NEW JERSEY

Court of Errors and Appeals.

CHARLES C. PILGRIM, Receiver of RUSSELL-ROBINSON CO., *Plaintiff-Respondent,* *vs.* AETNA LIFE INSURANCE COMPANY, *Defendant-Appellant.*	*On Appeal from Supreme Court*

Brief in behalf of Defendant-Appellant.

1.

STATEMENT OF THE CASE.

The appeal in above entitled suit is from a judgment in favor of plaintiff and against defendant for the sum of $6,132.50, in an action at law. The case was tried in the Essex Circuit before Judge Dungan, without a jury, and it was upon his findings that the judgment was entered.

The summons and complaint were served on defendant on January 19, 1916. A rule was made by Justice Kalisch, on February 5, 1916, extending defendant's time to answer until February 15, 1916, which rule was duly entered. A petition by defendant for removal of the cause to the United States District Court for the District of New Jersey and a bond on such removal, as prescribed by the Federal Judicial Code, were presented to Justice Kalisch, on February 11, 1916, and an order for removal of the cause to that Court made by him on that day. The removal was perfected by the filing of a certified copy of the proceedings in the office of

the Clerk of the United States District Court for the District of New Jersey pursuant to the code mentioned. Motion was made in behalf of plaintiff to remand the cause to the State Court on the ground that the removal was not within the time provided by the Code, and that motion was granted (see 234 Fed., p. 958). An order was made remanding the cause (case, pp. 99–125, pp. 38–41). Defendant answered in the Supreme Court, in addition to other defenses, that the Supreme Court was without jurisdiction because the cause was removable to the United States District Court for the District of New Jersey and had been duly and regularly removed to that Court. Before the trial proceeded objection was made on behalf of defendant to any further proceedings in the Supreme Court upon the ground that that Court had no jurisdiction for the reasons stated. The objection was overruled (case, pp. 11–12, p. 132). These facts are stated because of the jurisdictional question involved.

The suit was brought to recover on a policy of insurance issued by defendant to the Russell-Robinson Co., a corporation of the State of New Jersey (case, pp. 1–4).

The policy provided as follows (case, pp. 42–43; pp. 52–53):

> "In consideration of the premium herein "provided, The Aetna Life Insurance Com "pany of Hartford, Connecticut (called the "company), does hereby agree to indemnify "the assured described in the warranties "hereof, within the amounts as expressed "herein, against loss and/or expense arising or "resulting from claims upon the assured for "damages on account of bodily injuries and/or "death accidentally suffered, or alleged to have

"been suffered, by any person or persons not "employed by the assured, by reason of the "business described and conducted at the loca- "tions named in said warranties, whether "said injuries and/or death are accidentally "suffered, or alleged to have been suffered, at "the locations named or elsewhere, save and "except claims arising by reason of:

"(1). Injuries and/or death caused by any "person employed in violation of law as to age, "or of any age under fourteen (14) years, "where there is no legal restriction as to age "of employment.

"(2). Any draught or driving animal or ve- "hicle, or by any person while driving or using "the same.

"(3). Injuries and/or death to any person "while riding or attempting to ride on any el- "evator or hoisting device.

"(4). Liability of others assumed by the "assured under any contract or agreement, "oral or written."

"Subject to all agreements and conditions "hereof, claims are covered whenever arising, "on account of accidents or alleged accidents "occurring within the policy period stated "herein.

Warranties.

" 1. Name of assured: Russell-Robinson Company.
" 2. Address of Assured: 109-115 Frelinghuysen Avenue, Newark, Essex Co., New Jersey.
" 3. The assured is: Corporation New Jersey.

" 4. *Classified Description of the Business.* All operations incidental to the following business, in and during the continuance hereof.	Estimated Average number of employees	Estimated entire compensation for 12 months.	Premium rate per $100 of compensation.	Estimated Premium.	Town Street and Number where Business is located.
" Carpentry work in connection with buildings not exceeding four (4) stories in height (no grain elevator construction.)	Varies	$35,000.00	.35	$122.50	Newark New Jersey and elsewhere in New England and Middle Atlantic States.
" Carpentry work in connection with buildings exceeding 4 stories in height (no grain elevator construction).	Varies	5,000.00	.35	17.50	
" *Special Operations.* Demolition or wrecking of any structure.	None				
" Operation of locomotives and/or cars by means of locomotives.	None				
" All operations performed for assured under contract. Premium to be adjusted on the basis of total cost of the work, including all labor, material used, or delivered for use, all allowances, bonuses and commissions made, paid or due.	Varies	Estimated total cost. 40,000	Premium Rate per $100 of total cost. .10	$40.00	

" 5. The foregoing statement correctly describes the business to be in-
" sured, including all usual or special operations incident thereto, and
" the locations at which said business is conducted. None of the spe-
" cial operations described will be covered unless the estimated average
" number of persons engaged in such special operations, their estimated
" compensation, and the premium rate are specially stated herein."

On April 1, 1910, the Russell-Robinson Co. entered into a contract with Frederick G. Agens, owner of the premises known as No. 230 Market street in the city of Newark, and on the same day entered into another contract with the Real Securities Investment Company, a corporation of the State of New Jersey, owner of the premises known as No. 232 Market street in the same city, by which contracts the first named company agreed to provide all the materials and perform all the labor for the mason work, carpenter work, painting and metal ceilings included in the remodel and repair of the buildings on those premises, which buildings had theretofore been damaged by fire (case, pp. 54-67).

The Russell-Robinson Co., on April 2, 1910, entered into a contract with the Wm. L. Blanchard Co., a corporation of the State of New Jersey, whereby the last named company agreed to do the mason work included in above mentioned contracts (case, pp. 82-99).

One Louis Zamelsky, who was not an employe of any of the parties above mentioned, was killed by a falling wall which was being taken down while he was on the premises. His wife, as administratrix of his estate, brought a suit in the New Jersey Supreme Court against the Russell-Robinson Co. and the Wm. L. Blanchard Co. to recover damages for his death. She alleged that those companies on April 5, 1910, were in possession of the above mentioned premises, which had

been damaged by fire, and were engaged in remodeling and repairing them; that both companies sold to Louis Zamelsky the iron, beams, pipes and scrap iron on the premises and agreed that he was to enter upon the premises and remove that material; that both companies, by their servants, agents and laborers, were engaged in taking down the interior partition or division wall on the premises while Louis Zamelsky was on them and in the act of removing the material mentioned, and it thereupon became the duty of both companies to use proper care in removing the walls, and to use due and proper care to maintain the premises in a reasonably safe condition; that disregarding that duty they did not use due and proper care in removing the walls and did not use due and proper care to maintain the premises in a reasonably safe condition, but, on the contrary, by their servants carelessly, negligently and improperly, and without warning to Louis Zamelsky, pulled down the partition wall so that it fell upon him and killed him.

The suit was under the old practice and each defendant pleaded the general issue. It was tried before Judge Adams and a jury in the Essex Circuit, and the jury returned a verdict against both defendants for $6,000. Each defendant obtained a rule to show cause why the verdict should not be set aside and a new trial granted. The rule obtained by the Russell Robinson Co. was dismissed and that obtained by the Wm. L. Blanchard Co. made absolute. Thereupon judgment final was entered against the Russell-Robinson Co. *alone.* No judgment has been entered against the Wm. L. Blanchard Co. (case, pp. 126-132).

Shortly after the trial of the suit by Rose Zamelsky, administratrix, etc., above mentioned, the plaintiff in the present suit was appointed

receiver of the Russell-Robinson Co. by the Court of Chancery of New Jersey. He paid the judgment recovered by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co., and not being reimbursed therefor by the present defendant brought suit against it to recover $5,000 thereof, that being the limit stated in the policy of insurance. The ground of his action was that Louis Zamelsky was killed while the Wm. L. Blanchard Co. was engaged in performing an operation for the Russell-Robinson Co. under their contract above mentioned, by the falling of the wall upon him (case, p. 3, ll. 23-36).

The defenses were: (1) denial of plaintiff's alleged cause of action; (2) that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment on that claim, were for damages on account of the death of a person suffered, or alleged to have been suffered, by reason of the demolition or wrecking of certain structures by the Russell-Robinson Co., which claim and judgment were not covered by defendant's policy of insurance; (3) that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment on that claim, were for damages on account of the death of a person suffered, or alleged to have been suffered, by reason of the doing of certain mason work by the Russell-Robinson Co., which claim and judgment were not covered by defendant's policy of insurance; (4) that the judgment recovered by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. was not upon any claim against it for damages on account of bodily injuries or death accidently suffered, or alleged to have been suffered, by any person or persons not employed by said Russell-Robinson Co. by reason of any business men-

tioned in the warranties of the policy of insurance; (5) that the Supreme Court was without jurisdiction because the suit was removable to the United States District Court for the District of New Jersey and had been duly and regularly removed to that Court (case, pp. 6-12).

A supplement to the Practice Act of 1912 provides as follows (P. L. 1916, p. 109):

> "Bills of exceptions and writs of error in "such cases are abolished. In lieu of a writ "of error, an appeal may be taken in any case "in which the appellant would, heretofore, "have been entitled to that writ. Subject to "rules, such appeal shall be in the na- "ture of a rehearing upon any question of "law involved in any ruling, order, or judg- "ment below. Where causes are submitted to "the Court to be heard without a jury, any error "made by the Court in giving final judgment "in the cause shall be subject to change, modi- "fication or reversal without the grounds of "objection having been specifically submitted "to the Court."

2.

GROUNDS OF APPEAL.

1. The Supreme Court had no jurisdiction over the above-entitled suit, for the reason that the same was removable to the United States District Court for the District of New Jersey and was duly and regularly removed to that Court.

2. The evidence at the trial proved that the payment by plaintiff of the judgment recovered by Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co. was not

for loss and/or expense arising or resulting from a claim upon said Russell-Robinson Co. for damages by reason of the business described in the warranties of the policy of insurance mentioned in the complaint, against which defendant agreed by said policy of insurance to indemnify said Russell-Robinson Co.

3. The evidence at the trial proved that the claim of Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co., and the judgment upon that claim were by reason of the demolition or wrecking by the Russell-Robinson Co. of a structure.

4. The evidence at the trial proved that the claim of Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co., and the judgment upon that claim were by reason of the doing of certain mason work by the Russell-Robinson Co.

5. Under said evidence the finding by the Trial Court should have been in favor of the defendant.

6. The findings by the Trial Court do not support the judgment against defendant.

7. The Trial Court erroneously found that the work being done upon the premises on which Louis Zamelsky was killed was not the demolition or wrecking of any structure within the meaning of the policy of insurance mentioned in the complaint.

8. The Trial Court erroneously found that the work being done upon said premises was a rebuilding, remodeling and repairing of said structures, and was incidental in the business described in the warranties in said policy of insurance.

9. The Trial Court erroneously admitted in evidence a certain contract between the Russell-Robin-

son Co. and Frederick G. Agens and a certain contract between the Russell-Robinson Co. and the Real Securities Investment Co., each contract dated April 1, 1910.

10. The Trial Court erroneously admitted in evidence a certain contract between the Russell-Robinson Co. and the Wm. L. Blanchard Co., dated April 2, 1910.

11. The Trial Court erroneously admitted in evidence the charge of the Trial Judge to the jury in the suit by Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co. and the Wm L. Blanchard Co.

12. The Trial Court erroneously admitted testimony by William L. Blanchard, a witness on behalf of plaintiff, as to the claim upon which Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, recovered a judgment against the Russell-Robinson Co.

13. The Trial Court erroneously admitted testimony by Frank P. Russell, a witness on behalf of plaintiff, as to the claim upon which Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, recovered a judgment against the Russell-Robinson Co.

14. The Trial Court erroneously admitted testimony by Tom Timbernaro, a witness on behalf of plaintiff, as to the claim upon which Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, recovered a judgment against the Russell-Robinson Co.

15. The Trial Court found and determined the cause in favor of the plaintiff and ordered judgment against the defendant for the sum of $5,000.00 with interest thereon from June 3, 1913, amounting to $1,132.50, whereas there was no evidence to war-

rant such finding, determination and order for judgment.

16. Judgment should have been entered in favor of defendant.

3.

BRIEF OF THE ARGUMENT.

I.

The Supreme Court had no jurisdiction over this suit, for the reason that the same was removable to the United States District Court for the District of New Jersey and was duly and regularly removed to that Court.

The summons and complaint in the present case were served upon defendant on January 19, 1916. Upon application on behalf of defendant a rule was allowed by Justice Kalisch on February 5, 1916, extending defendant's time to answer until February 15, 1916, which rule was entered on February 7, 1916.

Section 29 of the Federal Judicial Code is as follows (U. S. Comp. Stats., 1913; Vol. 1, sec. 1010; p. 422):

> "Whenever any party entitled to remove "any suit mentioned in the last preceding sec- "tion, except suits removable on the ground of "prejudice or local influence, may desire to re- "move such suit from a state court to the dis- "trict court of the United States, he may make "and file a petition, duly verified, in such "State court at the time, or any time before "the defendant is required by the laws of "the State or the rule of the State court in "which such suit is brought to answer or plead "to the declaration or complaint of the plaint-

"iff, for the removal of such suit into the dis-
"trict court to be held in the district where
"such suit is pending, and shall make and file
"therewith a bond, with good and sufficient
"surety, for his or their entering in such dis-
"trict court, within thirty days from the date
"of filing said petition, a certified copy of the
"record in such suit, and for paying all costs
"that may be awarded by the said district
"court if said district court shall hold that such
"suit was wrongfully or improperly removed
"thereto, and also for their appearing and en-
"tering special bail in such suit if special bail
"was originally requisite therein. It shall then
"be the duty of the State court to accept said
"petition and bond and proceed no further in
"such suit."

A petition by defendant for removal of the cause to the United States District Court for the District of New Jersey, and a bond on such removal, as prescribed by the Federal Judicial Code, were presented to Justice Kalisch on February 11, 1916, and were accepted and approved by him. He made an order on that day for the removal of the cause to the United States District Court. The petition for, and bond on removal were filed on February 14, 1916. A certified copy of the record was duly filed in the office of the Clerk of that Court (case, pp. 106–125).

Motion in behalf of plaintiff was made before the United States District Court that the case be remanded to the Supreme Court on the ground that the removal was not within the time prescribed by the Federal Judicial Code, and Judge Rellstab, who heard the motion, held that the removal was not in time and ordered the cause remanded (case, pp. 38–41).

No appeal could be taken from the order remanding, and defendant, in order to protect its position that the case had been duly and regularly removed to the United States District Court and to have that matter reviewed by the appellate courts of the United States, objected to the jurisdiction of the Supreme Court, both in its answer and at the trial, upon the ground that the case was removable to the United States District Court and had been duly and regularly removed thereto. The objection was overruled.

Presumably this Court is bound by the construction placed upon the Federal Judicial Code by the United States District Court. We again repeat that the Supreme Court was without jurisdiction upon the grounds mentioned, for the purpose of preserving defendant's position in that respect and having it reviewed by the appellate courts of the United States if necessary.

II.

The evidence at the trial proved that the payment by plaintiff of the judgment recovered by Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co., was not for loss and /or expense arising or resulting from a claim upon said Russell-Robinson Co. for damages by reason of the business described in the warranties of the policy of insurance mentioned in the complaint, against which defendant agreed by said policy of insurance to indemnify said Russell-Robinson Co.

There was no allegation in the complaint, no evidence at the trial and no finding by the Trial Court

that the judgment recovered by Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co., was on a claim upon it by reason of the doing by that company of any carpentry work. The only other business mentioned in the warranties of the policy and included in its indemnifying clause by reference to the warranties was all operations performed for the assured under contract.

The allegation in the complaint was that "while "the said William L. Blanchard Co. was engaged "in an operation performed for said Russell-Robin- "son Co. under said contract, doing the work called "for thereby, upon the premises known and desig- "nated as Nos. 230 to 232 Market street, a certain "wall located thereon upon which the said William "L. Blanchard Co. was working, fell and did strike "one Louis Zamelsky, who was then and there "upon said premises, but who was not employed by "the said Russell-Robinson Co., by reason of which "the said Louis Zamelsky died on the same day "from the wounds and injuries received from saip "falling wall." It was also alleged that "Rose "Zamelsky, administratrix of the estate of the said "Louis Zamelsky, after actual trial of the issue, as "provided for by said policy, for the death of the "said Louis Zamelsky, recovered a judgment "against the said Russell Robinson Co in the New "Jersey Supreme Court for the sum of $6,000" (pp. 3–4).

There was no allegation in the complaint that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., nor the judgment upon that claim, were by reason of any operation performed for the Russell-Robinson Co., by the Wm. L. Blanchard Co. under the contract be-

tween them. The evidence proved that they were not.

A certified copy of the judgment record in the suit by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the Wm. L. Blanchard Co. was offered in evidence on behalf of defendant and admitted without objection. The judgment record proved the reason for her claim upon the Russell-Robinson Co. and for the judgment she recovered against it. She alledged in her declaration (which was filed prior to the practice Act of 1912) that the Russell-Robinson Co. and the Wm. L. Blanchard Co. were in possession of the premises on which Louis Zamelsky was killed, and that they, by their servants, carelessly, negligently and improperly, and without warning to him, threw down the wall so that it fell upon and killed him (case, pp. 126-129). Each company denied those allegations by its plea of general issue (case, pp. 129-130). The jury found both companies guilty of the negligence alleged, yet the Supreme Court entered judgment against the Russell-Robinson Co. *alone* (case, p. 131). Thus it appears that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment she recovered upon that claim, were by reason of the fact *that the Russell-Robinson Co., and its men*, carelessly, negligently and improperly, and without warning to Louis Zamelsky, threw down the wall so that it fell upon him and killed him, *and not by reason of any operation performed for the Russell-Robinson Co. by the Wm. L. Blanchard Co. under their contract.* The Supreme Court could not have determined that the Russell-Robinson Co. was liable because of any operation performed for it by the Wm. L. Blanchard Co. under their contract, for if it had, judgment would have been entered against the Wm. L. Blanchard Co. as well as against

the Russell-Robinson Co. If those facts do not appear plainly upon the face of the judgment record, they were proved by the charge to the jury by the Trial Judge in that suit, which was in evidence in the present case. He charged as follows (case, p. 81, ll. 33–40; p. 80, l. 22; p. 81, l. 10; p. 79, l. 38; p. 80, l. 10):

> "It being admitted that the deceased met "his unfortunate death by falling under a "mass of this wall, the question is who threw "that wall down? I cannot do less than ask "you to consider whether there is any proof in "the case from which you could infer that any- "thing which the men of the Russell-Robinson "Co. did produce, or contributed to produce, "that particular result.
>
> "When Mr. Blanchard was away Mr. Lang, "who was the foreman of the Russell-Robinson "Company, took his place. Either corporation, "that is, either Mr. Blanchard or Mr. Lang, "had the right to extend an invitation to some "outside person and thus justify the presence "of the person on the premises. Consequently "it may be that when Mr. Lang, in Mr. "Blanchard's absence, was having this duty of "general oversight, that there would be some "person or persons in the building to whom "Mr. Blanchard, without Mr. Lang's knowl- "edge, had given an invitation to enter. It "results from this, that Mr. Lang was put "upon the special duty of careful observation "and warning, and if there is evidence in the "case which satisfies you that Mr. Lang failed "in this duty of observation and warning, "and that Zamelsky was there by virtue "of the invitation extended to him by Mr.

"Blanchard without Mr. Lang's knowing any-
"thing about it, and this failure was the cause
"of the accident, then Mr. Lang came short of
"his duty, and his failure, if he did fails, was
"attributable to his employer, the Russell-Rob-
"inson Co.

"The Blanchard Company were independent
"contractors as we infer from the contract.
"They are described as sub-contractors, and I
"presume that they were independent contrac-
"tors. The Russell Robinson Company were
"also independent, and the Russell-Robinson
"Company under the rule as to independent
"contractors would not be liable as a princi-
"pal is for his agent for any negligence of
"the Blanchard Company in doing the work
"under their contract."

That charge left the jury to find whether the Russell-Robinson Co. and its men carelessly, negligently and improperly threw down the wall so that it fell upon Louis Zamelsky and killed him, and the jury so found. They were compelled to find also that the negligence of the Russell-Robinson Co. and its men caused Louis Zamelsky's death, independently of any operation performed for that company by the Wm. L. Blanchard Co., before they could return a verdict against the Russell-Robinson Co., and that they did so find was proved by their verdict. There can be no question that the judgment record, in the light of the charge by the Trial Judge, proved that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment upon that claim, were by reason of the fact that the Russell-Robinson Co. and its men carelessly, negligently and improperly, and without warning to Louis Zamelsky, threw down the wall so that it fell upon and killed him,

and not by reason of any operation performed for the Russell-Robinson Co. by the Wm. L. Blanchard Co.

Explanation of the reason for the charge by the Trial Judge in the suit by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the Wm. L. Blanchard Co. was contained in the testimony by plaintiff's witnesses, William L. Blanchard and Tom Timbernaro, president and employe, respectively, of the Wm. L. Blanchard Co., and by one of plaintiff's exhibits in the present case.

Mr. Blanchard reluctantly admitted that the men employed by the Russell-Robinson Co. helped to throw down the wall, and that Lang, a foreman, employed by that company, was in charge of the premises while he was away, which was substantially the testimony he gave at the trial of the former suit (case, pp. 26–31). Mr. Timbernaro admitted that he had testified at the trial of that suit that Lang helped him throw down the wall (case, p. 36, ll. 18–32).

The contract between the Wm. L. Blanchard Co. and the Russell-Robinson Co. (Exhibit P 7, pp. 82 *et seq.*), proved that the two companies were independent contractors.

The judgment record in the suit by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the Wm. L. Blanchard Co., together with the charge to the jury by the Trial Judge in that suit and the testimony and exhibit in the present case, proved that the claim by Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment she recovered upon that claim, were *solely by reason of the fact that the Russell-Robinson Co. and its men carelessly, negligently and improperly threw down the wall, without warning to*

Louis Zamelsky, so that it fell upon and killed him, and not by reason of any operation performed for the Russell-Robinson Co. by the Wm. L. Blanchard Co. under their contract. There was no evidence to the contrary.

