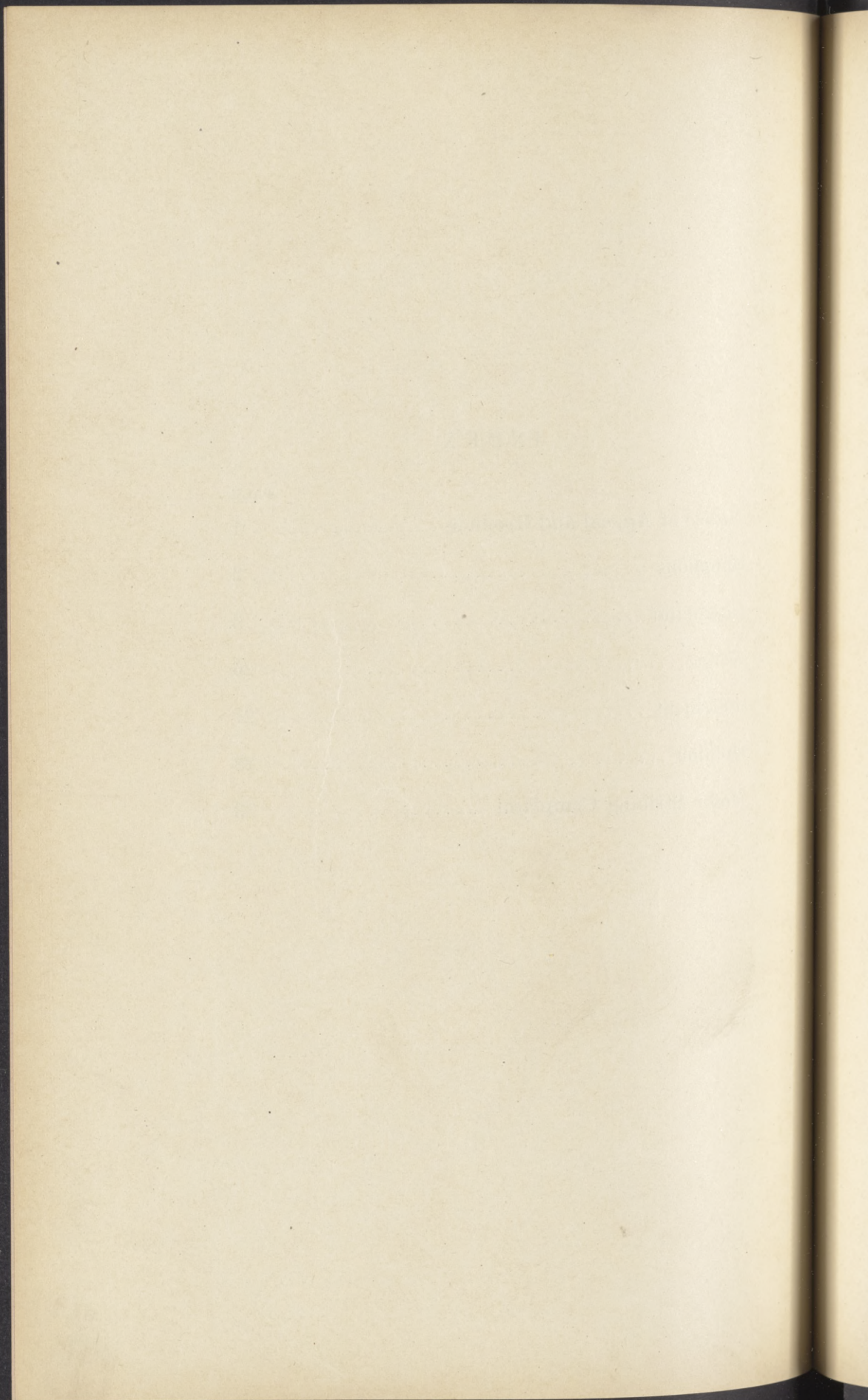


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NOTICE OF APPEAL AND GROUNDS.

(Filed April 8, 1929.)

NEW JERSEY SUPREME COURT.  
ATLANTIC COUNTY.

LOUIS GIROUD,

*Plaintiff,*

v.

NEW JERSEY MANUFAC-  
TURERS' CASUALTY INSUR-  
ANCE Co.,

*Defendant.*

10

Action at Law.  
Notice of Appeal and  
Grounds.

*To Cole & Cole, Esquires, attorneys for defendant, 20  
or to whom it may concern:*

Sirs:

Please take notice that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort of all causes from the whole of the judgment entered in this cause on the following grounds, to wit:

1. Because the Court erred in granting the defend- 30  
ant's motion for a dismissal of the plaintiff's com-  
plaint.

Dated, April 3, 1929.

Respectfully yours,

BURTON A. GASKILL,

*Attorney for Plaintiff.*

[ENDORSED.]

Service of the within Notice of Appeal and Grounds is hereby acknowledged this 4th day of April, A. D. 1929.  
 Cole & Cole,  
 Attorneys for Defendant.

10

## SUMMONS.

(Filed January 12, 1929.)

20 STATE OF NEW JERSEY TO NEW JERSEY MANUFACTURERS' CASUALTY INSURANCE COMPANY:

You are summoned, to answer the annexed complaint of Louis Giroud, in an  
 (Seal) action at law in the Supreme Court.

And take notice, that unless you file an answer to the said complaint with the Clerk of the Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in his suit and judgment may be entered against you.

30 Witness, Honorable William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this second day of January, in the year of 1929.

FRED L. BLOODGOOD,  
*Clerk.*

BURTON A. GASKILL,  
*Attorney.*

COMPLAINT.

NEW JERSEY SUPREME COURT.  
ATLANTIC COUNTY.

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LOUIS GIROUD,  v. NEW JERSEY MANUFACTURERS' CASUALTY INSURANCE Co.,	}	Plaintiff,   Defendant.	Action at Law. Complaint.	10
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Plaintiff herein, residing in Atlantic City, Atlantic County, New Jersey, says that: 20

1. On January 2, 1926, defendant was and still is a corporation empowered by law and engaged in the business of contracting, in consideration of an agreed sum paid as premium, for the indemnity of individuals, firms and corporations, against loss or damage resulting from bodily accident, injury or death suffered by any person by reason of the operation and use of automobiles, for which loss or damage the owner or operator would or might be legally liable. 30

2. On that day, for a valuable consideration, the defendant issued its policy of insurance, or contract of indemnity, to Stryker Transportation Company, Inc., thereby agreeing to indemnify it, the said

Stryker Transportation Company, Inc., therein called the assured to any amount not exceeding \$250,000 against loss or damage from bodily accident to or bodily injury or death suffered by any person or persons by reason of the maintenance, operation or use of any of the automobiles described in the schedule annexed to said policy or contract, for which loss or damage the said assured, or any other person operating such automobile with the  
10 permission of the assured, should be legally liable or responsible. And said policy or contract, according to its terms continued in force and effect for a period of one year from January 2, 1926, to January 2, 1927, expiring at twelve o'clock noon on the day last mentioned. A copy of said policy or contract is annexed hereto as part hereof and marked Exhibit A.

3. On or about April 21, 1926, while said policy or  
20 contract remained in full force and effect, plaintiff suffered bodily injury by reason of being struck by one of the automobiles described in schedule referred to, while said automobile was being operated by one Joseph Andryshowich with the permission of the assured, the said Stryker Transportation Company, Inc. Said Joseph Andryshowich was at the time the owner of the said automobile and legally responsible for the operation thereof. The benefit of the indemnity provided by said contract was in-  
30 tended to be for the plaintiff and all other persons who might be injured in like manner or under like circumstances, and plaintiff is entitled to the protection thereof.

