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NEW JERSEY SUPREME COURT.
HUDSON COUNTY.

NATHAN MARCUS, trading as WEST HOBOKEN PLUMBING SUPPLY COMPANY, *Plaintiff,* *vs.* MANUFACTURERS' LIABILITY INSURANCE COMPANY, a corporation, *Defendant,*	*Notice of Appeal*

NOTICE OF APPEAL.

To:

JEROME J. DUNN, Esq.,
Attorney for Plaintiff,
76 Montgomery Street,
Jersey City, N. J.

Sir:

TAKE NOTICE, that the defendant appeals to the Court of Errors & Appeals of the State of New Jersey from the whole of the judgment entered in this case.

Respectfully,

EDWARD S. HOLMAN,
Attorney for Defendant.

Dated: March 31st, 1921.

NEW JERSEY SUPREME COURT.

NATHAN MARCUS, trading as WEST HOBOKEN SUPPLY COMPANY, *Plaintiff-Appellee,* *vs.* MANUFACTURERS' LIABILITY INSURANCE COMPANY, a corporation. *Defendant-Appellant,*	*Grounds of Appeal.*

GROUNDS OF APPEAL.

JEROME J. DUNN, Esq.,

Attorney for Plaintiff-Appellee,

76 Montgomery Street, Jersey City.

Sir:

The appellant states the following ground of appeal in this cause:

(1) Because the Trial Court committed error in refusing to grant the defendant's motion at the close of the case, to direct a verdict in favor of the defendant and against the plaintiff.

Respectfully,

EDWARD S. HOLMAN,

Attorney for Def't-Appellant.

Dated: April 16th, 1921.

Judgment Record—Complaint

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

NATHAN MARCUS, trading as WEST HOBOKEN PLUMBING SUPPLY COMPANY, *Plaintiff,* *vs.* MANUFACTURERS' LIABILITY INSURANCE COMPANY OF NEW JERSEY, a corporation of New Jersey. *Defendant,*	*Action at Law Complaint.*

JUDGMENT RECORD—COMPLAINT.

The plaintiff, residing at West Hoboken, in the County of Hudson and State of New Jersey, says that:

1. On or about the 19th. day of November, 1918, at Jersey City, Hudson County, New Jersey, the above named defendant caused to be made a certain policy of insurance, in writing, purporting thereby, and containing therein, that in consideration of the payment of forty-six dollars ($46.00) premium, to be paid by said plaintiff, the receipt whereof the said defendant thereby acknowledged, the said defendant undertook and promised the said plaintiff, among other things, that it, the said defendant, would indemnify the said plaintiff against loss by reason of the liability imposed upon said plaintiff by law for damages on

account of personal injuries or death sustained by employes of the said plaintiff and the obligation for compensation therefor imposed upon the said plaintiff, and to defend in the name and on behalf of the said plaintiff any suits or other proceedings which might at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, and to pa yall costs taxed against said plaintiff in any legal proceeding defended by the Company, all interest accruing after entry of judgment, and all expenses incurred by the Company for investigation, negotiation and defense, all of which is imposed upon the said plaintiff under a law of the State of New Jersey, entitled, "An Act prescribing the Liability of an employer to make compensation for injuries received by an employe in the course of employment, establishing an elective schedule of compensation, and regulating procedure for the determination of liability and compensation thereunder, approved April 4, 1911" and the various amendments and supplements thereto, and the said defendant undertook and promised that the said policy above mentioned, which also contained certain other sundry provisions and promises, provisos, conditions, prohibitions and stipulations attached thereto; as by the said policy, reference thereto had, will more fully appear, should continue in force for a period of one year from the date thereof.

2. That at or about the time of making the said policy of insurance by the said defendant with the said plaintiff, the said plaintiff had in his employ, in connection with his business, as pro-

prietor of the West Hoboken Plumbing Supply Company, at West Hoboken, Hudson County, New Jersey, one Harry Soulowitz, who was employed by the said plaintiff, as a clerk and general all around helper.

3. That on or about the 29th day of May, 1919, the said Harry Soulowitz, while actually engaged in the course of his employment by the said plaintiff, sustained severe injuries, and has ever since that date suffered therefrom.

4. That on or about the 18th. day of October, 1920. the said Harry Soulowitz, at a formal hearing of his petition for compensation for the injuries above mentioned, sustained by him in the regular course of his employment by the said plaintiff, was awarded by Deputy Commissioner George J. Jaeger, of the Workmen's Compensation Bureau, of the Department of Labor of New Jersey, compensation for such injuries above mentioned, at the rate of ten ($10.00) per week for three hundred weeks, fifty dollars ($50.00) for medical expenses, and one hundred dollars ($100.00) for legal and counsel fees, against the above mentioned plaintiff.

5. Plaintiff in all other particulars complied with, performed and observed all other, the conditions, provisos, restrictions, prohibitions and stipulations of the said policy above mentioned, on his part to be complied with, performed and observed, according to the form and effect of the said policy.

6. Defendant, although often requested. has not kept with the said plaintiff the agreement aforesaid, contained in the said policy made be-

tween the said defendant and the said plaintiff in that behalf as aforesaid, but that the defendant has broken the same, in that, knowing of the award against the said plaintiff, the defendant having been present at the time of the hearing and the making of the award, and having defended the said case on behalf of the above mentioned plaintiff, he has wholly neglected and refused to indemnify the said plaintiff for loss sustained by him by reason of the liability imposed upon him, the said plaintiff, for compensation, medical expenses and legal and counsel fees, recovered by the said Harry Soulowitz, and still does refuse, so to do.

Wherefore plaintiff demands as damages $920.00 with interest and costs of this suit.

JEROME J. DUNN,
Attorney of Plaintiff.

JUDGMENT RECORD—ANSWER.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

NATHAN MARCUS, trading as WEST HOBOKEN SUPPLY CO.
Plaintiff,
vs.
MANUFACTURERS' LIABILITY INSURANCE COMPANY, a corporation of New Jersey,
Defendant,

Answer.

The defendant, a corporation of the State of

New Jersey, having its principal office at No. 37 Montgomery Street, Jersey City, New Jersey, says that:

First Defense.

(1) It admits the execution and delivery by this Company, of a policy of insurance, to the plaintiff, bearing date the 19th. day of November, 1918, but denies that the terms and conditions of the said policy are as set forth in paragraph one (1) of the complaint.

(2) It denies the allegations contained in paragraphs two (2), three (3), four (4) and five (5) of the complaint.

Second Defense.

(1) Defendant says that according to the terms and conditions of the said policy of insurance, the plaintiff was required to make known to the defendant immediately, the happening of the events alleged in paragraph three (3) of the complaint.

(2) In violation thereof, plaintiff did not notify defendant of the happening of the said events until five months thereafter, that is to say, until the month of October, 1919.

(3) Because of such breach on the part of the plaintiff, the defendant is not liable on its said contract of insurance.

Third Defense.

(1) Defendant will object that the complaint discloses no cause of action, in that it is not shown that under the terms and conditions of the policy of insurance alleged in this cause, plaintiff

gave to the defendant immediate notice of the happening of the events alleged in paragraph three of the complaint, as by the said policy of insurance plaintiff was required to do, and because in divers other respects and particulars, the complaint filed in the above cause does not disclose a cause of action.

EDWARD S. HOLMAN,
Attorney of Defendant.

JUDGMENT RECORD—JUDGMENT.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

NATHAN MARCUS, trading as WEST HOBOKEN PLUMBING SUPPLY CO.,
Plaintiff,

vs.

MANUFACTURERS' LIABILITY INSURANCE COMPANY OF NEW JERSEY, a corporation of New Jersey,
Defendant.

This action having been tried before Judge William H. Speer, with a jury, in the presence of counsel of the respective parties on March 28th, 1921; and the jury having thereupon returned a verdict in favor of the plaintiff and against the

defendants for nine hundred and twenty dollars ($920.00), with interest and costs;

Whereupon, it is ~~alleged~~ adjudged that the plaintiff recover of the defendant the sum of Nine hundred and twenty dollars ($920) and his costs, which are taxed at the sum of Forty-seven dollars and thirty-eight cents ($47.38), making in the whole the sum of Nine hundred and sixty-seven dollars and thirty-eight cents ($967.38).

Judgment entered April 1st, 1921.

NEW JERSEY SUPREME COURT.

TESTIMONY.

NATHAN MARCUS, trading as WEST HOBOKEN PLUMBING AND SUPPLY COMPANY,

vs.

MANUFACTURERS' LIABILITY INSURANCE COMPANY.

Tried March 28, 1921, before Speer, J. and a jury.

Jerome J. Dunn for the plaintiff.

Randolph Perkins (Mr. Drewen) for the defendant.

NATHAN MARCUS, sworn.

Direct examination by Mr. Dunn:

Q. What is your business? A. Plumbing supplies.

Q. What is the name of the company with which you are connected? A. West Hoboken Plumbing and Supply.

Q. Where are you located? A. 313 Paterson avenue, West Hoboken.

Q. Do you know the defendant company in this case? A. Yes.

Q. Did you ever have a policy of insurance with that company? A. Yes.

Q. I show you this policy of insurance and ask you if that is the policy of insurance they issued to you? A. Yes.

Q. What is the date of that? A. 1919 policy.

MR. DREWEN: It speaks for itself, I suppose.

MR. DUNN: No dispute? I offer this in evidence.

(Policy marked Exhibit P-1.)

Q. You paid the premium on that, didn't you? A. Yes.

Q. For what period does that policy cover? A. It covers all injuries that arise to any of my employees.

Q. For how long a time? A. As long as the policy exists.

Q. Did you have any men in your employ at that time, at the time of the making of the policy? A. Yes.

Q. What were the employees' names—any of them?

THE COURT: Give us the real one.

A. Harry Srulovitz.

Q. What was he doing? A. He was left in the place, taking care of the office and the shop end of it.

Q. Did anything happen to Mr. Srulovitz while he was in your employ? A. Yes.

Q. What happened to him? A. He got hurt.

Q. When was that when he was hurt? A. Around November—around June.

Q. What year? A. Wait a minute—I think it was May.

Q. What year? A. 1919.

Q. Did you ever do anything further in the Srulovitz case; were you ever called to court in that matter, or anything like that? A. No, sir.

Q. Were you ever in court in that matter? A. I was only in court when they issued a judgment against me.

Q. When was that? A. I could not recall the date, of course.

Q. What court were you in? A. I was down in some court in lower Jersey City, I forget the name of it.

Q. Was it before Commissioner Jaeger? A. Yes, sir.

Q. After the judgment was rendered against you, what did you do then? A. I went up to the insurance company and they simply said they would not take care of the case.

Q. Did they ever take care of the case for you?

A. *No;* they did so far—so far as he got the judgment, and no further.

Q. After he got the judgment what happened?

A. Nothing. I went up to the company and asked them that they should pay the judgment, and they simply said they would not do it.

Q. Did the insurance company take care of you at the trial of the cause? A. Yes.

Q. Had their lawyer there? A. Yes.

Q. What was their lawyer's name? A. I do not remember the name.

Q. Would you know him if you saw him? A. Yes.

Q. Were you represented by counsel at that trial? A. No.

Q. How much have you paid on this judgment? A. I do not remember; the receipts will tell you.

Q. Did you pay anything on it? A. I did.

Q. I show you a receipt purporting to be signed by Susie Srulovitz, as next friend of Harry Srulovitz; is that a receipt you got for money you paid? A. Yes, sir.

Q. How much did you pay? A. $920.

By the Court:

Q. Did you get that receipt at the time you paid it? A. Yes.

Q. What is the date of that receipt? A. December 3.

Q. You paid it on December 3, 1920? A. Yes.

MR. DUNN: I offer this in evidence.

(Receipt marked Exhibit P-2.)

THE COURT: What is the amount?

MR. DUNN: $920.

BY THE COURT:

Q. How did you come to have a lawyer from the insurance company at the hearing before Commissioner Jaeger; how did he get there? A. I notified the company of the accident, and that is all I did; and the company took care of the rest.

Q. When was it you notified them? A. I notified them, I think it was, some time after the case.

Q. Some time after what case? A. After the accident.

Q. I know, but about when was it? That is what we want to find out. A. Around August; I do not remember the date exactly.

Q. Whom did you notify? A. To the company; the Manufacturers Liability Insurance Company.

Q. But "the company" does not mean anything to that jury. What man did you tell? A. I could not tell the name, because the company—the Manufacturers Liability Insurance, I sent in the report however they have got their blanks.

Q. When did you send in the report? A. Around August.

Q. How did you come to get the blank? A. They mailed me in a blank and I filled it out and sent it back.

Q. When did they mail you the blank? A. I sent them in a report on my letterhead and they sent me back a blank to fill out, and since then they took care of the case.

Q. Why did you wait until August before you sent in the report of an accident that happened in

May? A. Well, we did not know—the boy happened to be very seriously sick, and we did not know whether it was from that little—whether it was from the accident.

By Mr. Dunn:

Q. After you turned in the report to the Insurance company did they do anything further in the case? A. They went around and investigated and took care of all the rest of the case.

Q. Did you go down to see them any time after you sent them the report? A. Yes.

Q. Did they talk to you about the case? A. I explained them. They said they would not take care of the case.

Q. They would not take care of it? A. They would not.

Q. Whom did you see at the Manufacturers Liability Insurance Company? A. I think once I seen Mr. Simmons, and the other gentleman sitting alongside of Mr. Simmons.