The mere fact that Louis Zamelsky was killed while the Wm. L. Blanchard Co. was performing an operation for the Russell-Robinson Co. under their contract, was immaterial. Rose Zamelsky, administratrix, etc., had no claim upon the Russell-Robinson Co. merely because Louis Zamelsky was killed while an operation was being performed for it by the Wm. L. Blanchard Co. That fact in itself furnished no valid reason for a claim against either company. She made no claim upon the Russell-Robinson Co. that it was liable because Louis Zamelsky was killed while the Wm. L. Blanchard Co. was performing an operation for it. Her claim was that the Russell Robinson Co. was guilty of negligence in its own operations. The jury found that such was the case and the Supreme Court sustained the verdict of the jury. The reason for the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co. and for the judgment upon that claim, which judgment resulted in loss or expense to the Russell-Robinson Co. was its own operations, and not those performed for it by the Wm. L. Blanchard Co. If that was not so, the verdict would have been sustained against both companies for the Wm. L. Blanchard Co. would have been held liable for its own operations.

There was no evidence that the Russell-Robinson Co. had suffered loss or expense which arose or resulted from a claim upon it by reason of any business described in the warranties of defendant's policy of insurance.

III.

The evidence at the trial proved that the claim of Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co, and the judgment upon that claim, were by reason of the demolition or wrecking by the Russell-Robinson Co. of a structure.

The policy of insurance in question by the express terms of its warranties excluded indemnity by defendant to the Russell-Robinson Co. for loss or expense arising or resulting from claims upon it for damages by reason of the demolition or wrecking of any structure (case, p. 52).

The Standard Dictionary defines the verb "demolish" as follows: "To destroy by tearing or throwing down, as a building, wall, or the like; separate the fabric or ruin the structure of, raze, dismantle."

The same work defines the verb "wreck" thus: "to bring any form of ruin or destruction upon, overthrow, shatter or break to pieces, destroy; as to wreck a commercial house, to wreck a railway train, or, financially a railway."

That work defines a "structure" as "that which is constructed, a combination of related parts; as a machine, a building, or a bridge."

It was said in the case of *Haskell et al. vs. Gallagher et al., 50 N. E., 485; 20 Ind. App., 224*, that the term "structure" when applied to a material thing made by human labor, whether considered etymologically, or with reference to the words by which it is immediately preceded in the statute means something composed of parts or portions which have been put together by human exertion.

In that case it was held that an oil well, together with the derrick engine, boiler, pumps, piping, and appliances attached thereto, was a "structure" within the meaning of a statute giving to material men a lien on a house, mill or other structure.

In the case of *Karasek vs. Peier, 50 L. R. A., p. 345* (Washington Supreme Court), it was held that a fence was a "structure" within the meaning of a statute providing that an injunction may be granted to restrain the malicious erection by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor. It was said in that case that in the widest sense, a structure is any production or piece of work artificially built up or composed of parts joined together in some definite manner; any construction.

It was said in the case of *Giant Powder Co. v. Oregon Pac. Ry. Co. et al, 42 Fed., p. 470*, that a railway is literally and technically a "structure." It consists of the bed or foundation, which may be of earth, stone or trestle-work, on which are laid the ties and rails. These, taken together, constitute a "structure" in the full sense of the word—a something joined together, built, constructed. Freund, Lat. Lex., "Structio," "Struc;" Worcest. Dict., "Structure."

The declaration in the suit by Rose Zamelsky, administratix, etc., against the Russell-Robinson Co., and the Wm. L. Blanchard Co., alleged that both of those companies, by their servants, carelessly, negligently and improperly, and without warning to Louis Zamelsky, threw down the wall which fell upon and killed him. Each company denied that allegation. The jury found both of them guilty. The Supreme Court determined that the verdict of the jury was correctly found against the Russell-

Robinson Co. *alone.* Those facts appeared on the face of the judgment record in that suit which was in evidence. Thus it appears from the judgment record that the Russell-Robinson Co. and its men threw down the wall which fell upon and killed Louis Zamelsky.

The charge to the jury by the Trial Judge in the suit by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the Wm. L. Blanchard Co., which was in evidence in the present case, makes it plain that the jury in that suit found the Russell-Robinson Co. and its men, guilty of carelessly, negligently and improperly throwing down the wall mentioned. The charge was as follows (supra):

> "It being admitted that the deceased met his "unfortunate death by falling under a mass of "this wall the question is who threw that wall "down? I cannot do less than ask you to con- "sider whether there is any proof in the case "from which you could infer that anything "which the men of the Russell-Robinson Com- "pany did produce, or contributed to produce, "that particular result."

Apart from the judgment record mentioned above and the evidence bearing upon it, the testimony by Mr. William L. Blanchard and Mr. Tom Timbernaro in the present case was that the men of the Russell-Robinson Co. helped to throw down the wall.

The uncontradicted evidence was that the Russell-Robinson Co. and its men helped to throw down the wall which fell upon and killed Louis Zamelsky, and that the claim of Rose Zamelsky, administratrix, etc., upon that Company was by reason of that fact. That being so, the question was whether the

throwing down of the wall was the demolition or wrecking of a structure.

The wall which fell upon and killed Louis Zamelsky was the center or partition wall between the two buildings on the premises and was several stories in heighth. It was not taken down brick by brick but was pushed over in sections so that it fell into the cellar.

The Trial Judge in charging the jury in the suit by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the William L. Blanch ard Co., said (italics ours):

> "Of course the *demolishing* of the wall was "in its own nature a dangerous operation, I "mean an operation which required great care "not only for the safety of the men engaged in "it but the safety of individuals who might be "around."

The wall mentioned was unquestionably being demolished or wrecked at the time Louis Zamelsky was killed. It was a structure, considered as a part of the buildings which it separated and by itself. Considering the buildings as a whole, part of their structure was demolished or wrecked when the wall was thrown down. Considered by itself the wall was something built, constructed and joined together. The word "structure" as used in the policy of insurance in question was a generic term embracing anything constructed and capable of being demolished or wrecked. It cannot be construed to mean less.

The Trial Judge charged the jury in the suit by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the Wm. L. Blanchard Co. that the two companies were independent con-

tractors and that the former was not liable for the negligence of the latter. Therefore, it appears that the Russell-Robinson Co. was not held for any negligence of the Wm. L. Blanchard Co. and its men in throwing down the wall.

The claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co. and the judgment she recovered against that company were *by reason of the demolishing or wrecking of the wall by the Russell-Robinson Co. and its men without due warning to Louis Zamelsky.* Defendant's policy of insurance did not cover loss or expense arising or resulting from such a claim.

IV.

The evidence at the trial proved that the claim of Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co., and the judgment upon that claim, were by reason of the doing of certain mason work by the Russell-Robinson Co.

The specifications for mason work to be done upon the premises on which Louis Zamelsky was killed provided for the taking down of the wall which fell upon and killed him, the removal of debris, and for the watching and guarding of the premises (case, p. 93, l. 35; p. 94, l. 4; p. 91, ll. 17-28.)

The only work being done upon the premises at the time Louis Zamelsky was killed was the taking down of the walls and the removal of burnt wood and debris.

Rose Zamelsky, as administratrix, etc., of Louis Zamelsky, claimed that the Russell-Robinson Co. and its men carelessly, negligently and improperly

and without warning to Louis Zamelsky pulled down the wall so that it fell upon and killed him (case, p. 128, ll. 23-41). The jury in her suit against the Russell-Robinson Co. and the Wm. L. Blanchard Co. found that such was the fact and the Supreme Court sustained the verdict of the jury. The uncontradicted evidence was that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment upon that claim were by reason of the careless, negligent and improper taking down of the wall by the Russell-Robinson Co. and its men without warning to Louis Zamelsky.

It is apparent that at the time Louis Zamelsky was killed the Russell-Robinson Co. and its men were engaged in taking down the wall which fell upon him; that the taking down of the wall and the watching and guarding of the premises were part of the mason work to be done upon the premises; and that the claim by Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment on that claim, arose or resulted by reason of the doing of such mason work by that Company. Defendant's policy of insurance provided for no indemnity to the Russell-Robinson Co. against loss or expense which arose or resulted from claims upon that company by reason of the doing by it of any mason work.

V.

Under the evidence the finding by the Trial Court should have been in favor of defendant.

The uncontradicted evidence proved that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment upon that claim, by virtue of which that company suffered loss or expense, did not arise or result by rea-

son of any operation performed for it by the Wm. L. Blanchard Co. but that they arose or resulted by reason of the demolition or wrecking of the wall by the Russell-Robinson Co., and that the demolition or wrecking of the wall was part of the mason work being done upon the premises. That being so, plaintiff was not entitled to indemnity under defendant's policy of insurance, and the Trial Court should have found in favor of defendant.

VI.

The findings by the Trial Court do not support the judgment against defendant.

The Trial Court found that on April 5, 1910, the Wm. L. Blanchard Co. was engaged in work upon the center wall on the premises, under its contract with the Russell-Robinson Co., and that at that time the wall fell and struck Louis Zamelsky, causing wounds from which he died. He ruled that such work came within and was covered by the clause of the warranties relative to all operations performed for the Russell-Robinson Co. under contract (case, p. 135, l. 23; p. 136, l. 18; p. 137, ll. 10-20).

Defendant agreed, by its policy of insurance, to indemnify the Russell-Robinson Co. only against loss or expense arising or resulting *from claims upon it by reason of the business mentioned in the warranties.*

Assuming that the Trial Court correctly found the facts above stated, and that his ruling was proper, *there was no finding that the claim of Rose Zamelsky, administratrix, etc., of Louis Zamelsky upon the Russell-Robinson Co., arose or resulted by reason of those facts*, nor that the Russell-Robinson Co., by virtue of the judgment recovered by her against it, had suffered loss or expense which

arose or resulted by reason of those facts, yet plaintiff could recover *only on a finding that such company had suffered loss or expense which arose or resulted from a claim upon it by reason thereof.* The Trial Court could not so find in view of the judgment record in the suit by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the Wm. L. Blanchard Co., and the evidence bearing upon it. There was a deficiency in the findings which was fatal to any recovery by plaintiff in the present case.

VIII.

The Trial Court erroneously found that the work being done upon the premises, on which Louis Zamelsky was killed, was not the demolition or wrecking of any structure within the meaning of the policy of insurance mentioned in the complaint.

The Trial Court did not state the reason for his finding that the work being done upon the premises, on which Louis Zamelsky was killed, was not the demolition or wrecking of any structure, but presumably it was because the contracts for the entire work upon the premises included removal of walls and debris, and also rebuilding, remodeling and repairing, the removal of the walls and debris constituting the minor portion of the work and the rebuilding, remodeling and repairing the major portion and, therefore, that the work being done upon the premises could not be generally described as demolition or wrecking.

The demolition or wrecking of any structure is described in the warranties of defendant's policy of insurance as special operations. The purpose of that clause of the warranties was to take the dem-

olition or wrecking of any structure out of general business description, prevent it from being included therein and classify such work as special operations.

The question was whether the operation of demolition or wrecking of any structure was being performed at the time Louis Zamelsky was killed, and not whether the work being done upon the premises could be generally described as demolition or wrecking.

At that time one of the walls on the premises was being pushed down in large sections so that it fell into the cellar, which was unquestionably an operation of demolition or wrecking of a structure. Therefore, the work being done upon the premises at the time Louis Zamelsky was killed, was the demolition or wrecking of a structure within the meaning of the policy of insurance and the finding to the contrary was erroneous.

VIII.

The Trial Court erroneously found that the work being done upon the premises, on which Louis Zamelsky was killed, was a rebuilding, remodeling and repairing of the structures on the premises, and was incidental to the business described in the warranties of the policy of insurance.

There can be no doubt that the loss or expense suffered by the Russell-Robinson Co., by virtue of the judgment recovered by Rose Zamelsky, administratrix, etc., against it arose or resulted from a claim upon it by reason of business in which *it was engaged* and not by reason of any operation performed for it under contract.

Assuming that the work of taking down walls

and removal of debris was incidental to the principal work of rebuilding, remodeling and repairing and that the work being done upon the premises can be generally described as rebuilding, remodeling and repairing, such work was not incidental to the business described in the warranties of the policy. The work of rebuilding, remodeling and repairing included mason work, painting and work on metal ceilings. None of that was incidental to carpentry work which was the only business described generally in the warranties. The finding that the work of rebuilding, remodeling and repairing was incidental to the business described in the warranties of the policy was erroneous.

IX.

The Trial Judge erroneously admitted certain documents and testimony.

The ninth, tenth, eleventh, twelfth, thirteenth, and fourteenth grounds of appeal will be argued under the above heading.

Plaintiff endeavored to prove that the Russell-Robinson Co. had suffered loss and expense by reason of a claim upon it which was covered by defendant's policy of insurance, and for that purpose offered in evidence the contract between the Russell-Robinson Co. and Frederick G. Agens, owner of part of the premises, dated April 1, 1910; the contract between the Russell-Robinson Co. and the Real Securities Investment Co., owner of the rest of the premises, dated April 1, 1910; the contract between the Russell-Robinson Co. and the Wm. L. Blanchard Co., dated April 2, 1910; testimony by William L. Blanchard as to the work done by the last named company under that contract; testimony by Frank P. Russell as to the contract between the Russell-Robinson Co. and the Wm. L. Blanchard

Co., and testimony by Tom Timbernaro, an employee of the Wm. L. Blanchard Co., as to the work being done by that company and its employees at the time Louis Zamelsky was killed. Those documents and that testimony were admitted by the Trial Judge, over objection on behalf of defendant, and were not subsequently excluded

The documents and testimony mentioned were objectionable and should have been excluded.

Notwithstanding any admission by defendant that Rose Zamelsky, administratrix, etc., had recovered a judgment against the Russell-Robinson Co., plaintiff was compelled to prove that judgment and could not do so by parol. A judgment cannot be proved by parol for any purpose.

> *Livesey et als. v. Besson et als., 82 N. J. L., p. 333.*
>
> *Lomerson v. Hoffman et al., 24 N. J. L., p. 674.*

Plaintiff could not prove the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co. by parol.

The insurance policy in question contained the following provisions:

> "If suit is brought against the assured to "enforce a claim for damages covered by this "policy, he shall immediately forward to the "company every summons or other process as "soon as the same shall have been served on "him, and the company will, at its own cost, "defend such suit in the name and on behalf "of the assured.
>
> "No action shall lie against the company to

"recover for any loss and/or expense under "this policy unless it shall be brought by the "assured for loss and/or expense actually sus- "tained and paid in money by him after actual "trial of the issue, nor unless such action is "brought within two years after payment of "such loss and/or expense."

It is not denied that the terms of the paragraph first above mentioned were complied with.

The rule stated in Freeman on Judgments, Fourth Edition, Vol. I., Section 174, p. 319, is as follows:

"Whenever one has an interest in the prose- "cution or defense of an action, and he, in the "advancement or protection of such interest, "openly takes substantial control of such pros- "ecution or defense, the judgment, when re- "covered therein, is conclusive for and against "him to the same extent as if he were the "nominal as well as the real party to the ac- "tion."

It is stated in Cyc., Vol. 22, pp. 106–107, that:

"One who is notified of the pendency of an "action and is given an opportunity to defend "is concluded as to all questions determined "therein which are material to a recovery "against him, in an action for indemnity "brought by defendant in the original suit. " * * * The judgment is also conclusive "upon defendants in the first action in their "character of plaintiffs, in the second as to the "facts therein determined. Hence, if it ap- "pears that the judgment in the first action was "based upon a finding of fact fatal to the re-

"covery in the second, the action over cannot "be maintained."

In the case of *DeGreiff v. Wilson et al.*, *30*, N. J. Eq., p. 435, that (italics ours):

"Although there is a conflict of authority on the subject, it seems to be the better opinion that, *except in cases where, upon the fair construction of the contract, the surety may have undertaken to be responsible for the result of a suit, or when he is made privy to the suit by notice, and the opportunity is given to him to defend it*, a judgment against the principal alone is, as a general rule, evidence of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment."

The exception mentioned in the case last cited apparently recognizes the rules stated by Freeman and in Cyc., heretofore quoted. Furthermore the policy of insurance in the present case expressly provided that defendant would be liable for loss and expense actually paid by the Russell Robinson Co. *after actual trial of the issue* on a claim against it. It undertook to be responsible for the loss and damage sustained by the Russell-Robinson Co. which arose or resulted from a suit upon a claim covered by the policy and for no other loss and expense.

Plaintiff neither alleged nor proved any fraud on the part of defendant in defending the suit brought by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the Wm. L. Blanchard Co. He neither alleged nor proved that defendant in the present case was estopped from denying liability for the judgment recovered by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. by reason of any conduct on its part in the

defense of that suit. There was no finding by the Trial Judge that there was any such fraud or conduct resulting in estoppel. If plaintiff had claimed, at any stage of the case, that defendant could not deny liability because it defended the suit brought by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the William L. Blanchard Co., defendant would have overcome such claim by proof that it undertook the defense under condition that the Russell-Robinson Co. was not engaged in work excluded in the warranties of the policy of insurance. Such a claim was not made and no proof by defendant upon it was necessary. Plaintiff cannot claim now, for the first time, that defendant was liable merely because it defended the suit mentioned.

The judgment record in the suit by Rose Zamelsky, administratrix, etc., against the Russell-Robinson Co. and the Wm. L. Blanchard Co., was admitted in evidence *without objection*. It was not only lawful evidence of her claim upon the Russell-Robinson Co., but was conclusive evidence of that claim.

It is stated in Cyc., Vol. 17, pp. 500–501, that:

> "In accordance with the general rule excluding parol evidence of the contents of an accessible public record, it is well settled that the proceedings, orders, judgments and decrees of courts of record cannot be proved by parol unless the record is lost or destroyed or is otherwise inaccessible, and a properly authenticated copy or transcript thereof cannot be obtained."
>
> "The rule just stated applies where it is sought to establish by parol facts which properly appear upon the records of a Court, or to

"prove by parol evidence the contents of docu-
"ments properly constituting a part of such
"records, although such facts and documents
"are not the acts of the Court itself. * * *
"The rule under discussion applies also to ex-
"clude parole evidence of the contents of plead-
"ings, of the findings and verdict of a jury of
"judicial writs, including the returns and other
"indorsements made thereon, and certificates
"of discharge in bankruptcy."

The judgment record proved conclusively that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co., and the judgment she recovered on that claim, were by reason of the fact that the Russell-Robinson Co. and its men, carelessly, negligently and improperly threw down the wall, without warning to Louis Zamelsky, so that it fell upon and killed him. The Trial Court found in effect, from the testimony and exhibits mentioned, that the judgment was by reason of the fact that Louis Zamelsky was killed while the Wm. L. Blanchard Co. were at work upon the wall under its contract with the Russell-Robinson Co., thereby varying the judgment record. The testimony and exhibits mentioned were therefore injurious to defendant.

X.

The Trial Court found and determined the cause in favor of the plaintiff and ordered judgment against the defendant for the sum of $5,000, with interest thereon from June 3, 1913, amounting to $1,132.50, whereas there was no evidence to warrant such finding, determination and order for judgment.

The only evidence of any loss or expense sus-

tained by the Russell-Robinson Co. was by the judgment record in the suit by Rose Zamelsky, administratrix, etc., against that company and the Wm. L. Blanchard Co. The only evidence of any claim upon the Russell-Robinson Co. from which that loss or expense arose or resulted was by that judgment record. The only evidence of the reason for that claim was by the judgment record. It appeared from the judgment record that the claim of Rose Zamelsky, administratrix, etc., upon the Russell-Robinson Co. for damages for the death of Louis Zamelsky, from which loss or expense arose or resulted to that company, was not by reason of any operation performed for it by the Wm. L. Blanchard Co., but was by reason of the demolishing or wrecking the wall which fell upon him by the Russell-Robinson Co.

Defendant did not agree by its policy of insurance to indemnify the Russell-Robinson Co. against loss or expense arising or resulting from such a claim.

The mere fact that the Wm. L. Blanchard Co. may have been at work upon the wall which fell upon and killed Louis Zamelsky, under its contract with the Russell-Robinson Co. was immaterial. That clause of the warranties of defendant's policy of insurance which related to operations performed for the Russell-Robinson Co., under contract, related only to such operations as would give rise to a claim against that company, as for instance, where that company employed another under a contract to do certain work for it, and would be held as a principal or master for the operations of the other. No one would desire or pay for indemnity insurance against operations for which it was in no way responsible. There would be no occasion for such insurance. Defendant's policy of insurance did not provide for

indemnity to the Russell-Robinson Co. against loss or expense which arose or resulted from the death of a person while an operation was being performed for it under contract and for which it was in no way responsible, but only against loss or expense which *arose or resulted from claims upon it by reason of such operations.* The mere fact that at the time Louis Zamelsky was killed the Wm. L. Blanchard Co. were at work upon the wall which fell upon and killed him under its contract with the Russell-Robinson Co. gave rise to no claim against the last named company which resulted in loss or expense to it.

The uncontradicted evidence was that the loss or expense suffered by the Russell-Robinson Co., by virtue of the judgment recovered against it by Rose Zamelsky, administratrix, etc., did not arise or result from a claim upon it by reason of any operation performed for it by the Wm. L. Blanchard Co., nor by reason of any other business described in the warranties of defendant's policy of insurance, but solely by reason of the demolishing or wrecking of the wall which fell upon and killed Louis Zamelsky by the Russell-Robinson Co., an operation expressly not included in the warranties of the policy, which demolition or wrecking was part of the mason work being done on the premises.

There being no evidence to the contrary, the finding, determination and judgment against defendant was erroneous.

We respectfully submit that judgment should have been entered in favor of defendant.

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New Jersey Court of Errors and Appeals

CHARLES C. PILGRIM, Receiver of the Russell-Robinson Co., *Respondent,*	*Action at Law.*
vs.	*On Appeal from Supreme Court.*
AETNA LIFE INSURANCE COMPANY, a corporation, *Appellant.*	

Brief for Respondent.

This action was founded on a public liability policy of insurance issued by the defendant company to the Russell-Robinson Co., who carried on the business of a general contractor and builder. The policy was dated November 18th, 1909, and covered a period of twenty-four months from that date. (Exhibit P. 2, p. 42.)