4. On September 20, 1926, plaintiff commenced an action against the said Stryker Transportation Company, Inc., and Joseph Andryshowich in the

Supreme Court of New Jersey to recover damages for his said injury, which action, upon issue joined, was regularly brought on for trial before a jury in the Atlantic County Circuit Court on March 29, 1927, and upon which trial the jury returned a general verdict for damages against the said defendants in that suit in favor of the plaintiff for the amount of \$30,000, upon which verdict a judgment was entered in this court on Postea on April 1, 1927, for the sum of \$30,000 damages and \$62.45 costs. Thereafter and within the time prescribed by law, and the practice of said court, said Joseph Andryshowich obtained a rule to show cause why the verdict against him should not be set aside and a new trial of said action ordered, which rule after argument thereon was discharged thereon by an order of the said Court, bearing date January 18, 1928, with costs. 10

5. The said Stryker Transportation Company, Inc., the defendant in said action, appealed from the said judgment so entered against it, as aforesaid, to the Court of Errors and Appeals, which last-named court, upon reviewing said judgment, reversed the same as to the said Stryker Transportation Company, appellant; whereupon judgment of reversal was entered and the record duly remitted as by the record of said appeal remaining in the said Court or Errors and Appeals appears. 20

6. On October 27, 1928, the plaintiff herein, having theretofore caused to be issued out of the said Supreme Court in due form on said judgment a writ of *feri facias de bonis et terris*, and the same having been duly and regularly returned in the court wholly unsatisfied, caused to be issued out of said court on said judgment an *alias* writ of *feri facias* 30

*de bonis et terris* tested on the day and year last mentioned, which alias writ after being recorded, was delivered to the sheriff of the County of Mercer, wherein the said Joseph Andryshowich, the defendant execution debtor, therein resided, to be executed; which alias writ was thereafter duly returned by said sheriff into court with his return endorsed thereon in words and figures as follows:

10        "I hereby return the within writ wholly unsatisfied, not being able to find any good or chattels, rights or credits, lands, tenements, hereditaments or real estate of the said defendant whereof to make the within moneys or any part thereof.

JOHN N. RACE,  
Sheriff."

Dated November 7, 1928.

20        At the time of the recovery of said judgment against the said Joseph Andryshowich, his entire property and assets were and still are insufficient to pay his debts and existing obligations for the payment of which he is legally liable, and he then was and has ever since been insolvent.

30        7. In and by the said policy or contract, it was provided, among other things, that if judgment should be recovered against the assured and execution thereon should be returned unsatisfied because of the insolvency of the assured and if the company, the defendant herein, should have been liable under the terms of said contract to indemnify the assured had such execution been satisfied, then the person injured might maintain an action against the defendant herein under the terms of said policy or contract for the amount of such judgment, not exceeding the amount of said policy, and also in and by said policy or contract it was further

agreed that the indemnity provided by said policy or contract was thereby extended so that the same should be available to any person lawfully operating with the permission of the named assured any automobile described in the schedule thereto, and to any person, firm or corporation legally responsible for the operation thereof.

8. Said policy or contract to indemnify Stryker Transportation Company, Inc., the named assured 10 was by the terms thereof extended to include indemnity of the said Joseph Andryshowich and the legal responsibility of the said Joseph Andryshowich to answer plaintiff in damages for his said injury having been determined by said judgment, and execution thereon against him having been returned unsatisfied, as aforesaid, because of his insolvency a cause of action has accrued to plaintiff against defendant under the terms of said policy or contract to sue for and recover the amount of 20 said judgment with interest and costs.

9. The said Stryker Transportation Company, Inc., paid the premium on said policy or contract as the same accrued or became payable and duly performed and observed all the conditions of the said contract of indemnity on its part.

10. On April 1, 1927, there was paid on account of said judgment for the said Joseph Andryshowich the sum of \$5,000 on account of said judgment and the sum of \$62.45 costs, together with 30 \$46.34 costs on the rule to show cause, and together with interest of \$303.74 on the sum of \$5,062.45 from April 1, 1927, to April 1, 1928, leaving a balance due on said judgment above described of \$25,000, together with interest from April 1, 1927, and

neither Joseph Andryshowich nor the defendant herein has paid the balance due on said judgment or any part thereof.

Plaintiff demands as damages \$25,000 and interest thereon from April 1, 1927.

BURTON A. GASKILL,  
*Attorney for Plaintiff.*

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EXHIBIT A.

No. A 23441

Form A1

20 NEW JERSEY MANUFACTURERS' CAS-  
UALTY INSURANCE COMPANY OF  
TRENTON, N. J.

30 IN CONSIDERATION of the premium herein provided and the statements set forth in the schedule of particulars, hereby agrees to indemnify the assured, (SUBJECT TO THE EXCLUSIONS, LIMITATIONS and CONDITIONS HEREINAFTER SPECIFIED) to an amount not exceeding TWO HUNDRED FIFTY THOUSAND DOLLARS (\$250,000) in respect of any one accident or disaster, against loss or damage resulting from bodily accident to or bodily injury or death suffered by any person, for which loss or damage the assured shall become legally liable by reason of the maintenance or use of the automobile or automobiles described in the schedule hereof.

EXCLUSIONS AND LIMITATIONS.

NEW JERSEY MANUFACTURERS' CASUALTY INSURANCE COMPANY (HEREINAFTER CALLED THE COMPANY) SHALL NOT BE LIABLE UNDER THIS POLICY:

(a) Unless and until this policy and/or any endorsements attached hereto shall have been signed 10  
by an underwriter of the company.

(b) For any liability to any person who is an employee or agent of the assured.

(c) For any liability unless the same is incurred during the policy period mentioned in the schedule hereof.

(d) For any liability incurred when the automobile 20  
involved is not within the United States of America or Canada, or upon a vessel in coastwise transportation between two of the ports thereof.

(e) In the event that this policy shall have been assigned unless and until the assent of the company to such an assignment is endorsed hereon in writing signed by said underwriter.

(f) To any receiver, trustee or other person to whom any interest in this policy or any automobile 30  
described herein may have passed by operation of law for any liability incurred after the date of acquiring such interest.

(g) Unless the statements contained in the schedule hereof are true in fact at the time when this

policy is issued and also at the time of liability incurred, or if the assured has concealed or misrepresented any material fact or circumstances concerning this insurance or the subject thereof.

- (h) For any loss or liability incurred if at the time of liability incurred the automobile is being used for the carriage of passengers for hire or is being rented under contract or lease for the carriage  
10 of passengers for hire, or is being operated in any race or speed test or by any person contrary to law as to age or under the age of sixteen years where no statute restricts the age, or being operated or used in furtherance of any illegal undertaking, or with the assent of the assured by any person forbidden by law to use or operate the automobile.

#### CONDITIONS

- 20 IF THE ASSURED SHALL FAIL TO PERFORM AND ABIDE BY ANY OF THE TERMS OF THE FOLLOWING CONDITIONS THE COMPANY SHALL NOT BE LIABLE UNDER THIS POLICY TO INDEMNIFY AGAINST ANY LIABILITY THERETOFORE OR THEREAFTER INCURRED BY THE ASSURED.

- 30 CONDITION 1. The assured shall at all times render to the company all co-operation and assistance in the assured's power in defending assured against claims of liability and in adjusting and minimizing loss or damage hereunder.

CONDITION 2. The assured shall not commit or attempt any fraud or false swearing touching any matter relating to this insurance or the subject thereof either before or after loss.