Q. Mr. Simmons, the man in court? A. Yes.

Q. What did Mr. Simmons tell you when you went down there? A. Mr. Simmons said the vice-president of the company said that he would not pay for the judgment or anything in the case.

Q. I show you a letter on your stationery, and a carbon copy of a letter— Yes.

Q. Did you write that letter to the insurance company. A. Yes.

Q. Is that the reply you got from them? A. Yes.

Q. In which they state that they sent one of their investigators to the hospital? A. Yes.

MR. DUNN: I offer this letter in evidence at this time—dated October 8, 1919.
(Letter marked Exhibit P-3.)

Q. I show you another letter dated October 27, 1919, addressed to you, purporting to be signed by the Manufacturers Liability Insurance Company, Claim Department, B. M. D., in which they say they sent a man to the hospital—they received the report of the visits. Is that the letter you received from them? A. Yes.

(Letter offered in evidence and marked exhibit P-4.)

Q. You sent them written notice of the accident, didn't you? A. I did.

Q. Then they sent you a blank to be filled out? A. Yes.

Q. How long before you filled out the blank did you send them written notice of the accident? A. About three or four days.

Q. At the time of the hearing before Commissioner Jaeger, did you file an answer to the petition filed by Mr. Srulovitz? A. No, sir.

Q. Were you called down to the Manufacturers Liability Insurance Company for the purpose of signing the answer in this case? A. No, sir.

Q. You never signed the answer in this case, did you? A. No, sir.

Q. Did you ever have a consultation with the counsel for the insurance company prior to the hearing before Commissioner Jaeger? (No answer.)

Q. You never had such a consultation in re-

gard to this case? A. When I was over at Judge Jaeger's office, at the court, so there was a lawyer from the insurance company, and that is the only time I have been talking to a lawyer, at that moment.

Q. Was a copy of the petition in the case of Srulovitz against you sent to you? A. No, sir.

Q. You do not know where it was sent, do you? (No answer.)

MR. DUNN: That is all.

Cross Examination by Mr. Drewen:

Q. This Srulovitz boy whom you say was hurt, he is related to you some way, isn't he? A. What is that?

MR. DUNN: I object as irrelevant.

MR. DREWEN: Only for the purpose of showing interest.

THE COURT: I think I will permit it, to show the relationship of the parties.

Q. Is this Srulovitz boy related to you? A. Yes.

Q. In what way? A. He is a nephew.

Q. He is your sister's boy? A. Yes.

Q. Now, this boy was injured on May 29th, was he not? A. Yes.

Q. And he never came back to work again? (No answer.)

Q. Did you go to see him? A. Yes.

Q. Just as soon as he remained away from work you went to see him? A. Yes.

Q. You say that you sent the company a letter reporting the accident some time in August; is that right? A. Yes.

Q. Are you sure about the time, or are you only guessing at it? A. I think it is about that time.

Q. Might it not have been in September? A. It may be.

Q. And you say that a few days after you sent the letter to the company they sent you some blanks? A. Yes.

Q. What did you do with the blanks? A. I filled them out and returned them.

Q. Right away? A. Yes.

Q. Is this (indicating) such a blank as was filled out? A. I don't remember. I don't remember, unless I see my signature on it.

Q. Did you sign it or just write your name by the typewriter? A. I think I signed my name.

Q. Do you know whether you did or not? A. I am almost sure.

Q. When you say that the company's lawyer was there, you only mean to tell us that you understood that the man who was there was a lawyer from the company; is that right? A. Yes.

Re: Direct Examination by Mr. Dunn:

Q. This lawyer was not your lawyer, was he?
THE COURT: He has already sworn he was not.

GEORGE J. JAEGER, sworn.

Direct examination by Mr. Dunn:

Q. You are Deputy Commissioner in the New

Jersey Workmen's Compensation Bureau? A. Yes.

Q. You are here under subpoena duces tecum, are you not? A. I am.

Q. Will you produce the original petition filed in the case of Harry Srulovitz, by Susie Srulovitz, his next friend, against Nathan Marcus, trading as West Hoboken Plumbing Supply Company? A. I will have to go back of the petition filed by Susie Srulovitz to the original petition which was filed, and an amended petition was filed later. That (producing paper) is the original petition.

Q. Filed May 28, 1920? A. Yes. There is the original acknowledgment of service of that petition. Here we have the original amended petition.

Q. Commissioner, from this acknowledgment of service can you tell who received that; who it was served on? Was it served on the defendant insurance company? A. The acknowledgment of service is "Doctor Alexander C. Ruoff," who is assistant medical director of the Manufacturers Liability Insurance Company.

Q. Have you an acknowledgment of service on this second petition? A. No, I have not. A motion was made to dismiss on account of the statute of limitations having caused the time to expire. That motion to dismiss was dismissed by me and the petition allowed to stand, and I then recommended that the amended petition be filed.

Q. I have here an answer to the amended petition. Who is the answer filed by? A. The affidavit is by Alexander Dembe, attorney of the respondent.

THE COURT: Did the letter accompany the petition?

THE WITNESS: It did.

Q. This letter accompanied the petition? A. Yes.

MR. DUNN: I offer all these in evidence.

THE COURT: All except the letter. That you will have to prove later.

(Papers marked P-5, P-6 and P-7.)

Q. There was a hearing before you in this case, was there not? A. The final hearing was held on October 18, 1920.

Q. What was your finding in that case? A. There was really no defense entered by—

THE COURT: What was the finding? That is all.

A. I found that the petitioner was under temporary disability, that that temporary disability was to run for a period not to exceed three hundred weeks, the company to have the privilege to re-open the matter from time to time if the examination showed there was improvement.

Q. Have you the determination in that matter? A. Yes; I have.

MR. DUNN: I offer in evidence the determination.

(Paper marked P-8.)

Q. Was there an informal hearing prior to the formal hearing? A. There was.

Q. I show you a notice. Is that the regular notice sent out for informal hearings? A. It is.

Q. Did you send that notice out? A. Yes.

Q. What date is that dated? A. December 17, 1919.

Q. And the informal hearing is called for what date? A. Friday, December 26, 1919—there is no year—but it is 1919.

Q. Was that informal hearing ever held? A. There was an informal hearing.

Q. What transpired at that hearing? A. I cannot recall that. I have not the informal papers with me.

Q. At the final hearing held in October of 1920 was Mr. Marcus present. A. He was.

Q. Was he represented by counsel? A. *He was.*

Q. Have you stenographic minutes taken at that trial? A. Yes.

MR. DUNN: I offer in evidence the stenographic minutes taken at the trial.
(Minutes marked P-9.)

SUSIE SRULOVITZ, sworn.

Direct examination by Mr. Dunn:

Q. Where do you live? A. 16 East 105th Street, New York.

Q. Have you any children? A. Yes.

Q. What is your son's name? A. Harry Srulovitz.

Q. I show you a letter dated December 6, purporting to be from the Manufacturers Liability

Insurance Company to you. Did you ever receive that letter from the Manufacturers Liability Insurance Company? A. Yes, sir.

Q. In which they state they are taking up the case for you? A. Yes.

Q. On the 6th of December, 1919, were you at the Manufacturers Liability Insurance Company's office? A. I was not in the office, but I was called in the court.

Q. What court? A. It was in Jersey Avenue —I think in Mr. Jaeger's room.

LEO SIMMONS, sworn.

Direct examination by Mr. Dunn:

Q. Mr. Simmons, by whom are you employed? A. Manufacturers Liability Insurance Company.

Q. What are your duties? A. I hold the position of assistant claim manager.

Q. In the course of your duties do you handle the stationery of the Manufacturers Liability Insurance Company? A. I do.

Q. Do you know the names of the various employees in that department? A. I do.

Q. I show you a letter dated October 2, 1920, purporting to be on the Manufacturers Liability Insurance Company's stationery. Is that from your office?

Q. Who wrote that?

MR. DREWEN: If you know.

A. I can't tell who wrote it.

Q. Whose name is signed to it? A. Alexander Dembe is the name signed to it.

Q. Is he an employee of your company? A. He was at one time.

Q. At the time that was written?

MR. DREWEN: He does not know when that was written? Do you?

MR. DUNN: By the date on the letter.

A. I could not answer that positively. I think he was at the date indicated on that.

MR. DUNN: I offer it in evidence.

BY THE COURT:

Q. Well, did he represent your company in the transaction before the commissioner? A. Not that I know of.

Q. Do you know that he did not? A. No.

Q. Do you know anything about it? A. I do not know anything about the hearing, no, sir.

Q. I do not care anything about the hearing. Did you represent your company with respect to this hearing? A. I assume that he did, although I cannot tell that of my own knowledge.

Q. Who can tell it? Let us get the truth here. Who can tell us? Give us the name of somebody in your company.

Q. So, if you can let us know who can tell us, in your company, we will adjourn until we can get him here and find out. A. The general counsel of the company, Mr. Holman; and Mr. Dembe was employed at one time by the legal department.

Q. Where is the general counsel? A. In his office, I think, 37 Montgomery Street.

Q. I show you the respondent's answer filed to the petition. Do you know if that came from your office? A. I do not know that it did, no, not to my knowledge.

Q. You do not know whether it did or not? A. No.

Q. What is the general custom in the office of the Manufacturers Liability Insurance Company —to assign a man from your department to represent the defendants in these compensation cases?

MR. DREWEN: What is your department?

THE WITNESS: Claim department.

Q. Is it the custom in your department to assign men to investigate these cases, or defend these cases, as the case may be? A. Not from the claim department. It goes to the legal department when it once goes on for a formal hearing. Prior to that time it is taken care of by the claim department.

Q. Do you know if a man was assigned from the claim department to investigate this case? A. He was.

Q. Do you know his name? A. I could not tell his name; I would have to look at the records.

Q. Have you the records here? A. I have not.

MR. DREWEN: Was Mr. Tappey assigned?

THE WITNESS: He was one of the men who investigated the case.

Q. From your department? A. Yes.

(Defendant moves for a nonsuit on the ground that there is no proof of any notice in accordance with the conditions of the policy of insurance—an immediate written notice to be given to the company upon the occurrence of an

accident. That the evidence shows injury occurred. May 29, 1919; reported to the defendant company by the assured October 1, 1919.)

Motion for nonsuit overruled.

Objection noted by defendant.

Defense.

Defendant reads notice served by him upon plaintiff to produce two letters written by defendant to plaintiff dated November 11, 1919, and December 27, 1919.

Letters are produced by plaintiff.

They are offered in evidence by defendant and marked defendant's exhibits D-1, D-2.

Defendant rests.

Defendant moves for direction of verdict on the ground that evidence shows injury occurred May 29, 1919, and that the plaintiff did not report it to the defendant until September 29, defendant receiving the written notice October 1, 1919. And on the ground that there is no proof that plaintiff complied with the terms and conditions of the policy of insurance requiring him to give immediate notice in writing to defendant upon the occurrence of an accident.

Motion overruled. ~~Case submitted to jury on the theory that jury may find from evidence in case that defendant assumed control of defense of claim before Commis-~~

Stipulation

~~; sioner, under Workmen's Compensation Act, before letter of December 27, 1919, disclaiming liability had been written by defendant to plaintiff.~~ See Court's charge p. 49 post

Objection noted by defendant.

STIPULATION.

NEW JERSEY SUPREME COURT.

HUDSON COUNTY.

NATHAN MARCUS, trading as WEST HOBOKEN PLUMBING SUPPLY COMPANY,

Plaintiff,

vs.

MANUFACTURERS' LIABILITY INSURANCE COMPANY OF NEW JERSEY, a corporation of New Jersey,

Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, for the purposes of the appeal in the above entitled cause, that the injuries to employe of the assured (plaintiff-respondent) occurred on May 29th, 1919, and that notice of such injury was given by the plaintiff-respondent to the defendant-appellant on September 29th, 1919.

JEROME J. DUNN,
Attorney for Plaintiff-respondent.

EDWARD S. HOLMAN,
Attorney for Defendant-appellant.

EXHIBIT P-1.

NEW JERSEY WORKMEN'S COMPENSATION AND EMPLOYER'S LIABILITY POLICY

MANUFACTURERS' LIABILITY INSURANCE CO.
OF NEW JERSEY.

Executive Office, 1 Montgomery Street,
Jersey City, N. J.

Policy No.	Policy Expires
N. J. W. 31327	Nov. 21, 1919

(Herein called the Company)

DOES HEREBY AGREE with the Employer (herein called the Employer) named and described as such in the Declarations hereinafter set forth and hereby made a part thereof, as respects personal injuries sustained by Employes, including death at any time resulting therefrom, as follows:

Compensation.

1. To pay in the manner provided by the Workmen's Compensation Law of the State of New Jersey and all amendments thereto and supplements thereof. Any sum due or to become due from the Employer because of any such injuries or death and the obligation for compensation thereof imposed upon the Employer by such Law. It is agreed that all of the provisions of such law covered hereby shall be a part of this contract as fully and completely as though written herein, so far as they apply to compensation for any personal injury or death covered by this policy while it shall remain in force. This obligation for compensation shall include all provisions of such law respecting medical and hospital service and medicines.

Ehhibit P 1

Liability.

II. To indemnify the Employer against loss by reaso nof the liability imposed upon Employer by law for damages on account of such injuries or death.

Service.