By the policy the defendant agreed to indemnify the plaintiff against loss and expense resulting from claims upon the plaintiff for damages on account of bodily injuries or death accidentally suffered by any person not employed by the plaintiff by reason of the business described and conducted at the locations named in the warranties therein stated, of which the following is a copy:

CLASSIFIED DESCRIPTION OF THE BUSINESS. All operations incidental to the following business, in and during the continuance thereof.	Estimated Average Number of Employees.	Estimated Entire Compensation for 12 Months.	Premium Rate per $100 of Compensation.	Estimated Premium.
Carpentry work in connection with buildings not exceeding four (4) stories in height (no grain elevator construction).	Varies	35000.	.35	122.50
Carpentry work in connection with buildings exceeding four stories in height (no grain elevator construction).	Varies	5000.	.35	17.50
SPECIAL OPERATIONS.				
Demolition or wrecking of any structure.	None			
Operation of locomotives and / or cars by means of locomotives.	None			
All operations performed for Assured under contract. Premium to be adjusted on the basis of total cost of the work, including all labor, material used or delivered for use, all allowances, bonuses and commissions made, paid or due.	Varies	Estimated total cost. 40000.	Premium rate per $100. of total cost. .10	40.00

TOWN, STREET AND NUMBER WHERE BUSINESS IS LOCATED

Newark, New Jersey, and elsewhere in New England and Middle Atlantic States.

The Russell-Robinson Co. subsequent to the issuing of said policy and on April 1st, 1910, entered into an agreement with the Real Securities Investment Company, a corporation, whereby the said Russell-Robinson Co. was to remodel and repair the premises known and designated as No. 232 Market street in the City of Newark, New Jersey, and also on that day entered into a similar contract with Frederick G. Agens of the said City of Newark whereby the said company agreed to remodel and repair the premises known and designated as No. 230

Market Street, Newark, New Jersey. (Par. 5 of complaint; par. 5 of answer); (Exhibits P. 3 and 4, pp. 54 and 60).

The Russell-Robinson Co. on April 2nd, 1910, entered into a contract with William L. Blanchard Co., whereby the said Blanchard Company for a consideration agreed that it would perform and do all the mason work and plastering for the restoration of said premises known as Nos. 230 and 232 Market Street in accordance with certain specifications. (Par. 6 of complaint; par. 6 of answer); (Exhibit P. 7, p. 82).

This contract amongst other things provided that the said William L. Blanchard Company was to take down the center wall of said premises (p. 22, ll. 37 to 40); (Exhibit P. 7, p. 82, on p. 93, ll. 32 to 8, p. 94).

While the said William L. Blanchard Company on April 5th, 1910, was engaged in doing the work under the contract on the center wall it fell and in falling struck Louis Zamelsky, who was not employed by the Russell-Robinson Company and who was then and there upon the premises, causing his death. (Par. 7 of complaint; par. 7 of answer.)

Immediately after the occurrence of the accident notice thereof was given to the defendant, as provided for in said policy and the plaintiff performed all the conditions of said policy upon its part to be performed. (Par. 8 of complaint; par. 8 of answer.)

On June 10th, 1913, in a cause pending in the New Jersey Court of Chancery wherein Frank P. Russell was the plaintiff and the said Russell-Robinson Company was the defendant, the plaintiff herein, Charles C. Pilgrim, by an order made on that day by the said Court of Chancery was duly appointed and subsequently

qualified as receiver of said corporation, the Russell-Robinson Company, with all the powers granted to such a receiver, pursuant to the statute in such case made and provided. (Par. 9 of complaint; par. 9 of answer.)

The administratrix of the estate of Louis Zamelsky (Rose Zamelsky) after actual trial of the issue, as provided for by said policy, recovered a judgment of six thousand dollars against the Russell-Robinson Company in the New Jersey Supreme Court for the death of the said Louis Zamelsky.

In this suit the Russell-Robinson Company was represented and defended by the attorneys for the Insurance Company who conducted the litigation throughout to final judgment without giving any notice to said company that it in anywise disputed its liability on the policy now being sued on in this suit.

Charles C. Pilgrim, the plaintiff herein, as receiver of the said Russell-Robinson Co., paid said judgment on the 30th day of March, 1915. The defendant has not indemnified the plaintiff for its loss or expense.

The case was by agreement of counsel tried before the court without a jury and upon this state of facts, concerning which there is no dispute, the court found that the judgment obtained by Rose Zamelsky, administratrix of the estate of Louis Zamelsky, was covered by the policy issued by the defendant company, and found a verdict in favor of the plaintiff for five thousand dollars with interest, part of the amount which the plaintiff had been obliged to pay to the said administratrix.

From this judgment the defendant now appeals.

Point I.

THE SUPREME COURT HAD JURISDICTION.

The defendant's answer, according to the rules of the Supreme Court, was due to be filed February 8th, 1916.

On February 5th, 1916, an order was made by Justice Kalisch on an *ex parte* application extending the defendant's time to answer to February 15th, 1916.

On February 11th, 1916, three days after the original time of the defendant to answer had expired, Justice Kalisch made an order removing said cause from our Supreme Court to the District Court of the United States for the District of New Jersey (Exhibit D. 1, page 123).

On March 3rd, 1916, the attorneys for the plaintiff served a notice of motion upon the attorneys for the defendant to the effect that on March 13th, 1916, at the United States District Court for the District of New Jersey they would make an application for an order remanding said cause to the New Jersey Supreme Court upon the ground that at the time the order for removal was made the time within which such an application or order could have been made had elapsed, and the defendant therefore was not entitled to have the said cause so removed.

On August 22nd, 1916, an opinion was filed by Judge Rellstab of the United States District Court holding that said cause should be remanded. (Exhibit P. 1, l. 38.)

On August 22nd, 1916, an order was made by the United States District Court for the District of New Jersey remanding said cause to our Supreme Court. (Exhibit P. 1, p. 41.)

The 37th section of Chapter 3 of the Judicial Code gives the United States District Court power to dismiss any cause of action removed from the State Court to the Supreme Court, "or to remand it to the court from which it was removed."

The order made by the United States District Court in this cause was one remanding said cause to this court and not dismissing it. The order provided,—

> "That said cause be remanded to the Supreme Court of the State of New Jersey from whence it was removed and that said cause proceed in said court."

This case was therefore properly returned to this court which again acquired jurisdiction.

Rule 56 of this court (Rule 38, Practice Act, 1912) abolishes pleas to the jurisdiction and in abatement and provides that the objection shall be made on motion. The defendant having failed to comply with this rule and having filed its answer setting forth various defenses has entered an appearance in this cause and thereby waived all objection to the jurisdiction of this court.

United States v. *Griefen,* 72 N. J. L. 1.

The No. Hudson Co. Railway Company v. *Flanagan,* 57 N. J. L., p. 696, Court of Errors and Appeals, in which Justice Gummere says on page 697:

> "It is too late for the defendant now to take exception to this action of the Circuit Court even if it be admitted to be unwarranted, for by engaging in the trial before the Court of Common Pleas it committed itself to the jurisdiction of that court and as that court already had jurisdiction of the

subject matter of the suit its right to try the case became complete when the parties to it committed themselves to its jurisdiction."

Point II.

THE LOSS SUSTAINED BY THE PLAINTIFF WAS COVERED BY THE POLICY.

The facts in the case are clear and undisputed and the manner in which the accident complained of happened is admitted by both parties.

Briefly the facts are these:

1. The Russell-Robinson Company had a general contract to rebuild and remodel premises on Market Street.

2. It made a contract with William L. Blanchard Company whereby said company was to do all the mason work which also included the partial removal of a certain center wall.

3. While the said Blanchard Company was working upon the center wall and removing it * * * as provided for by its contract the wall fell and killed Louis Zamelsky, who was not employed by the plaintiff.

4. For his death so occasioned his administratrix recovered a judgment against the Russell-Robinson Company, who was obliged to pay the same.

The defendant in its policy agrees to indemnify the plaintiff against loss arising from claims on account of bodily injuries or death accidentally suffered by any person not employed by the plaintiff by reason of the business conducted by the plaintiff and described in the warranties attached to the policy.

The warranties under the heading *Classified Description of the Business* reads:

> "All operations incidental to the following business in and during the continuation thereof."

Then the warranties mention carpentry work in connection with buildings of a certain number of stories and then states two special operations,—one "demolition" and the other "operating of locomotives" which are excepted. Then comes the following paragraph which is included and covered by the policy,—

> "All operations performed for the Assured under contract, premium to be adjusted on the basis of total cost of the work including all labor, material used or delivered for use, all allowances, bonuses and commissions made, paid or due."

The premium charged upon this particular item by the Insurance Company to the Assured amounted to $40 as stated in the policy, being based upon an estimate total under this clause of $40,000.

The policy should be construed most strongly against the defendant and in favor of the plaintiff.

Charles Wolff Packing Co. v. *Traveller's Insurance Co.*, 146 Pac. 1175.

Kresge v. *Maryland Casualty Co.*, 143 N. W. 668.

Kinston Cotton Mills v. *Liability Assurance Corp.*, 77 S. E. 682.

The defendant is responsible for the language used in the policy and the meaning most favorable to the insured must be accepted.

Rickerson v. *H. F. I. Co.*, 149 N. Y. 307, at 313.

No words could be more comprehensive or broader than the words "all operations" and this phrase must mean exactly what it says and must cover any and all operations performed for the Assured under contract.

The Trial Court found (page 137):—

> "The clause of the policy providing 'all operations performed for the Assured under contract' means all work done or performed by any one for the Assured which work was covered by the contract entered into between the Assured and the party doing the work."

The wording of the contract is clear and definite and no other construction could be placed upon it, and * * * the ruling of the Trial Court in this respect must be sustained.

By absolutely ignoring the testimony in the Zamelsky case and the issues which were submitted by the Court to the jury for determination and looking only to the allegation made made by the plaintiff in her complaint and the verdict of the jury, the defendant contends that the judgment recovered therein proves conclusively that the accident occurred by reason of the fact that the Russell-Robinson Company and its men carelessly, negligently and improperly threw down the wall without warning to Louis Zamelsky.

It requires but a glance at the charge of Judge Adams in that case to refute this contention.

The fact that this work upon the wall which fell was being done by Blanchard Company for

the Russell-Robinson Company under a contract entered into between them was never even disputed.

The Court in its charge on page 73 says:

> "It appears from the proof that certain men of the Blanchard Company were engaged on the work of demolishing this wall. It may be presumed that in doing so they were acting under what is called in this instrument the sub-contract. It appears in the proof that the Blanchard Company had the right to dispose of the iron."

And again on page 81 the Court charged the jury:

> "You will also consider whether there is sufficient evidence from which you can conclude that the work done by the Russell-Robinson Co. contributed to throw the wall down. There is evidence that Blanchard's men were at work on the wall, taking it down with pick-axes and what not and one was pushed against it with a ladder. These are all Blanchard's men. There is evidence that Russell-Robinson's men were pulling down old wood and I think there is something in the evidence—I am sure there is—that the tendency of this pulling down of old wood was to bring some bricks down, too. I do not recall that any of the Russell-Robinson's men were working with implements in the wall itself."

If the wall fell because of the fact that the Russell-Robinson Co. by its agents and servants had removed and pulled down some of the old wood, as the Court charged, then the Russell-Robinson Co. was engaged in carpentry work which was nevertheless covered by the policy,

entitling the Assured to be indemnified by reason of any loss sustained thereby.

The Judge also charged the jury in reference to the possible negligence of the Russell-Robinson Co., and says on page 80:

> "These two companies were together in control of the premises. There is no doubt about that. When Mr. Blanchard was on hand he watched the door and looked after things generally. When Mr. Blanchard was away Mr. Lang, who was the foreman of the Russell-Robinson Company, took his place. Either corporation, that is, either Mr. Blanchard or Mr. Lang, had the right to extend an invitation to some outside person and thus justify the presence of that person on the premises. Consequently it may be that when Mr. Lang, in Mr. Blanchard's absence, was having this duty of general oversight, that there would be some person or persons in the building to whom Mr. Blanchard, without Mr. Lang's knowledge, had given an invitation to enter. It results from this, that Mr. Lang was put upon the special duty of careful observation and warning, and if there is evidence in the case which satisfies you that Mr. Lang failed in this duty of observation and warning, and that Zamelsky was there by virtue of the invitation extended to him by Mr. Blanchard without Mr. Lang's knowing anything about it; and this failure was the cause of the accident; then Mr. Lang came short of his duty and his failure, if he did fail, was attributable to his employer, the Russell-Robinson Company. This conclusion would lead to a verdict for the plaintiff and against the Russell-Robinson Company; un-

less it should appear in your opinion that Mr. Zamelsky by his own negligence contributed to his own death."

This is the only conceivable theory upon which the verdict against the Russell-Robinson Co. can be sustained, and if the judgment was rendered because of this fact then the policy nevertheless covered the plaintiff for the loss sustained because the general management or guarding of the premises upon which the plaintiff was working is certainly an operation incidental to the business itself which was being carried on upon said premises.

But there is no denial in the entire case of the fact that the Blanchard Company was working on the wall which fell and killed Zamelsky and that the falling was the direct cause of his death and that the Blanchard Company was doing the work thereon under a written contract with the Russell-Robinson Co. which was offered in evidence.

The conclusion must, therefore, be reached that the prior proceedings as a matter of fact do not establish the defendant's contention that the wall was removed or demolished by the plaintiff.

Moreover the defendant's contentions will avail it nothing unless the Court holds that the doctrine of *res adjudicata* is applicable to the situation in hand because it is the application of this doctrine which the defendant by its indirect argument is attempting to obtain.

In other words it contends that a certain question was decided in the first proceedings which now becomes binding and effective upon the plaintiff in the present suit, and therefore estops it from offering further evidence as to the occurrence thereof.

It is respectfully insisted that the doctrine of *res adjudicata* does not apply.

> A matter is not to be regarded *res adjudicata* unless there be identity of the things sued for, of the cause of action, of the persons and parties, the quality of the persons for and against whom the claim is made and the judgment in the former action be so in point as to control the issue in the pending one.
>
> *Mershon* v. *Williams,* 63 Law 398.
>
> *Hoffmeir* v. *Trost,* 83 Law 358.
>
> *Clark Thread Company* v. *William Clark Company,* 55 Eq. 658.
>
> *Cromwell* v. *Sac County,* 94 U. S. 351.

In the case of *Steam Packing Co.* v. *Sickles,* 65 U. S. 333, the Court held,—

> "That where the record of the first suit does not show that the point involved was actually decided parol evidence is admissible to show the state of affairs that existed at the trial with a view to ascertain what was decided."

In *Schilstra* v. *Van Den Heuvel,* 90 Atl. 1056, the Court, on page 1058, says:

> "But where the second action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. In all matters therefore where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising upon a different cause of action the inquiry must always be as to the point or question actually

litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in any other action.

"The doctrine of this case was approved by this Court in Paterson *v.* Baker, 51 N. J. Eq. 59; 26 Atl. 324, and in Clark Thread Co. *v.* William Clark, 55 N. J. Eq. 658; 37 Atl. 599. See Hoffmeier *v.* Trost, 83 N. J. Law 358; 88 Atl. 221."

A plea of *res adjudicata* must show that the same point at issue on the present bill was at issue on the former bill, and that the title to relief is the same in the second bill as in the first. Schneider *v.* Schmidt, 92 Atl. 789.

See also *Brown, et als.,* v. *Marmaduke,* 93 Atl. 1023.

The defendant's contention must therefore fall for the two reasons above argued. First, because the defendant failed to establish it as a matter of fact; secondly, even if established the doctrine of *res adjudicata* is not applicable and the decision in the first case is not binding upon the plaintiff in the case at bar.

The loss sustained by the plaintiff was undoubtedly one which arose or resulted by reason of an operation incidental to the business described in the warranties of the defendant's policies, because it is undisputed that it arose and resulted by reason of an operation which was being performed for the plaintiff under contract.

Point III.

THE LOSS DID NOT ARISE BY REASON OF THE DEMOLITION OR WRECKING OF ANY STRUCTURE BY THE RUSSELL-ROBINSON COMPANY.

If the loss was occasioned by reason of and while the William L. Blanchard Company was performing an operation under contract for the Russell-Robinson Company then it is perfectly immaterial whether or not this work was a wrecking or demolition of any structure, because it does not conflict with the special operations stated in the policy but comes under the clause "ALL OPERATIONS PERFORMED FOR THE ASSURED UNDER CONTRACT," which would cover wrecking or demolition as long as said wrecking or demolition was not being done by the Russell-Robinson Company itself but was being done and performed for it by some one else under contract. "All operations" could mean nothing else and if the defendant had intended to exclude wrecking or demolition performed by some one else for the Assured it could have so stated in its policy. It is responsible for the language of the policy and must be bound thereby.

The work being performed on the premises in question at the time of the accident did not, however, consist of a demolition or wrecking of any structure.

The wording of this clause causes it to cover only situations where an entire structure is wrecked or demolished. This is what it says and what it must mean. If the defendant had intended otherwise it could have inserted after the word "structure" the words "or any part thereof." Having failed to do so and having is-

sued the policy knowing that it would be construed most favorably to the Insured and against itself it must be deemed to have intended that this clause should only cover the wrecking or demolition of a whole or entire structure.

In Webster's International Dictionary the third definition of the word "structure" is: "Something constructed or built, as a building, a dam, a bridge; esp. a building of some size; an edifice."

Demolition is there defined as: Act of demolition; destruction; utter overthrow,—opposed to construction; also formerly, Pl. ruins; remains.

Wreck is there defined as: To destroy; disable, or seriously damage; to bring wreck or ruin upon by any kind of violence; to overthrow, shatter, or destroy; to cause to suffer ruin; as, to wreck a train; to involve in a wreck; to ruin, damage or imperil by wreck, etc.

In the case at bar there was no intention of the Russell-Robinson Company or of the William L. Blanchard Company to demolish or wreck the premises known as 230 and 232 Market Street. The work which was being done upon the premises is particularly described in the contracts offered in evidence made between Russell-Robinson Company and the Real Securities Investment Company and Frederick G. Agens, which provide that the said contractor was to remodel and repair the said premises. The contract price for the work to be done upon 230 Market Street was $8,000 (p. 58), and for the work to be done on 232 Market Street $7,000 (p. 65).

The total amount of the contract made between the Russell-Robinson Company and William L. Blanchard Company for the doing of the

mason work on said premises, amounted to $5,700, for the brick work, plastering and partition work (p. 23, ll. 32 to 36). The cost of taking down the center wall, the falling of which caused the accident, and portions of the other walls which had been damaged by the fire, would have been $60 (p. 24, ll. 1 to 18). Approximately, therefore, only one-tenth of one per cent. of the entire contract was represented by the removal of the center wall and portions of the other walls which had been damaged.

The only contention of the defendant's which could therefore be substantiated is that part of the structure or structures upon which the plaintiff was working was wrecked or demolished and there is absolutely no evidence nor any finding that there was a wrecking or demolition of the structures upon which the plaintiff was working.

If the defendant's contention in regard to this phase of the case can be sustained and the wall which was removed can be called a structure, causing the work done thereon to come within the special operations, then a part of the wall would likewise be a structure within the defendant's definition, and a wrecking of any portion thereof would constitute an operation falling within the special clause excepted by the policy.

Under the defendant's contentions the taking apart or removing of a door frame, the ripping out of a window sill, the taking up of a floor or part thereof for the purpose of relaying one, the taking out of panels or wainscotting, the removing and repairing of a dumb waiter, would all come within the defendant's definitions and fall within the special clause not covered by the policy.

Under these circumstances the most fertile imagination cannot conceive of a situation which would be covered by the policy in question, because it is of common knowledge that in practically all carpentry work, excepting the actual work of new construction, some taking away of the old structure is absolutely necessary in order to instal the new or make a repair thereof.

It is respectfully contended that the work being done on the premises in question was not the demolition or wrecking of any structure within the meaning of that clause in the policy, but was a re-building, remodeling and repairing of said structures.

Point IV.

THE FINDING OF FACT BY THE TRIAL COURT THAT WILLIAM L. BLANCHARD COMPANY WAS ENGAGED IN DOING THE WORK ON THE WALL WHICH FELL AND CAUSED THE ACCIDENT AND NOT THE RUSSELL-ROBINSON CO. AND THAT THE WORK WAS NOT THE DEMOLITION OR WRECKING OF ANY STRUCTURE IS NOT REVIEWABLE.

This case was tried before the Judge without a jury by consent of counsel.

The Trial Court found as a matter of fact that the William L. Blanchard Company was engaged in doing the work on the center wall which caused it to fall and kill Zamelsky (pp. 135 and 136) and that the work being done upon said center wall was not the demolition or wrecking of any structure within the meaning of that clause in the policy (p. 136) but was a rebuilding, remodeling and repairing of the structure upon said premises and was incidental to

the business described in the warranties in the policy.

There is an abundance of evidence supporting these findings. Mr. Blanchard on page 22 testified that his company was doing the work of removing this wall and on page 23 again testifies to the same fact (line 12).

> Q And in the morning when you were there what were your men doing? A In the morning up until 11 o'clock we were removing material from the building; from 11 o'clock to 12 we were tearing down some of the brick on the center wall.

The witness, Tom Timbernano, testifies to the same effect (page 35, lines 2 to 10):

> Q Do you remember the accident at Market Street, 230 Market Street? A Yes, sir.
>
> Q Do you know Mr. Lang? A Yes, sir.
>
> Q Who was doing the work of tearing down the wall there? A Blanchard.

Line 18:

> Q How many men did you have with you tearing down the wall? A Two besides me.

There is also sufficient evidence to warrant the finding of the Court that the work being done was not the wrecking or demolition of any structure. This is fully argued and covered in this brief under Point III.

What would constitute a wrecking or demolition of any structure within the meaning of the defendant's policy of insurance would be a question of fact to be decided by a jury. *John Sommer Faucet Co.* v. *Commercial Casualty Co.*, 99 Atl. 342. The Trial Court having determined

that fact according to the evidence its finding is not reviewable.