CONDITION 3. Upon the occurrence of any accident which may involve injury to or death of any person by any automobile described in the schedule hereof and/or upon claim made by any person that such injury or death has occurred, the assured shall forward immediately written notice thereof with the fullest information obtainable at the time to the Company's Home Office at Trenton, N. J. The assured shall immediately upon receipt of any summons, process, or court or other papers touching such injury or death likewise forward the same to the company. 10

Notice given by or on behalf of the Assured to any authorized agent of the Company within the State of New Jersey, with particulars sufficient to identify the Assured, shall be deemed to be notice to the Company. Failure to give such notice within the time specified in the Policy shall not invalidate any claim made by the Assured if it shall be shown not to have been reasonably possible to give such notice within the prescribed time and that notice was given as soon as was reasonably possible. 20

CONDITION 4. The assured shall not, without the prior written assent of the company, voluntarily assume or admit the existence of any liability for injury to or death of any person, or incur any expense or settle any claim, except at the assured's own expense; except that the assured may provide at the company's expense at the time of the injury such immediate surgical relief as is imperative. 30

CONDITION 5. The assured whenever requested by the company shall aid in effecting settlement, securing information and evidence and the attendance of witnesses, and in the defense of any suit and in the prosecution of any and all proceedings to

review any verdict or judgment rendered therein; but without such request the assured shall not interfere in any negotiations for settlement or any legal proceedings.

#### FURTHER AGREEMENTS

The Company and the Assured agree:

- 10 1. That the company will, upon compliance by the assured with the foregoing conditions, defend at the expense of the company, any action (whether groundless or not) brought against the assured to enforce a liability insured against by this policy.
- 20 2. The company further agrees upon like condition that where the company pays any amount for or toward satisfaction of any liability under this policy, the company will also pay or satisfy any court costs and expenses arising out of the defense against such liability, and will also pay all interest accrued on the amount paid by the company toward the satisfaction of any judgment finally determining such liability.
- 30 3. If judgment is recovered against the assured and execution thereon is returned unsatisfied because of the insolvency or bankruptcy of the assured, and if the company would have been liable under the terms of this policy to indemnify the assured had such execution been satisfied, then the person injured or his or her personal representatives in case death results from the accident, may maintain an action against the company under the terms of this policy for the amount of such judgment not exceeding the amount of this policy.

4. This company shall be subrogated to all rights of the assured in respect of, and may require from the assured an assignment of, a right of recovery against any party for any loss or damage any part of which is covered by this policy. In the event that the company shall recover from any third party a sum in excess of the amount which the company may expend in payments on account of assured's liability and any expense of making such recovery, then such excess shall be paid by the company to the assured. 10

5. This policy shall be cancelled at any time at the request of the assured, in which case the company shall upon demand and surrender of this policy refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be cancelled at any time by the company by giving the assured five days written notice of cancellation with or without tender of the excess paid premium above the pro rata premium for the expired term, which premium (if not tendered) will be refunded on demand. Notice of cancellation mailed to the address of the assured stated in the schedule hereof shall be sufficient notice. 20

6. The assured hereby warrants the truth of each and every statement contained in the schedule hereof and this policy shall be void if at the time of issuance hereof any of these statements are untrue in fact. 30

7. No suit or action against this company on this policy shall be brought unless instituted within ninety days after disavowal in writing by the company of liability to the assured for the relief claimed in such action or suit, or within ninety days after the liability of the assured to any third person shall

have been fixed or determined by judgment; but if any provision of this paragraph is in conflict with the statutes of any state within which action on this policy is instituted, the conditions of this paragraph shall be inoperative in so far as in conflict with such statute.

8. This policy constitutes the entire and complete contract between the company and the assured and  
10 no erasure or change appearing on the face of the policy as originally printed shall have the effect of extending or increasing the liability of the company under this policy, but such erasure or change may have the effect of reducing or decreasing such liability. No extension or waiver of the EXCLUSIONS, LIMITATIONS, CONDITIONS or AGREEMENTS of this policy shall be valid or effectual unless endorsed hereon in writing signed by an underwriter of the company, or unless after loss  
20 occurs such waiver or extension shall be in writing signed by the general attorney of the company.

9. The indemnity provided by this policy is extended so that the same shall be available, in the same manner and under the same conditions as it is available to the named assured, to any person or persons while riding in or lawfully operating the automobile described in the schedule and to any person, firm or corporation legally responsible for the  
30 operation thereof, provided such use or operation is with the permission of the named assured, or, if the named assured be an individual, with the previous permission of an adult member of the named assured's household other than a chauffeur or domestic servant.

10. The attention of the assured is called to Ar-

title IV, Section 2, of the by-laws of the company which is printed on this policy.

(HERE ATTACH ENDORSEMENTS IF ANY)  
AUTOMOBILE

ENDORSEMENT  
LIABILITY

FLEET SCHEDULE AND AGREEMENTS  
THIS INSURANCE IS SUBJECT TO THE  
CONDITIONS OF AND AS PER PRINTED 10  
FORM ATTACHED TO AND MADE A  
PART OF THIS POLICY NO. A-23441  
E. A. P.

(HERE ATTACH ENDORSEMENTS IF ANY)  
AUTOMOBILE

ENDORSEMENT  
LIABILITY

FLEET SCHEDULE AND AGREEMENTS  
THIS INSURANCE IS SUBJECT TO THE 20  
CONDITIONS OF AND AS PER PRINTED  
FORM ATTACHED TO AND MADE A  
PART OF THIS POLICY NO. A-23441.  
E. A. P.

NEW JERSEY MANUFACTURERS' CAS-  
UALTY INSURANCE COMPANY

Agrees in consideration of the statements in the  
schedule hereto, which the assured warrants to be 30  
true, that the policy of which this endorsement is a  
part is amended in the following particulars in re-  
spect only of the insurance given by said policy:

The company and the assured mutually agree:

- (a) This policy is intended to cover all commer-

cial automobiles and/or trailers owned and/or hired and used by the assured during the policy period.

(b) Upon delivery of this policy the assured shall pay to the company the advanced premium stated herein and the earned premium shall be adjusted as hereinafter provided. If the earned premium thus computed is greater than the advanced premium paid, the assured shall immediately pay the  
10 additional premium to the company; if less the company shall return to the assured the unearned premium but in any event the company shall retain the minimum premium herein stated.

(c) Beginning with the effective date of this policy and continuing concurrently therewith, the Assured shall maintain for each separate location where commercial automobiles and/or trailers owned by the Assured are kept or used, an accurate  
20 record of, (a) the advertised load capacity of such automobiles, (b) the number and remuneration of regular chauffeurs, occasional chauffeurs and others who operate automobiles, (c) the amount received from the renting of commercial automobiles and/or trailers to others and the names of the person or persons to whom rented; for each separate location where commercial automobiles and/or trailers are hired and used by the Assured an accurate record of  
30 the amounts incurred for the hire of such automobiles and/or trailers, with the names of their owners or lessors.

(d) The Company shall be permitted at all reasonable times during the policy period to inspect the automobiles and/or trailers covered hereby and to examine the Assured's books and other records at any time during the policy period or any extensions

thereof or within one year after their final expiration, so far as the books and other records relate to the automobiles and/or trailers covered thereby.

(e) The computation of advance premium for this policy and the adjustment of the earned premium hereunder are divided into two parts: (1) Automobiles and/or trailers owned by the Assured; (2) Automobiles and/or trailers hired by the Assured.