III. To serve the Employer (1) by the inspection of work-places set forth in said Declarations whenever deemed nesessary by the Company and thereupon to suggest to the Employer such changes and improvements as may operate to reduce the number and severity of personal injuries during work; and (2) upon notice of such injuries so sustained by investigation thereof and by settlement of any resulting claims in accordance with the law.

Defense.

IV. To defend in the name and on behalf of the Employer any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, proceedings, allegations and demands are wholly groundless, false or fraudulent.

Costs and Expenses.

V. To pay all costs taxed against the Employer in any legal proceedings defended by the Company, all interest accruing after entry of judgment, and all expenses incurred by the Company for investigation, negotiation and defense.

Employes Covered.

VI. This policy shall cover all employes of the Employer, legally employed.

Exhibit P 3

This Policy is subject to the following Conditions:

Notice.

Condition H. Upon the occurrence of an accident, the Employer shall give immediate written notice thereof to the Company or its duly authirized agent. He shall give like notice with full particulars of any claim made on account of such accident. If any suit or other proceeding is instituted against the Employer he shall immediately forward to the Company and notice, summons or other process served upon him.

In witness whereof, the Manufacturers' Liability Insurance Company of New Jersey has caused this policy to be signed by its President and Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative of the Company.

A. E. WILLIAMSON, President.

JOHN G. J. JOHNSON, Secretary.

Countersigned at Jersey City, New Jersey, this 19th day of Nov., 1918.

By WM. H. HECKROLD,
Authorized Representative.

EXHIBIT P-3.

MANUFACTURERS' LIABILITY INSURANCE COMPANY

Jersey City, N. J.
October 27, 1919.

West Hoboken Plumbing Supply Company,
West Hoboken, N. J.

Gentlemen: In re: Harry Srulovitz Claim No. C-27502.

Exhibit P 4

We have received report from our physician who called on the above injured, and there seems to be some question as to whether or not this man's condition is the result of an accident arising out o fand in the course of his employment.

We are to get the complete history in this case, and will advise you further in the course of a few days.

Yours very truly,
MANUFACTURERS' LIABILITY INSURANCE COMPANY,
B. M. D.
Claim Department.

EXHIBIT P-4.

MANUFACTURERS' LIABILITY INSURANCE COMPANY

Jersey City, N. J., October 8, 1919.

West Hoboken Plumbing Supply Co.,
West Hoboken, N. J.

Gentlemen: In re: Harry Shrulovitz Claim No. C-27502

We have sent one of our investigators to the hospital to see this man and render us a report as to his condition.

We note from the accident report that this injury occurred May 29th, 1919. Can you kindly advise us as to the exact date on which the injured was compelled to stop work on account of same?

Yours very truly,
MANUFACTURERS' LIABILITY INSURANCE CO.,
B. M. D.
Claim Department.

PLAINTIFF'S EXHIBIT P-5.

NEW JERSEY DEPARTMENT OF LABOR.
WORKMEN'S COMPENSATION BUREAU.

TRENTON, N. J.

Amended

RESPONDENT'S ANSWER TO
EMPLOYEE'S CLAIM PETITION.

HARRY SOULOWITZ, *Petitioner.* *vs.* WEST HOBOKEN PLUMBING SUPPLY COMPANY, *Respondent.*	*Claim Petition No.* 667 *October 2nd,* 1920

Attorney for Respondent, Alexander Dembe,
37 Montgomery St., Jersey City, N. J.

In answer to Claim Petition filed in this cause:

1. What is the petitioner's name? Harry Soulovitz.

2. Where does he reside? 16 East 105th Street, New York City, New York.

6. Was the petitioner in your employ at the time of the accident? Yes.

7. State your business. Plumbing Supplies.

8. Did you receive written notice from the Petitioner at the time of hiring, or later, that the Compensation Law was not to apply to him? No.

9. Did you give such notice to him? No.

Plaintiff's Exhibit P 5

10. When did you first have knowledge of this accident? May 29th, 1919.

11. Did you receive notice of this accident from the Petitioner? Yes.

12. If so, on what date? May 29th, 1919.

13. Has any claim for compensation been made? Yes.

14. What was the Petitioner's regular occupation, and what kind of work was he doing at the time of the accident? Clerical Work and all around man. Assorting different crates in the store.

15. When did the accident happen? May 29th, 1919.

16. Where did the accident happen? In store.

17. What was the nature of the accident, and how did it happen? The Petitioner alleges that he injured his left leg in assorting different crates in the store at 313 Paterson Avenue, West Hoboken, N. J.

18. On what date was the petitioner compelled to stop work because of the injury? Don't know.

19. On what date was the injured well enough to work again? Don't know.

20. If still disabled, on what date do you estimate he will be able to work? Don't know.

21. Give your understanding of the nature of any injury from which he should recover? Don't know.

22. Give your understanding of any perma-

Plaintiff's Exhibit P 5

nent injury which has resulted in either amputation or less usefulness of any member, or impairment of any physical organ. Explain fully. Don't know.

23. Were the wages fixed by piece-work? No.

26. Give number of hours in an ordinary working day. 8 hours.

27. Give number of days in an ordinary working week. 5.

28. State the amount of weekly wages. $20.00.

29. How much money have you paid the injured as compensation (not medical aid) since the accident? None.

30. Have you promised to pay compensation? None.

32. Was medical aid required? No. Not at the time, but the next day.

34. Were you requested to supply the necessary medical service required by law? Yes, but not until after October 1st, 1919.

35. Did you furnish this service? Yes, sent our doctor, R. J. Azzari, to the hospital for deformities and joint diseases.

36. If so, between what dates? On October 27th, 1919.

38. Give name of physician and hospital rendering service at your direction. Doctor R. J. Azzari.

39. What other facts are there which you believe important? If you deny that compensation

Plaintiff's Exhibit P 5

is payable in this case, explain fully your reasons for this conclusion. We disclaim liability for the following reasons, to wit:

1. That the report of Dr. R. J. Azzari shows that the petitioner wa ssuffering from Pneumoccoccio Hip Joint Disease, but that this disease was not a result of the said accident nor did it arise in the course of his employment.

2. That there was no eye witnesses to the happening of the accident.

3. That the statement of the witnesses are prejudiced by the relationship to the petitioner.

4. That the petitioner's allegations as to the injuries sustained are exaggerated.

5. That the statements of the petitioner are prejudiced by his relationship to the respondent.

WEST HOBOKEN PLUMBING COMPANY,
313 Paterson St., West Hoboken, N. J.
By ALEXANDER DEMBE,
Attorney.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON } SS

ALEXANDER DEMBE, of full age, being duly sworn according to law, on his oath deposes and says: That he is the attorney of the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

ALEXANDER DEMBE,
Attorney of Respondent.

Petitioner's Exhibit P 7

Subscribed and sworn to before me, this second day of October, 1920, at Jersey City, N. J.

KATHERYN M. KANE,
Notary Public of New Jersey.

Plaintiff's ~~PETITIONER'S~~ EXHIBIT P-7.

NEW JERSEY DEPARTMENT OF LABOR.
WORKMEN'S COMPENSATION BUREAU,
TRENTON, N. J.

Employee's Claim Petition for Compensation.

HARRY SOULOWITZ, *Petitioner,* *vs.* WEST HOBOKEN PLUMBING SUPPLY COMPANY, *Respondent.*	*Claim Petition No.* 667. *May 29th,* 1920, *May 28th,* 1920.

Attorney for Petitioner, Jerome J. Dunn,
76 Montgomery St., Jersey City, N. J.
Telephone 3388 Montgomery.

To the Workmen's Compensation Bureau of New Jersey:

The claimant respectfully alleges the following facts:

1. What is your name? Harry Soulowitz.

2. Where do you live? 16 East 105th Street, New York, N. Y.

3. Sex? Male.

Petitioner's Exhibit P 7

4. Age? 18.

5. Married? Single.

6. By whom were you employed at the time of the accident? (Give name and business address). West Hoboken Plumbing Supply Company, 313 Paterson Avenue, West Hoboken, N. J.

7. What was the business of your employer? Plumber Supplies.

8. Did you give written notice to your employer at the time you were hired, or later, that the Compensation Law should not apply to you? No.

9. Did you receive such notice from your employer? No.

10. Did your employer have knowledge of your accident? Yes.

11. Did you notify your employer of your accident? Yes.

12. If so, on what date? May 29th, 1919.

13. Have you made claim to your employer for compensation? Yes.

14. What was your regular occupation, and what kind of work were you doing at the time of the accident? Clerical work and all around man.

15. When did the accident happen? May 29th, 1919.

16. Where did the accident happen? West Hoboken Plumbing Supply Co., 313 Paterson Avenue, West Hoboken, N. J.

Petitioner's Exhibit P 7

17. What was the nature of the accident, and how did it happen? I was doing general work in this place, and at the time of the accident, I was checking up some boxes or crates which are very heavy, being 23x25x15 inches and varying in thickness from ½ inch to 1¼ inches; these crates were heavily laden, and one of them fell upon me, causing the fracture of the hip joint. When it fell upon me, I became unconscious and the said crate could barely be lifted from me by the person who came into the room.

18. On what date were you compelled to stop work because of the injury? May 29th, 1919.

19. On what date were you well enough to work again? Cannot work even now.

20. If still disabled, on what date do you think you will be able to work? Perhaps in a year or two.

21. Give nature of any injury from which you will recover. Am at present wearing a brace on my leg, and will probably never recover from said injury.

22. If any permanent injury has resulted, either amputation or loss of usefulness of any member, or impairment of any physical organ, explain fully. Must wear a brace on one leg, and a padded shoe on the other. Am unable to do any work whatever.

23. Were your wages fixed by piece-work? No.

26. Give number of hours in an ordinary working day. 8 hours.

Petitioner's Exhibit P 7

27. Give number of days in an ordinary working week. 6 days.

28. State the amount of weekly wages. $20.00.

29. How much money have you received from your employer as compensation (not medical aid) since your accident? Nothing.

30. Has your employer promised to pay you any compensation? No.

32. Was medical aid required? Yes.

33. Did you receive medical, surgical or hospital services? Both.

34. Did you request your employer to furnish these services? Yes.

35. Were they furnished? No.

37. If not, what sum did you spend for them during the first and second weeks after the accident? Was in hospital for months.

38. Give name and address of physician and hospital. Hospital for Deformities and Joint Diseases, 1919 Madison Avenue, New York, N. Y. Dr. Finkelstein, 226 70th Street, New York City.

39. What other facts are there which you believe important? Have applied for compensation and attended a hearing on December 26th, 1919, but for some reason the hearing was adjourned and it seems to have been entirely forgotten.

40. Are you willing that the Compensation Bureau endeavor to secure compensation for you, by agreement, before calling for an official hearing? Yes.

Petitioner's Exhibit P 7

Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

HARRY SOULOVITZ,
Petitioner.
16 East 105th St., N. Y.

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } ss

Harry Soulowitz of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

HARRY SOULOVITZ,
Petitioner.

Subscribed and sworn to before me, this 10th day of August, 1920, at Jersey City, New Jersey.

JEROME J. DUNN,
Attorney-At-Law of New Jersey.

PLAINTIFF'S EXHIBIT P-8.

STATE OF NEW JERSEY
DEPARTMENT OF LABOR,
WOMEN'S COMPENSATION BUREAU.

HARRY SOULOWITZ by SUSIE SOULOWITZ as Next Friend, *Petitioner,* *vs.* NATHAN MARCUS, Trading as WEST HOBOKEN PLUMBING SUPPLY COMPANY, *Respondent.*	*Claim Petition No. 667 on Petition for Compensation Determination of Facts and Rule for Judgment.*

(This exhibit is a determination of facts and rule for judgment in the above entitled cause, by George J. Jaeger, Deputy Commissioner of Workmen's Compensation. The rule for judgment based upon the finding of facts is as follows):—

It is, therefore, on this 10th day of March, 1921, ordered, that judgment final be entered in favor of the petitioner, Harry Soulowitz, by Susie Soulowitz as next friend, and against Nathan Marcus, trading as the West Hoboken Plumbing Supply Co., in the sum of $10 per week for a period commencing fourteen days after May 29th, 1919, for 91 weeks up to the date of this determination and judgment, beside the further sum of $10 per week during the temporary disability of the said Harry Soulowitz for a period not to exceed 300 weeks

in total, or until such time as application is made for a re-hearing in this matter and the award changed according to law. The petitioner is also entitled to receive from the respondent the fee for filing this determination with the Clerk of the Court of Common Pleas of Hudson County.

GEORGE J. JAEGER,

Deputy Commissioner.

EXHIBIT P-9.

WORKMEN'S COMPENSATION BUREAU,

Jersey City, New Jersey.

HARRY SOULOWITZ,
Petitioner,
vs.
WEST HOBOKEN PLUMBING SUPPLY COMPANY,
Respondent.

(This exhibit is a "transcript of stenographer's notes of evidence taken in the above entitled matter before George J. Jaeger, Deputy Compensation Commissioner, at the Workmen's Compensation Building, 571 Jersey Avenue, Jersey City, N. J., on the 18th day of October, A. D., 1920").

This exhibit contains no mention of, or reference to the defendant-appellant, Manufacturers' Liability Insurance Company, nor to its contract

Exhibit P 9

of Workmen's Liability Insurance with the plaintiff-respondent, except as follows:

THE COURT: You are the attorney for the company, aren't you?

MR. DEMBE: I am not.

THE COURT: For Mr. Marcus, trading as the West Hoboken Plumbing Supply Company, you are the attorney for them?