Jersey City v. *Tallman,* 60 N. J. L. 239. On page 240:—

> "On a trial by a Judge without a jury it is his province to settle the facts according to his views of the evidence. Kalbfleisch *v.* Standard Oil Co., 14 Vroom 259. His findings of fact are not reviewable on error. It is only where the facts found do not support the conclusion that the judgment can be disturbed on error. Columbia, &c. Co. *v.* Geisse, 9 *Id.* 39, 580; City, &c. *v.* Hill, 10 *Id.* 555; Blackford *v.* Plainfield, &c., 14 *Id.* 438."

Point V.

THE DOCUMENTS AND TESTIMONY WERE PROPERLY ADMITTED.

It is difficult to understand the contention of the defendant that the judgment obtained by Rose Zamelsky, administratrix, against the Russell-Robinson Company was not properly proved. No objection to this effect was made at the trial of the cause.

Paragraph 10 of the complaint sets forth specifically the recovery of said judgment and the defendant in paragraph 10 of its answer admits the allegations of paragraph 10 of the complaint.

According to Rule 34 of the Supreme Court which says,

> "Every material allegation of fact in a pleading which is not denied by the adverse party is deemed to be admitted unless the latter avers that he has no knowledge or information thereof sufficient to form a belief,"

the judgment was admitted by the pleadings and consequently no further proof thereof was required.

The defendant objects to the admission of the evidence and documents upon the ground that the judgment record in the prior trial was the only competent evidence.

This is another attempt to apply the doctrine of *res adjudicata* which is not applicable for the reasons hereinbefore stated under Point II.

> A judgment recovered against a principal alone is as a general rule as against the surety evidence of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment.
>
> *De Greiff* v. *Wilson,* 30 N. J. Eq. 435.

Consequently the judgment record simply proved the recovery of the judgment itself and all other questions were left open, making it necessary for the plaintiff to prove the other facts by competent evidence in order to establish the liability of the defendant.

In *Boston & M. R. R.* v. *Brackett,* 53 Atl. 304, the Court on page 305 says:

> "But whatever questions are material to the recovery in the second suit which were not material to the recovery in the first suit and determined by it are open * * *. When it is not clear from the record upon what ground damages were recovered, if, upon some ground upon which the original suit proceeded, and upon which the judgment may have been rendered, the defendant would be liable while upon others they would

not, parol evidence is admissible to ascertain whether the facts in controversy have been so determined as to settle the rights of the parties in the second suit."

Steam Packing Co. v. *Sickles,* 65 U. S. 333.

This is exactly what was done in the case at bar, and it was necessary in order to prove the defendant's liability to offer in evidence the testimony taken and the documents which were admitted.

There was no error in their admission by the court.

Point VI.

THE DEFENDANT IS ESTOPPED FROM DENYING LIABILITY.

In the suit instituted by Rose Zamelsky, administratrix of the estate of Louis Zamelsky, deceased, against the Russell-Robinson Company to recover damages against said company, because of the death of the said Louis Zamelsky, caused by the falling of the center wall of the premises in question, the Russell-Robinson Company was represented and defended by the attorneys for the Aetna Life Insurance Company, the defendants in this suit, who conducted the litigation throughout, both on the original trial and on the hearing on the rule to show cause therein, which resulted in a final judgment being entered against the said company for the sum of $6,000. No notice was ever given by the Insurance Company to the Russell-Robinson Company that it in anywise disputed its liability upon the policy in question, and the first intimation that the Russell-Robinson Co. had of the

fact that the Insurance Company intended to dispute liability was after the entire litigation had been terminated, the judgment paid by the company and indemnification asked by the company of the Insurance Company.

Under these circumstances the defendant is estopped from denying its liability upon the policy.

In the case of *Sachs* v. *Maryland Casualty Co.*, 156 N. Y. S., page 419, it was held that where a policy of insurance indemnifying the Assured against loss from liability imposed by law for injuries to his employees subjected a claim for an accident on an action brought thereon to the exclusive control, defense and management of the insurer which undertook the defense of a suit and then abandoned it on the ground that the insured's agent had knowledge of the accident prior to the time when it was reported to the insurer, such insurer although the Assured unsuccessfully defended the suit could not in the latter's suit against it to recover the expense of the litigation assert that the claim was not covered by the policy since the insurer irrespective of a strict *estoppel in pais* cannot assume to operate under a provision in its favor and then repudiate it.

The case of *Humes Construction Co.* v. *Philadelphia Casualty Co.*, 79 Atl., p. 1, is exactly in point.

> Where the insurer under an employer's liability policy, permitting it so to do and with full knowlege of the facts took entire charge of a personal injury suit against insured and conducted the same, both in the trial and appellate courts, it could not thereafter claim that it was not liable for the judgment recovered on the ground that the

insured party was not an employee of insured within the meaning of the policy.

The Court on page 3 said:

"The defendant, however, without reservation, and with an apparent admission of liability in the premises, did take upon itself in behalf of this plaintiff the conduct of the defense of said suit, both in the superior court and before this court upon exceptions. When it was finally decided in this court that Driscoll was not an employee of the plaintiff, the defendant for the first time claimed that it was not liable to indemnify the plaintiff for its loss in consequence of the injuries to Driscoll. With the possibility that it might be liable to the plaintiff under the policy, the defendant, for its own purposes, desired to have complete control of the defense in the Driscoll suit. Because of the apparent admission of liability arising from the defendant's conduct, the plaintiff turned over to it such complete control of the plaintiff's interests in said suit, thus depriving itself of any advantage that might arise from a conduct of the matter by its own attorneys in its own way. The defendant cannot be permitted now to say that the plaintiff was not injured thereby, or that the travel and the result of the proceeding would have been the same if the plaintiff had taken charge of the matter for itself.

Such claims are based entirely upon conjecture. The law will not allow the defendant, without rendering itself liable to the plaintiff, to assume these inconsistent positions to the disadvantage of the plaintiff."

The same rule was followed in the case of *Employers' Liability Assurance Corporation of London* v. *Chicago and Big Muddy Coal and Coke Co.*, 141 Fed. 962.

"The policy of insurance indemnifies against loss from common law or statutory liability for damages on account of bodily injuries fatal or non-fatal, but exempts therefrom injuries occasioned by reason of the failure of the assured to observe any statute affecting the safety of persons, or any local ordinance, of which it has knowledge.

"But the policy also provides that upon the occurrence of an accident, immediate written notice, with the fullest information obtainable, shall be given to the assurer; and that upon any such suit being brought for damages on account of the accident, the assured shall not settle any claim except at his own costs; nor incur any expense, nor interfere in any negotiation or settlement, or in any legal proceeding, without the consent of the assured previously given in writing—the assurer undertaking at its own cost, to defend or settle actions in the name of the assured, unless the assurer shall elect to pay the assured the indemnity.

"What construction would be put upon the general contract of insurance, as modified by the exemption indicated, and how that might affect defendant in error's right to indemnify on the facts stated, had plaintiff in error elected not to take the Coats case out of defendant in error's control, we need not here determine; *for the act of the plaintiff in error, in taking control and dominion of the action for damages, and keeping such control and dominion until judg-*

ment was entered, without notice to the defendant in error that it did not consider itself liable under the policy—thereby taking from the defendant in error the control and dominion of the action—is such a construction of the policy, by contemporaneous acts, as estops plaintiff in error from denying liability, now that that action is at an end. To take any other view of this case would be to hold that the assurer could effectually tie the hands of the assured, in an action that might, or might not, on a close construction of the policy, be covered by the terms of the policy, and then, the cause being determined against it, insist that upon a closer reading of the policy, the assured ought to have been left to make its own defense, and at its own risk. This cannot be the law.''

It is respectfully insisted that the defendant by reason of having conducted the entire litigation in the prior suit on behalf of the defendant, having had complete and entire control and management thereof to final judgment, assumed liability and is now estopped from denying the same.

It is respectfully contended that no error was committed in the trial of this cause; that the court had jurisdiction thereof; that the loss sustained by the plaintiff was covered by the policy; that the evidence received was properly admitted; that the defendant is estopped at the present time from denying its liability and that the judgment recovered below should be affirmed.

Respectfully submitted,

LUM, TAMBLYN & COLYER,
Attorneys for Respondent.

RALPH E. LUM,
Of Counsel.

INDEX.

TESTIMONY FOR PLAINTIFF.

PLAINTIFF'S EXHIBITS.

Complaint.

(Served January 19, 1916.)

New Jersey Supreme Court.

ESSEX COUNTY.

CHARLES C. PILGRIM, Receiver of the Russell-Robinson Co., *Plaintiff,* *vs.* AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Action at Law.* *Complaint.*

Charles C. Pilgrim, Receiver of the Russell-Robinson Co., residing in the City of Newark in the County of Essex and State of New Jersey says that:

1. The Russell-Robinson Co. at the times herein alleged was a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in the City of Newark in the County of Essex and State of New Jersey, and maintained, conducted and carried on the business of a general contractor and builder.

2. On November 18, 1909, the defendant was and still is a corporation duly incorporated with power and authority, amongst other things, to insure and indemnify against loss or expense arising or resulting from claims for damages on account of bodily injuries or death.

3. For and in consideration of the sum of $360 the defendant on November 18th, 1909, executed to the said Russell-Robinson Co. a policy of insurance, agreeing thereby to indemnify the said Russell-Robinson Co. against any loss and expense to the extent of $5,000, resulting from claims upon the said Russell-Robinson Co. for damages on account of bodily injuries or death suffered by any person not employed by the said Russell-Robinson Co., by reason of the business described and conducted at the locations named in the warranties set forth in said policy, said policy covering a period of twenty-four months, beginning November 18th, 1909.

4. Under the warranties as contained in said policy the business of the said Russell-Robinson Co. was described as follows under the following heading:

"CLASSIFIED DESCRIPTION OF THE BUSINESS.

All operations incidental to the following business, in and during the continuance thereof.

Carpentry work in connection with buildings not exceeding four (4) stories in height (no grain elevator construction). Carpentry work in connection with buildings exceeding four stories in height (no grain elevator construction).

All operations performed for the assured under contract."

The location of said business under said warranties was given as follows:

"Newark, New Jersey and elsewhere in New England and Middle Atlantic States."

5. The said Russell-Robinson Co. subsequent to the issuance of the said policy entered into an agreement with the Securities Investment Co. and Frederick G. Agens, whereby the said Russell-Robinson Co. for a consideration agreed to remodel and repair the premises known and designated as Nos. 230 to 232 Market Street, Newark, New Jersey, which had been damaged by fire.

6. Subsequent to the making of the aforementioned contract the said Russell-Robinson Co. on or about the 2nd day of April, 1910, entered into a contract with William L. Blanchard Co., whereby the said William L. Blanchard Co. for a consideration agreed that it would perform and do all the mason work and plastering for the restoration of the said premises Nos. 230 to 232 Market street, in accordance with certain specifications.

7. On April 5, 1910, while the said William L. Blanchard Co. was engaged in an operation performed for said Russell-Robinson Co. under said contract, doing the work called for thereby, upon the premises known and designated as Nos. 230 to 232 Market street, a certain wall located thereon upon which the said William L. Blanchard Co. was working, fell and did strike one Louis Zamelsky who was then and there upon said premises, but who was not employed by the said Russell-Robinson Co., by reason of which the said Louis Zamelsky died on the same day from the wounds and injuries received from said falling wall.

8. Immediately after the occurrence of the accident the said Russell-Robinson Co. gave notice thereof to the defendant, as provided for in said policy, and otherwise performed all the

conditions of said policy on its part to be performed.

9. On June 10, 1913, in a cause then pending in our New Jersey Court of Chancery, wherein Frank P. Russell was the complainant and the said Russell-Robinson Co. was the defendant, the plaintiff herein, Charles C. Pilgrim, by an order made on that day by our said Court of Chancery was duly appointed and subsequently qualified as receiver of said defendant corporation, Russell Robinson Co., with all the powers granted to such a receiver, pursuant to the statutes in such case made and provided.

10. That Rose Zamelsky, the administratrix of the estate of the said Louis Zamelsky, after actual trial of the issue, as provided for by said policy, for the death of the said Louis Zamelsky, recovered a judgment against the said Russell-Robinson Co. in the New Jersey Supreme Court for the sum of $6,000.

11. The said Charles C. Pilgrim, the plaintiff herein, as receiver of the said Russell-Robinson Co., was forced to and did on the 30th day of March, 1915, pay to the said Rose Zamelsky, administratrix, the sum of $6,847.24, being the amount of said judgment with interest and costs thereon.

12. The defendant has not indemnified the plaintiff for said loss and expense.

Plaintiff demands $5,000 with interest thereon and costs.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Order Extending Time to Answer.

(Entered February 7, 1916.)

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CHARLES C. PILGRIM, Receiver of the Russell-Robinson Company, *Plaintiff,* *vs.* AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Action at Law.* *Order Extending Time.*

It is, on this February 5, 1916, ORDERED that the time of defendant in above cause to answer therein be and it hereby is extended until February 15, 1916.

Let the foregoing order be entered.

SAMUEL KALISCH,
J. S. C.

Entered February 7th, 1916 on motion of

COLLINS & CORBIN,
Attorneys of Defendant.

Answer.

(Filed September 6, 1916, as in time by consent.)

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CHARLES C. PILGRIM, Receiver of the Russell-Robinson Company, *Plaintiff,* *vs.* AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Action at Law.* *Answer.*

Defendant, AETNA LIFE INSURANCE COMPANY, a corporation organized under and by virtue of the laws of the State of Connecticut, having its principal office in the City of Hartford in that State and an office at No. 100 William street in this City, County and State of New York, says that:

FIRST DEFENSE.

1. It admits that the Russell-Robinson Co. was a corporation organized under and by virtue of the laws of the State of New Jersey and had its principal office in the City of Newark, in the County of Essex and State of New Jersey, but has no knowledge or information whether said Russell-Robinson Co. at all of the times mentioned in the complaint was a corporation and had an office as stated in paragraph 1 of the

complaint, and has no knowledge or information as to the business maintained, conducted and carried on by said Russell-Robinson Co.

2. It admits paragraph 2 of the complaint.

3. It admits paragraphs 3 of the complaint, but says that all of the provisions of said policy of insurance are not stated in the complaint.

4. It admits paragraph 4 of the complaint; but says that all of the warranties set forth in said policy of insurance are not stated in the complaint, one of said warranties by said Russell-Robinson Co. being that its business did not include the demolition or wrecking of any structure.

5. It admits paragraph 5 of the complaint, except that it says that the contracts mentioned in said paragraph were made by said Russell-Robinson Co. with Frederick G. Agens and Real Securities Investment Co., separately, on April 1, 1910, and that in and by said contracts said Russell-Robinson Co. agreed to provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by J. O'Rourke & Sons, architects, for the mason work, carpenter work, painting and metal ceilings included in the remodel and repair of the buildings known and designated as Nos. 230 and 232 Market St., in the City of Newark, Essex County, New Jersey, respectively.

6. It admits paragraph 6 of the complaint.

7. It admits that one Louis Zamelsky was killed on April 5, 1910, by the falling upon him of a wall on the premises mentioned in the complaint, but denies the other allegations of paragraph 7 of the complaint.

Answer.

8. It admits paragraph 8 of the complaint, except it denies that said Russell-Robinson Co. performed all the conditions of said policy of insurance on its part to be performed for the reason that said Russell-Robinson Co., at the time of the death of said Louis Zamelsky, was engaged in certain mason work or in the demolition or wrecking of certain structures on the premises mentioned in the complaint, contrary to and in violation of the warranties by said Russell-Robinson Co. contained in said policy of insurance.

9. It admits paragraph 9 of the complaint.

10. It admits paragraph 10 of the complaint, except it says that it appeared upon said trial that the claim of said Rose Zamelsky as administratrix of the estate of said Louis Zamelsky against said Russell-Robinson Co. was not a claim against which the defendant agreed to indemnify said Russell-Robinson Co. in and by said policy of insurance and said judgment recovered on said claim by said Rose Zamelsky, administratrix as aforesaid, was not a judgment recovered according to the provisions of said policy of insurance.

11. It has no knowledge nor information of the facts alleged in paragraph 11 of the complaint, sufficient to form a belief.

12. It denies that it has not paid plaintiff the expense and costs of the litigation arising out of the claim of Rose Zamelsky as administratrix of Louis Zamelsky against said Russell-Robinson Co., but admits the other allegations of paragraph 12 of the complaint.

Answer.

SECOND DEFENSE.

1. The claim of Rose Zamelsky as administratrix of the estate of Louis Zamelsky upon said Russell-Robinson Co. for damages for the death of said Louis Zamelsky, upon which she recovered a judgment against said Russell-Robinson Co., as mentioned in the complaint, was a claim upon said Russell-Robinson Co. for damages on account of the death of a person suffered, or alleged to have been suffered, by reason of the demolition or wrecking of certain structures by said Russell-Robinson Co.

2. The judgment recovered by said Rose Zamelsky as administratrix of the estate of said Louis Zamelsky against said Russell-Robinson Co. in the New Jersey Supreme Court, mentioned in the complaint, was on a claim upon said Russell-Robinson Co. for damages on account of the death of a person suffered, or alleged to have been suffered, by reason of the demolition or wrecking of certain structures by said Russell-Robinson Co.

3. Defendant in and by the policy of insurance mentioned in the complaint did not agree to indemnify said Russell-Robinson Co. against loss or expense arising or resulting from claims upon it for damages on account of the death of a person suffered, or alleged to have been suffered, by reason of the demolition or wrecking of any structures by said Russell-Robinson Co.

THIRD DEFENSE.

1. On April 1, 1910, said Russell-Robinson Co. entered into a contract with Frederick G. Agens and another contract with Real Securities Investment Company, a corporation, wherein and whereby said Russell-Robinson Co., for certain

considerations therein expressed, undertook and agreed to provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by J. O'Rourke & Sons, architects, for the mason work, carpenter work, painting and metal ceilings included in the remodel and repair of the buildings known and designated as Nos. 230 and 232 Market street in the City of Newark, Essex County, New Jersey, respectively.

2. In and by the specifications for the mason work which were a part of said contracts it was provided that the west wall, the center wall supported on the steel beams and iron columns and the rear wall of second and third story, east building and third story west building, should be carefully taken down, and rebuilt by said Russell-Robinson Co.

3. The claim of Rose Zamelsky as administratrix of the estate of Louis Zamelsky upon said Russell-Robinson Co. for damages for the death of said Louis Zamelsky, upon which she recovered a judgment against said Russell-Robinson Co., as mentioned in the complaint, was a claim upon said Russell-Robinson Co. for damages on account of the death of a person suffered, or alleged to have been suffered, by reason of the doing of said mason work by said Russell-Robinson Co.

4. The judgment recovered by said Rose Zamelsky as administratrix of the estate of said Louis Zamelsky against said Russell-Robinson Co. in the New Jersey Supreme Court, mentioned in the complaint, was on a claim upon said Russell-Robinson Co. for damages on account of the death of a person suffered, or alleged to have

been suffered, by reason of the doing of said mason work by said Russell-Robinson Co.

5. Defendant in and by the policy of insurance mentioned in the complaint did not agree to indemnify said Russell-Robinson Co. against loss or expense arising or resulting from claims upon it for damages on account of the death of a person suffered, or alleged to have been suffered, by reason of the doing of any mason work by said Russell-Robinson Co.

FOURTH DEFENSE.

1. Defendant repeats paragraph 1, 2 and 3 of the third defense.

2. The judgment recovered by Rose Zamelsky as administratrix of the estate of said Louis Zamelsky against said Russell-Robinson Co. in the New Jersey Supreme Court, mentioned in the complaint, was not upon any claim against said Russell-Robinson Co. for damages on account of bodily injuries or death accidentally suffered, or alleged to have been suffered, by any person or persons not employed by said Russell-Robinson Co. by reason of any business described as carpentry work in connection with buildings not exceeding (4) stories in height or carpentry work in connection with buildings exceeding four (4) stories in height, or by reason of any operations performed for said Russell-Robinson Co. under said contract.

FIFTH DEFENSE.

This court is without jurisdiction in this suit for that the same is of a civil nature at common law where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and is between citi-

zens of different states, and can be fully determined between them and said suit was duly and regularly removed by defendant to the District Court of the United States for the District of New Jersey by the making and filing of a petition, duly verified, in said suit in this court before defendant was required by the laws of the State of New Jersey, or by the rule of this court, to answer or plead to the complaint of plaintiff, for the removal of said suit to said District Court, and the making and filing therewith of a bond by defendant to plaintiff with good and sufficient surety, for its entering in said District Court, within thirty days from the date of filing said petition a certified copy of the record in said suit, and for paying all costs that might be awarded by the said District Court if said District Court should hold that said writ was wrongfully or improperly removed thereto, and also for its appearing and entering special bail in said suit if special bail was originally requisite therein, which petition and bond were duly accepted by this court and an order made by it for the removal of said suit to said District Court, due notice of said petition and bond for removal having been given by defendant to plaintiff prior to filing the same, and a certified copy of the record of said suit was entered in said District Court within thirty days from the date of filing said petition.

COLLINS & CORBIN,
Attorneys of Defendant.

Reply.

(Filed September 8, 1916.)

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CHARLES C. PILGRIM, Receiver of the Russell-Robinson Co., *Plaintiff*,	*Action at Law.*
vs.	*Reply to Defendant's Answer.*
AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	

The plaintiff by way of reply to the defendant's answer says:

REPLY TO FIRST DEFENSE.

1. The plaintiff by way of reply to the fourth paragraph of the first defense denies that one of the warranties by the said Russell-Robinson Co. in the policy therein referred to was that its business did not include the demolition or wrecking of any structure.

2. The plaintiff by way of reply to the eighth paragraph of said defense denies that at the time of the death of said Louis Zamelsky the said Russell-Robinson Co. was engaged in certain mason work or in the demolition or wrecking of certain structures on the premises mentioned in the complaint, contrary to and in violation of the warranties by said Russell-Robinson Co. contained in said policy of insurance.

Reply.

3. The plaintiff by way of reply to the tenth paragraph of said defense denies all of the allegations therein contained, excepting as alleged in the plaintiff's complaint.

REPLY TO SECOND DEFENSE

1. The plaintiff denies the allegations contained in the first, second and third paragraphs of the second defense excepting as the same are alleged in the plaintiff's complaint.