(1) The advance premium stated in the Schedule is based in part upon the estimated number of chauffeurs and others who operate commercial automobiles owned by the Assured, employed by the Assured during the Policy Period in accordance with the schedule forming part hereof at the rates stated therein. The earned premium for the Policy Period shall be adjusted by determining the number of chauffeurs and operators for each classification and location as hereinafter provided and by applying to such number the rates stated in said schedule. If any such classification and location involves commercial automobiles of more than one load capacity grouping as hereinafter described, the rates applicable to such classification and location shall be an average of the different load capacity rates. These average rates shall be obtained, first, by ascertaining the percentage of the commercial automobiles which belong in each load capacity grouping; second, by applying these percentages to the respective rates for the various load capacity groups involved; third, by adding the results to determine the average rates. Load capacity groups shall be as follows: (1) Automobiles with an advertised load capacity of one ton or less; (2) Automobiles with an advertised load capacity of more than one ton, but not over three and one-half tons; (3) Automobiles

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with an advertised load capacity of over three and one-half tons. The number of chauffeurs or operators shall be determined by dividing the total annual remuneration expended for regular chauffeurs or operators and occasional chauffeurs or operators by the annual per capita average wage; the result shall be the number of automobiles upon which the earned premium shall be adjusted as hereinbefore provided. In ascertaining the average per capita  
10 annual wage remuneration for regular time only shall be included. If the Assured operates an automobile he shall be included as one additional chauffeur. Total remuneration shall include all salaries, wages or sums paid for regular time, overtime, piece-work, or other allowances, and also the cash equivalent of all board, merchandise, store certificates, or any other substitute for cash.

In the event that commercial automobiles and/or trailers owned by the Assured are rented without  
20 chauffeurs to others, a sum equivalent to one-third of the amount charged by the Assured for such rented automobiles or trailers shall be included in the total actual annual remuneration as representing the remuneration of the chauffeurs of such rented automobiles.

(2) The advance premium stated in the Schedule is based in part upon hired commercial automobiles and/or trailers and computed upon an amount estimated by the Assured as the amount to be expended  
30 for the hire of such automobiles and/or trailers during such policy period, which amount is set forth in the schedule forming part hereof. The adjustment of earned premium shall be made upon the basis of the amount incurred (whether paid or not) by the Assured as the consideration due from him to the owners or lessors for such hired automobiles

and/or trailers used during such policy period at the premium rates for each One Hundred (\$100) Dollars of such amounts incurred as stated in said schedule. It is agreed that this policy shall not cover the liability of any owner or lessor from whom the Assured hires automobiles and/or trailers unless coverage for such owner or lessor is specially provided by further endorsement attached to this policy.

The automobiles and/or trailers to be covered by 10 this endorsement are all automobiles and/or trailers to be used by the assured for business purposes during the policy period. In respect thereof the assured makes the following estimates:

(a) As to commercial automobiles and/or trailers owned by the assured. That the estimated number of chauffeurs or operators to be employed will be 14; (b) that the estimated total annual remuneration of all chauffeurs or operators will be..... 20 and that the automobiles and/or trailers so to be used are of the following classes or descriptions:

30	20	10	20
LOCATION	Trenton, New Jersey.		
Advertised Load Capacity	Number Owned	Estimated Average Number Used	Rates per Automobile Liability
1 Ton or Less		2	\$33.00
1 Ton to 3½ Tons			
Over 3½ Tons Trailers		12	63.00
			\$756.00

LOCATION

Advertised Load Capacity	Number Owned	Estimated Average Number Used	Rates per Automobile Liability
1 Ton or Less			
1 Ton to 3½ Tons			
Over 3½ Tons Trailers			

*Complaint*

LOCATION

Advertised Load Capacity	Number Owned	Estimated Average Number Used	Rate per Automobile Liability
1 Ton or Less			
1 Ton to 3½ Tons			
Over 3½ Tons Trailers			

(b) ESTIMATED ADVANCE PREMIUM FOR OWNED AUTOMOBILES  
MINIMUM PREMIUM FOR SAME \$315.00

(c) AS TO COMMERCIAL AUTOMOBILES AND/OR TRAILERS TO  
BE HIRED.

Location	Estimated Amount Incurred for Policy Period If any	Rates per \$100 Liability
Trenton, N. J.		.90

(d) ESTIMATED ADVANCE PREMIUM FOR HIRED AUTOMOBILES  
MINIMUM PREMIUM FOR HIRED AUTOMOBILES \$

(e) TOTAL ESTIMATED ADVANCE PREMIUM \$822.00

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20

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Complaint

(f) The foregoing estimates made by the assured are intended to include all commercial automobiles and/or trailers to be owned by the assured at any location and all chauffeurs or operators who may operate any commercial automobiles and/or trailers so owned, and is also intended to include all commercial automobiles and/or trailers to be hired by the assured, except (as to those owned by the assured).

- 10 The other terms, exclusions, limitations, conditions, warranties and agreements of the policy remain unchanged. Attached to and forming part of Policy No. A-23441 of New Jersey Manufacturers' Casualty Insurance Company, of Trenton, N. J. Dated, January 2, 1926.

E. A. PERRY,  
Automobile Underwriter.

20

## SCHEDULE

1. Name of the Assured: Stryker Transportation Company, Inc.
2. Address of Assured: 2053 South Broad Street, Trenton, New Jersey.
3. The policy period is from noon, January 2, 1926, to noon, January 2, 1927, Eastern Standard  
30 Time.
4. The only uses to which the automobiles described herein will be put are Commercial.
5. The automobiles are principally used in Trenton, New Jersey, and vicinity.

6. The nature of the business is General Contractors.

7. The automobiles covered by this policy are as follows:

DESCRIPTION	Factory and/or	Year of	
Trade Name	Motor No.	Model	
Model or			
No. of Cylinders	Kind of Power	Capacity	List Price Premium
SEE	ENDORSEMENT ATTACHED	\$822.00	10

8. No claims have been made against the assured on account of personal injuries caused by any automobiles driven by or for the assured, except as follows: No exceptions.

9. No Company has cancelled Liability Insurance on this risk during the past three years except as follows: No exceptions. 20

IN WITNESS WHEREOF the company has caused this policy to be executed by its President and by its Secretary but this policy shall not be in force until countersigned by an Automobile Underwriter.

J. PHILIP BIRD, President. W. C. BILLMAN, Secretary.

Countersigned this 2nd day of January, 1926, but effective only within policy period shown in the SCHEDULE hereof. 30

E. A. PERRY,  
Automobile Underwriter.

## EXTRACT FROM BY-LAWS

DIVISION OF UNDERWRITING PROFITS  
ARTICLE IV, SECTION 2

Section 2. After setting aside the necessary reserves and providing for the regular and further dividends above referred to, the Board of Directors  
10 may from time to time in their discretion determine the advisability of paying to policyholders a dividend upon the net premiums received and to be received on policies written in the then previous fiscal year of the company and the rate of any such dividend. All determinations in favor of such dividends shall be submitted to the Commissioner of Banking and Insurance of the State of New Jersey; and when and not before said Commissioner shall have  
20 informed the company that he does not object to or does consent to or approves, or omits for thirty days to inform the company that he disapproves, any such determination in whole or in part, the company shall become obligated for the payment of such dividend to the extent thus allowed by said Commissioner; provided, however, that the company shall not be so obligated in respect of any policy covering a risk in the State of Pennsylvania or other state where the company may be or become authorized to do business, until, nor beyond the extent to which,  
30 such dividend shall have been likewise acted upon by the Insurance Commissioner of such other state. No dividend to a policy holder shall be payable until after the termination of the policy, the completion of the payroll audit (if there be any) and the receipt of all balance of premiums on said policy.

AUTOMOBILE LIABILITY  
POLICY

(Public Liability Only)

NEW JERSEY MANUFACTURERS'  
CASUALTY INSURANCE COM-  
PANY OF TRENTON, N. J.

Operated by the Manufacturers' Asso-  
ciation of New Jersey

J. PHILIP BIRD      W. C. BILLMAN      10  
President                      Secretary  
HOME OFFICE  
TRENTON, N. J.

---

POLICY NO. A 23441

HOME OFFICE NO. 1242

INSURED Stryker Trans. Co., Inc.

PREMIUM \$822.00                      20

EXPIRES January 2, 1927.

PLEASE READ YOUR POLICY

## NOTICE.

NEW JERSEY SUPREME COURT.  
ATLANTIC COUNTY.