MR. DEMBE: Yes. And I answered it in my language. And our idea of the thing in introducing the statement is that inasmuch as he is insured with the insurance company, he is one of the assured in the insurance company, that the testimony as regards his injuries is somewhat exaggerated by the fact that he is insured.

THE COURT: Is he insured?

MR. DEMBE: He was insured at the time, but we are disclaiming liability.

THE COURT: Are you the attorney for Mr. Marcus trading as the West Hoboken Plumbing Supply Company?

MR. DEMBE: I am the attorney for the Manufacturers' Liability Insurance Company, but we represent him.

MR. DUNN: I object to all this line of testimony and ask it to be stricken from the record, on the ground it has no bearing on the case. And any statement which was made by his attorney, and this man

takes an affidavit on it, those facts were within his knowledge.

THE COURT: As I understand it Mr. Dembe is attorney for Nathan Marcus trading as the West Hoboken Plumbing Supply Company.

MR. DUNN: Absolutely, and those facts are within his knowledge. And if he took an affidavit he must have gotten the facts from some place. He was not present at the time of the accident.

Any reference to the insurance company should be stricken from the record. It is prejudicial to my client's interests, if he represents both; the insurance company has not interposed any defense to this at all. It is the West Hoboken Plumbing Supply Company that have.

THE COURT: That will come later.

MR. DUNN: Mr. Marcus has nothing to do with it.

THE COURT: Let it appear in the record. For whom do you appear, Mr. Dembe; as attorney for Mr. Marcus, trading as the West Hoboken Plumbing Supply Company?

MR. DEMBE: I am appearing for the Manufacturers' Liability. In cases of this kind, even though we disclaim liability, it has been the custom of the Company anyhow to represent the assured.

Exhibit P 9

THE COURT: Are you representing the assured in this case?

MR. DEMBE: Yes.

MR. DUNN: Then all reference to the insurance company was superfluous.

THE COURT: Absolutely.

MR. DUNN: Do you disclaim liability for the insurance company or for Mr. Marcus?

THE COURT: You do not say you are disclaiming liability for Marcus, do you?

MR. DEMBE: No.

THE COURT: There is nothing in the pleadings covering the point as to Mr. Dembe appearing for the Manufacturers' Liability Insurance or for any other insurance company. Therefore any reference to it here is entirely out of order in my opinion.

MR. DUNN: It is in here he sent this man to him. I claim this answer is of the West Hoboken Plumbing Supply Company.

THE COURT: It has been filed as such.

MR. DUNN: I think a motion to strike out the answer is in order.

THE COURT: No. I will not strike it out.

MR. DUNN: Then I ask you to strike out the disclaimer of liability in the answer

Exhibit P 9

on the statement of the attorney himself. He said that the West Hoboken Plumbing Supply Company does not disclaim liability, but he said that the Manufacturers' Liamility Insurance Company disclaim liability, and they are not connected in the answer in any way. They are not filing any defense. Sections 34 and 35 I ask be stricken out for the same reason. On the answers of the defendant alone; he said he didn't send Dr. Zarie, that he doesn't know Dr. Zarie.

THE COURT: What have you to say, Mr. Dembe?

MR. DEMBE: This Dr. Zarie was sent by the Company after we got notice of the accident. And our statement in here, about Dr. Zarie—

THE COURT: Evidently they are not the answers of the respondent.

MR. DUNN: I am claiming, Your Honor, that the affidavit taken by Mr. Dembe, is taken as attorney for the respondent. And those facts were within his knowledge, and they are not taken as attorney of any insurance company. I see no mention of any insurance company in here.

THE COURT: They are not a party to this proceeding.

MR. DUNN: On Marcus's own statement he did not send Dr. Zarie.

Defendant's Exhibit D 1

Witness: NATHAN MARCUS:

By Mr. Dunn:

Q. Do you disclaim liability in this case? Do you think you are liable, Mr. Marcus? A. Who is not liable? Q. The West Hoboken Plumbing Supply Company? A. I carry an insurance policy for that purpose.

THE COURT: That is not the answer to the question.

Q. Do you think that you ought to pay this man the money that is due to him for the injury that happened in your shop? A. I don't think I should pay. But I carry an insurance policy.

Q. That is between yourself and the insurance company. Do you think you are liable? A. Yes.

Q. Do you think you are liable? A. Yes. The Company is liable for me.

Q. The West Hoboken Plumbing Supply Company? A. Insurance company. I had the accident liability.

Q. That is a separate point. I ask you if you think you are liable, and you said yes. That is your answer, isn't it? A. Yes.

DEFENDANT'S EXHIBIT D-1.

November 11, 1919.

West Hoboken Plumbing Supply Co.,
West Hoboken, N. J.
In re: Harry Srulovitz, Claim No. C-27502.

Gentlemen:

We are investigating the circumstances in the above entitled case, and in view of the fact that

Defendant's Exhibit D 2

the accident occurred on May 29th and was not reported to us until October 1st, we beg to advise that it will be necessary for us to make a reservation of our rights under our policy which call for prompt reports of accidents in all cases.

In the meantime we will continue the investigation in the case, having in mind your interests in the matter; but we reserve our right at any time to disclaim liability under the terms of our policy if we see fit to do so.

Yours very truly,

MANUFACTURERS' LIABILITY
INSURANCE COMPANY.
B. M. D.
Claim Department.

DEFENDANT'S EXHIBIT D-2.

December 27th, 1919.
C-27502.
Srulowitz vs. W. Hoboken Plumbing
Supply Co.

West Hoboken Plumbing & Supply Co.,
313 Paterson Avenue,
West Hoboken, N. J.

Dear Sir:

On November 11th, last, we advised you that we had made a reservation of our rights under our policy which called for prompt reports of accidents in all cases.

Defendant's Exhibit D 2

The investigation, which we advised you on that date that we were making discloses the fact that we have been greatly prejudiced in the premises by reason of the delayed notice of this accident from you to us.

We, therefore, beg to advise that we disclaim all liability by reason of the above accident for the reasons hereinbefore mentioned. We beg to advise you that the Hearing which was to have been heard yesterday morning by the New Jersey Compensation Commission has been adjourned for one week.

If you will call at this office we will be pleased to give you the benefit of our investigation in the matter and to advise you how you can best defend this claim for compensation.

Thanking you for your co-operation, etc., we are,

Yours very truly,

MANUFACTURERS' LIABILITY INSURANCE COMPANY.
GARRET Z. DEMAREST,
Attorney.

See Exhibit D-3 p. 48 post

Defendant's Exhibit D 3

Manufacturers' Liability Insurance Co.
Jersey City, N. J., December 27th, 1919.
C-27502.
Srulowitz vs. W. Hoboken
Plumbing & Supply Co.

West Hoboken Plumbing & Supply Co.,
313 Paterson Avenue,
West Hoboken, N. J.

Dear Sir:

On November 11th last we advised you that we had made a reservation of our rights under our policy which called for prompt reports of accidents in all cases.

The investigation, which we advised you on that date that we were making discloses the fact that we have been greatly prejudiced in the premises by reason of the delayed notice of this accident from you to us.

We, therefore, beg to advise that we disclaim all liability by reason of the above accident for the reasons hereinbefore mentioned. We beg to advise you that the Hearing which was to have been heard yesterday morning by the New Jersey Compensation Commission has been adjourned for one week.

If you will call at this office we will be pleased to give you the benefit of our investigation in the matter and to advise you how you can best defend this claim for compensation.

Thanking you for your co-operation, etc., we are,

Yours very truly,

GARRETT Z. DEMAREST,

COURT'S CHARGE.

Gentlemen of the Jury:

In this suit the plaintiff sues the defendant insurance company on a policy of insurance and seeks to recover an indemnity for an amount of money which is alleged by the plaintiff to have been paid by the plaintiff in this suit to an employee who was injured in the course of his employment, and who received payment on account of an award made by the commissioner appointed under the provisions of the Workmen's Compensation Act.

You gentlemen listened undoubtedly, before the adjournment of the court for lunch, to rather a lively argument that took place between the court and counsel for the defendant. That argument has nothing whatever to do with the decision by you of this case. The object of that argument on the part of counsel for the defendant was to see whether or not the case was in a situation where there was nothing for the jury to pass upon, and the obligation of the court when that argument had been made was to decide that simple question, whether there was or was not anything for the jury to pass upon; and the Court concluded that it was his duty at that stage of the case to determine that there was something which the jury should pass upon. Consequently, I say, you just drive out of your minds any notion that the discussion that then took place will have, or can have, legitimately any bearing in your consideration or decision of this case.

Now, really, there is only one question that, according to the arguments of counsel and the course that the case has taken, is open to you for

decision; and that question is—and I am going to state it in rather a lengthy way in order to make it perfectly clear so that you may do full justice in this case between these parties—that question arises out of this situation of law and fact: The policy under which this action is brought contains these provisions—it contains others, but these I want especially to direct your attention to—that the defendant company agrees with the employer, the plaintiff in this suit, to pay, in the manner provided by the workmen's compensation law of the State of New Jersey, and all amendments thereto and supplements thereof, any sum due or to become due from the employer because of any such injuries, or death, and the obligation for compensation therefor imposed upon the employer by such law. It is agreed that all of the provisions of such law covered hereby shall be a part of this contract as fully and completely as though written herein, so far as they apply to compensation or to any personal injury or death covered by this policy, while it shall remain in force. This obligation for compensation shall include all provisions of such law respecting medical and hospital service and medicines. And then it provides in the second paragraph, under the title "Liability," to indemnify the employer against loss by reason of liability imposed upon the employer by law for damages on account of such injuries or death.

Now, in this case it appeared that a man by the name of Srulovitz was employed by the plaintiff in the suit, and that in the course of his employment he received injuries; that his case was taken up by the commissioner under the said employers

liability act and that an award was made, and that an allowance was made for the docter and some other things which you heard in the evidence, amounting to $920, so far as the suit now being tried involves such an allowance; and it is to recover that payment, which it is said has been made, that this suit is brought.

The defendant comes in and says that it objects to making any payment under this contract because the contract contained this provision, under the title "Notice:"

"Upon the occurrence of an accident, the employer shall give immediate written notice thereof to the company, or its duly authorized agent. He shall give like notice, with full particulars, of any claim made on account of such accident. If any suit or other proceeding is instituted against the employer he shall immediately forward to the company any notice, summons, or their process served upon him."

Now, the defendant says that this plaintiff did not, upon the occurance of the accident, give immediate written notice thereof to the company or its duly authorized agent. And that is the fact. The employer, Mr. Marcus, the plaintiff in this suit, did not give immediate written notice to the company or its dnly authorized agent of the fact of the happening of the accident. The accident happened in May—I think May 29—1919, and no notice was given until some time in October. Now, the law is not, as one of the characters in Shakespere says, "an ass;" the law is nothing like that. The law does not construe the word *immediate* notice in the insurance policy to mean an instan-

taneous notice, so that the minute the accident happens the notice, has to go in. That is not what the law requires. The law simply requires the obvious, plain, common sense construction of that language, which is that he shall give notice within a reasonable time under the circumstances of the case. That is, he shall give notice with due diligence and without undue delay. Now, in this case he did not do that thing; there can be no doubt about that. To wait four months, with the knowledge of the accident in your mind, during which the company might have the opportunity to investigate the injuries and determine their cause, their nature, what the physicans call the prognosis, the likely career of the disease in the system of the individual—the very object of immediate notice is to give the company the opportunity to employ its time profitably at a time when such employment may be profitably made. Now, that the plaintiff did not do; and in order, therefore to recover on this contract the plaintiff has got to get around that some way permitted and allowed by the law. Therefore, what does the plaintiff say? I may say that he did not give it, and there is no excuse for not giving it; absolutely none. The company did not mislead him; the company did not hold him off; he had the knowledge; indeed, the boy who was injured was his own nephew, so that the knowledge was in his mind, and the company was within call and within easy reach, and the notice could have been given. He did not do it. Now, right there the company could have said "This ends the contract. This condition was a condition precedent, as the law calls it, that is a condition that you have to per-

form in accordance with its terms before you have a right to recover anything." The company could have said that and it would have ended the contract, because,- as one of the counsel in summing up very properly said, contracts are made to be performed, not to be broken, and if the people are to be secure in their property, much of which rests upon contracts, those contracts are entitled to be considered by the courts sacred instruments made by the parties, requring performance, and unless performed, manifestly, being broken, the one who has broken them has no right of recovery. Now I say the plaintiff must be able to get around that breach, for it was a breach on his part, in some way if he is to be entitled to recover. Now, what does he say? He says that the defendant in this suit, the insurance company, waived that right which it had under the contract. Now, the courts have clearly defined what a waiver is. A waiver is the voluntary relinquishment of a known right. And by voluntary we mean, as the language clearly and etymologically imports, the intentional giving up of a known right. Now, what do the authorities say with respect to an effort on the part of the plaintiff to establish a waiver?—because the law is perfectly settled in this state that if a man claims that the defendant in a suit waived a right the burden rests upon the party claiming such waiver to make it out by the greater weight of the evidence Now, what do the authorities say upon that subject? They say the question of waiver is mainly a question of intention, which lies at the foundation of the doctrine. Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be intentional.