REPLY TO THIRD DFFENSE

1. The plaintiff denies the allegations contained in paragraphs three, four and five of the third defense excepting as the same are alleged in the plaintiff's complaint.

REPLY TO FOURTH DEFENSE.

1. The plaintiff makes the same reply to paragraph one of the fourth defense as it made to paragraphs one, two and three of the third defense.

2. The plaintiff denies the allegations contained in the second paragraph of the fourth defense.

REPLY TO FIFTH DEFENSE. (First reply.)

1. This plaintiff denies that this court is without jurisdiction but admits that this suit is of a civil nature and that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars and is between citizens of different states.

2. All of the other allegations contained in the fifth defense this plaintiff hereby denies.

Reply.

SECOND REPLY.

1. On February 11th, 1916, an order was made by this court removing this cause from this court to the United States District Court for the District of New Jersey.

2. On March 3rd, 1916, the attorneys for the plaintiff herein served a notice of motion on the attorneys for the defendant that on March 13th, 1916, at the United States District Court for the District of New Jersey, to be holden at Newark, New Jersey, they would make an application for an order remanding said cause from the United States District Court to the New Jersey Supreme Court, said application being made upon the ground that at the time the order for removal of said cause was made from the New Jersey Supreme Court to the United States District Court, the time within which such an application or order could have been made had elapsed, and the defendant was therefore not entitled to have said cause so removed.

3. Said motion was duly argued before Judge Rellstab of the said United States District Court on the 13th day of March, nineteen hundred and sixteen, and upon request of counsel for the defendant leave was given both counsel to submit briefs.

4. On the 14th day of August, 1916, the said Judge Rellstab filed an opinion on said motion to remand, holding that the motion to remand should be granted.

5. On August 22nd, 1916, a substituted opinion was filed by Judge Rellstab, holding that the motion to remand said cause should be granted.

6. On August 22nd, 1916, an order was made by the United States District Court for the Dis-

Reply.

trict of New Jersey remanding this cause to the Supreme Court of the State of New Jersey from whence it was removed.

7. A certified copy of said order remanding said cause from the United States District Court to this court was filed with the clerk of this court on August 26th, 1916.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

Testimony.

NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CHARLES C. PILGRIM, Receiver,

vs.

AETNA LIFE INSURANCE COMPANY.

Transcript of shorthand notes of testimony, and so forth, taken in the above stated cause, upon the trial thereof, at the Court House, Newark, N. J., on January 12, 1917.

By consent the case is tried before Hon. Nelson Y. Dungan, Judge, without a jury.

Lum, Tamblyn & Colyer for plaintiff.

Collins & Corbin, Mr. Bain for defendant.

Mr. Bain. Before the plaintiff proceeds, I desire to object to any further proceedings in this suit before this court on the ground stated in the fifth defense in the answer, which is that the court is without jurisdiction (reading same). I now move for appropriate judgment by this court to sustain objection, and in support of that motion I will offer a certified copy of the record as filed by the clerk of the United States District Court.

Same marked Exhibit D. 1.

Mr. Lum. I offer in evidence a certified copy of the opinion of Judge Rellstab, and a certified copy of the order remanding.

Same marked Exhibit P. 1.

(Argued.)

The Court. The motion will be denied.

An exception to this ruling is noted by the defendant as ground of appeal.

Mr. Lum opened on behalf of the plaintiff.

Mr. Lum. I offer in evidence the policy of insurance.

Same marked Exhibit P. 2.

Mr. Lum. I offer in evidence the contracts between the Russell-Robinson Company and Frederick G. Agens, and between the Russell-Robinson Company and Real Securities Investment Company.

Mr. Bain. I object to the admission of these contracts upon the ground that the claim of Rose Zamelsky against Russell-Robinson, on which judgment was entered, and for the recovery of part of which judgment this suit was brought, has been reduced to a judgment, and the best evidence, and, in fact, the only evidence of that claim, is the record of the judgment.

Mr. Lum. I will withdraw the offer at this time.

Mr. Lum continues the opening.

Mr. Bain opened for the defendant.

Mr. Lum. I think it would save time to argue the matter now, and then go on with the testimony later, rather than offer testimony now and have the argument later.

The Court. Since it is before the Court, and not before a jury, I should prefer to have it done that way.

Mr. Lum. I will offer in evidence the contracts marked P. 3 and P. 4 for identification.

Mr. Bain. I object to these contracts upon the ground that the claim of Rose Zamelsky against the Russell-Robinson Company has been reduced to judgment, and that the record of the judgment is conclusive evidence of that claim at this time. I also object to these contracts upon the ground that there is no evidence they form any part of the proof upon which Rose Zamelsky recovered judgment against the Russell-Robinson Company. I object to the contracts upon the further ground that the claim upon which Rose Zamelsky recovered judgment against Russell-Robinson Company cannot be changed or altered, nor can the judgment on that claim be changed or altered by any evidence offered at this time. Also upon the ground that no evidence can now be offered to prove the claim upon which Rose Zamelsky recovered judgment against the Russell-Robinson Company.

(Argued.)

The Court. I would suggest that as the testimony is principally documentary the Court should receive it, and if, upon consideration, the Court should conclude that it is improperly received, it can be stricken out.

(The suggestion is consented to by counsel for the respective parties.)

The Court. It may be understood that this objection shall go to the contracts of the Russell-Robinson Company and William L. Blanchard Company, and to all testimony under those contracts.

Mr. Bain. And to all testimony tending to prove the claim of Rose Zamelsky against Russell-Robinson Company.

The Court. Yes, I should think your objection might be considered as going to all that testimony, and then any portion of it which the Court feels should not be considered will be stricken out. The contracts will be admitted subject to be stricken out hereafter by the Court, if found not to be properly applicable to the issues in this suit.

Said contracts marked Exhibit P. 3 and Exhibit P. 4.

Mr. Lum. I offer in evidence the charge of Judge Adams to the jury in the case of Zamelsky against Russell-Robinson Company and William L. Blanchard Company, delivered on May 20, 1913, as found in the printed record.

The Court. It will be admitted, subject to be stricken out.

Same marked Exhibit P. 5.

Mr. Bain. I have an additional objection to that, that the pleadings are controlling, and if those pleadings sufficiently disclose the cause of action on which she obtained judgment against Russell-Robinson Company, then this charge is not admissable.

Mr. Lum. I offer in evidence the specifications between Russell-Robinson Company and Blanchard Company, being the specifica-

tions admitted in the suit of Zamelsky against Russell-Robinson Company, and marked Exhibit D. 3 in that case.

Mr. Bain. I object to these specifications. I will not object to a printed copy of the specifications being offered in lieu of the originals, but I do object to the admission of the specifications as the specifications in the contract between Russell-Robinson and Blanchard Company, on the ground there is no evidence that the specifications offered are the specifications in that contract.

The Court. That involves, then, going into the evidence in that case.

Mr. Bain. If it is material to consider that contract.

Mr. Lum. Russell-Robinson, whom Mr. Bain defended, admitted that those were, that is, he brought them in.

The Court. They were offered by—

Mr. Lum. By the plaintiff, Zamelsky, and Zamelsky tried to get them in through Mr. Blanchard, but unsuccessfully; later the offer was renewed, and Mr. Bain's client identified them sufficiently, so they did come in; that was clearly *res adjudicata;* they were considered and printed, and are part of the record; so the only question now, it seems to me, is as to the propriety of it.

The Court. They will be admitted subject to Mr. Bain's objection.

Same marked Exhibit P. 6.

WILLIAM L. BLANCHARD, sworn for the plaintiff.

Direct examination by Mr. Lum.

Q Mr. Blanchard, do you remember the contract work at 230-232 Market street?

Mr. Bain. I object to any testimony by Mr. Blanchard upon this ground, in addition to the objection I have raised to the documentary evidence, that no parol testimony can be offered to explain the case upon which Rose Zamelsky recovered judgment against Russell-Robinson Company, or to explain that claim, or to change the claim upon which Rose Zamelsky recovered against Russell-Robinson Company, as shown by that record.

The Court. Subject to that objection the testimony will be received.

A I do.

Q What work, if any, did your company do with reference to a wall there, center wall? A Built up a new wall between the center lines of the two buildings.

Q In order to do that was there any removal work necessary? A The first floor and basement had been taken out before the fire and they set up steel columns and beams; the two properties were one on the first and second floor, or the basement and second floor, the second and third floor were a wall that had been damaged by fire, and the steel beams on which it rested were all twisted and out of shape.

Q And who did the work of removing this center wall, who had the contract for it? A The brick part of it the Blanchard Company had.

Q Were you personally familiar with that work? A Yes, sir.

Q It was under your supervision? A It was, yes, sir.

Q Do you remember the day of the Zamelsky accident? A I do.

Q Were you at the premises that day? A I was not there the moment the accident happened; I was there that day, yes, sir, before and after.

Q And in the morning when you were there what were your men doing? A In the morning up until eleven o'clock we were removing material from the building; from eleven o'clock to twelve we were tearing down some of the brick on the center wall.

Q Who gave instructions to your men as to the method and way of tearing down that brick? A I did personally.

Q And were they at it when you left? A They were, yes, sir.

Q When did you hear of the accident? A About quarter of three, I think, that afternoon.

Q And did you go to the premises then? A I did, yes, sir.

Q What did you see as to that wall? A Well, there was more of it tore down than there was when I left.

Q Now what was the total amount of your contract in dollars? A Why, if I remember correctly, $5,500, $5,700 for the brick work, plastering, partition work.

Q Were there other walls besides the center wall to be taken down there? A There were a few walls that were damaged where the beams were burned and fallen out, and possibly pulled out four or five inches.

Q What proportion did the wall, taken down, or to be taken down under your contract, bear to the entire wall space, surface?

Objected to as immaterial.

Mr. Lum. I am offering this simply for the purpose of laying the basis for argument that this was not a demolition or wrecking.

The Court. It will be received subject to objection.

A Why, the cost would be about two to three laborers for three or four days at the rate of about $3 a day on a contract of $5,500 to $5,700.

Q Give it to us in dollars? A Why, $50 or $60.

Q Were or were you not engaged in the demolition or wrecking of any structure?

Objected to.

Objection sustained.

An exception to this ruling is noted by the plaintiff as ground of appeal.

Q Just state very briefly what you found on your return to the building. A Why, I found—

The Court. He said he found more of the walls down than when he left.

Q (*By the Court.*) Was there anything else you found? A The police were on guard there, and I learned of the accident.

Cross examination by Mr. Bain.

Q How much of the wall which fell upon Zamelsky was taken down? A Why, I didn't see any of the wall on Zamelsky, they had taken the bodies away before I arrived there.

Q On the day that Zamelsky was killed was the entire center wall from the basement to the roof of the building taken down? A Oh, no.

William L. Blanchard, cross.

Q In the course of the restoration of the premises mentioned by you was that entire wall taken down? A Yes, sir, the center wall.

Q How was the wall taken down? A By pushing over into the cellar of No. 232 where the beams were out entirely from the cellar to the roof.

Q Pushing with what? A With ladders and planks, set up on this side of the wall and push it over in sections.

Q The wall was not taken apart brick by brick, but pushed down in great portions? A Pushed down in portions, yes, sir.

Q Did Russell-Robinson Company have any men at work on the premises mentioned by you at the time of the death of Zamelsky? A They did.

Q How many? A Oh, I can't recollect just now, I think four or five.

Q What were they doing, that is, the men of the Russell-Robinson Company? A They were levelling up floor beams, taking out wall beams, taking care of the woodwork.

Q Was there any carpenter work being done upon the building at the time Zamelsky was killed? A Yes, sir.

Q What was it? A Removing of some beams to level floors, and picking out burned sections of beams that were in this center wall.

Q Was not that all work incident to the taking down of the wall? A No, sir, we never handle anything in the wood line.

Q Well, was not the taking—or did not the taking out of the wood from the wall, ends of beams, result in throwing down the wall, or part of it? A No, sir, the wall was thrown down purposely.

Q Didn't you testify on the trial of the case of Rose Zamelsky against Russell-Robinson Company that the result of taking out some of the wood by men of the Russell-Robinson Company resulted in throwing some of the bricks of the wall down? A Positively no.

Q I call your attention to this question which was asked of you upon the trial of the case of Rose Zamelsky against Russell-Robinson Company, and ask you whether you gave the answer which I read: "Q. Now you say Mr. Lang took his men upstairs, where had they been working? A They had been lowering old lumber from the vestibule and the interior parts, what they could reach, out to the street. Q Where upstairs did they go, where did you take them? A Went upstairs tearing off the burned parts of wood, throwing the walls, pushing them down into the cellar 50 feet back from Market street." Do you remember giving that testimony? A I never gave any testimony that Russell-Robinson's men were throwing walls.

Q Did you give the testimony which I just read to you? A It doesn't sound as though I gave anything worded that way.

Q Will you swear now that you did not give such testimony? A I will swear that I never said Russell-Robinson's men there threw any brick work; we called them in to assist us with the ladder to push the wall over that caused the accident.

Q I call your attention to this testimony given by you in the trial of the case of Rose Zamelsky against Russell-Robinson Company: "Q Were there any of Russell-Robinson's men working on this wall while your men were working on it? A Well, I think so, taking out

wood." A Yes, sir, they were taking out the wood, that is what I said right along, we were taking out the brick.

Q I call your attention to this testimony given by you at the trial of that case: "Q Now, was this wall taken down by your men alone, or with the assistance of men employed by the Russell-Robinson Company? A Russell-Robinson had the woods to remove, the removal of the wood would have thrown the whole wall without me having any men there." Did you give that testimony? A Yes, sir.

Q Did you also give this testimony: "Q I am asking you now whether they assisted in tearing that wall down? A They done their part, which would naturally— Q Did they assist you in— A They were not compelled to assist me. Q Did they assist you? I am asking you. A I will answer in my way. Q (*By the Court.*) The question is merely as to the fact. They either did or did not. A The taking out of the wood would throw the wall down without me being there." Did you give that testimony? A I did, yes, sir.

Q Did you also give this testimony in that case: "Q Who else was working on the wall besides your men? A Russell-Robinson's men and my men." Did you give that testimony? A Yes, sir.

Q Did you also give this testimony at the trial of that case? "Q Well, you just said that you did not know whether they did or not? A If you want to get out a diagram or plan of it and specify any one piece, I will tell you. My men handled some wood, Russell-Robinson's men handled some brick. Q Russell-Robinson's men handled all the brick? A If they were in the

way of their wood—no. Q They were on the wall with your men, were they not? A No, they were off at a distance, working at this wall with pries and ropes and— Q To pull it down? A Yes." Did you give that testimony? A Yes, but the way you read that you read it as though it was Russell-Robinson's men; it was my men had the ropes and pries on the wall, and Russell-Robinson's men taking the wood from the wall.

Q I will now read you the question preceding that testimony I just read: "Q Who else was working on the wall besides your men? A Russell-Robinson's men and my men." The next question is: "Q What work were they doing on the walls? A They were taking the wood out of the wall." A Yes, sir.

Q Who did "they" refer to? A Russell-Robinson taking the wood out of the wall and us taking the brick out of it.

Q Russell-Robinson's men did handle some brick in the wall? A Naturally, one or two, but no tearing down.

Q "Q Russell-Robinson's men handled all the brick? A If they were in the way of their wood—no. Q They were on the wall with your men, were they not?" Were not the men referred to in that question Russell-Robinson Company men? A I don't think that is fair for you to pick out those parts, now, if the bricks were in the way—

The Court. One minute, Mr. Blanchard.

Witness. I know, but I can't give an intelligent answer to these; he picks out parts.

The Court. If the part read is not sufficient for you to identify it as your testi-

mony you can say that you don't know; if you know you did not give such testimony, you can say "No"; if you know you did give such testimony you can say "Yes"; you have three alternatives there.

Witness. I never answered "No"; to the question he just asked me about Russell-Robinson's men not handling brick; if it was on their wood they would naturally throw it aside.

Q Do you say Russell-Robinson's men did throw out some of the brick wall? A I don't—they took out the woodwork that threw down the wall, if there was any wood in there.

Q Didn't you testify that the result of taking out the wood was the result of throwing down some of the wall? A No, I said it would if the beams was taken out without pulling down the wall, it would act as a lever and throw the whole wall down.

Q I asked you whether you did not give this testimony? "Q Russell-Robinson's men handled all the brick? A If they were in the way of their wood—no. Q They were on the wall with your men, were they not? A No, they were off at a distance, working at this wall with pries and ropes and— Q To pull it down? A Yes." Q Did you give that testimony? A Yes, that is in regards to my men, but you are reading it as though it was Russell-Robinson's men.

Q Didn't that testimony refer to Russell Robinson's men? A It did not on my part, no, sir, not in regards to removing the brick wall.

Q Mr. Blanchard, was not the first question I have just read to you whether Russell-Robinson's men had handled all the brick? A They didn't handle all the brick.

Q Wasn't that the question? A I don't know what it is.

Q I will read you the question: "Russell-Robinson's men handled all the brick?" Now, do you recall the question? A I don't, no, sir.

Q The next question is as follows: "They were on the wall with your men, were they not?" The men referred to by you were the men of Russell-Robinson, weren't they? A I couldn't tell you, the book is there, and I have given my testimony, and if you will pass me the book I will tell you what I testified; I can't put the words together as you are trying to ask me the question, they are not familiar terms with me—

The Court. You may assume that what Mr. Bain is reading is in the book. Mr. Bain's reputation and character as a lawyer moves me to say that you may assume that what he reads you is in that book.

Witness. The question is, were the men on the wall; the wall was a middle pier wall, and he is asking me questions that a man with the intelligence I have couldn't answer them in a thousand years.

Q Who was in charge of the Russell-Robinson men? A Charles Lang.

Q What was his position? A Foreman carpenter.

Q How many men did he have working? A Five or six.

Q How many men did you have working on the premises at the time? A Two or three.

Q When you went away from the premises who looked after it? A Mr. Charles Lang.

Q Did he look after the entrance door downstairs while you were away? A He so testified he did.

Q Did he have a sort of general charge of the premises while you were away from them? A Yes, sir.

Q Now, Mr. Blanchard, will you explain exactly what the Russell Robinson Company's men were doing at the time Zamelsky was killed on the premises? A I only have hearsay what they were doing; they were assisting my men to push with a ladder a piece of section of wall over into the vacant cellar.

FRANK P. RUSSELL, sworn for the plaintiff.

Direct examination by Mr. Lum.

Q What is your business ? A Contractor, carpenter.

Q Were you an officer of the Russell-Robinson Company in 1909? A Secretary and treasurer.

Q You were familiar with the contracts offered in evidence on the work at 230 Market street? A Yes, sir.

Q And you know the contract made with Mr. Blanchard? A Yes, sir.

Q And that covered what?

Mr. Bain. I object to the testimony by Mr. Russell on the same grounds I objected to the testimony of Mr. Blanchard, and upon the further ground that the contracts, if admissible at all, speak for themselves.

Mr. Lum. You realize the fact that the contract with the Blanchard Company has not been found.

Mr. Bain. If the contract between Russell-Robinson Company and the Blanchard Company is admissible at all, I will not ob-

ject to your using the copy found in the printed book.

Mr. Lum. I offer in evidence the contract between the Russell-Robinson Company and the Blanchard Company found on page 266 of the printed book.

Mr. Bain. I object to it.

The Court. It will be admitted subject to objection.

Same marked Exhibit P. 7.

Q You say you were familiar with the contract P. 7? A Yes, sir.

Q What, if anything, did your company have to do with the tearing down of any wall?

Mr. Bain. I object to that, the contract speaks for itself.

Mr. Lum. It is merely introductory.

The Court. I will overrule the objection.

An exception to this ruling is noted by the defendant as ground of appeal.

A Nothing.

Q And Mr. Lang was your foreman? A Yes, sir.

Q And was he given any instructions with reference to doing any work on this wall that you know of ? A None whatever.

Cross examination by Mr. Bain.

Q Were you at the premises upon which Louis Zamelsky was killed on the day he was killed? A Not for probably an hour and a half after the accident.

Q Have you any personal knowledge of what your men were really doing at the time Zamelsky was killed?

The Court. I suppose you assume he had not, when he was not there.

Q (*By the Court.*) Had you been there before that day? A I was there early in the morning.

Q (*By Mr. Bain.*) What were your men doing when you were there? A They were pulling the woodwork around some of the window openings. The building had been damaged by fire and there was small pieces of woodwork had to be removed so as to take measurements for new window frames; we had just a foreman and a small boy there; the foreman built a fence and kept the public out.

Q Did you ever see your men taking out burned beams, anything of that sort, on the premises? A Not personally.

Q You were not required to do that under your contract for the carpenter work?

Mr. Lum. The contract speaks for itself.

The Court. Is that contract in evidence?

Mr. Bain. I am not sure whether the contract that has been offered was a complete contract, or not.

Mr. Lum. The same as the one used before.

Q (*By the Court.*) Was there any other contract than the one? A The original contract between the owner and Russell-Robinson Company for the work, that specification and contract, was given to the Aetna Insurance Company.

Q (*By Mr. Bain.*) Were there separate specifications for the carpenter work under your contract with the owners of 232? A Russell-

Robinson had what we call a general contract, and the different kinds of work were mentioned one after the other through the specifications.

Q Were there separate specifications for the carpenter work from the specifications for the mason work? A I think general specifications separated for the mason work, and then carpenter work, and then referred to painting, plumbing and so forth.

Q The specifications as to the carpenter work were separate and distinct from the specifications as to the mason work, is that true? A In rotation, yes, sir.

Q Do I understand you to say that the specifications for the carpenter work were a part of this contract between you and the owners of the premises mentioned? A As far as I know.

Q Which has been offered in evidence? A Yes, sir.

Mr. Bain. I make the further objection that the entire specifications have not been produced.

Witness. They were all given to the Aetna Company after the accident.

By Mr. Lum.

Q Have you any other specifications other than those produced here? A No, sir.

Q And have you ever seen them since you gave them to this defendant? A I have never seen them since that day.

TOM TIMBERNARO, sworn for the plaintiff.

Direct examination by Mr. Lum.

Q You are employed by Mr. Blanchard? A Yes, sir.

Tom Timbernaro, cross.

Q And were in 1910? A Yes, sir.

Q Do you remember the accident at Market street, 230 Market street? A Yes, sir.