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10	LOUIS GIROUD,	} <i>Plaintiff,</i>	} Action at Law. Notice.
	v.		
	NEW JERSEY MANUFACTURERS' CASUALTY INSURANCE Co.,	} <i>Defendant.</i>	

---

20 *To the within-named plaintiff:*

Notice that we shall move before Judge Sooy in the court room, Guarantee Trust Building, Atlantic City, New Jersey, on Friday, the 1st day of February next, at the hour of eleven o'clock, in the forenoon, to strike and dismiss the complaint in this cause upon the following grounds:

30 (a) Admitting to be true all the facts sufficiently pleaded, no cause of action is shown in favor of the plaintiff and against the defendant;

(b) Assuming that the alleged policy of insurance marked Exhibit A to the complaint in fact was issued by defendant and its terms correctly stated, there is no liability on the part of the defendant to the plaintiff;

(c) The allegations in the complaint show affirmatively that the only one liable to answer to the plaintiff is Joseph Andreshowich.

COLE & COLE,  
*Attorneys for Defendant.*

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JUDGMENT.

NEW JERSEY SUPREME COURT.

LOUIS GIROUD,	} <i>Plaintiff,</i>	Action at Law.	20
v.			
NEW JERSEY MANUFACTURERS' CASUALTY INSURANCE Co.,	} <i>Defendant.</i>	Judgt. for Deft. on Striking Out Complaint.	
			Cole & Cole, Attorneys.

Costs, \$33.00.

Judgment entered this twenty-sixth day of February, A. D. nineteen hundred and twenty-nine, in favor of defendant and against the plaintiff for the sum of thirty-three dollars costs. 30

WM. S. GUMMERE,  
*C. J.*

A true copy.

FRED L. BLOODGOOD, *Clerk.*

## OPINION.

(Filed February 25, 1929.)

## NEW JERSEY SUPREME COURT.

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LOUIS GIROUD,

*Plaintiff,*

v.

NEW JERSEY MANUFAC-  
TURERS' CASUALTY INSUR-  
ANCE Co.,*Defendant.*Motion to Strike  
Complaint.  
Memo.

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COLE &amp; COLE, for the motion.

BURTON A. GASKILL, contra.

SOOY, J.

This is a motion to strike the complaint on the ground that it does not disclose a legal cause of action.

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The complaint alleges, paragraph 2, that defendant issued its policy of insurance or contract of indemnity, to the S. T. Co., thereby agreeing to indemnify it, the S. T. Co., against loss or damage from bodily injury, &c., by any person or persons by reason of the maintenance, operation or use of the automobiles described in the schedule annexed to the policy, for which loss or damage the said as-

sured, or any other person operating such automobile with the permission of the assured, should be legally liable or responsible.

Paragraph 3 alleges that plaintiff, while the policy was still in force, suffered bodily injury by reason of being struck by one of the automobiles described in the schedule aforesaid and while said auto was being operated by a Mr. A., with the permission of the assured, the S. T. Co., that A was the owner of the auto and legally responsible for the operation thereof. 10

Paragraph 4 alleges that the result of a suit against the S. T. Co. and A resulted in a joint judgment against both defendants and in favor of this plaintiff; that the S. T. Co. appealed from the judgment and that A obtained a rule to show cause why the judgment should not be set aside; that the Court of Errors and Appeals reversed the judgment as to the S. T. Co. and that the Supreme Court dismissed A's rule. 20

Paragraph 5 alleges that execution was issued against A, returned unsatisfied and that A is insolvent.

Paragraph 7 alleges that the contract of indemnity aforesaid provides that if judgment should be recovered against the assured and execution be returned unsatisfied, because of the insolvency of such assured, and if the insurance company, the defendant, herein, would have been liable under the terms of its policy, to the assured, had the execution been satisfied, then the person injured may bring suit against the insurance company and, plaintiff further alleges, that, by the terms of the policy it was further agreed that the indemnity provided by the policy was extended so that the same should be available to any person lawfully operating with the permission of the assured, any auto described in the 30

schedule and to any person, firm or corporation legally responsible for the operation thereof.

Paragraph 8 alleges that the policy to indemnify the S. T. Co. was extended to include indemnity to A and that the legal responsibility of A to respond to the present plaintiff having been established by the Supreme Court as aforesaid and A being insolvent, that plaintiff is entitled to recover against this defendant.

- 10 It will be observed that the allegation of the complaint is that the policy was and is a contract of indemnity. This is borne out by the terms of the policy. It is further alleged that it is a policy of indemnity to the S. T. Co. against damages by reason of the operation, &c., of the autos described in the schedule annexed thereto, for which damages the S. T. Co. or any person operating with its permission, would be *legally responsible*.

- 20 The policy and schedule are annexed to and made a part of the complaint.

- The schedule refers to an endorsement by the terms of which certain autos owned by the S. T. Co. are enumerated. The schedule does not list the truck of A specifically, so that the truck is not included in the schedule unless it may be said to be included in subdivision "c" thereof, which is in language following, "as to commercial autos and/or trailers to be hired," under which no autos or trailers are listed but for which, if hired, a premium of .90 is to be charged.

- 30 It thus appears that the coverage on A's truck, if it was covered, must have been (a) because the S. T. Co. had hired the truck from A or, that it was a truck operated by A with the permission of the S. T. Co.

Ordinarily, this Court would be bound by the averments in the complaint, but, if the facts asserted

therein are notoriously known to be otherwise and definitely established by the Court of Errors and Appeals to be otherwise, then, on this motion, this Court is not bound by them.

The Court of Errors, in *Giroud v. S. T. Co.*, 6 Ad. Rep., p. 332, has held that A was not the servant of the S. T. Co. in the operation of the truck on the day and at the time and place of the accident, but that A was then and there an independent contractor, saying, "The question before us is whether the driver (A), in collecting and delivering of the gravel, was a servant, for whose acts the appellant (S. T. Co.) was liable under the doctrine of *respondet superior*, or an independent contractor, for whose acts it was not liable." The Court held that the relation of master and servant did not exist but that A was an independent contractor. 10

It would seem that, under this decision, the truck of A was not included in the schedule as a "hired" truck, nor was it being operated by or with the permission of the S. T. Co. 20

To hire property involves the idea of passing of the possession, management and control of the thing hired into the hands of the hirer. No such thing happened here under the language of the decision above quoted.

Nor was A's truck being operated by A with the permission of the S. T. Co. Consent means, as I understand the use of that word, "To yield when one has the right, power or will not to do so." Stryker had contracted with A to do certain work and, in that respect, may be said to have consented that A should employ the means necessary to carry out the work and, incidental thereto, to use the truck in question but, can it be said that S consented as contemplated by the 9th section of the policy? S had contracted with A to do the hauling and, there- 30

after, S did not have the power to deny A the use of the truck nor did S consent to the use thereof as contemplated by Sec. 9 aforesaid, which section reads as follows:

10           “The indemnity provided by this policy is extended so that the same shall be available, in the same manner and under the same conditions as it is available to the named assured, to any person or persons while riding in or lawfully operating the automobile described in the schedule and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured.”

20           There can be no question but that the policy was and is one of indemnity, *i.e.*, to indemnify Stryker for “loss or damage for which the assured shall become legally liable.” (The Court of E. & A. has said that Stryker is not legally liable) as well as under Sec. 9, to indemnify “any person or persons while riding in or lawfully operating the auto, with the permission of the named assured,” but it seems to me, that the plaintiff cannot claim advantage under the indemnity clause of this policy.

30           There can be no question but that if the indemnity extends to A, and A is insolvent, that plaintiff is entitled to the benefit of the indemnity, but, the insolvency of A does not help plaintiff unless the policy may be extended so as to cover indemnity to A.