Charge

There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and to be estopped thereby. Such intent is an operation of the mind. It should be proven and found as a fact. Another authority has laid down that rule in these words—and it helps a bit in the understanding of a rule to state it from different viewpoints—to constitute a waiver, within the definition already given, it is essential that there should be an existing right, benefit or damage, a knowledge, actual or constructive, of its existence, and an intention to relinquish it. No man can be bound by a waiver of his rights unless such waiver is distinctly made, with full knowledge of his rights which he intends to waive, and the fact that he knows his rights and intends to waive them must clearly appear by the preponderance of the evidence, the burden of the establishment of which to such an extent rests upon the plaintiff in the suit.

Now, then, what is it that the plaintiff in the suit says constitutes evidence of such waiver? You remember before lunch when he argument was had on the motions, the case was devoid at that time of a clear, unequivocal expression on he part of the insurance company of its attitude toward this claim. After lunch a couple of letters were put into the case, sent by the defendant to the plaintiff, intended to be expressive of its attitude in reference to the claim which the plaintiff was making against the company on his policy of insurance issued by the company. Now, the plaintiff says in his suit that while the company may have been declaring that it would not waive

or relinquish or abandon its right to have the contract declared to be void as against it because the condition precedent of giving notice had not been given, they were acting in a way to belie their words. That, in a few words, is precisely the claim made by the plaintiff in this suit to establish his waiver. In other words, he says, to make it plainer, if I can by more graphic language, "True, you were saying that you would not waive your rights, but you were acting as if and so that you did." That is what he claims. So that you see we have at last now gotten down to the real point that is in contest here between these two parties. Did this defendant—and you take all the evidence to ascertain whether it did or not; what it said and what it did, what it wrote and how it acted, through its attorneys and its agents—taking all its activities, you say form them whether this defendant company has been shown by the greater weight of the evidence—and the burden rests upon Mr. Marcus to show that it has—to have waived its right to insist upon that condition of the contract. If it has, then the plaintiff is entitled to have a verdict for $920. If it has not, he is not.

Now, then, concerning the expressed attitude of the defendant company in this suit there can be no doubt. What it said it meant to do is in no manner of doubt. An attorney appeared at the hearing before Commissioner Jaeger, and in no uncertain terms decared that he did not represent the insurance company but that he represented the insured. The company sent the plaintiff a couple of letters, which you will have when you shall retire to consider of your verdict, one dated

the 11th of November, 1919, and the other dated December 27th, 1919, in the first of which it declared that it reserved its rights under the policy, which called for prompt reports of accidents in all cases, and in the meantime would investigate, and so on. In the second, after having indicated that it had made an investigation and found from the investigation that they had been greatly prejudiced in the premises by the delay of the notice of the accident, they said: "We beg therefore to advise that we disclaim all liability by reason of the above accident for the reasons hereinbefore mentioned. We beg to advise you that the hearing which was to have been held yesterday morning by the New Jersey compensation commission has been adjourned for one week." Now, if there is any meaning to language, that means that they did disclaim, and that they said "We will not be responsible under this contract." Now, as opposed to that the plaintiff says that their actions in going before the commissioner, as the plaintiff claims they went before the commissioner—whether they did or not is for you to say—through their attorney, and having actually gone before the commissioner before this last letter was written, and then having persisted in pursuing the defense of the action without the knowledge of the plaintiff—I say the plaintiff's claim is that having done that, the plaintiff claims that their actions and their words differed, and that therefore it is a question for the jury to say which is to be believed, actions or words. Now, if there were no conflict between words and actions in the case, the law, gentlemen, would be that by assuming control of litigation arising out of the accident the insurer, that is the company, waives the con-

dition requiring immediate notice of the accident. I say if there were no conflict in the matter the actual assumption of the trial of the litigation would naturally waive the right to have the notice given immediately of the fact of the accident; and the reason for that is very plain, and it is the very essence of logic, when you stop to think of it. The contract, so far as the defendant is concerned, if the defendant saw fit to avail itself of the right, would have no effect at all in any of its parts if the defendant saw fit to avail itself of the provision that it was entitled to have a notice given immediately on the happening of the accident, because the law says that the right to that notice is a condition precedent which the plaintiff must perform before he has a right to have any relief under the contract; and therefore if the defendant should see fit to say to the plaintiff "We avail ourselves of that condition," that contract is dead —just dead, no provision would have any effect anywhere, anyhow; but if on the other hand the defendant should say, "Oh, well, we wanted the notice, but we are going to go and consider this contract which we have a right to declare dead, alive," why, the law would naturally say you cannot have it alive for one purpose and dead for another; it is either a corpse or it is an animated being, and under the circumstances it cannot be both. That is what the law would say. And so I say the question is in the case whether or not, assuming that there is now a conflict—and whether there is or not you are to say from the evidence—between what the defendant wrote in its letters and what it did before the commissioner, you are to say which represents the real intent of this defendant. If you are satisfied by the greater

weight of the evidence that the intent of this defendant was to voluntarily relinquish its known right to have this contract ineffective as against them because no notice was given pursuant to the provision which I read you, then the defendant is entitled to have your verdict; but if on the other hand the greater weight of the evidence makes out that the defendant waived its right to insist upon having this contract declared ineffective as against because immediate notice had not been given of the fact of the accident, why then you would find for the plaintiff and assess the damages at $920.

Now, it was not an easy thing to talk about, but I have tried from several angles to make it perfectly clear to you, because that is my job. After I am through you will have to go out and decide it. If there are no questions, you may go out and decide it.

(Mr. Drewen confers with the court.)

The Court: It has been called to my attention that it is thought that I said that this letter, the one of December, 1919, was written after the adjudication by the commissioner. I do not think I said that. I certainly did not mean to say that. What I said was, as I recall it—if I did not say it I say it now and correct it if I was wrong—it was written after the petition was filed with the commissioner.

Now, gentlemen, you will take the case and decide it.

NEW JERSEY

Court of Errors and Appeals

NATHAN MARCUS, trading as WEST HOBOKEN PLUMBING SUPPLY CO., *Plaintiff-Respondent,* *against* MANUFACTURERS' LIABILITY INSURANCE CO., of New Jersey, a corporation of New Jersey. *Defendant-Appellant.*	*On Appeal From Supreme Court.*

BRIEF FOR PLAINTIFF--RESPONDENT

FACTS

This is an appeal taken by the defendant from a judgment entered in New Jersey Supreme Court in a case tried in the Hudson Circuit before Judge William H. Speer and a jury.

The defendant-appellant (hereinafter called the defendant) had issued a policy of Employers' Liability Insurance to the plaintiff-respondent (hereinafter called the plaintiff) on or about the 19th day of November, 1918, where in and whereby the said defendant agreed to and with the said plaintiff:

1. To pay in the manner provided by the Workmen's Compensation Law of the State of New Jersey and all amendments thereto and supplements thereof, any sum due or to become due from the Employer because of any such injuries or death and the obligation for compensation thereof imposed upon the Employer by such Law.

It is agreed that all of the provisions of such law covered hereby shall be a part of this contract as fully and completely as though written herein, so far as they apply to compensation for any personal injury or death covered by this policy while it shall remain in force. This obligation for compensation shall include all provisions of such law respecting medical and hospital service and medicines.

2. To indemnify the Employer against loss by reason of the liability imposed upon Employer by law for damages on account of such injuries or death.

3. To serve the Employer (1) by the inspection of work-places set forth in said Declarations whenever deemed necessary by the Company and thereupon to suggest to the Employer such changes and improvements as may operate to reduce the number and severity of personal injuries during work; and (2) upon notice of such injuries so sustained by investigation thereof and by settlement of any resulting claims in accordance with the law.

4. To defend in the name and on behalf of the Employer any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, proceedings, allegations and demands are wholly groundless, false or fraudulent.

5. To pay all costs taxed against the Employer in any legal proceeedings defended by the Company, all interest accruing after entry of judgment, and all expenses incurred by the Company for investigation, negotiation and defense.

6. This policy, shall cover all employes of the Employer, legally employed.

This Policy is subject to the following Conditions:

NOTICE.

Condition H. Upon the occurrence of an accident, the Employer shall give immediate written notice thereof to the Company or its duly authorized agent. He shall give like notice with full particulars of any claim made on account of such accident. If any suit or other proceeding is instituted against the Employer he shall immediately forward to the Company and notice, summons or other process served upon him. (Cace page 26 Exhibit P. 1.)

During the term of the policy, the plaintiff had in his employ a party by the name of Harry Soulowitz, who was injured in the course of his employment on the 29th day of May, 1919. The injured was confined to the hospital for some months and then notified the plaintiff herein, who in turn notified the defendant herein.

The defendant, at various times thereafter communicated with the plaintiff and also with the injured, informing them that they were investigating the matter (Case, page 28, line 40) (page 29, line 30), and notified the mother of the injured that they were taking up the case for her (Case page 21, line 9), and went ahead and arranged for an informal hearing, (reference to which is made in Exhibit D 3, (case page 48 line 27, and on November 11, 1919, stated that they were making a reservation of their rights under their policy (case page 45 Exhibit D 1), and subsequently on December 27, 1919, advised that they disclaimed all liability by reason of the delayed notice of the accident to them from the plaintiff herein. (case page 48 exhibit D 3). But further offered to give the benefit of their investigation in the matter to the plaintiff herein and to advise him ho could best defend the claim for compensation (case page 48, Exhibit D 3).

Subsequently on May 28, 1920, the injured filed a claim-petition for compensation (plaintiff's exhibit P. 6) which claim- petition was served upon Dr. AlexanderC. Ruoff assistant Medical Director of the Manufacturers' Liability Insurance Co., and service acknowledged by him (case page 18 line 26). A motion was then made by the defendant herein to dismiss this petition, but the petition was allowed to stand against the objection of the defendant with the recommendation that an amended petition be filed. (case page 18 line 34). This amended petition was filed on or about the 10th day of August, 1920, and an answer to this petition was filed by the Insurance Company for the plaintiff (assured) herein on or about the 2nd day of October, 1920.

On the 18th day of October, 1920, Deputy Commissioner George J. Jaeger, of the New Jersey Workmen's Compensation Bureau, awarded compensation in favor of Susie Soulowitz, as next friend of Harry Soulowitz, the injured employee, and against the present plaintiff, Nathan Marcus, (case Page 39 exhibit P. 8). At this hearing, Alexander Dembe appeared for the present plaintiff at the request of the Manufacturer's Liability Insurance Company by whom he was employed. (case page 22 line 30). The plaintiff herein subsequently paid the said award to the injured employee (Plaintiff's exhibit P 2).

Subsequently the present plaintiff demanded that the defendant herein comply with that part of the policy in which they agreed to indemnify the employer against loss by reason of the law imposed upon the employer by law for damages resulting from injuries covered by the policy.

This the defendant refused to do, and suit was brought.

At the close of the whole case, the defendant herein made a motion for the direction of a verdict on the ground that there was no evidence to show that the plaintiff had complied with the condition of the policy requiring immediate notice of the accident, and on the ground that there was positive evidence that the defendant had violated that condition, by failing for four months to give notice to the Company of the accident.

The motion was overruled by the trial judge on the ground that there was evidence in the case from which the jury might infer that the defendant assumed control of the defense in the compensatiton action brought against the plaintiff in the compensation proceedings, and had thereby waived its rights under the plaintiff's breach.

I.

THE TRIAL JUDGE COMMITTED NO ERROR IN DENYING THE MOTION OF THE DEFENDANT FOR THE DIRECTION OF A VERDICT, FOR THERE WAS EVIDENCE IN THE CASE FROM WHICH THE JURY COULD LEGALLY INFER THAT THE DEFENDANT DID WAIVE ITS RIGHTS UNDER THE PLAINTIFF'S BREACH OF THE CONDITION IN THE POLICY.

The evidence of the case, bearing on the question of waiver under this point, is as follows:

The testimony of the plaintiff shows, that he notified the Company of the accident and that the Company took care of the rest. (case page 13 line 10), and that he received a letter from the Company stating that he was investigating the circumstance in the case (case page 28 exhibit P 3) (case page 29 exhibit P 4), and another letter

in which the Company made a reservation of these rights under the policy (case page 45 exhibit D 1), and a final letter, in which the Company informed him that their investigations had been completed, but that they disclaimed all liability by reason of the accident, because of the delayed notice, and in the very same letter they specifically and clearly state that if the plaintiff herein would call at their office, they would give him the benefit of their investigation in this matter and advise him how best to defend the claim of compensation. (Case page 48 exhibit D 2). Thereafter on the 28th day of May, 1920, the claim-petition was filed by the injured (plaintiff's exhibit P 6), and the Company accepted service of the petition. (Case page 18 line 26), and made a motion to dismiss the petition. However, the petition was allowed to stand with the recommendation that an amended petition be filed. (Case page 18 line 34). This amended petition was filed on or about the 10th day of August, 1920, and was answered on or about the 2nd day of October, 1920, by Alexander Dembe, attorney of the respondent (case page 30 line exhibit P 5). Subsequently the matter came on for a formal hearing before Deputy Commissioner George J. Jaeger and it is plainly shown in exhibit P. 9 page 40 that Mr. Dembe who appeared at the hearing, did so at the request of the Manufacturers' Liability Insurance Company, and not for Marcus. That the idea of the controversy was to show in just what capacity Mr. Dembe appeared because there were some allegations in the answer filed by the respondent, that Marcus denied having made. Marcus stated that he was not served with a copy of the petition in the matter, and that

the Insurance Company had taken care of that and had filed the answer and he knew nothing about it. Reference to the stenographic notes of the trial before Deputy Commissioner Jaeger, discloses these facts. (Plaintiff's exhibit P. 9). The result of the controversy was that it established the fact that Mr. Dembe appeared for the Manufacturers' Liability Insurance Co., who were defending the action for Marcus. The testimony of Leo Simmons, Assistant Claim Manager for the Manufacturers' Liability Insurance Co. is to the effect that Mr. Dembe was an employee of that Company (case page 21 line 42) and that he was employed in the legal department of that company, (case page 22 line 32). There is no doubt that the Insurance Company sent Mr. Dembe to represent Marcus in this case, and thereby assumed control of the defense of the case.

