusted it with the Van Horn Company. When he purchased it, it was charged then against the Van Horn Company, and there was a counterclaim with the same merchant for insurance, and later on the superintendent sent his check for it."

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This also, was not objected to by plaintiff's counsel nor was any testimony produced by plaintiff to refute it.

Under the authorities cited *supra*, respondent was entitled to have this testimony go to the jury, and that is the extent to which the trial court went. Clearly this is not now open to argument in this court, there being evidence in the case from which the Jury might properly find as it did.

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POINT IV.

Legal Effect.

Ground of appeal No. 21. Payment in merchandise is legal payment if the creditor is willing to accept it. The Insurance Company by a long course of conduct, with knowledge of the transactions, and of the custom in the business, signified
10 its willingness to accept.

By the evidence offered by respondent, appellant's willingness to accept the merchandise as payment of the premiums and its ratification of its agents' dealings with respondent, as well as its knowledge of and acquiescence in the custom referred to, all became questions of fact for the Jury,—the trial court so charged.

(See Case, pp. 136 and 137.)

> "Now it is the law and it must be quite
> 20 reasonably obvious to you, that where I am appointed an agent by another to collect money I cannot take all sorts of merchandise in payment, and if all that appeared in this case were the testimony of actual transference of merchandise to the agents and the crediting on this account of that merchandise by the agents, on the insurance account, the Court would be obliged to say to you that it could not be credited. But the defendant
> 30 contends that there was authority in this agent to receive payment in that form, and quite considerable evidence has been introduced along such lines. It is only upon the theory that the agent was authorized to receive the payment in merchandise, authorized by the company, that you can find any credit to the defendant upon that kind of payment."

The plaintiff introduced no evidence of an affirmative character to refute that it had sanctioned
40 such a method of payment.

The Jury's findings from the questions of fact are not reviewable on appeal, if there is any evidence in the case to sustain it.

Defiance Fruit Co. vs. *Fox,* 76 N. J. Law 482;
Upton vs. *Slater,* 83 N. J. Law 373;
Mahoney vs. *Ins. Co.,* 80 N. J. Law 136;
Hudson Real Estate Co. vs. *Bauer,* 74 N. J. Law 90;
Spargo vs. *C. R. R. Co.,* 86 Atl. Rep. 385. 10

POINT V.

Not a Voluntary Statement.

Ground of Appeal, No. 11, states an inaccuracy. Objection was made by plaintiff's counsel that the answer was not responsive. The witness Van Horn was in the midst of answering the question 20 of defendant's counsel when plaintiff's counsel interrupted; and when the objection was overruled, the witness finished his answer. (See Case, p. 124.)

POINT VI.

Not a Nameless Representative.

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Ground of Appeal, No. 12 also states an inaccuracy. On p. 127, line 40, of the Case, in answer to the question of the Court, "Mr. Van Horne, what was the position of the gentlemen who had charge of your course of dealing with Mr. Brock?", the witness answered, "It was Mr. Cruett." And in answer to a further question by the Court, the witness testified, beginning on the same page (127), "He was the head man of the liability department and he was the man who ef- 40

fected that contract you have there. He was the man I had all my dealings with. He was the head man of the company." And at p. 128, in answer to defendant's counsel's question, "From the home office?", Van Horn answered, "Yes, sir; right from Baltimore."

POINT VII.

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Legal Evidence to controvert Plaintiff's full claim.

Ground of Appeal No. 20, is disposed of by Points I, II, III and IV, *supra*, because it is evidently appellant's theory that the lower Court should have stricken out all of the defendant's testimony, and then directed a verdict for plaintiff for the full amount claimed.

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POINT VIII.

Admissions of Amount Due.

Ground of Appeal No. 23, is also inaccurate. Defendant admitted a balance due in open Court (see pp. 96, 98, 99, 110, 133, 137 of the Case).

"Mr. Moore: I did not object to the offering of
30 Mr. Baker as a witness to these books. I do not believe in taking any technical advantage of anybody. We are here to find out how much we owe. We say we owe so much and they say it is so much more. Now, I think Mr. Brock can show what he took from the books, just as Mr. Baker testified what he took from the books. If I had invoked the rule on him, he would not have had any case." Then again on p. 137, the Court in its charge to the jury said, "It has been stated by defendant's
40 counsel that on that theory of the case there

would be an admitted amount of $517.12 but you will have to ascertain the facts from the whole testimony in the case." All the court charged the jury was that the defendant having admitted liability to that amount, they were bound to find in favor of the plaintiff for at least that amount. There was a conflict of view as well as a conflict of testimony regarding the amount due, which clearly raised a jury question; and there being evidence to sustain the jury's finding it cannot be reviewed in this court. 10

Spargo vs. *C. R. R. Co., supra.*

POINT IX.

Claim in Bankruptcy.

Ground of Appeal, No. 17 is also inaccurate. It appears on p. 129 of the Case, that the witness Van Horn did not answer the question, "Was any claim filed against your company by the Fidelity & Deposit Company?" 20

POINT X.

Volenti non fit injuria.