Q Did you know Mr. Lang? A Yes, sir.

Q Who was doing the work of tearing down the wall there? A Blanchard.

Mr. Bain. I object to that, if it is intended to be a question as to operation under the contract.

The Court. I suppose he means who was actually doing it?

Mr. Lum. That is all.

Q Did you see Mr. Lang there? A Yes, sir.

Q Did he touch the wall at all? A No.

Q What was he doing? A Tearing down the woodwork.

Q And how many men did you have with you tearing down the wall? A Two besides me.

Cross examination by Mr. Bain.

Q How many men did Mr. Lang have under him? A About five or six men.

Q At the time the center wall fell what were Mr. Lang's men doing? A Well, he take down the woodwork, tear down the woodwork.

Q Mr. Lang's men were working on the wall, were they, when it fell? A No.

Q How close were they to the wall? A Well, it was about four or five feet from.

Q Did you testify on the trial of the case of Rose Zamelsky against the Russell-Robinson Company and Blanchard Company in this building? A I don't understand what you mean.

Q Did you go on the witness stand the same as you are on in another case? A Yes.

Q Brought by the wife, I think, of Louis Zamelsky? A I was, yes.

Q And don't you remember when you testified before that you were asked this question: "Q And where was the work going on, all on the third floor?" and you answered, "A Yes, I was working right at the nose point, and there was a man working beside me and there was a woodpile on this wall, and on the front he had a wood cell, you know, and I seen it is all open, and he throwed down those things, and I throw down this wall, so we were together." Do you remember that? A We wasn't together, we was apart, I was working on brick while he was working on woodwork.

Q Do you remember saying this when you testified before, you were asked whether there were not a lot of men on the building, and you said no, and then you were asked "Only two men?" and you answered, "I had two men. And I got two men and Charlie Lang, he helped me on the wall, too;" do you remember that? A Well, I say once my men he brought loose brick down, and I had one, me, too, I had ladder in my hand, I tried to shift that wall, and I tell Mr. Lang he help me out, and he came against, he helped me out a little.

Q Mr. Lang helped you throw down the wall, is that right? A Yes.

Mr. Lum. That is our case.

RECESS.

Mr. Bain. I offer in evidence a certified copy of the record, on behalf of the defendant, a certified copy of the judgment record in the case of Rose Zamelsky, administratrix, against Russell-Robinson Company.

Same marked Exhibit D. 2.

Motion for Judgment.

Mr. Bain. I move for judgment in favor of the defendant upon the ground that it does not appear that the claim of Rose Zamelsky, administratrix of Louis Zamelsky, against the Russell-Robinson Company was by reason of the performance of any operation by the William L. Blanchard Company for the Russell-Robinson Company under any contract. Also upon the ground that it appears the claim of Rose Zamelsky, administratrix, against the Russell-Robinson Company, and the judgment recovered on that claim, were by reason of the demolition or wrecking of a structure by that company. Also upon the ground that it appears that the claim of Rose Zamelsky, administratrix against the Russell-Robinson Company, and the judgment upon that claim, were by reason of the doing of certain mason work by the Russell-Robinson Company. Also upon the ground that it appears that the claim of Rose Zamelsky and the judgment recovered upon that claim were not by reason of any of the businesses mentioned in the warrenties of the policy of insurance. I also move to dismiss the action on the ground the Court has no jurisdiction, on the grounds stated in urging that objection heretofore.

The Court. This motion will be held, and will be considered at the time the entire case is decided.

Mr. Lum. It is admitted by Mr. Bain that the judgment recovered has been paid by Mr. Pilgrim.

Exhibit P. 1.

Mr. Bain. You also concede the defendant has paid all expenses of litigation.

Mr. Lum. We do.

(Argued.)

Decision reserved.

Exhibit P. 1.

Opinion of District Judge Rellstab on motion to remand.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON COMPANY, *vs.* AETNA LIFE INSURANCE COMPANY.	*Action at Law.* *On Motion to Remand.*

Lum, Tamblyn & Colyer, for plaintiff.
Collins & Corbin, for defendant.

Opinion.

RELLSTAB,
District Judge.

This suit was begun in the New Jersey Supreme Court, Rule 76 of the court, formerly 55 of "The Practice Act of 1912" of New Jersey (N. J. P. L. 1912, p. 377), requires that the an-

swer of the defendant be filed within 20 days after service of the summons. Rule 217, formerly 3 of said Practice Act, authorizes the making of an order by said court or justice thereof, extending the time for the filing of said answer. In this case, on the application of the defendant, an order was made by one of the justices of that court granting such an extension. Within the extended period, but after the date when according to such rule, the defendant was required to plead, it caused said suit to be removed here.

Section 29 of the Act of Congress of March 3, 1911, designated as "The Judicial Code" provides that the party entitled to remove a suit from a State to a Federal Court shall file a petition "In such suit in such State Court at the time, or any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit * * *" Said section 29 is mediately derived from Section 3 of the Act of Congress of March 3, 1875 (18 Stat. 471). Under the Act of 1875, the suitor could remove the suit before or at the term at which said case could be first tried and before the trial thereof.

The plaintiff moves to remand on the ground that the time had elapsed within which the suit could have been removed. So far as advised, this question has not been passed upon in this judicial circuit. The cases in the other circuits conflict upon the question, whether an order made by the State Court in the cause extending the time to plead, likewise extends the time within which the cause may be removed.

Exhibit P. 1.

In my judgment, the cases denying such latter extension, reflect the true construction of the limit placed on the right to remove by the Federal Statute. The legislative purpose in changing the time within which the removal was to be made seemingly was to require the suitor to make his election of the forum in which the case was to be tried before he submitted himself to the jurisdiction of the State Court. At any rate, Congress used language which if given their ordinary meaning would accomplish such purpose. The time referred to in said Section 29, is fixed and not fluctuating. It is the time designated by Statute or rule, which applies indiscriminately to all suits of a like character, and not a time that may vary in length fixed by an order of court as the exigencies of a particular case may appear to require. The language is not that the plaintiff petition for the removal before he is "required" to plead, but at or before the time he is "required" by the laws of the State or the rule of the State Court * * * to answer or plead. Certainty as against uncertainty, with relation to the time within which the removal is to be applied for, a prompt election by the defendant of the forum wherein the cause is to be tried, and speeding the cause for trial as against delaying it, are obtained by such interpretation—desideration not negligible in matters of practice.

The motion to remand is granted.

Exhibit P. 1.

Order Remanding.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON COMPANY, *Plaintiff,* *vs.* AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Action at Law.* *Order Remanding Cause.*

This matter coming on to be heard in the presence of Lum, Tamblyn & Colyer, attorneys for the plaintiff, and Collins & Corbin, attorneys for the defendant, upon motion to remand the above stated action to the Supreme Court of the State of New Jersey, and the court having heard the reasons assigned for remanding said cause and having heard arguments of counsel for plaintiff and defendant respectively and having duly considered the same.

It is, thereupon, on this 22nd day of August, A. D., Nineteen hundred and sixteen, on motion of Lum, Tamblyn & Colyer, of counsel with the above named plaintiff, ORDERED that the said cause be remanded to the Supreme Court of the State of New Jersey, from whence it was removed, and that the said cause proceed in the said court and that the plaintiff do recover his costs on this motion to be taxed.

JOHN RELLSTAB,
Judge.

Exhibit P. 2.

Exhibit P. 2.

Policy of Insurance.

Policy No. P. Y 4000

AETNA

LIFE INSURANCE COMPANY.

Accident and Liability Department.
Contractors Public Liability Policy.

INSURING CLAUSE.

IN CONSIDERATION OF THE PREMIUM HEREIN PROVIDED, THE AETNA LIFE INSURANCE COMPANY of Hartford, Connecticut (called the Company), DOES HEREBY AGREE TO INDEMNIFY the Assured described in the Warranties hereof, within the amounts as expressed herein, AGAINST LOSS AND/OR EXPENSE ARISING OR RESULTING FROM CLAIMS UPON THE ASSURED FOR DAMAGES on account of bodily injuries and/or death accidentally suffered, or alleged to have been suffered, by any person or persons not employed by the Assured, by reason of the business described and conducted at the locations named in said Warranties, whether said injuries and/or death are accidentally suffered, or alleged to have been suffered, at the locations named or elsewhere, save and except claims arising by reason of:

(1) Injuries and/or death caused by any person employed in violation of law as to age, or of any age under fourteen (14) years, where there is no legal restriction as to age of employment.

Exhibit P. 2.

(2) Any draught or driving animal or vehicle, or by any person while driving or using same.

(3) Injuries and/or death to any person while riding or attempting to ride on any elevator or hoisting device.

(4) Liability of others assumed by the Assured under any contract or agreement, oral or written.

Subject to all agreements and conditions hereof, claims are covered whenever arising, on account of accidents or alleged accidents occurring within the Policy period stated herein.

THIS INSURANCE IS SUBJECT TO THE FOLLOWING CONDITIONS:

REPORTING ACCIDENTS AND CLAIMS.

A. Upon the occurrence of an accident covered by this Policy the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company or its duly authorized agent. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in his power.

REPORT AND DEFENSE OF SUITS.

B. If suit is brought against the Assured to enforce a claim for damages covered by this

Exhibit P. 2.

Policy he shall immediately forward to the Company every summons or other process as soon as the same shall have been served on him, and the Company will, at its own cost, defend such suit in the name and on behalf of the Assured.

CO-OPERATION OF ASSURED. EXPENSE.

C. The Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance or witnesses and in prosecuting appeals, but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at his own cost, without the written consent of the Company previously given, except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident.

ASSURED'S RIGHT OF RECOVERY.

D. No action shall lie against the Company to recover for any loss and/or expense under this Policy unless it shall be brought by the Assured for loss and/or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action is brought within two years after payment of such loss and/or expense.

Exhibit P. 2.

SUBROGATION RIGHTS.

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

CONCURRENT INSURANCE.

F. If the Assured carry a policy of another insurer, against any loss and/or expense covered by this Policy, the Assured shall not recover from the Company a larger proportion of the entire loss and/or expense than the amount hereby insured bears to the total amount of valid and collectible insurance applicable thereto.

CHANGE OF INTEREST.

G. No assignment of interest under this Policy shall be valid unless the written consent of the Company is endorsed hereon, signed by its President, a Vice-President, Secretary or Assistant Secretary.

BASIS OF PREMIUM.

H. Except as provided in the Warranties hereof for operations performed for Assured under contract the premium is based on the entire compensation earned during the period

Exhibit P. 2.

of this Policy by all persons engaged in the business as described in the Warranties hereof who are not specifically excluded. If such entire compensation exceeds the sum set forth in said Warranties, the Assured shall immediately pay to the Company the additional premium earned. If such entire compensation is less than the sum set forth in said Warranties the Company will return the unearned premium when determined, but in any event the Company shall retain the minimum premium stated in said Warranties.

WAGE
STATEMENTS.

I. The Assured shall, when requested, furnish the Company with a written statement showing the total cost of all work performed for the Assured under contract and which is covered by this Policy and shall also furnish a written statement of the amount of compensation, according to classifications described in the Warranties hereof, earned by all persons engaged in the business covered by this Policy during the whole or any part of the Policy period. The Company shall be permitted at all reasonable times to examine the books and records of the Assured as respects the cost of work performed for Assured under contract and the compensation of all persons engaged in the business covered hereunder, provided a request for such examination is made within one year from the expiration of the Policy period, and the Assured shall render all reasonable assistance. The rendering of any statement of such compensation or any payment of premium thereon shall not bar the ex-

Exhibit P. 2.

amination herein provided for, nor the Company's right to any additional premium earned.

INSPECTION.

J. The Company shall be permitted at all reasonable times to inspect the plant, works, machinery and appliances used in the business covered by this Policy.

CANCELLATION.

K. This Policy may be cancelled at any time by either of the parties hereto upon written notice to the other party stating when thereafter cancellation shall be effective. The date of cancellation shall then be the end of the Policy period. If such cancellation is at the request of the Assured and he has not retired from the business described in the Warranties hereof, the compensation for the full original Policy period shall be computed upon the basis of the compensation to date of cancellation, the total cost of work done for Assured under contract and covered hereunder being computed in like manner, and the earned premium calculated at short rates in accordance with the table printed hereon. In any event where cancellation is at the request of the Assured, the Company shall retain not less than the minimum premium stated in said Warranties. Notice of cancellation mailed to the address of the Assured stated in said Warranties shall be a sufficient notice, and the check of the Company similarly mailed a sufficient tender of any unearned premium, when determined.

Exhibit P. 2.

ALTERATIONS IN POLICY.

L. No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto and signed by the President, a Vice-President, Secretary or Assistant Secretary of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. Upon the acceptance of this Policy the Assured agrees that its terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein. The personal pronoun herein used to refer to the Assured shall apply regardless of number and gender.

AUTHORIZD AGENTS.

M. No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by the President, a Vice-President, Secretary or Assistant Secretary of the Company.

(Form 60. Ed. Sept., '08.)

This space is intended for the attachment of such endorsements as may be executed as provided in the Policy, and, when so executed and attached they are to be construed as a part of the Policy.

Exhibit P. 2.

ENDORSEMENT No. 8506.

(STATEMENT OF WAGES AND OF CONTRACT WORK AND ADJUSTMENT OF PREMIUM ANNUALLY.)

It is hereby understood and agreed that on or about twelve months after date of this Policy, and each succeeding twelve months thereafter, during the period of this Policy, the Assured shall furnish the Company with a report of the actual amount of compensation earned by all employees and a report showing the total cost of all work performed for the Assured under contract as covered by this Policy during the preceding twelve policy months, and the premium shall be adjusted as provided in Condition "H."

New York City, New York, November 18th, 1909.

(Signed) WILLIAM J. GARDNER,
Resident Secretary.

I hereby certify that this is a correct copy of Policy issued to RUSSELL-ROBINSON COMPANY.

Hartford, Conn., March 20, 1914.

SHORT RATE CANCELLATION TABLE.

Take the percentage indicated opposite the number of days or months Policy has been in force, upon the premium for the full original Policy period calculated as provided in Condition K, and the result will be the premium earned in case of cancellation. Short rate premium for periods not specifically named in this table must be charged at a rate propor-

Exhibit P. 2.

tionate to the rate charged for the next preceding and succeeding periods.

Policies Issued for Term of One Year.

Policy in Force	Per Cent. of Premium	Policy in Force	Per Cent. of Premium
1 day	1%	51 days	27%
2 days	2%	54 days	28%
3 days	3%	57 days	29%
4 days	4%	60 days	30%
5 days	5%	65 days	32%
6 days	6%	70 days	34%
7 days	7%	75 days	36%
8 days	8%	80 days	38%
9 days	9%	85 days	39%
10 days	10%	90 days or 3 months	40%
12 days	11%	105 days	45%
14 days	12%	120 days or 4 months	50%
16 days	13%	135 days	55%
18 days	14%	150 days or 5 months	58%
20 days	15%	165 days	64%
22 days	16%	180 days or 6 months	68%
24 days	17%	195 days	73%
26 days	18%	210 days or 7 months	75%
28 days	19%	225 days	78%
30 days	20%	240 days or 8 months	80%
33 days	21%	255 days	81%
36 days	22%	270 days or 9 months	85%
39 days	23%	285 days	87%
32 days	24%	300 days or 10 months	90%
45 days	25%	315 days	92%
48 days	26%	330 days or 11 months	95%
		360 days or 12 months	100%

Policies Issued for Term of Three Years.

Policy in Force	Per Cent. of Premium	Policy in Force	Per Cent. of Premium
1 month	8%	19 months	66%
2 months	12%	20 months	68%
3 months	16%	21 months	70%
4 months	20%	22 months	72%
5 months	24%	23 months	74%
6 months	28%	24 months	76%
7 months	32%	25 months	78%
8 months	36%	26 months	80%
9 months	39%	27 months	82%
10 months	42%	28 months	84%
11 months	45%	29 months	86%
12 months	48%	30 months	88%

Exhibit P. 2.

13 months	50%	31 months	90%
14 months	53%	32 months	92%
15 months	56%	33 months	94%
16 months	59%	34 months	96%
17 months	61%	35 months	98%
18 months	63%	36 months	100%

(Form 60. Ed. Sept., '08.)

LIMITS OF INDEMITY.

N. The Company's liability for loss on account of an accident resulting in bodily injuries and/or death to one person is limited to Five Thousand Dollars ($5000.00); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident resulting in bodily injuries and/or death to more than one person is limited to Ten Thousand Dollars ($10000.00). The Company will however, as provided in Conditions B and C hereof, pay the expense of litigation in addition to the sum herein limited and will also pay all costs taxed against the Assured in any legal proceeding defended by the Company, and interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the Company's liability herein expressed.

POLICY PERIOD.

O. The Policy period shall be Twenty-Four months, beginning on the Eighteenth day of November, 1909, at noon, and ending on the Eighteenth day of November, 1911, at noon, standard time at the location of the business described in the Warranties hereof.

Exhibit P. 2.

WARRANTIES.

P. The following Warranties, numbered 1 to 10 inclusive, are hereby made a part of this contract, and are acknowledged and warranted by the Assured to be true upon the acceptance of this Policy, except such as are declared to be matters of estimate only.

WARRANTIES.

1. Name of Assured, Russell-Robinson Company.
2. Address of Assured, 109-115 Frelinghuysen Avenue, New ark, Essex Co., New Jersey.
   (Name Street, Town, County and State where Head Office is located.)
3. The Assured is, Corporation, New Jersey.
   (State whether individual, estate, co-partnership or corporation, and if a corporation name State in which incorporated; if a co-partnership give the names of each member thereof.)
4. Classified description of the business. (All operations incidental to the following business, in and during the continuation thereof.)—Carpentry work in connection with buildings not exceeding four (4) stories in height (no grain elevator construction; estimated average number of employees, varies; estimated entire compensation for 12 months, 35000.00. premium rate per $100 of compensation, .35; estimated premium, 122.50; town, street and number where business is located, Newark, New Jersey and elsewhere in New England and Middle Atlantic States.

   Carpentry work in connection with buildings exceeding 4 stories in height (no grain elevator construction)—Estimated average number of employees, varies; estimated entire compensation for 12 months, 5000.00; premium rate per $100 of compensation, .35; estimated premium, 17.50.

   Special Operations—Demolition or wrecking of any structure: estimated average number of employees, none.

   Operation of locomotives and/or cars by means of locomotives: estimated average number of employees, none.

   All operations performed for Assured under contract, premium to be adjusted on the basis of total cost of the work, including all labor, material used or de-

Exhibit P. 2.

livered for use, all allowances, bonuses and commissions made, paid or due: Estimated average number of employees, varies; estimated total cost, $40000.; premium rate per $100 of total cost, .10; estimated premium, 40.00.

5. The foregoing statement correctly describes the business to be insured, including all usual or special operations incident thereto, and the locations at which said business is conducted. None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations, their estimated compensation, and the premium rate, are specially stated herein.
6. The estimated compensation includes that of all persons engaged in the business as described herein (whether compensated by salary, wages, for piece work, overtime or allowances, and whether paid in cash—in whole or in part—in board, store certificates, merchandise, credits or any substitute for cash), to whom compensation of any nature is paid, including President, Vice-President, Secretary, Treasurer and Clerical Force, except as follows: President, Vice-President, Secretary, Treasurer and Clerical Force.
7. If complete and accurate payroll records are not kept corresponding to the classifications herein described the total actual payroll shall be considered as expended under the highest rated classification.
8. No dynamite, nitroglycerine or explosive powder is made, sold, kept or used in the business described herein, except as follows: No exceptions.
9. The estimated premium for this Policy is Three Hundred Sixty and no/100 Dollars ($360.00), due and payable as follows:
   One Hundred Eighty and no/100 Dollars ($180.00), November 18th, 1909.
   One Hundred Eighty and no/100 Dollars ($180.00), November 18th, 1910.
10. The minimum premium for this Policy shall be Forty and no/100 per annum Dollars ($40.00).

Exhibit P. 3.

IN WITNESS WHEREOF, The ÆTNA LIFE INSURANCE COMPANY has caused these presents to be signed by its President and Secretary, but the same shall not be binding unless countersigned by an authorized agent of the Company.

W. G. BULKELEY,
President.

J. ROWE,
Secretary.

Countersigned at.....this.....
day of.....19.....
.....General Agent.

(Form 60, Ed. Sept., '08.)

Exhibit P. 3.

Contract between Russell-Robinson Co. and Frederick G. Agens.

THIS AGREEMENT, made the First day of April in the year nineteen hundred and ten, by and between RUSSELL-ROBINSON CO., a Corporation organized under the laws of the State of New Jersey, of the City of Newark, County of Essex and State of New Jersey, party of the first part (hereinafter designated the Contractor), and FREDERICK G. AGENS, of the City of Newark, County of Essex, State of New Jersey, party of the second part (hereinafter designated the Owner),

WITNESSETH, that the Contractor , in consideration of the fulfillment of the agreement

Exhibit P. 3.

herein made by the Owner , agree with the said Owner , as follows:

ARTICLE I. The Contractor , under the direction and to the satisfaction of J. O'ROURKE & SONS, Architects, acting for the purposes of this contract as agents of the said Owner , shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said Architects for the Mason work, Carpenter work, painting and metal ceilings included in the remodel and repair of the building, known and designated as No. 230 Market Street, in said city of Newark, Essex County, New Jersey, which drawings and specifications are identified by the signatures of the parties hereto.

ART. II. The Architects shall furnish to the Contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the Contractor shall conform to the same as part of this contract so far as they may be consistent with the original drawings and specifications referred to and identified, as provided in Art. I.

It is mutually understood and agreed that all drawings and specifications are and remain the property of the Architects.