While it is true that possibly, by their letter of December 27, 1919, the Company intended to disclaim all liability under the policy; their subsequent acts were such as to show the direct contrary of that intention. All the steps taken by them after that letter required and demanded an amount of voluntary effort and investigation. It is clear that the defendant Company knew of the plaintiff's breach of the condition in their policy, but in spite of this knowledge, went ahead and filed pleadings in the compensation matter and even went so far as to send counsel to the hearing for the purpose of representing Marcus at it.

The trial court did not err when refusing to direct a verdict in favor of the defendant and against the plaintiff in the case below, because the question as to whether or not the Insurance Company had waived a breach of the condition in

the policy by assuming control of the defense of the claim before the Workmen's Compensation Commissioner was a question of fact for the jury, and as such was decided by the jury. It is always a question of fact for the jury, whether a waiver is to be inferred from the evidence produced, or it is to be established by way of evidence.. Nickerson vs Nickerson 12 Atlantic Reporter 680; Robinson vs Pa. Fire Ins. Co. 3 8Atlantic Reporter 320. It is the duty of the Court to charge and define the law applicable to waiver, but it is the province of the jury to say whether the facts of the particular case constitute waiver as defined by the Court. Savage M'fg Co. vs. Armstrong 17 Me. 34-37.

Where there is no expressed waiver, it is not only necessary for the jury to determine what the facts are which are relied upon for the purpose of showing the waiver but it is also the peculiar and proper province of the jury to determine what inferences are properly deduceable from such facts. Robinson vs. Pa. Fire ins. Co. (supra)

It may be laid down as a general rule that the question whether the evidence of any case establishes a waiver of any legal right to the party, is one of fact to be settled by the verdict of the jury. In all questions of this sort so much depends on the intent with which the parties act, that it would be impossible for the Courts to establish any certain rule by which all cases should be governed. They must necessarily be left to the determination of the juries, whose peculiar province it is to ascertain the intent with which the parties act, as gathered from the various facts and circumstances proved in each particular case. Robinson vs Pa. Fire Ins. Co. (supra)

In the case below there was evidence produced, from which it could be inferred that there was a waiver, and it was therefore the province of the jury so to determine.

In the Empire State Surety Co. vs Pacific National Lumber Co., cited in 200 Federal Reporter, page 224, the defendant issued to the plaintiff an Employer's Liability policy of Insurance, containing a proviso that it would be liable for any loss arising from an injury to an employee, due to the failure of plaintiff to observe any statute affecting the safety of persons. The injured employee brought suit against the plaintiff, and the defendant, as permitted by the contract took exclusive charge of the defense with the plaintiff's consent, and carried the case to the Supreme Court of the State, where judgment for the plaintiff was affirmed. Held, that by so doing, defendant had waived any defense of non-liability under its policy because of such proviso.

CONDITIONS OF THE LIABILITY POLICY REQUIRING IMMMEDIATE NOTICE TO AN INSURER OF AN ACCIDENT ARE WAIVED, WHEN THE INSURER ACTUALLY ASSUMES CONTROL OF A LITIGATION GROWING OUT OF THE ACCIDENT. Tulare Power Co., vs. Pacific Surety Co. (185 Pacific Reporter 399).

A policy of insurance prepared by an Insurance Company is to be construed strictly against it and in favor of the insured. Where an insurer, with full knowledge of all the facts, assumes liability, it is thereafter precluded from repudiating the same. When the defendant assumed the defense of the action, he had every means of ascertaining whether the loss was one for which it

was liable under its policy. It is perfectly well settled that under such circumstances, an insurer who has, with full knowledge, undertaken the defense of an action, and deprived the insured of control of it, will be deemed estopped to deny the accident within the terms of the policy. (Glens Falls Cement Co. vs Travelers' Ins. Co. 11 App. Div. N. Y. 411.) (Brassil vs Md. Casualty Co. 147 App. Div. N. Y. 815.) (Royle Mining Co. vs Fib. & Cas. Co. 120 Mo. App. 104) (Fairbanks Canning Co. vs London Guarantee & Accident Co. 154 Mo. App. 327) (Tozier vs Ocean Accident & Guarantee Corp. 94 Minn. 478) (Globe Nav. Co. vs Md. Cas. Co. 39 Wash. 299). As the Court pointed out in Brassil vs Md. Cas. Co. (supra), the position of any insurer who denies his liability from the first and refuses to defend, is quite different from that where one elects to defend and thus ousts the insured from any opportunity to defend himself.

THE INSURANCE COMPANY WAIVED ITS BREACH OF THE CONDITION IN THE POLICY BY PARTICIPATING IN THE DEFENSE OF THE SUIT AGAINST MARCUS.

Where an Insurance Company participates in the defense of the suit against the insured they are there after estopped to assert that their liability was predicted on a ground not covered by the policy or the conditions of the policy were not complied with. Glens Falls Portland Cement Co. vs Travelers' Insurance Co. 11 App. Div. (N. Y.) 411; Royle Mining Co. vs Fidelity & Casualty Co. 126 Mo. App. 104; David Tozier vs Ocean Accident and Guanantee Corp. 94 Minn. 478; Tulare Powder Co., vs Pacific Surety Co., 185 Pacific Reporter 399.

The more usual manner of waiving a right is by action which indicate an intention to relinquish the right or by failure to insist upon it. While waiver belongs to the family of estoppel and of the doctrine of estoppel lies at the foundation of the law of waiver, it is difficult to make a distinction between waiver and estoppel, especially as applied to the law of insurance contracts and in avoidance of forfeiture, which will give to each a clear, legal significance and scope, separate and independent of each other. Judge Field in Mutual Life Ins. Co. vs Wolff, cited in 95 U. S. 326 says, "that the doctrine of waiver as asserted against the Insurance Company to avoid the strict enforcement of conditions contained in their policy is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the Company has been such as to induce action and reliance upon it and where it would operate as fraud upon the insured that they were otherwise allowed to disavow their conduct and enforce the conditions."

In considering whether there has been a waiver or an estoppel, the difference between waiver and estoppel is that is the former the result is voluntary, while in the latter the conduct of the party may have been voluntary, but with the intention not to lose any existing rights, yet, if such conduct mislead then estoppel arises. Libby vs Haley 39 Atlantic Reporter 1004.

IT IS ELEMERTARY LAW THAT THE RELATIONSHIP BETWEEN ATTORNEY AND CLIENT IS FOUNDED UPON CONTRACT. And it is certain that there was no such relationship between Mr. Marcus and Mr. Dembe, and that the relationship existed only between the

Manufacturers' Liability Co. and Mr. Dembe who was employed in the legal department of that Company, (case page 22 line 32). And further that Mr. Dembe was sent by the Manufacturer's to defend, in the name of and on behalf of Mr. Marcus, the suit which had been brought against him in accordance with the terms of their policy.

Does not Mr. Marcus testify that he did not employ Mr. Dembe, that he did not know Mr. Dembe (case page 12, line 11 to 20)?

The Insurance Company may well say that they intended to disclaim all liablility on the policy, when they wrote their letter of December 27, 1919; but have not their after-acts been the direct opposite of that intention? Intention is better expressed by acts done, rather than acts intended to be done. The Company may have decided inwardly to have nothing more to do with the Marcus matter, and to treat it as a closed incident as far as they were concerned, but their after-acts, those occupying a space of time from the 28th day of May, 1920, until the 18th day of October, 1920, were unequivocally and diametrically opposed to this inward desire. They were affirmative acts and acts which required deliberation. They were acts which showed that the Company intended to see the matter through to the end, to forget the condition requiring immediate notice and to live up to the letter of their contract. They are now estopped to deny that one of the conditions of the policy was broken if they intend-

If after their letter of December 27, 1919, they considered the condition of the policy breached, why did they go to the trouble of defending the claim before the Compensation Commission? ed to urge this point.

There is no question but that deeds speak louder than words and that deeds of doing are much stronger and much more powerfully felt than the mere words expressing an intention to do.

What does immediate notice mean?

IT HAS BEEN HELD THAT IMMEDIATE NOTICE MEANS NOTICE WITHIN A REASONABLE TIME UNDER THE CIRCUMSTANCES OF THE CASE. (Employers' Liab. Ins. C. vs New Albany Light, etc. Co. 28 App. Div. N. Y. 437) (Ward vs Md. Cas. Co., 71 N. H. 267 and 262, 51 Atlantic Reporter 900.) (Travelers Ins. Co. vs Myers 62 Ohio State Reports 522-539.)

With regard to the question of notice, assume that notice was given out of the time in which it should have been given under the terms of the policy. In what way was the defendant being prejudiced? They went ahead and investigated the whole matter, promptly reporting to Mr. Marcus the result of this investigation.

Notice need not be given by the assured until there has been both an accident and a claim for damages made on account thereof by the person injured. Grand Rapids vs N. Y. Fid. 111 Mich. 148; Anoka Lumber Co. vs. N. Y. Fid. 63 Minn. 286.

The testimony before the Commissioner in the Marcus matter showed that immediately after the accident, the injured Harry Soulowitz was taken away and confined for a long time, unable to leave his bed. He made no claim for damages against the plaintiff herein. And possibly the plaintiff herein did not believe such a claim would be made. It would appear from the Grand Rapid case that the plaintiff herein was justified in with-

holding his notice to the defendant Company. The requirement of a policy of accident insurance is that the assured shall give the Insurance Company written notice of the accident and forward to it the summons in any suit against the assured growing out of the accident which failure to give immediate notice is waived if the insured actually assumes control of such litigation. Where an Insurance Company, with full knowledge of all the facts, enters into negotiations and relations with the assured, recognizing the continued validity of the policy, the right to forfeiture for any previous default which may be asserted is waived. J. Frank & Co. vs New Amsterdam Cas. Co. 175 Calif. 293. Knarston vs Manhattan Life Ins. Co. 124 Calif. 74-78.

Of course the condition of the policy required notice of all probable liability is intended primarily to afford an opportunity to the insurer promptly to take charge of the defense. Such requirements are reasonable and just, but they are waived as in the above case, when the insurer actually does assume control of the litigation growing out of the accident.

When the Insurance Company elects to defend an action, a new contract between it and the insurer comes into existence. Brissil vs Md. Cas. Co. 47 App. Div. N. Y. 815.

We therefore submit that the instructions to the jury concerning their nature of waiver and what must be established in the case in order that waiver may be found are correct.

There are facts in evidence from which it may be inferred that the Company had waived its rights under the policy, and one of these facts is; whether or not the Company had assumed control

of the defense of the claim before the Workmen's Comopensation Commissioner. In reaching its verdict, the jury found that it had assumed control of the defense.

There is evidence from which the intentional giving-up of these rights by the defendant can be shown in that it voluntarily accepted service of the pleadings, and filed additional pleadings and had counsel present at the hearing before the Commissioner in the Compensation matter.

There was certainly evidence in this case that waiver was manifested as all the acts done by the Company after their letter of December 27, 1919, were deliberate and intentional. There was evidence that Mr. Dembe, an attorney employed in the legal department of the Manufacturers' Liab. Ins. Co. went before the Commissioner in the hearing on October 18, 1920, and that he was there at the request of the Manufacturers' Liability Insurance Company, and further that the defendant-appellant's fullest part in the defense of the assured was during the period from the 28th day of May, 1920, to the 18th day of October, 1920.

The defendant under his policy of insurance, agreed to perform certain forms of service, one of which was to defend these compensation claims filed against the employer, and if the Insurance Company believed that the conditions of the policy were not lived up to, then they were not required to live up to their agreement and could have treated the policy as no longer in effect when such condition was breached. Failing to do this, the facts are plainly shown that they assumed control of the defense of the action, and thereby waived rights to assert breach of the condition of the failure to give immediate notice of the accident.

WE RESPECTFULLY SUBMIT IN CONCLUSION THAT:

Where the Insurance Company makes full and complete investigation of all the facts and circumstances surrounding the accident, then writes a letter to the assured disclaiming all liability, and

Where the Insurance Company in view of these facts and circumstances, as soon as a petition in the Workmen's Compensation Court is filed, accepts service of the same, makes a motion to strike it out and when an amended petition, is filed, files an answer to it, and takes steps to bring it on for hearing, furnishes counsel, defends the action, to a close in this Court, and

Where during all the time of the preparation and defense of this action, nothing is said to or done by the Insurance Company, to even place in the mind of the insured the slightest suspicion that they would subsequently deny liability, but by their acts, he is led to believe that nothing further would come of the fact of the delayed notice, and

Where at the hearing of the case against the insured, it is admitted that the counsel present there is employed by and represents the Insurance Company.

It is clear, that the conduct of the insurer can be said to evince an intention to waive the breach of the condition in the policy of insurance.

JUDGMENT BELOW SHOULD BE AFFIRMED.

RESPECTFULLY SUBMITTED,

JEROME J. DUNN,
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SAMUEL D. LEVY,
Of Counsel with Plaintiff-Respondent.