          The fleet clause of the policy, so called, does not help the plaintiff. The policy is, by this endorsement, amended: (a) This policy is intended to cover all commercial automobiles and/or trailers owned and/or hired and used by the assured during the policy period.”

          This endorsement does not apply to the situation

as it existed between the S. T. Co. and because the auto was not owned by S nor was it used or hired by S.

The motion to strike the complaint is granted.

*Plaintiff requested and was granted an exception.*

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ORDER STRIKING COMPLAINT.

(Filed February 26, 1929.)

NEW JERSEY SUPREME COURT.

ATLANTIC COUNTY.

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LOUIS GIROUD,

*Plaintiff,*

v.

NEW JERSEY MANUFACTURERS' CASUALTY INSURANCE COMPANY,

*Defendant.*

Action at Law.  
On Motion to Strike  
Complaint.  
Order Striking  
Complaint.

This matter coming on to be heard on motion of counsel for defendant to strike the complainant, and in the presence of counsel for plaintiff; and the Court having read and considered the complaint and heard and considered the argument of respective counsel; and being of the opinion that the complaint should be stricken;

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It is on this 25th day of February, 1929, on motion of Cole & Cole, attorneys of defendant, ordered that the complaint be, and the same hereby is, stricken because it fails to show a cause of action in favor of plaintiff against the defendant, with costs in favor of defendant.

On motion of

COLE & COLE,

*Attorneys of Defendant.*

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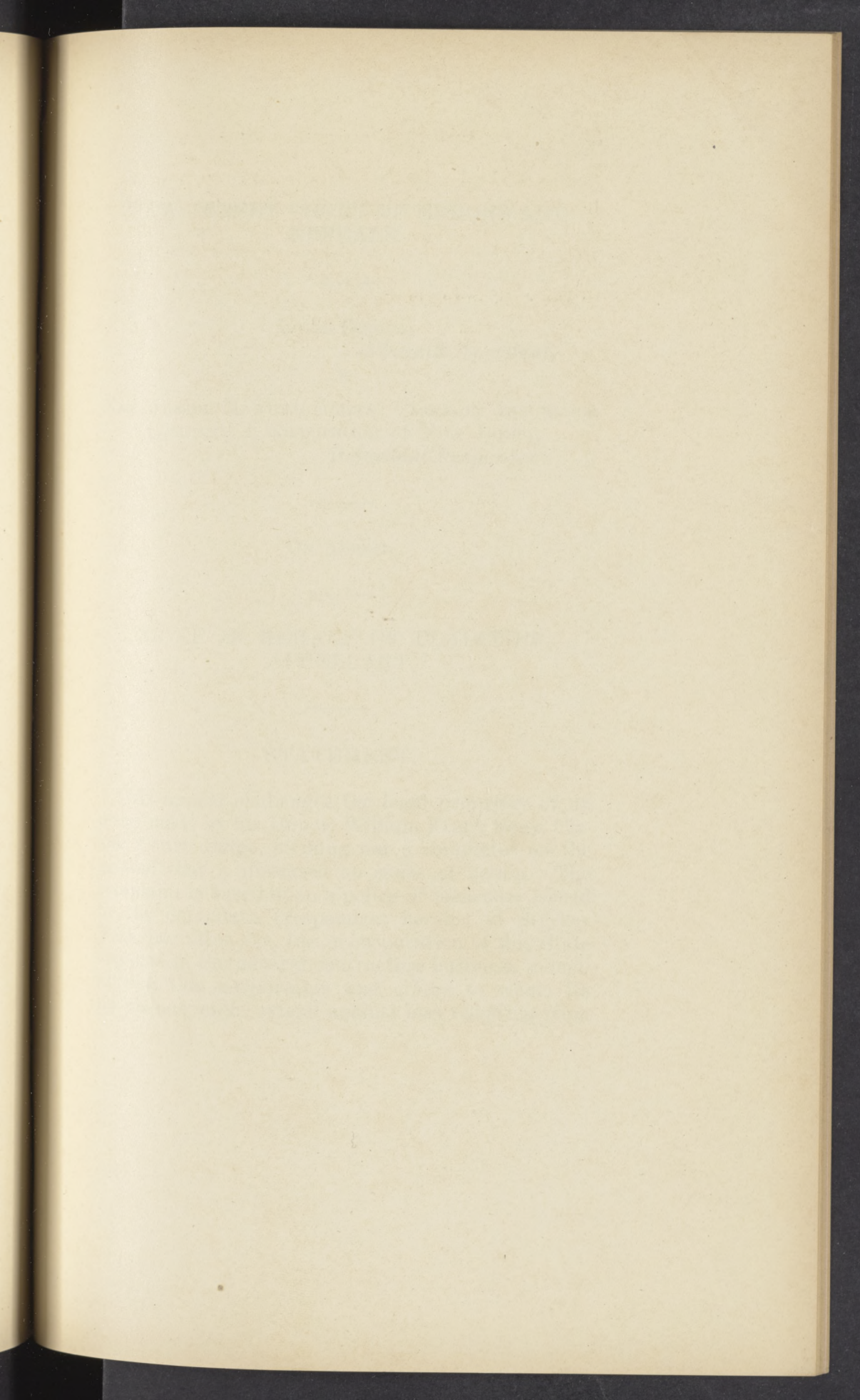
Let this rule be entered in the minutes of the court.