ART. III. No alterations shall be made in the work shown or described by the drawings and specifications except upon a written order of the Architects, and when so made, the value of the work added or omitted shall be computed by the Architects, and the amount so ascertained shall be added to or deducted from the contract price. In case of dissent from such award by either party thereto, the valuation of the work added or omitted shall be referred to three (3)

disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

ART. IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architects or their authorized representative. It shall, within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the Architects shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architects, the Owner shall be at liberty, after three days' written notice to the Contractor , to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract and if the Architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall be at liberty to terminate the employment of the Contractor for the said work and to enter

Exhibit P. 3.

upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ, any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor , it shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor , but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the Owner . The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architects, whose certificate therefor shall be conclusive upon the parties.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times herein stated in sixty (60) working days.
provided that

ART. VII. Should the Contractor be obstructed or delayed in the prosecution or completion of work by the act, neglect, delay or default of the Owner , or the Architects, or of any other contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the

Exhibit P. 3.

employees through no default of the Contractor , then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the Architects within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the Architects, but appeal from their decision may be made to arbitration, as provided in Article III. of this contract.

ART. VIII. The Owner agree to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor , agree that it will reimburse the Contractor for such loss; and the Contractor agree that if it shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), then it shall make good to the Owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architects, but appeal from their decision may be made to arbitration as provided in Article III of this contract.

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be $8000.00 (EIGHT THOUSAND DOLLARS) subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the Owner to the

Exhibit P. 3.

Contractor in installments as follows: In proportionate payments from time to time as the works progress. Fifteen per cent (15%) of the value of the work completed at the time of each payment to be retained by the party of the second part until the completion of the contract.

The final payment shall be made within 30 days after this contract is fulfilled.

All payments shall be made upon written certificates of the Architects to the effect that such payments have become due.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner or the said premises might become liable, and which is chargeable to the Contractor , the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default.

ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

Exhibit P. 4.

It is further mutually agreed that the following changes from plans and specifications are to be made:

Fire door openings in party wall are to be filled in with an 8″ brick wall, leaving the jambs plumb and arch turned over. Omit elevator shafts and elevators. Omit all fire doors.

ART. XIII. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

In presence of

JOSEPH B. O'ROURKE.

RUSSELL-ROBINSON CO. (S)
F. P. RUSSELL, *Secy-Treas.*
FRED'K G. AGENS. (S)

Exhibit P. 4.

Contract between Russell-Robinson Co. and Real Securities Investment Company.

THIS AGREEMENT, made the First day of April in the year nineteen hundred and Ten, by and between RUSSELL-ROBINSON CO., a Corporation organized under the laws of the State of New Jersey, of the City of Newark, County of Essex, State of New Jersey.

party of the first part (hereinafter designated the Contractor), and REAL SECURITIES INVESTMENT COMPANY, a corporation or-

Exhibit P. 4.

ganized under the laws of the State of New Jersey, of the city of Newark, County of Essex and State of New Jersey,

party of the second part (hereinafter designated the Owner),

WITNESSETH, that the Contractor , in consideration of the fulfillment of the agreement herein made by the Owner , agree with the said Owner as follows:

ARTICLE I. The Contractor under the direction and to the satisfaction of J. O'Rourke & Sons, Architects, acting for the purposes of this contract as agents of the said Owner , shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said Architects for the completion of all the Mason work, Carpenter work, painting and metal ceilings, included in the remodel and repair of the building know and designated as No. 232 Market Street in the said city of Newark, Essex County, New Jersey, which drawings and specifications are identified by the signatures of the parties hereto.

ART. II. The Architects shall furnish to the Contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the Contractor shall conform to the same as part of this contract so far as they may be consistent with the original drawings and specifications referred to and identified, as provided in Art. I.

It is mutually understood and agreed that all drawings and specifications are and remain the property of the Architects.

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ART. III. No alterations shall be made in the work shown or described by the drawings and specifications except upon a written order of the Architects, and when so made, the value of the work added or omitted shall be computed by the Architects, and the amount so ascertained shall be added to or deducted from the contract price. In case of dissent from such award by either party thereto, the valuation of the work added or omitted shall be referred to three (3) disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

ART. IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architects or their athorized representative. It shall, within twenty-four hours after receiving written notice from the Architects to that effect, proceed to remove from the grounds or buildings all materials condemned by them, whether worked or unworked, and to take down all portions of the work which the Architects shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architects, the Owner shall be at liberty, after

Exhibit P. 4.

three days' written notice to the Contractor , to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architects shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall be at liberty to terminate the employment of the Contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ, any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the Contractor , it shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor , but if such expense shall exceed such unpaid balance, the Contractor shall pay the difference to the Owner . The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architects, whose certificate therefor shall be conclusive upon the parties.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times herein stated in sixty (60) working days.

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provided that

ART. VII. Should the Contractor be obstructed or delayed in the prosecution or completion of work by the act, neglect, delay or default of the Owner , or the Architects, or of any other contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no default of the Contractor , then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the Architects within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the Architects but appeal from their decision may be made to arbitration, as provided in Article III. of this contract.

ART. VIII. The Owner agree to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor , agree that it will reimburse the Contractor for such loss; and the Contractor agree that if it shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as above stated), then it shall make good to the Owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architects, but appeal from their decision may

Exhibit P. 4.

be made to arbitration as provided in Article III of this contract.

ART. IX. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be $7000.00 (SEVEN THOUSAND DOLLARS) subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the Owner to the Contractor in installments as follows: In proportionate payments from time to time as the works progress. Fifteen per cent (15%) of the value of the work completed at the time of each payment to be retained by the party of the second part, until the completion of the contract.

The final payment shall be made within 30 days after this contract is fulfilled.

All payments shall be made upon written certificates of the Architects to the effect that such payments have become due.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner or the said premises might become liable, and which is chargeable to the Contractor , the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contractor default.

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ART. X. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

It is further mutually agreed that the following changes from plans and specifications are to be made: Fire door openings in party wall are to be filled in with an 8″ brick wall, leaving jambs plumb and arch turned over. Omit plaster board under Mezzanine floor and Balcony, plaster board & plaster partition enclosing the stairway. Omit pent house on roof, omit elevator shafts. Omit elevator doors, omit Mezzanine floor and balcony, omit the 6x14 beams on second floor, substituting 2x14, omit balcony rail & hangers, build stud partition enclosing stairway. Change front doors to single doors, one entering store, door from stairhall to store. Omit the stairway shown. Move show window sufficient to accomodate the two doors. Partitions enclosing toilets, one on each floor 8′ 0″ high. Omit all fire doors.

ART. XIII. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

Exhibit P. 4.

In Witness Whereof, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

In presence of

Joseph B. O'Rourke.

RUSSELL-ROBINSON CO. (S)
F. P. RUSSELL, *Secy-Treas.*

REAL SECURITIES INVESTMENT CO.,

PHILIP J. BOWERS, *Pres.*

William S. Fairchild, *Secy.*

Exhibit P. 5.

Exhibit P. 5.

Judge's charge in case of Rose Zamelsky, Admx., etc. v. Russell-Robinson Co. and Wm. L. Blanchard Co.

NEW JERSEY SUPREME COURT.

ROSE ZAMELSKY, Administratrix, etc., of LOUIS ZAMELSKY, deceased, *Plaintiff,* *vs.* RUSSELL-ROBINSON COMPANY and WM. L. BLANCHARD CO., *Defendants.*	*Action at Law.*

The Court charges the jury as follows:

ADAMS, *J.*

Gentlemen of the jury, I will make a few remarks as to the nature of the case before speaking of the accident.

It would be very undesirable for a jury to adopt the estimates of counsel as to what would be a fair verdict, for it is just possible that it might not be sustained by the evidence in the cause. The fact that this suit was brought for ten thousand dollars means nothing. The question is what the proof shows the dollar and cent value of the deceased to his family. In speaking of this now I am not assuming that the plaintiff can recover anything. I am just trying to indicate to you very briefly what the nature of the action is.

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Here was a man forty years old, in the junk business, having a little place with a horse and wagon. He had what is described as a partnership in profits with his nephew, Joseph Zamelsky, who also had a horse and wagon. They had a settlement every two or three weeks and divided the profits. Joseph Zamelsky was asked what the net earnings were and he told what they took in every week, and as I remember the testimony his statement ran from two hundred and fifty to three hundred dollars for three weeks for both of them. I think he said that forty dollars a week for one of them was an average figure, speaking of the net profits at the time of the accident. Of course, whatever it was, when Joseph Zamelsky was killed on the 5th of April, 1910, his earnings stopped. He left a widow whom you have seen. I do not know that she told her age. You may judge. He also left a family of young children. Jacob, at the death of his father was fifteen years old; Sarah, eleven; Tillie, seven, and Benjamin was five. His widow and these children are the persons for whom this suit is brought and the question is what the father would have probably have paid them if he had not died as he did. It was his duty of course to support his wife and children. The presumption is that he would do it if he could. He seems to have been on good terms with them and in favor with them as one of the household.

The length of his life was uncertain. He might have died the next day of disease or of some other accident. The length of the lives of each one of them is also uncertain. With the death of each one of the family the ability

of that member of the family to receive would be terminated. So that you are dealing with conjectures in estimating the probable pecuniary value, the mere dollars and cents value of the father to this widow and these children. It depends upon the contingency of life, as I have said, and the contingency of health. They seem to be in good health now and he was in good health at the time of his death; and it depends upon the contingency of his being a faithful husband and being disposed to do what a man ought to do to support his children. I might talk to you a long while without saying anything more than this for I am as ignorant of the future as you are. But I want to say this. Counsel has already referred to it. That if you have to deal with this part of the case—and whether you do or not depends upon your view of the other part of the case—if you do reach a conclusion as to what this father would probably have paid the rest of the family in the future, say per year, and how long that would probably continue—for that is another uncertain element—and multiply the probable annual amount by the probable number of years, you will reach a sum which you will not award; for this reason; that you would be giving too much. What you should reach is the present value.

Suppose that I had a contract with the foreman of this jury to pay him fifty dollars a year for twenty years, say on the first of January of each year. After I had made the contract I would get tired of it and say, "I would like to commute that contract, give cash down and get out of it. It is twenty years too long." The foreman would say to me, "Very well I

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will take a thousand dollars. Twenty times fifty is a thousand." I say, "No, I do not think I will give you one thousand dollars. If I should give you one thousand dollars you could invest it at five per cent, and get fifty dollars a year for twenty years, and at the end of twenty years have the one thousand dollars besides." The point to be reached would be the present value of that contract. That is all I have to say about the question of damages.

The declaration in this case, which is the plaintiff's statement of her cause of action, the widow being the plaintiff and suing for the children and herself distinctly says what it is that the plaintiff claims. I will not quote it all, but it says this, that the accident which occurred was occasioned by the defendants, that is, both these defendant companies; both the Russell-Robinson Company and the William L. Blanchard Company are complained of together in the declaration. "That the said defendants by its servants carelessly, negligently and improperly and without any warning to the said Louis Zamelsky, deceased, did pull down a certain brick partition wall on the said premises, whereby the said wall did fall and strike with great force and violence the body of the said Louis Zamelsky, deceased, who was then and there lawfully engaged in removing the aforesaid iron, beams, pipe and scrap iron, and by means whereof he died." In other words, it is not said that he was killed by a brick hitting him on the head. But it was distinctly asserted before that it was to take down all the interior brick partition wall or division wall between the two properties. The testimony of several witnesses and the evidence of the pho-

tographs is that he was buried, all but his head, in a mass of brick. Officer King tells us that he lay somewhat on his face, and that there lay across his back a mass of brick wall which was a foot thick and about six feet by three, which the officer thought had broken his back. I do not know that there is any more evidence that his back was broken, but it is very likely, of course.

There is a contract in evidence which shows certain things. It is dated the second of April, three days before the accident, between the William L. Blanchard Company and the Russell-Robinson Company. The Blanchard Company is described as the sub-contractor and the Russell-Robinson Company is described as the general contractor. The contract is for mason work and plastering, for the restoration of the premises, 230-232 Market street, recently damaged by fire. The Securities Investment Company and Frederick G. Agens are the respective owners. That is, as I understand it, Mr. Agens owns one of the numbers and the securities company the other. It does not appear which, but it does not make any difference. The nature of the work, as I have stated, is the restoration of mason and plaster work of the premises recently damaged by fire. The contract is restricted to the mason work. It is accompanied by specifications which are purely constructive. Nothing is said, either in the contract or specifications about any destructive work; yet the evidence shows that some destruction had to precede construction. The situation was such. In the specifications this partition wall is mentioned as the dividing line between the two properties, from which it might

possibly be inferred that it was the intention when the specifications were drawn that that wall should stand as the dividing line. However that may be, if that intention was ever formed, it was abandoned. It was a large wall and was on stilts, I might say, which extended from the first to the third story and was built on columns; iron, I suppose, or steel, arising from the cellar no doubt. But it would not be at all strong, for the fire had consumed the wood-work which must be there to secure and support the wall. At any rate, what these experienced builders wanted to do, and which they evidently did, was to take that wall down. And there is nothing to show that it was not a very proper conclusion. It appears from the proof that certain men of the Blanchard Company were engaged on the work of demolishing this wall. It may be presumed that in doing so they were acting under what is called in this instrument, the sub-contract. It appears in the proof that the Blanchard Company had the right to dispose of the iron.

The first question is, was there any contract between Louis Zamelsky, the deceased, and these contractors, or either of them. The declaration says there was a contract, in these terms. "Plaintiff avers that the said defendants entered into a contract with the said Louis Zamelsky, deceased, wherein and whereby the said defendants undertook to sell to the said Louis Zamelsky, deceased, the iron, beams, pipes and scrap iron then and there on the premises 230-232 Market Street" and so forth "and that by the terms of said agreement of sale, then and there entered into between the said defendants and the said Louis Zamelsky, deceased, it was

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undertaken and agreed that the said Louis Zamelsky, deceased, was to enter upon said premises and remove said iron" and so forth.

Now, you see, considering this matter first as to the Blanchard Company and then as to the Russell-Robinson Company, the evidence adduced on behalf of the plaintiff is of a transaction with Mr. Blanchard. He says, "I had dealings with Mr. Blanchard, and bought the old iron on Market street, 230-232, in the building. The first day I went alone. The second day was when taking iron from all over the building." My notes are brief. He either said they were taking iron or he was taking iron, I am not sure which. In the specifications there was this provision, headed "Protection to the Public." This is in the specifications which were offered in evidence as against the Russell-Robinson Company. "The contractor shall provide and maintain all legal or necessary guards, fences, lights, warning signs, a watchman by day and night, temporary sidewalks over sidewalk excavation, and other constructions required during the erection of the works, to fully protect all persons from damage, injury or loss either to their persons or property and will be wholly responsible should any damage, injury or loss occur through or from the neglect, carelessness or incompetence of himself or his employees." Much time has been spent on the question as to whether measures were or were not taken for the protection of the public or individuals. I do not say that the time has not been well spent, because such evidence is competent and to a certain extent important, and this provision is very proper. It is very proper for one thing because it guards

the sidewalk where everybody goes. It is proper for another thing for a moral reason if not for a legal reason because it tends to protect people, usually careless people, from the consequences of their own negligence, by keeping them out of mischief. That, however, is one thing; a legal duty is another. It is a moral duty to go to the help of persons in danger with whom we have no contractural relations and give help to them, but it is not a legal duty unless some contract obliges you to do it. But this matter that I am talking about is not of so much legal importance as may be supposed, as between the plaintiff and defendants. This results from the rules of law which apply to trespassers and licensees and persons under an invitation.

It is not to be forgotten that 230 and 232 Market street were private property, just as your house or mine, and the names of the owners are in the contract. The contractors were, under their contracts, rightfully in possession of the premises, and the rules which define the rights of persons owning private property, and between them and others, are applicable as between these people and their contractors. What are these rules?

First, as to trespassers. A trespasser is one who goes wrongfully on private property. The owner of that property or person who represents the owner is under no obligation to a trespasser except to refrain from wilful injury or from having secret or concealed dangers on the premises. If a man trespasses on my property I can order him off. If he does not go I can put him off. I can use just as much force as necessary, and while he resists, he re-

sists at his own risk. I am accountable for nothing except that I must not wilfully injure him or get him in a trap.

Secondly, as to licensees. That is a person who has a license, a permission. A man goes to another and says, "May I go on your premises and look about?" "Yes, you may." He does it at his own risk. The owner's obligation is just the same as it was in the case of a trespasser. He cannot throw him off because he has licensed him to go on. There is that difference between those two classes of cases; but he is under no obligation to take care of him.

Again as to persons who have an invitation to go on. Now, what is an invitation, in law? I read from the Turess case in 32 Vroom. "Invitation is a term whose legal import is known. Invitation may be express, as when the owner or occupier of land, by words, invites another to come on it or make use of it or something thereon; or it may be implied, as when such owner or occupier, by acts or conduct, leads another to believe that the land or something thereon was intended to be used as he uses them, and that such use is not only acquiesced in by the owner or occupier, but is in accordance with the intention or design for which the way or place or thing was adapted and prepared or allowed to be used.

"It will be observed that, in the case of an implied invitation, the relation is imposed upon the owner or occupier of land only when he has done something which justifies one who enters upon the land and makes use of it or something upon it in believing that he intended such use to be made; and he who makes such use can claim

the relation only when he is justified by the acts or conduct if the owner or occupier in believing that such use was intended. And entry and use by such invitation are thus distinguished from entry and use by mere permission."

Did Mr. Blanchard invite L. Zamelsky to enter the premises and take out iron? I am now talking about the case between the Blanchard Company and the plaintiff. If there was a partnership between Joe and his uncle the invitation, if it was given, I think would be available to both parties; and if it was necessary to have much carrying he might even find it necessary to have somebody help him. But was there such an invitation? Joseph Zamelsky says there was. Mr. Blanchard's account of the matter was this, that he never invited young Zamelsky, who was the only one of the two he says he knew. He had no dealings with him at all until he met him in the vestibule; that the short pieces of iron were brought by his workmen into the vestibule through a door which was kept locked and the long pieces of iron were carried out in the street, there not being room enough in the vestibule; and that what Zamelsky was invited to do and what he did was to get the iron, short pieces, in the vestibule and the long pieces from the street and have them weighed, and he bought them at such a price, I suppose so many cents a pound. And he further says that young Zamelsky, whose first name he did not know, was specifically told on the afternoon of April 5th not to get any iron that afternoon, as he expected that this wall would be overthrown.

If Zamelsky was invited into the premises to get iron and accepted the invitation then he was rightfully on the premises and the invita-

tion, if there was one, would cover his partner. The burden is on the plaintiff to show that such an invitation was given and was still in force at the time of the accident, that it was not revoked. If that was the situation the Blanchard Company was under a duty to take reasonable care that this wall should be so demolished as not to injure persons rightfully on the premises, of whom in the case supposed in that view of the subject, Joseph Zamelsky and his uncle would be two.

So that that brings us to the next question. Did the Blanchard Company fail to exercise reasonable care in demolishing this wall? If you do not reach that question, however, if you decide the first question in the negative, if you say there was no invitation that ends the case and the plaintiff cannot recover. If you say there was an invitation, then you come to the next question, which is, did the Blanchard Company fail to exercise reasonable care in demolishing this wall? Of course the demolishing of the wall was in its own nature a dangerous operation, I mean an operation which required great care not only for the safety of the men engaged in it but the safety of individuals who might be around. Did the Blanchard Company fail to exercise reasonable care under all the circumstances of the case in what they did toward the demolishing of this wall? The plaintiff cannot recover unless you answer both of these questions in the affirmative, unless you shall say that the Zamelskys were invited to enter and did enter in pursuance of that invitation and that the Blanchard Company in throwing down this wall, in what they did with respect to to throwing it down, failed to take reasonable care not to

Exhibit P. 5.

injure him or any other persons who might be rightfully on the premises; but especially them because they are the only members of that class whose rights are at issue in this case.

Even if the Zamelskys were there by invitation the plaintiff will not be entitled to your verdict unless you are satisfied by what seems to you a preponderance of the proof that the Blanchard Company failed to exercise reasonable care and that such failure was the cause of the accident.

If you find both of these questions in favor of the plaintiff; that is, if you find that there was an invitation given, which was acted upon, and also which had not been revoked; that there was a failure on the part of the Blanchard Company to fully exercise reasonable care, in consequence of which the injury was inflicted, your verdict should be in favor of the plaintiff and against the Blanchard Company, unless you should conclude that Louis Zamelsky, the deceased, failed himself to exercise reasonable care for his own safety in going where he did. His safety was not guaranteed. If he was invited to enter the premises he was not exonerated from the duty of exercising care for his own safety, of being prudent. If you think he was prudent and went into a place which he should have realized was one of imminent danger, where peril was obvious or ought to have been obvious to him if he was prudent, then he went at his own risk and cannot recover.

So much for the Blanchard Company. Now, how does the case stand as to the Russell-Robinson Company? The Blanchard Company were independent contractors as we infer from the contract. They are described as sub-contractors

Exhibit P. 5.

and I presume that they were independent contractors. The Russel-Robinson Company were also independent, and the Russell-Robinson Company under the rule as to independent contractors would not be liable as a principal is for his agent for any negligence of the Blanchard Company in doing the work under their contract. The rule of agency, we understand, is that if a man's agent is careless, he under whom the agent acts is responsible for the acts of the agent within the scope of his employment. But where you make an independent contract with a man each tub stands on its own bottom. The Russell-Robinson Company cannot be held in this case for anything but its own acts, with a qualification which I will mention hereafter.

These two companies were together in control of the premises. There is no doubt about that. When Mr. Blanchard was on hand he watched the door and looked after things generally. When Mr. Blanchard was away Mr. Lang, who was the foreman of the Russell-Robinson Company, took his place. Either corporation, that is, either Mr. Blanchard or Mr. Lang, had the right to extend an invitation to some outside person and thus justify the presence of that person on the premises. Consequently it may be that when Mr. Lang, in Mr. Blanchard's absence, was having this duty of general oversight, that there would be some person or persons in the building to whom Mr. Blanchard, without Mr. Lang's knowledge, had given an invitation to enter. It results from this, that Mr. Lang was put upon the special duty of careful observation and warning, and if there is evidence in the case which satisfies you that Mr. Lang failed in this duty of observation and

Exhibit P. 5.

warning, and that Zamelsky was there by virtue of the invitation extended to him by Mr. Blanchard without Mr. Lang's knowing anything about it; and this failure was the cause of the accident; then Mr. Lang came short of his duty and his failure, if he did fail, was attributable to his employer, the Russell-Robinson Company. This conclusion would lead to a verdict for the plaintiff and against the Russell-Robinson Company; unless it should appear in your opinion that Mr. Zamelsky by his own negligence contributed to his own death. That is the same question again that we talked about when we were speaking about the Blanchard Company.