CHARLES A. ROONEY,
Of Counsel with Plaintiff-Respondent.

New Jersey Court of Errors and Appeals

NATHAN MARCUS, trading as West Hoboken Plumbing Supply Company, Plaintiff-Respondent, vs. MANUFACTURERS' LIABILITY INSURANCE COMPANY, Defendant-Appellant.	On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-APPELLANT.

Facts.

This is an appeal from a judgment entered in the New Jersey Supreme Court in a case tried in the Hudson Circuit.

The defendant-appellant (hereinafter called defendant) had issued a policy of Employers' Liability Insurance to the plaintiff-respondent (hereinafter called the plaintiff). Under this policy of insurance the defendant agreed:

> (1) To pay compensation in the manner provided by the Workmen's Compensation Law of the State of New Jersey and all amendments

thereof and supplements thereto, and any sum due or to become due from the employer because of injuries sustained by employes, and to discharge the obligation of paying compensation therefor imposed upon the employer by such law.

(2) To indemnify the employer against loss by reason of the liability imposed upon the employer by law for damages resulting from such injuries.

(3) To serve the employer, among other ways, by investigating injuries upon receipt of notice thereof and by settlement of any resultant claims, in accordance with law.

(4) To defend, in the name and on behalf of the employer, any suits or other proceedings which may be at any time instituted against him on account of such injuries.

This policy was subject, among others, to the following condition:

"CONDITION H.—Upon the occurrence of an accident the employer shall give immediate written notice thereof to the company, or its duly authorized agent. He shall give like notice, with full particulars, with any claim made on account of such accident. If any suit or other proceeding is instituted against the employer he shall immediately forward to the company any notice, summons or other process served upon him."

As much of the policy as is pertinent to the present issue appears in the printed case at page 26, etc.

On May 29, 1919, while the policy was in force, one Srulovitz, an employe of the insured, was injured in the course of his employment. He filed a petition with the Workmen's Compensation Bureau for compensation for his injuries.

The Compensation Commissioner rendered judgment in favor of the employe Srulovitz, and against the present plaintiff. In the present suit plaintiff seeks to recover from the defendant Insurance Company for the amount paid by him on that judgment.

At the trial of this case it was established that the plaintiff had violated the condition of the policy requiring prompt notice of the accident. The accident in this case occurred May 29, 1919 (Case, page 16, line 35). The plaintiff did not send notice to the defendant until September 29, 1919, four months later (Case, page 17, line 11; page 25, line 30).

At the close of the whole case defendant made a motion for direction of a verdict on the ground that there was no evidence to show that plaintiff had complied with the condition of the policy requiring immediate written notice of the accident, and on the ground that there was positive evidence that defendant had violated that condition by failing for four months to give notice of the accident.

The motion was overruled by the Trial Judge on the ground that there was evidence in the case from which the jury might infer that the defendant assumed control of the defense in the litigation brought against the plaintiff in the Compensation proceedings, and had thereby waived its rights under plaintiff's breach.

I.

The Trial Judge committed error in denying defendant's motion for direction of a verdict, because there was no evidence in the case from which the jury could legally infer that defendant had waived its rights under the plaintiff's breach of the conditions of the policy.

The evidence in the case, bearing on the question of waiver under this point, is as follows:

> The defendant, as above set forth, received no notice of the accident until four months after its occurrence. The notice reached the hands of defendant October 1, 1919 (Case, page 46, lines 1-4).
>
> The defendant made an investigation of the facts and wrote to the plaintiff on November 11, 1919, informing him of his breach, and stating that it reserved its rights under the policy, which calls for prompt reports of accidents in all cases (Case, page 45, line 40, etc.).

On December 27, defendant again wrote to plaintiff, as follows:

> "Manufacturers' Liability Insurance Co.,
> Jersey City, N. J., December 27th, 1919.
> C-27502.
>
> Srulowitz vs. W. Hoboken
> Plumbing & Supply Co.
>
> West Hoboken Plumbing & Supply Co.,
> 313 Paterson Avenue,
> West Hoboken, N. J.
>
> Dear Sir:
>
> On November 11th last, we advised you that we had made a reservation of our rights under

our policy which called for prompt reports of accidents in all cases.

The investigation, which we advised you on that day we were making discloses the fact that we have been greatly prejudiced in the premises by reason of the delayed notice of this accident from you to us.

We, therefore, beg to advise that we disclaim all liability by reason of the above accident for the reasons hereinbefore mentioned. We beg to advise you that the hearing which was to have been heard—yesterday morning by the New Jersey Compensation Commission has been adjourned for one week.

If you will call at this office we will be pleased to give you the benefit of our investigation in the matter and to advise you how you can best defend this claim for compensation.

Thanking you for your co-operation, etc., we are,

Yours very truly,

GARRETT Z. DEMAREST."

(Case, page 48.)

On October 2, 1920, an answer was filed on behalf of the present plaintiff, as respondent in the compensation proceedings. This answer was signed by one Alexander Dembe, as attorney for respondent (Case, pages 30-33).

There was testimony by the witness Simmons, Assistant Claim Agent of defendant, that Alexander Dembe was at one time employed by the defendant. He was asked if Dembe was so employed on the date of a certain letter, and the witness answered: "I

could not answer that positively; I think he was on the date indicated on that," but the letter apparently did not get into evidence (Case, page 21, line 40; page 22, line 10).

This same witness testified later that "Mr. Dembe was employed at one time by the Legal Department" (Case, page 22, line 34).

At the hearing before the Workmen's Compensation Commissioner, in which the present plaintiff was respondent, Alexander Dembe appeared. Colloquy ensued between the Commissioner and Mr. Dembe, as to the character of the latter's appearance in the case. This colloquy appears in the present case at pages 41-45. *At this hearing the disclaimer of liability by the present defendant was again made known by the statement by Mr. Dembe that plaintiff had been insured by the defendant, but that the defendant was disclaiming liability* (Case, page 41, line 25). This, presumably, was in the presence of the present plaintiff, who was there and testified (Case, page 20, line 21).

The plaintiff at that hearing, himself, freely admitted on the record his liability to the employe for the latter's injuries (Case, page 45, lines 1-30). The employe being plaintiff's nephew (page 16, lines 30-40).

The foregoing is all there is in this case bearing on the question of defendant's waiver of plaintiff's breach of the policy.

The following is a chronology of the events:

Policy of insurance issued to plaintiff	November	19, 1918
Accident occurred	May	29, 1919
Notice of accident by plaintiff to defendant	September	29, 1919
Notice received by defendant	October	1, 1919
Notice of reservation by defendant to plaintiff of its rights under plaintiff's breach	November	11, 1919
Notice by defendant of disclaimer of its liability because of plaintiff's breach	December	27, 1919
Employe's petition for compensation filed	May	28, 1920
Answer to petition filed	October	2, 1920
Final hearing of employe's petition by Compensation Commissioner	October	18, 1920

So that it is clear that plaintiff knew of the defendant's disclaimer for nearly one year before the holding of the hearing, and that he was made aware of it again at the time of the hearing by the statement of Dembe.

Now, the Trial Judge overruled defendant's motion for a verdict on the ground that there was evidence of a *waiver* of plaintiff's breach. It is clear also, from his charge to the jury that it was on the theory of *waiver* that the case was submitted to the jury.

It becomes pertinent at this point, therefore, to urge the distinction between waiver and estoppel.

That the two are frequently confused in the decisions has been recognized by learned authority in our own State.

Justice Magie considers the question in Redstrake vs. Cumberland Insurance Company, 44 N. J. L., 294, and says, at page 303:

> "Waiver and estoppel are frequently used with reference to insurance policies as if they were synonymous terms. Cases plainly of estoppel are treated, as presenting questions of waiver."

And he cites many instances.

In the present case there is no element of estoppel. The plaintiff, though his notice to the defendant was not received until October 1st, knew by letter from defendant under date of November 11th, that its rights resulting from plaintiff's breach were specifically reserved, and again, on December 27th, following, that it positively disclaimed liability under the insurance policy by reason of the plaintiff's breach, and he had this knowledge for one whole year before the Compensation hearing. He was not misled in any particular; he was not deceived into doing what he otherwise would not have done; he was not withheld from making any settlement that would have been less onerous than the judgment which ultimately went against him. And chiefly the fact that the plaintiff was not prejudiced by any conduct evinced by the Insurance Company is conclusively demonstrated by his own admission of liability on the record at the hearing before the Workmen's Compensation Commissioner.

Upon the argument of the motion at the trial, the cases cited by the Court as controlling were:

Tulare Co. Power Co. vs. Pac. Surety Co., 185 Pac. (Cal.), 399;

Glens Falls Portland Cement Co. vs. Travelers Ins. Co., 42 N. Y. Supp., 285.

But the dominant principle in these cases, and in all that line of precedents to which they belong is that of *estoppel and not waiver.*

It is universally understood that the underlying principle of waiver is intent. But in the line of cases in which it is held that assumption of, or participation in, the defense of the damage suit against the insured by the insurer effects a waiver by the insurer of a prior breach of the policy by the insured, it will be seen that in each case there is involved conduct on the part of the insurer—*apart from its acting in insured defense*—which has prejudiced and compromised the independent rights of the insured, thus estopping the insurer from making any statement of its intent as to waiver, and precluding the question of intent entirely.

For example: let us examine the two cases which were cited against us below:

Tulare Co. Power Co. vs. Pac. Surety Co. (supra):

The Surety Company had issued to the Power Company a policy of Employers' Liability Insurance. In July, 1913, one Bergen was killed while in the employ of the Power Company. On September 13, 1913, insured sent notice of suit by the administratrix against it. On September 17, 1913, the Insurance Company, in response to said notice, advised the attorneys of insured that the policy had been cancelled on the books of the Insurance Company by reason of the non-payment of premiums. On December 8, 1913, the administratrix commenced her action against the insured. On December 27, 1913, the insurance company communicated by letter, through its attorney, to the insured that the former had investigated the facts

surrounding the non-payment of the premium and that in view of the report of that investigation the Company would, upon receipt of the insured's check for the earned premium due from June 16th, 1913, to September 16, 1913, reinstate the policy without prejudice. The policy was paid and on March 3, 1914, the insurance company wrote the insured: "This letter will serve to notify you that Policy No. C-P 2374, issued June 16, 1913, and subsequently cancelled, has been reinstated as of the date of issue and is in full force and effect."

Thereupon, the insurance company in the name of the Power Company and on its behalf, filed an answer to the complaint of Bergen's administratrix. A trial of the action was had and judgment was given in favor of the administratrix. With full knowledge of Bergen's death and claim therefor, and with knowledge of all the facts attending the alleged breach, the Insurance Company precipitated reinstatement of the policy.

It at no time appears that the Insurance Company had ever made any reservation of its rights until after the judgment had been recovered against the insured. *"It precluded the insured from making any effort to settle the case or to employ its own attorneys. It permitted the insured to rely upon the fact that the insurance company had no reason to disclaim liability under its policy."*

Of similar import is the other case cited against us—that of the Glens Falls Portland Cement Co. (supra):

Here, *before denying liability,* the Insurance Company had filed its answer and taken control of the litigation. It was after the insurance company had represented the insured down to the very time of trial that it suddenly made disclaimer of liability. The insurer's defense in the suit against it by the insured was that the original taking control

of the litigation was of no avail in working a waiver *because they did not know of the breach.* In this case, also, the element of estoppel is clear. The insurance company received notice of the claim that was being made against the insured for injuries. It did not disclaim liability. The Court says, at page 288:

> "If the insurance company had then notified the cement company that it denied the validity of the policy, *the latter company might possibly have settled with Jasmin upon more favorable terms than it afterwards did. The insurance company waited, and thus led the cement company to wait.* On September 3, 1905, the summons and complaint in the damage suit were served upon this plaintiff, and by it placed in defendant's hands three days later. The defendant was then called upon, under the terms of its policy, to take its position, *certainly before October* 3, 1905, *when it served the answer to Jasmin's complaint.*"

In the case of Tulare County Power Co. (supra), the Court cites as authority Frank vs. New Amsterdam Casualty Co., 165 Pac., 927. The latter case also turns upon the question of estoppel, and not waiver. There the surety company took control of the litigation against the insured and a judgment of $2,500 was entered against the insured. *The surety company promised that an appeal would be taken, notwithstanding which they permitted the judgment to become final.* Here, again, there was no disclaimer of liability *until after the judgment had been rendered* against the insured *and suit had been brought by the latter against the insurance company.* The Court says in that case:

> "Moreover, the surety company, by failing to appeal on behalf of J. Frank & Company, from

the judgment in the suit for damages *deprived the latter of important and valuable rights. The President of J. Frank & Company was told that counsel for the surety company had the matter of a settlement in hand; that an effort to settle was being made, but that no agreement would be made which would involve the payment of more than* $200. *Having permitted the insured thus to alter its position, the surety company may not now seek to deny the binding force of the policy."*

Here is the clearest case, not of waiver, but estoppel.

Another case of estoppel is Utterback-Gleason Co. vs. Standard Accident Ins. Co., 184 N. Y. Supp., 862. The Court recites the facts at page 867:

"The insurance company had been warned by the respondent that, notwithstanding its disclaimer, it would be held to the insured's contract and that the insurance company need not continue in the case under any other condition. *Appellant kept in and defended the case, prepared and argued its present appeal and took all chances according to its theory upon respondent's money, until it was determined that someone must pay Caroline T. Willey for her injuries.* Appellant refused to pay * * *. Appellant waived any right to take its present position and is *estopped from raising the question."*

We can find no case where the mere participation of the insurer in the defense of the insured, has, without other circumstances which workead an *estoppel* of the insurer to disclaim liability or deny its intention to waive the breach, been held to effect a waiver of the prior breach by insured.