One is not injured by that to which one consents. Grounds of Appeal, numbers 2, 3, and 4, all refer to the action of the trial court with regard to the admission of evidence of the contents of the books of account of respondent. The books were first offered by appellant, and through its witnesses Messler and Baker. Statements from them were admitted in evidence without objection by respondent's counsel. Indeed, this was the only evidence to sustain appellant's case. Respondent was willing to have the amount in con- 30 40

troversy between the parties determined without the interposition of technical objections but when respondent offered the same books and sought to present similar evidence of the contents of these books through a witness qualified to so testify, without pursuing the cumbersome technical method of proving the books and then searching out the items one by one, in the same way that appellant had done, appellant's counsel then objected
10 to this method, insisting that such proof was not legally competent. It was then that the colloquy between the court and appellant's counsel herein referred to, ensued.

"Mr. Moore: I did not object to the offering of Mr. Baker as a witness to testify to these books. I do not believe in taking any technical advantage of anybody. We are here to find out how much we owe. We say we owe so much and they say it is so much
20 more. Now, I think Mr. Brock can show what he took from the books, just as Mr. Baker testified what he took from the books. If I had invoked the rule on him, he would not have had any case.

The Court: What do you say, Mr. Bodine?

Mr. Bodine: I should say it was a matter of the cross examination of the auditor.

The Court: I shall be inclined, then, to throw this case out of court, if that course is
30 taken. I feel that the other side ought to have a chance, and if you are going to take that course of getting in evidence things that are not properly admissible at all, as even Van Horn's books were not admissible, or the contents were not admissible, I think I will give the defendants a full chance, or I may deal differently with it than that. If you have no other proof here I may compel you to begin again.

Mr. Bodine: It has not been my purpose
40 to transcend any of the rules—

The Court: Then I will exercise the prerogative of the Court and strike—or I may rather strike out the testimony as to these books which will leave you without any testimony, as incompetent.

Mr. Bodine: I would like to have this matter entered on the record, and Mr. Moore is at liberty to proceed with his examination. I wish this matter on the record, and I consent to Mr. Moore proceeding with the examina- 10 tion of Mr. Brock.

The Court: All right."

If the evidence in this form was incompetent when offered by respondent, it was likewise incompetent in behalf of appellant. Conversely, if competent for appellant, it was competent for respondent. It is a poor rule that won't work both ways. All through appellant's Brief in this court, the testimony is referred to as com- 20 petent when offered in support of appellant's case. It seems only to have become incompetent when offered in like manner in support of respondent's defense.

The stipulation was not forced upon plaintiff's counsel as a condition to which he was obliged to assent or suffer a dismissal, with sufficient other legal evidence in the case to establish his right to a recovery; but was imposed as a condition of permitting his case to stand when there was not 30 sufficient legal evidence to sustain it, if the rule were applied against him which he then insisted should be applied against his adversary. There was no coercion. It was a simple statement by the Court to the effect that if plaintiff's counsel pressed the objection to defendant's testimony, the Court would also feel bound to apply the rule against plaintiff. Then came the acquiescence to save his case.

Mr. Brock was shown to be ably qualified to 40

testify from the books of his own Company. The method used is sanctioned by Rule 88 of the Supreme Court, the Court in which this case was tried,—

> "In the cases of assessment of damages to be made by the Court, or any justice thereof, or by the clerk, when the nature of the account or demand of the plaintiff or plaintiff's is such that the book of account of original
> 10 entries of the plaintiff or plaintiffs is competent and legal evidence of such account or demand, the said book shall be produced before the court or officer with due proof thereof or there shall be produced a copy of the entry or entries in such book with an affidavit that the book from which the said copy was taken is the book of account of original entries of the plaintiff or plaintiffs, and that the copy produced has been truly taken there-
> 20 from; and that the money demanded therein is justly due and owing, and the said copy and affidavit, with the assessment to be made, shall be filed with the clerk."

The statement presented by Mr. Brock was taken from the same books as the statement presented by Mr. Baker, the plaintiff's main witness. Mr. Brock was the proprietor of the concern and knew his own books. The books were in Court.
30 "Where the results of voluminous facts contained in writings or of the examination of many books, papers or records, are to be proved, and the necessary examination of this documentary evidence cannot be conveniently or satisfactorily made in court, it may be made by an expert accountant or other competent person and the results thereof may be proved by him, if the books, papers, or records, themselves are properly in evidence, or their absence satisfactorily explained.
40 It seems, however, that the jury are not bound

by the result thus ascertained, but may make their own calculations from the books and papers in evidence'' (17 Cyc. 511).

POINT XI.

It is respectfully submitted, therefore, that the judgment under review should be affirmed for the amount rendered, $517.12; and in view of the fact that liability for this amount was admitted by defendant at the trial and that the present appeal was taken not by the defendant but by the plaintiff, in whose favor judgment was entered, we submit that the affirmance should be without interest upon the judgment and with double costs in this Court to the Appellee. 10

> ''Double Costs; liability of plaintiff in error. That if any person shall sue or prosecute any writ of error, for reversal of any judgment whatsoever, given after any verdict in any court of record of this state, and the judgment shall afterwards be affirmed, then such person shall pay unto the defendant in the said writ of error, his or their double costs, to be recovered by execution in manner aforesaid.'' 20
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> 2 C. S., p. 2296, Sec. 43.

Respectfully submitted,
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