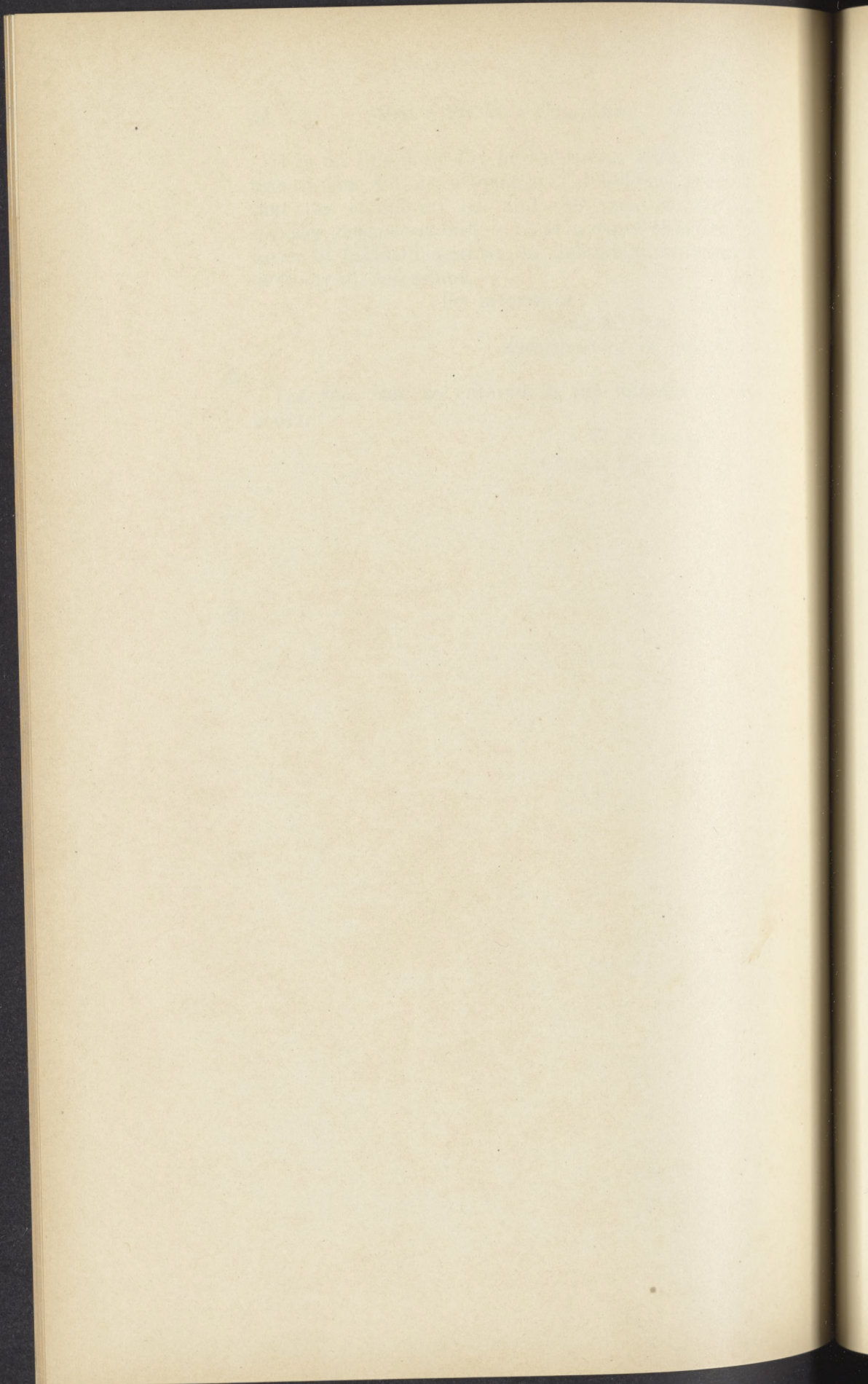
W. F. Sooy,

*Circuit Court Judge.*

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NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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LOUIS GIROUD,  
*Plaintiff-Appellant,*

v.

NEW JERSEY MANUFACTURERS' CASUALTY INSURANCE  
COMPANY, a corporation of New Jersey,  
*Defendant-Respondent.*

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ON APPEAL.

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BRIEF IN BEHALF OF PLAINTIFF-  
APPELLANT.

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STATEMENT.

This appeal challenges the legal propriety of an order made by his Honor, William Frank Sooy, Circuit Court Judge, striking out a complaint on the ground that it disclosed no cause of action. The complaint is based upon a policy of insurance issued by the defendant (respondent herein) to Stryker Transportation Co., Inc., a corporation of this State engaged in the general contracting business, indemnifying that corporation *and others* to whom its provisions might extend against loss resulting from

accidents by reason of the operation and use of automobiles. The policy is attached to the complaint and is made a part thereof. The plaintiff (appellant here) was struck and suffered serious injuries which consisted largely of the loss of a leg from collision with an automobile truck operated by one Andryshowich, in the employ of the assured, and sued in the Supreme Court to recover damages for his injury, bringing his action and obtaining a verdict against both Stryker Transportation Co., Inc., and Andryshowich. The latter obtained a rule to show cause why the verdict, as to him, should not be set aside and a new trial granted, with the result that the rule was discharged. (See *Giroud v. Andryshowich*, 139 Atlantic, 898.) The judgment against the Stryker Transportation Co., Inc., was reversed by this Court on appeal. Unable to obtain satisfaction of his judgment because of the insolvency of Andryshowich, the plaintiff commenced the present suit against the defendant upon this policy issued to the Stryker Transportation Co. as assured.

The complaint in the suit last mentioned based upon the provisions of the policy was that which the Court below ordered stricken and it is to review the legality of the order striking the complaint that this appeal is taken.

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#### ARGUMENT.

The policy of insurance contains the following undertakings and provisions covering the person, persons, firms, or corporation insured:

“To indemnify the named assured to an amount not exceeding Two Hundred and Fifty Thousand Dollars (\$250,000.) in respect of any

one accident or disaster against loss or damage resulting from bodily accident to or bodily injury, or death suffered by any person for which loss or damage the assured shall become legally liable by reason of the maintenance or use of the automobile or automobiles described in the schedule hereof." See page 8, S. C.

Under the title "Further Agreements," it was agreed between the company (insurer) and the named assured (Case, p. 14, clause 9) that:

*"The indemnity provided by this policy is extended so that the same shall be available in the same manner and under the same conditions as it is available to the named assured, to any person or persons while riding in or lawfully operating the automobile described in the schedule, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured, or, if the named assured be an individual, with the previous permission of an adult member of the named assured's household, other than the chauffeur or a domestic servant."*

By special endorsement on the policy, it is provided (Clause a, page 15) that:

*"This policy is intended to cover all automobiles and/or trailers owned and/or hired and used by the assured during the policy period."*

Clause 3 under the heading "Further Agreements" (on page 12 Case) gives a right of action directly against the company under the terms of the policy for the amount of any judgment not exceed-

ing the amount of the policy where execution shall be returned unsatisfied because of the insolvency of the assured.

New Jersey P. L. 1924, Chapter 153, page

~~162~~; 352

*Merchants Mutual Automobile Liability Insurance Co. v. Smart*, 206 App. and Dib. 630, 198 N. Y. Supp. 949;

*Merchants Mutual Automobile Liability Insurance Co. v. Smart*, 267 U. S. 126;

*Knabe v. Independence Indemnity Co. N. J.*, Adv. Reports, Volume 7, No. 5, page 93.

The fact that Andryshowich was the owner of the car that caused the injury and that he hired it to the assured, is established in this Court (see *Giroud v. Stryker Transportation Co.*, 140 Atlantic 305), that he was responsible for its operation within the meaning of the policy and his liability fixed is likewise established (see *Giroud v. Andryshowich*, 139 Atlantic 898). This leaves as the only question to be adjudged whether or not the operation and use of the car was, at the time of the accident, "with the permission of the named assured" within the meaning of the policy. It is hardly conceivable that the assured would have hired Andryshowich and his car for a specific work at a specific price withholding permission to perform that work.

The averments of the complaint constitute plaintiff as one entitled to the character of "insured" within the meaning of the policy as extended.

The learned Judge in the court below, in striking out the complaint, seems to have considered himself bound by the judgment of this Court in *Giroud v. Stryker Transportation Co.* above cited. It is submitted that he utterly misconceived the scope and

affect of that decision. What this Court decided was that the relation of master and servant had not been established and therefore the doctrine of *respondeat superior* did not apply. The learned Judge then proceeded to define and discuss the meaning of the word "permission" as employed in the policy. Whether the car was being operated "with the permission of the named assured" was a jury question and the legal question arising upon the complaint was really one of construction of contract on which the existence of the relation of master and servant or of the doctrine of *respondeat superior* was in no wise involved.

The precise questions here presented were considered and determined by the Supreme Court of Errors of Connecticut (*Dickinson v. Maryland Casualty Co.*, 125 Atlantic 866). The Court in that case was called upon to construe a provision in an automobile accident liability policy issued by the defendant, Clause II of which was in language identical with Clause 9 of "Further Agreements" contained in the policy in this case, and contained also the insolvency provision found in the policy in this case. In the cited case, one Donato Maisano was the owner of an automobile and procured from the defendant company (Maryland Casualty Co.) a policy of insurance containing among others the provisions referred to. One, Riccitelli, was an employe of a company in which Donato was interested and was a licensed operator of motor vehicles. Louis Maisano was a brother of Donato, and was an adult member of Donato's household and living at his home. He was not a chauffeur or domestic servant of Donato. The insured car was kept in a garage in the rear of Donato's home. Riccitelli met Louis at the garage and asked to borrow the car to go home and change his clothes. Louis replied, "Alright,

and hurry back.” Thereupon Riccitelli took the car and drove away with it with the knowledge and permission of Louis. Instead of going home, he first drove to a saloon where he stayed fifteen minutes and took in three passengers; then he drove more than a mile directly away from his home to another drinking place, and then to a third place. Being doubtful whether it was not already time to return the car to the owner’s garage, he started back toward the garage, intending to find out on the way whether he still had time to go home and change his clothes, and if not, to return the car to the garage. Before he began to use the car for the permitted purpose it skidded into a tree and Dickinson (one of the passengers) was killed. The administrator of the estate of the deceased passenger brought an action against Riccitelli, the driver, claiming damages against him for his negligence in causing the death of Dickinson and recovered judgment against Riccitelli of \$4,000. The judgment was not paid and the Casualty Co., defendant, refused to pay, whereupon suit against it was instituted to recover the amount of the judgment in the Superior Court, and that Court requested the advice of the Supreme Court of Errors upon the following question:

“Whether the permission given by Louis Maisano was such permission as to bring Riccitelli within the terms and meaning of the policy and especially the provisions of Clause II commonly referred to and called the ‘Omnibus Coverage Clause’ at the time the injuries were received by Dickinson.”