And this Court would be required to go to even greater lengths than that in the instant case in order to establish a *waiver*.

We can find no authority for the proposition that the mere conduct of insured's defense by the insurer has, ipso facto, the magic property of working a waiver by the insurer of insured's breach.

The contrary of this is demonstrated by Borden, Inc. vs. Mass. Bond & Ins. Co., 128 N. E. (N. Y.), 204, which is a case in point with the present one. In this case the New York Court of Appeals reversed the Appellate Division. There, the Insurance Company undertook the defense of the action on the clear understanding with the insured that it did so subject to its rights under the policy. The insured was not misled in any way. *There was no estoppel to operate against the insurer.* The Court says, at page 208:

> "Under all of these circumstances it is impossible to see how the respondent ever indicated any waiver of its rights or ever so misled the insured that it is now estopped from asserting those rights."

In line with this ruling is Mason Henry Press vs. Aetna Life Insurance Company, 211 N. Y., 489, and 105 N. E., 826.

What we have thus far been striving to establish is this:

That the authorities which have been cited as adverse to the present defendant are not really so, because they turn on the question of estoppel, and not on waiver; that in the present case there are no circumstances upon which estoppel can be predicated against the defendant—the insured was frankly and candidly dealt with throughout, he was at no time misled as to his or defendant's position,

his rights were in no way compromised, and in the end he, himself, fully admitted his liability on the record at the Compensation hearing; and, therefore, that the ruling of the Trial Court on defendant's motion for a verdict in the present case can be sustained only on the ground of *waiver* by the insurance company, and not on the ground of estoppel.

There was no evidence of WAIVER by defendant of plaintiff's breach.

NOW, WHAT IS WAIVER?

Waiver is a matter of *volition.* It depends entirely upon the *intention of the party to whom waiver is attributed.*

In Webster's new International Dictionary, waiver is defined to be:

> "The act of waiving or *intentionally* relinquishing or abandoning some known right or privilege."

In Bouvier it is defined as:

> "The *intentional* relinquishment of a known right with both knowledge of its existence and an *intention to relinquish it.*"

The cases and authorities generally stress the element of intent.

> "The question of waiver is mainly a question of *intention, which lies at the foundation of the doctrine.* Waiver must be manifested in some *unequivocal manner* and to operate as such it must in all cases be *intentional.* There

can be no waiver unless *intended* by one party and *so understood by the other.*"

40 Cyc, 261.

"From the mere proof of an equivocal act it cannot be assumed as a conclusion of law that a waiver has been effected."

Traynor vs. Johnson, 1 Head (Tenn.), 51, 53.

"A waiver is something more than a passive, negative state of demand. It is a positive and affirmative act."

Hurley vs. Farnsworth, 78 Atl., 291. See also:
People vs. Atkinson, 123 N. Y. Supp., 577.

"A more usual manner of waiving a right is by conduct or acts *which indicate an intention to relinquish the right.*"

40 Cyc, 265.

"The burden is upon the party claiming the waiver to prove it by such evidence as does not leave the matter *doubtful or uncertain.*"

40 Cyc, 269.

See: Thomas vs. West Jer. R. R. Co., 24 N. J. Eq., 567.

"A waiver of a contract right is a *voluntary and intentional* renunciation of it, and some positive or dispositive action, inconsistent with the contract right, is necessary to effect a waiver."

Welsbach Street Lighting Co. vs. Wichita,
168 Pac. (Kan.), 1090-4 (Cases cited).

"A waiver is something more than a passive, negative state of demand. It is a positive, affirmative act. It is an *intentional* relinquishment of a known right. *The intention to waive is essential.* Of course, it may be proved otherwise than by evidence of express declaration. It may be inferred from acts and from nonaction, but whatever the evidence, it must have probative force and sufficient to prove that there was, in fact, *an intention to waive the right.* There must appear no mere neglect to claim the right, but a *voluntary* choice not to claim it."

Hurley vs. Farnsworth, 17 Atl. (Me.),
291, at 292 (Cases cited).

It having been established that "intention lies at the foundation of the doctrine of waiver" and that it is essential to it, let us examine the conduct of these parties throughout the period during which evidences of intention concerning the matter of waiver are material.

This period runs from September 28th, 1919, when the plaintiff sent to defendant its first notice of the accident, to October 18th, 1920, the date of the hearing.

During this time, the following evidence of intention on the part of defendant is manifested by it—not, indeed, intention to waive, but on the contrary, *intention to insist upon its rights under plaintiff's breach:*

(1) Letter of November 11th, 1919, of defendant to plaintiff, in which the former makes express reservation of its rights.

(2) Letter of December 27th, 1919, by defendant to plaintiff in which the former expressly disclaims liability by reason of plaintiff's breach.

(3) Statement made by the attorney at the hearing before the Compensation Commissioner (in plaintiff's presence), that defendant disclaimed liability.

Throughout this period, by no act of the defendant was the plaintiff misled, prejudiced or compromised in any way.

Moreover, we need hardly again urge the point that the idea of prejudice to plaintiff is precluded by his express admission of liability on the record at the hearing before the Compensation Commission.

At no time in the period from November 11th, 1919, when defendant notified plaintiff of the reservation of its rights, to the time of the hearing, did the defendant do anything to evince an *intention to waive.* Plaintiff's testimony that "I notified the Company of the accident, that is all I did *and the Company took care of the rest*" (page 13, line 10), is in clear conflict with the established facts in the case. Plaintiff does not deny that the defendant gave him repeated notice of reservation and disclaimer; he does not state anything that the defendant did to mislead him between the notice of disclaimer and the hearing. And he does say that when he called on defendant after he had sent notice of the accident, "They said they would not take care of the case" (page 14, lines 15-21).

Surely the defendant had a right, upon receipt of the first notice of the accident, to make an in-

vestigation. It may have had no just reason to avail itself of plaintiff's breach of the requirement of prompt notice. There may have been no harm done by the breach. An investigation of the facts and circumstances was the only way to tell; and a month later, defendant made known to plaintiff that it had been greatly prejudiced by his failure to give prompt notice of the accident, and that it reserved its rights under the policy. From then on there was no change in defendant's expressed intent, and plaintiff was given no reason to doubt or to misunderstand the real attitude of defendant towards its liability under the policy.

For the purpose of this argument however, let it for the moment be conceded that there was a circumstance which perhaps tended to show that the defendant meant to waive. That is conceding the utmost for the circumstance in question. We refer to the relation of the defendant company to the defense of insured in the proceedings before the Compensation Commissioner.

That circumstance is equivocal in itself. It may have indicated an intent to waive or it may not, but though the circumstance in itself is equivocal, the statement made at the hearing, by the attorney, that the defendant Insurance Company disclaimed its liability under the policy (page 41, line 25; page 42, line 40), was *unequivocal, definite* and *certain.*

How could the jury properly have been given the power to find that the defendant's conduct *implied* an intent to waive, when such implication is overcome completely by positive statements accompanying the conduct which clearly manifested a fixed and definite *intent not to waive.*

It must be borne in mind here, that the plaintiff could make no case below without evidence of an *intent upon the part of the defendant to waive*

the plaintiff's breach. The case contains no such evidence. On the contrary, the evidence of the defendant's intent is not intent to waive, *but intent to have its rights under plaintiff's breach.* That is defendant's expressed purpose throughout.

We submit that the Court's instructions to the jury concerning the nature of waiver and what must be established in the case in order that waiver may be found, are correct.

But the complete lack of proof in the plaintiff's case of defendant's INTENT TO WAIVE, is emphasized by a comparison of the evidence with the import of the Court's instructions.

For example, the Court said:

> "Now I say the plaintiff must be able to get around that breach, for it was a breach on his part, in some way if he is to be entitled to recover. Now, what does he say? He says that the defendant in this suit, the insurance company, waived that right which it had under the contract. Now, the courts have clearly defined what a waiver is. A waiver is a *voluntary relinquishment of a* known right. And by voluntary we mean, as the language clearly and etymologically imports, the *intentional giving up* of a known right."

Where in this case is the evidence of "intentional giving up" by the defendant?

And again:

> "The authorities say the question of waiver is mainly a question of intention, which lies at

> the foundation of the doctrine. Waiver must be manifested *in some unequivocal manner*, and to operate as such it must in all cases be *intentional*. There can be no waiver unless *so intended* by one party and so understood by the other."

There certainly is no evidence in this case that waiver was "manifested in some *unequivocal manner.*"

And again:

> "No man can be bound by a waiver of his rights unless such waiver is *distinctly* made, with full knowledge of his rights which he *intends* to waive, and the fact that he knows his rights and *intends to waive them must clearly appear by the preponderance* of the evidence."

In view of the status of the evidence in the case, we fail to see how this instruction with its statement that waiver must be "distinctly made," etc., has any pertinence.

In the course of his charge, the Court read to the jury defendant's letter of December 27th, 1919, disclaiming liability. The Court then said:

> "Now, if there is any meaning to language, that means that they did disclaim, and that they said 'We will not be responsible under this contract.' Now, as opposed to that the plaintiff says that their actions in going before the commissioner, as the plaintiff claims they went before the commissioner—whether they did or not is for you to say—through their attorney, and having actually gone before the commissioner *before this last letter was written, and then having persisted in pur-*

> *suing the defense of the action without the knowledge of the plaintiff*—I say the plaintiff's claim is that having done that, the plaintiff claims that their actions and their words differed, and that therefore it is a question for the jury to say which is to be believed, actions or words."

We call attention to the words in italics. There was no evidence that an attorney went before the commissioner, before the letter of December 27th, 1919 was written. The hearing before the commissioner was held on October 18th, 1920, nearly a year after the letter in question. And there is absolutely no evidence that the defendant "persisted in pursuing the defense of the action without the knowledge of the plaintiff." Even admitting defendant's full part in the defense of insured, this defense lies entirely within the period of two days—October 2, 1920, and October 18, 1920, when the hearing was held.

The Court's attention was called to this inaccuracy (Case, page 58, line 23, etc.), and then the Court said this:

> "It has been called to my attention that it is thought that I said that this letter, the one of December, 1919, was written after the adjudication by the commissioner. I do not think I said that. I certainly did not mean to say that. What I said was, as I recall it—if I did not say it, I say it now and correct it if I was wrong—it was *written after the petition was filed with the commissioner.*"

But the letter was not "written after the petition was filed with the commissioner." The petition of the injured employee was not filed with the compensation commissioner until some time after Au-

gust 20th, 1920; at any rate, that is the day on which the petition was sworn to (the petition appears in the printed case, at pages 34-8). So that the petition was not complete until about nine months after the defendant's letter of disclaimer. The Commissioner testified that the "original petition" was filed by the employee May 28th, 1920 (Case, page 18, line 18). Even so, that was five months after the defendant's letter of disclaimer.

Furthermore, so far as any participation in the defense is concerned, it must be borne in mind that the defendant, under its policy of insurance, had undertaken to discharge several forms of service in behalf of the plaintiff, only one of which was to indemnify the employer against loss by reason of the liability imposed on him for injuries to his employees. Among these forms of service was:

> "To defend in the name and on behalf of the employer any suits or other proceedings which may at any time be instituted against him, etc." (Case, page 27, line 21).

And:

> "To investigate injuries sustained by employees" (Case, page 27, line 18).

In the case of Compton Hills Laundry Company against Gen. A. F. & L. Assurance Corporation, 190 S. W. (Mo.), 382, the Court held:

> "Since an insurer in an employers' liability insurance policy can refuse to defend an action for damages only at its peril, it cannot be held to have waived any defense under the policy by defending or negotiating for a compromise settlement, so long as any peril exists."

The Court says in the latter case:

> "Not only did the defendant have the right before withdrawing from the defense of the damage suit to make such investigation as was reasonably necessary to determine if the accident was covered by the policy, but it had a right to make its defense and negotiate for a compromise settlement, so long as there was any reasonable ground to apprehend that a claim of liability could, or would be made on any ground covered by the policy." Citing Buffalo Steel Co. vs. Aetna Ins. Co., 136 N. Y. Supp., 977, 984.

Of course, the latter contention goes further than the necessities of the defendant on this appeal. It is made in the interest of a complete presentation of our case to the Court.

WE RESPECTFULLY SUBMIT IN CONCLUSION THAT:

Where insured has committed a breach of a condition precedent in a policy of liability insurance, in which, among other things, the insurer agrees to indemnify insured, investigate injuries to his employees, and defend him in proceedings against him;

And where the insurer promptly makes known to insured its disclaimer of liability to indemnify because of the breach by insured, and offers to assist the latter in his defense of the action;

And where whatever is done by the insurer in the defense of the insured is done under EXPRESS DISCLAIMER OF LIABILITY THROUGHOUT, SO THAT INSURED IS NOT DECEIVED, PREJUDICED OR MISLED IN ANY WAY;

And where, at the hearing of the case against him, THE INSURED HIMSELF EXPRESSLY ADMITS HIS LIABILITY;—

Then, we submit, that the conduct of insurer cannot be said to evince any evidence of its INTENTION TO WAIVE THE BREACH of the policy by insured.

Respectfully,

RANDOLPH PERKINS,
Counsel for Defendant-Appellant.