The question was answered in the affirmative, the Court resting its decision on either of two grounds:

1. By the settled rules of construction (of contracts of insurance) that must be adopted which is most favorable to the insured.

2. By the reasonable construction of the language used in the light of the intention of the parties.

Citing many authorities and among others, *Smith v. Fidelity and Deposit Co.* (N. J. Errors and Appeals, 120 Atlantic 322 and 98 N. J. L. 534).

Obviously the question of the effect or existence of the policy sued on here was not before the Court where the theory of the case was negligence purely. Its provisions could not be there considered. What this Court passed upon in determining the question of the right of this plaintiff to recover against the Stryker Transportation Co. was the presence or absence of proof establishing the relation of master and servant to which the doctrine of *respondeat superior* might be applied; not whether, and if so what contractual relation existed between the insuring defendant and the named assured in the policy.

The questions arising upon this complaint were neither decided nor present. Whether or not the car driven by Andryshowich at the time of the accident was one of the automobiles described in the schedule (See "C" Case, p. 21), and whether or not there was evidence of operation by him "with the permission of the named assured" independent of that afforded by the policy were clearly questions for the jury.

Appellant respectfully submits that the order and judgment of the Court below should be set aside.

Respectfully submitted,

BURTON A. GASKILL,

Attorney for Plaintiff-  
Appellant.



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# New Jersey Court of Errors and Appeals

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LOUIS GIROUD,  
*Plaintiff-Appellant,*

v.

NEW JERSEY MANUFACTURERS' CAS-  
UALTY INSURANCE COMPANY,  
*Defendant-Respondent.*

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ACTION AT LAW.

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RESPONDENT'S BRIEF.

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STATEMENT.

Appellant sued Joseph Andryshowich and Stryker Transportation Company in the Supreme Court to recover damages resulting from an injury received by him due to the collision of his motor-cycle with a truck owned and driven by Andryshowich. Stryker Transportation Company was made a party upon the theory that Andryshowich was its servant at the time of the collision. There was a verdict against both defendants which was affirmed as to Andryshowich on his rule to show cause, and reversed as to Stryker Transportation Company, by the judgment

of this Court on the ground that there was no relation of master and servant between Andryshowich and Stryker Transportation Company. See 140 Atlantic Reporter 305.

Respondent insured Stryker Transportation Company, and this action is against the insurance company, respondent, on its policy upon the theory that by its terms appellant is a beneficiary and entitled to recover the amount of the judgment recovered against Andryshowich.

The policy is made a part of the complaint and the complaint avers the substantial and material facts upon which the right to recover is based. There was a motion to strike the complaint because it disclosed no cause of action, and the motion prevailed. From the order thereon, plaintiff appeals.

The bottom and sole question is, does the policy, in the circumstances, run to the benefit of appellant.

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#### ARGUMENT.

#### THE COMPLAINT DISCLOSES NO CAUSE OF ACTION AGAINST RESPONDENT.

Appellant must concede that there was no relation of master and servant between Andryshowich and Stryker Transportation Company, and that the Stryker Transportation Company has no liability to appellant. Such was the judgment of this Court in the cited case, and this was followed by Judge Sooy who heard the motion to strike the complaint.

At the time of the collision, Andryshowich was driving the truck owned by him, and he was on his own errand as an independent contractor. There

was not, and is not, any privity between appellant and respondent. The policy is obviously one of indemnity. It begins:

"In consideration of the premium herein provided and the statements set forth in the schedule of particulars, hereby agrees to indemnify the assured \* \* \* in respect to any one accident or disaster, against loss or damage resulting from bodily accident to or bodily injury or death suffered by any person, for which loss or damage the assured shall *become legally liable* by reason of the maintenance or use of the automobile or automobiles described in the schedule hereof."

If we stop here, it will require the highest flight of imagination to assume that in the light of the conceded facts the appellant could hold the respondent. The quoted language makes it liable only in the event that Stryker Transportation Company is *legally liable* to some one by reason of the maintenance of one of the automobiles described. We have shown that the judgment of this Court was that there was no legal liability on the part of the Stryker Transportation Company to the appellant.

Counsel for appellant stressed and seems to rely upon Section 9 of the policy, which reads:

"The indemnity provided by this policy is extended so that the same shall be available, in the same manner and under the same conditions as it is available to the named assured, to any person or persons while riding in or lawfully operating the automobile described in the schedule and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured."

The claim is that the automobile driven by Andryshowich was numbered among those insured and that he was driving it "with the permission of the named assured." Judge Sooy in his opinion was unable to find that the truck of Andryshowich is covered by the policy and we think and contend that as to this he was correct. But it is legally inconsequential whether it is or is not. As a matter of extreme precaution against possible successful claims, Stryker Transportation Company had a right to insure against the truck for fear that a jury might find the relation of master and servant. Appellant has not brought himself within the provisions of said section. He was not riding in or lawfully operating the automobile. Nor was he "Any person, firm or corporation legally responsible for the operation thereof." Nor was Andryshowich operating the truck "with the permission of the named assured (Stryker Transportation Company)." The complaint relies solely upon the permissive feature of the section and it, the complaint, avers:

"It was further agreed that the indemnity provided by said policy or contract was thereby extended so that the same should be available to any person lawfully operating with the permission of the named assured any automobile described in the schedule thereto, and to any person, firm or corporation legally responsible for the operation thereof."

Concededly the truck was not the property of the Stryker Transportation Company but was the property of Andryshowich. How then can it be said that at the time of the collision Andryshowich was operating his own truck with the permission of the Stryker Transportation Company?

It is an abuse and misuse of plain language to assert such a claim.

The appellant has based his right of recovery wholly upon the permissive feature and is therefore limited thereto.

It must always be borne in mind that the policy is purely one of indemnity only. This is recognized in the complaint, paragraph 2 reading:

“On that day, for a valuable consideration, the defendant issued its policy of insurance, or contract of indemnity, to Stryker Transportation Company, Inc., thereby agreeing to indemnify it,” &c.

In his opinion, Judge Sooy aptly says:

“There can be no question but that the policy was and is one of indemnity, i. e., to indemnify Stryker for ‘loss or damage for which the assured shall become legally liable.’ (The Court of E. & A. has said that Stryker is not legally liable) as well as under Sec. 9 to indemnify ‘any person or persons while riding in or lawfully operating the auto, with the permission of the named assured,’ but it seems to me, that the plaintiff cannot claim advantage under the indemnity clause of this policy.”

Until there is a judgment against Stryker Transportation Company or a legal claim which it might pay, it has had no legal liability and therefore nothing against which to be indemnified under the terms of the policy and therefore no liability on the part of the respondent under its policy. The manifest attempt is to transmute a policy of indemnity to Stryker into a policy agreeing to pay appellant in any event.

The opinion of Judge Sooy carries its own vindication and without more, we are content to rely upon his reasoning and conclusion as being invulnerable and unassailable.

The judgment should be affirmed.

Respectfully submitted,

COLE & COLE,  
*Attorneys for Respondent.*