You will also consider whether there is sufficient evidence from which you can conclude that the work done by the Russell-Robinson Company contributed to throw the wall down. There is evidence that Blanchard's men were at work on the wall, taking it down with pick axes and what not, and one was pushing against it with a ladder. These are all Blanchard's men. There is evidence that Russell-Robinson's men were pulling down old wood and I think there is something in the evidence—I am sure there is—that the tendency of this pulling down of old wood was to bring some bricks down too. I do not recall any evidence that any of the Russell-Robinson men were working with implements in the wall itself. It being admitted that the deceased met his unfortunate death by falling under a mass of this wall, the question is who threw that wall down? I cannot do less than ask you to consider whether there is any proof in the case from which you could infer that anything which the men of the Russell-Robinson Company did produce, or contributed to produce, that particular result.

Exhibit P. 7.

Exhibit P. 6.

Not admitted in evidence.

Exhibit P. 7.

Contract between Wm. L. Blanchard Co. and Russell-Robinson Co.

A CONTRACT FORM.

Endorsed by the Associated Building Contractors of Essex Co., N. J.
January, 1905.

J. O'ROURKE & SONS,
Architect.

THIS AGREEMENT, made the Second day of April in the year nineteen hundred and ten, by and between

WM. L. BLANCHARD CO.,
a corporation in the State of N. J.,
No. 160 Sherman Avenue,
Newark, N. J.
Mason Contractor.

parties of the first part (hereinafter designated the sub-contractor), and

RUSSELL-ROBINSON CO.
a corporation in the State of N. J.
General Building Contractors,
No. 109-15 Frelinghuysen Ave.,
Newark, N. J.,

parties of the second part (hereinafter designated the General Contractor). WITNESSETH, that the Contractors, in consideration of the

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fulfillment of the agreement herein made by the Owners, agree with the said Owners as follows:

ARTICLE I. The Contractors under the direction and to the satisfaction of J. O'Rourke & Sons, Architects, acting for the purposes of this contract as agent of the said Owner, shall and will provide all the materials and perform all the work mentioned in the specifications and shown on the drawings prepared by the said Architect for the Mason work and plastering for the restoration of the premises No. 230-232 Market street, recently damaged by fire, The Securities Investment Co. and Frederick G. Agens, respective Owners, which drawings and specifications are identified by the signatures of the parties hereto.

ART. II. The Architect shall furnish to the Contractor such further drawings or explanations as may be necessary to detail and illustrate the work to be done, and the Contractor shall conform to the same as part of this contract so far as they may be consistent with the original drawings and specifications referred to and idenitfied, as provided in Art. I.

It is mutually understood and agreed that all drawings and specifications are and remain the property of the Architect.

ART. III. No alterations shall be made in the work shown or described by the drawings and specifications except upon a written order of the Architect, and when so made, the value of the work added or omitted shall be computed by the Architect, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party thereto, the valuation of the work added or omitted shall be referred to three (3)

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disinterested Arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expenses of such reference.

ART. IV. The Contractor shall provide sufficient, safe and proper facilities at all times for the inspection of the work by the Architect or his authorized representative shall, within twenty-four hours after receiving written notice from the Architect to that effect, proceed to remove from the grounds or buildings all materials condemned by him, whether worked or unworked, and to take down all portions of the work which the Architect shall by like written notice condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications.

ART. V. Should the Contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the Architect, the Owner shall be at liberty, after three days' written notice to the Contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the Contractor under this contract; and if the Architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the Owner shall be at liberty to terminate the employment of the contractor for the said work and to enter upon

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the premises and take possession, for the purpose of completing the work comprehended under this contract, of all materials, tools and appliances thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor and in case of such discontinuance of the employment of the Contractor, shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the Owner in finishing the work, such excess shall be paid by the Owner to the Contractor, but if such expense shall exceed such unpaid balance the Contractor shall pay the difference to the Owner. The expense incurred by the Owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the Architect, but an appeal from his decision may be made to arbitration, as provided in Article III of this Contract.

ART. VI. The Contractor shall complete the several portions, and the whole of the work comprehended in this Agreement by and at the time or times herein stated.....

.....

provided that.....

ART. VII. Should the Contractor be obstructed or delayed in the prosecution or completion ..... work by the act, neglect, delay or default of the Owner, or the Architect, or of any other contractor employed by the Owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the em-

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ployees through no fault of the Contractor then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the Architect within twenty-four hours of the occurrence of such delay, the duration of such extension shall be certified to by the Architect, but appeal from his decision may be made to arbitration, as provided in Article III of this contract.

ART. VIII. The Contractor shall have the right to lock out.....employees upon an order so to do being received by..... from the Associated Building Contractors or .....Masters' Association of Newark, and in the event of such lock-out taking place no claim for damages shall be made by the Architect or Owner on account of any delay caused thereby, and the time fixed by this contract for the completion of the work shall be extended for a period equivalent to the time lost by reason of said lock-out. The Contractor shall notify the Architect in writing within twenty-four (24) hours of the cessation and resumption of work.

ART. IX. The Owner agree to provide all labor and materials not included in this contract in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the Contractor, agree that.....will reimburse the Contractor for such loss; and the Contractor agree that if ..... shall delay the material progress of the work so as to cause any damage for which the Owner shall become liable (as

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above stated), then ..... shall make good to the Owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and determined by the Architect, but appeal from his decision may be made to arbitration as provided in Article III of this contract.

ART. X. It is hereby mutually agreed between the parties hereto that the sum to be paid by the Owner to the Contractor for said work and materials shall be Fifty Two Hundred and Fifty ($5250.00) Dollars, subject to additions and deductions as hereinbefore provided, and that such sum shall be paid in current funds by the Owner to the Contractor in installments as follows:

As the work progresses less 15% reserve.

.....

The final payment shall be made within..... days after this contract is fulfilled.

All payments shall be made upon written certificates of the Architect to the effect that such payments have become due.

If at any time there shall be evidence of any lien or claim for which, if established, the Owner or the said premises might become liable, and which is chargeable to the Contractor, the Owner shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify..... ..... against such lien or claim. Should there prove to be any such claim after all payments are made, the Contractor shall refund to the Owner all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the Contract default.

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ART. XI. It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials.

ART. XII. The Owner shall during the progress of the work maintain full insurance on said work, in ..... own name and in the name of the Contractor, against loss or damage by fire. The policies shall cover all work incorporated in the building, and all materials for the same in or about the premises, and shall be made payable to the parties hereto as their interest may appear.

ART. XIII. The said parties for themselves, their heirs, executors, administrators and assigns, do hereby agree to the full performance of the covenants herein contained.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals, the day and year first above written.

W. L. BLANCHARD CO. (Seal)
W. L. BLANCHARD, Pres. (Seal)

Attest:

J. S. BLANCHARD,
Sec.

RUSSELL-ROBINSON CO. (Seal)
B. F. ROBINSON, Pres. (Seal)

Attest:

F. P. RUSSELL,
Sec.

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MASONS SPECIFICATIONS.

Specifications of Mason's Materials and Workmanship to be furnished in the Alterations and re-building of Nos. 230-232 Market St., Newark, N. J.

All the works to be erected and finished in accordance with designs and plans prepared by and under the superintendence of

J. O'ROURKE & SONS, ARCHITECTS
NEWARK, NEW JERSEY.

Jan. 1910.

Owner.

Permits:

Preparatory to estimating on the works, each contractor shall visit the premises and thoroughly examine the site. He shall carefully note the present condition of the grounds and shall familiarize himself with all matters relative thereto and to the proposed works, before making and submitting his estimate therefor.

Performance of Works:

The entire works must be done carefully and safely without injury or damage to the adjoining building or properties or annoyance to the Owner or occupants thereof.

No rubbish to be allowed to accumulate at the works or in the street, all such must be promptly removed as often as directed.

Materials and Labor:

All materials, labor and workmanship required for the works throughout are to be of first class quality of their several kinds as hereinafter specified, and none but competent and experi-

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enced mechanics and workmen are to be employed on the said works, either at the site or in the shops.

The contractor is to have all materials delivered and properly placed on the site in such quantities as shall insure the uninterrupted progress of the works, the least obstruction of the premises, or the streets, and no overloading at any point.

Samples and Models:

Samples, models and tests of materials and workmanship, for approval, must be furnished to the Architects whenever required and all materials and workmanship used in or for the works must be fully to the approved samples, models and tests.

Guarantee:

The contractor is responsible for and must make good any defects arising or discovered in his works within two (2) years after completion thereof and acceptance by the Architects.

Union Labor:

On all works throughout the contractor shall employ "Union Labor" only and shall pay to the men employed the current "Union Rates" of wages.

Permits, &c:

The contractor must, at his own cost, obtain all necessary permits, give all necessary notices, pay all legal fees and comply with all State and Municipal Building and Sanitary Laws, Ordinances, Rules and Regulations relating to building and the preservation of the public health.

Any labor or materials in addition to that herein specified or indicated on the drawings

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that may be necessary to comply with these laws, ordinances, rules or regulations are to be supplied by the contractors without additional cost.

This clause will not apply to special cases or arbitrary decisions, not covered by the aforesaid laws, ordinances, rules or regulations.

In such cases the additional cost only will be borne by the Owner.

The contractor is to provide for an abundant supply of water for building purposes during the entire progress of the works.

Protection to the Public:

The contractor shall provide and maintain all legal or necessary guards, fences, lights, warning signs, a watchman by day and night, temporary side walks over side walk excavation, and other constructions required during the erection of the works, to fully protect all persons from damage, injury or loss either to their persons or property and will be wholly responsible should any damage, injury or loss occur through or from the neglect, carelessness or incompetence of himself or his employees.

Protection of Works:

The contractor shall supply and set as directed by the Architects, all plank or timber centers, braces, shores, temporary covering, frames, boxings, or other constructions required to set, protect and properly secure all works and materials, set or to be set.

Any injury resulting from neglect of the above must be made good at the expense of the contractor.

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No centres are to be struck or braces or supports removed without the consent of the Architects.

The contractor is also to supply all necessary pumps, drains and sewer connections and do all grading or other work necessary in and around the building and site to keep same free from water and in a safe condition.

Cutting and Fitting:

The contractor is to have each mechanic or workman do all the required cutting and fitting in his line for all other mechanics or workmen, and make good his own work after all other mechanics and workmen.

Any work shown on the plans and not particularly described in the specifications, or vice versa, shall be executed as though it were shown and described in both.

Drawings:

All drawings placed in the contractor's charge are to be carefully protected and held by him subject to the inspection of and return to the Architects, as their property whenever demanded.

The Architects will furnish one complete set of plans and specifications and necessary working drawings to the contractor and extra sets and parts of sets to sub-contractors as may be necessary.

Any further copies desired by the contractor will be furnished to him at a reasonable compensation therefor.

Figured dimensions on drawings are in all cases to be taken in preference to scale measurements, and in case of any doubt or discrepancy the same will be promptly referred to the Archi-

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tects by the contractors before taking any action thereon.

The contractor will carefully examine and verify the correctness of all drawings, immediately after they are placed in his charge, and he will be held strictly responsible for the accurate and correct setting out of all work.

Survey:

This contractor will have the site properly surveyed by an experienced "City Surveyor," approved by the Architects, who will lay out and mark the correct lines, levels and grades of the property and the side walk and street sewer in front.

He will also establish bench marks or datum levels in front and rear as directed by the Architects.

The contractor must verify the correctness of the survey lines and levels and bench marks and will be held strictly responsible for the accuracy of the setting out of all the work.

Sub-Contracts:

No sub-contracts are to be let without the approval of the Architects, and all work that is sub-let shall come under the provisions of the General Contract. The names and addresses of all sub-contractors and a statement of the work sub-let shall be furnished to the Architects.

Old Work:

This contractor will estimate on removing all the old rubbish at present in the building.

The west wall, the centre wall supported on the steel beams and iron columns and the rear wall of second and third story, east building and third story west building, will be carefully taken

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down, and any brick that may be considered suitable by the Architects can be used in the new brick walls after they have been thoroughly cleaned off.

The east wall is in good condition and will remain in place.

This contractor will do all necessary cutting of walls for the floor beams and anchors.

The walls taken down will be re-built on a foundation of concrete, composed of 2″ machine broken stone, approved American Portland cement and clean, sharp sand, in the proportions of one measure of cement, three of sand and five of broken stone, all to be thoroughly mixed dry, and then thoroughly mixed moderately wet and immediately placed and tamped solid in the trenches, level on top ready to receive the walls and piers.

The concrete under walls will be 12″ wider than the walls and that under the piers two feet wider than piers.

Should any weak or defective places be found in the earth foundations, such places shall be excavated to an approved solid bottom and filled with concrete as above specified, at the contractor's expense; but should such weak or defective places involve a depth of over one foot additional concrete in any place the cost of such overplus work shall be paid by the Owner in accordance with the Architect's estimate thereon.

This contractor will do all underpinning where required, to properly protect adjoining walls and properties.

Supply the necessary concrete footings for the angle elevator frames and the wood posts in cellar.

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Back Filling:

Properly back fill around all footings, walls, and piers with suitable clay material, filling all cavities and tamping solid as it is filled in.

The centre wall will be built up from cellar 12″ thick, leaving the present columns and steel beams in place.

All the walls, piers and brick partitions shall be built of first quality, hard burned Jersey brick, laid in the best manner, joints neatly pointed and every sixth course to be a heading bond course.

The rear walls will be patched up where required and all joints neatly pointed up, and the new rear walls built on top, two stories on east building and one on west building.

Mortar:

All brick work throughout will be laid up in approved American Portland cement and sand mortar. The present east wall will be pointed up carefully with cement mortar whenever required, all loose mortar will be carefully scraped out, and the joints slushed full and pointed.

All mortar to be mixed in the best manner, in proper proportions, and to be fresh when used.

Cement mortar to be mixed in the proportions of one measure of cement to one measure of sand.

Arches:

Build strong, plain brick arches of 8″x12″ rings over openings in brick work on inside face of walls and wherever directed by the Architects. Fire door openings to have arches of at least three rings.

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To be built on wood centres furnished and set by the carpenter in the usual manner.

Chases, &c:

Build in the walls, as directed and as shown, all chases, openings and recesses required for pipes, &c., also all toothings and slip joints and properly fill and point up all such work at completion.

Do all necessary repairing and re-building of brick work under stage of west building.

Iron Work:

Furnish and set new iron window guards to the first story and mezzanine floor rear, window bars to be of same thickness and spacing as those at present in the building.

Three doors in rear will be fitted with bar doors with hinges built into wall and to have brass padlocks. Window guards and doors to be same style as at present.

Furnish and set one new rolling door to freight elevator, to be in same style as present door.

Furnish to the carpenter the rods, nuts and washers supporting the balcony as shown on plans.

Furnish and set cast iron base plates for wood post in cellar as shown.

Furnish and erect in position as shown the iron frames for elevator shaft, to be of four upright 6″ angles each to have two cross bracing angles in each panel in each story and to extend up to and including the pent house, to have 6″ angles to support the sheave beams; these angles to have diagonal bracing to the main upright angles; the uprights in cellar will have cast iron

plate under same to give bearing on the stone base blocks.

The exterior of pent house will be covered with corrugated iron same as present house, on three sides.

Flues:

Do all necessary repairing and re-pointing of flues in the east wall and leave same perfect at completion.

Blue Stone:

Furnish and set blue stone coping to parapet walls, party and west wall, to be quarry cut, about 4″ thick and 14″ wide.

Repair and replace the coping on east wall and furnish new coping for the added length of east wall.

Furnish and set blue stone sills and lintels to all windows and doors in rear as indicated on rear elevations.

Door sill 6″ by full thickness of walls. Lintels 4″ thick, sills 6″ thick, all quarry cut.

Supply and set blue stone caps to piers in cellar of the west building, also base stones for elevator frames and wood posts in cellar of east building.

Concrete Floors:

Do all necessary patching and repairing of concrete floors in cellar, to be of same thickness and materials as the present floors:

Plaster Blocks:

Three sides of elevator shafts will be enclosed with plaster blocks set between the angle frames.

To be 3″ hollow blocks as manufactured by the Adamant Manufacturing Co., or any other block equal and approved by the Architects.

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All plaster blocks to be set in No. B Adamant plaster thoroughly grouted, fitted and secured in the best manner, and straight throughout and left ready for plastering.

Plastering:

The rear walls of first and second stories and the side walls of first and second stories and the interior and exterior of elevator shafts will be plastered in the best manner.

All plastering will be either Rock Wall, King's Windsor or Adamant.

All to be mixed, applied and finished in strict accordance with the formula of the manufacturers.

All walls plastered will receive one coat of patent dry mortar plaster. All the above will have a finish of first quality lime putty and clean washed Rockaway sand properly mixed and applied, thoroughly floated down with cork face floats and finished in the best manner to a uniform nap surface and tint.

There will be no plastering on the third floor.

Wherever the walls are furred, which includes leveling the east wall in first story and the two stories of the rear walls, this contractor will estimate on using first quality spruce lath, thoroughly seasoned, properly spaced, well nailed and breaking joints in the usual manner.

The ceilings of first and second floors, including ceiling of mezzanine and balconies will be furred with plaster board, thoroughly nailed in the best manner.

This contractor will thoroughly overhaul and repair the tile floor in front, replacing broken tile, and leave everything perfect at completion.

At the completion of his contract this contractor shall thoroughly clean in and about the

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premises, carting all his old material and rubbish and leave everything in perfect condition. *Separate Estimate:*

This contractor will submit two estimates covering the cost of his work in each building, he will consider the centre wall a party wall and divide his cost between the two.

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Transcript of Proceedings filed in office of Clerk of United States District Court for the District of New Jersey.

THE STATE OF NEW JERSEY
TO AETNA LIFE INSURANCE COMPANY, a corporation.

(Seal)

You are summoned to answer the annexed complaint of Charles C. Pilgrim, receiver, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court at Trenton *within twenty days* after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court at Trenton this fourteenth day of January, Nineteen hundred and sixteen.

WM. C. GEBHARDT,
Clerk.

Lum, Tamblyn & Colyer,
Attorneys.

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NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON Co., *Plaintiff,* *vs.* AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Action at Law.* *Complaint.*

Charles C. Pilgrim, Receiver of the Russell-Robinson Co., residing in the City of Newark in the County of Essex and State of New Jersey, says that:

1: The Russell-Robinson Co., at the times herein alleged was a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having its principal office in the City of Newark in the County of Essex and State of New Jersey, and maintained, conducted and carried on the business of a general contractor and builder.

2: On November 18, 1909, the defendant was and still is a corporation duly incorporated with power and authority, amongst other things, to insure and indemnify against loss or expense arising or resulting from claims for damages on account of bodily injuries or death.

3: For and in consideration of the sum of $360., the defendant on November 18th, 1909, executed to the said Russell-Robinson Co., a policy of insurance, agreeing thereby to indemnify the said

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Russell-Robinson Co. against any loss and expense to the extent of $5000., resulting from claims upon the said Russell-Robinson Co., for damages on account of bodily injuries or death suffered by any person not employed by the said Russell-Robinson Co., by reason of the business described and conducted at the locations named in the warranties set forth in said policy, said policy covering a period of twenty-four months, beginning November 18th, 1909.

4: Under the warranties as contained in said policy the business of the said Russell-Robinson Co. was described as follows under the following heading:

"CLASSIFIED DESCRIPTION OF THE BUSINESS:

All operations incidental to the following business, in and during the continuance thereof.

Carpentry work in connection with buildings not exceeding four (4) stories in height (no grain elevator construction). Carpentry work in connection with buildings exceeding four stories in height (no grain elevator construction).

All operations performed for the Assured under contract."

The location of said business under said warranties was given as follows:

"Newark, New Jersey and elsewhere in New England and Middle Atlantic States."

5: The said Russell-Robinson Co., subsequent to the issuance of the said policy entered into an agreement with the Securities Investment Co. and Frederick G. Agens, whereby the said Russell-Robinson Co., for a consideration agreed to

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remodel and repair the premises known and designated as Nos. 230 to 232 Market Street, Newark, New Jersey, which had been damaged by fire.

6: Subsequent to the making of the aforementioned contract, the said Russell-Robinson Co., on or about the 2nd day of April, 1910, entered into a contract with William L. Blanchard Co., whereby the said William L. Blanchard Co., for a consideration agreed that it would perform and do all the mason work and plastering for the restoration of the said premises Nos. 230 to 232 Market Street, in accordance with certain specifications.

7: On April 5, 1910, while the said William L. Blanchard Co. was engaged in an operation performed for said Russell-Robinson Co. under said contract, doing the work called for thereby, upon the premises known and designated as Nos. 230 to 232 Market Street, a certain wall located thereon upon which the said William L. Blanchard Co. was working, fell and did strike one Louis Zamelsky who was then and there upon said premises, but who was not employed by the said Russell-Robinson Co., by reason of which the said Louis Zamelsky died on the same day from wounds and injuries received from said falling wall.

8: Immediately after the occurrence of the accident, the said Russell-Robinson Co. gave notice thereof to the defendant, as provided for in said policy, and otherwise performed all the conditions of said policy on its part to be performed.

9: On June 10, 1913, in a cause then pending in our New Jersey Court of Chancery, wherein Frank P. Russell was the complainant and the said Russell-Robinson Co. was the de-

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fendant, the plaintiff herein, Charles C. Pilgrim, by an Order made on that day by our said Court of Chancery, was duly pointed and subsequently qualified as receiver of said defendant corporation, Russell-Robinson Co., with all the powers granted to such a receiver; pursuant to the statutes in such case made and provided.

10: That Rose Zamelsky, the administratrix of the estate of the said Louis Zamelsky, after actual trial of the issue, as provided for by said policy, for the death of the said Louis Zamelsky, recovered a judgment against the said Russell-Robinson Co., in the New Jersey Supreme Court, for the sum of $6000.

11: The said Charles C. Pilgrim, the plaintiff herein, as receiver of the said Russell-Robinson Co., was forced to and did on the 30th day of March, 1915, pay to the said Rose Zamelsky, administratrix, the sum of $6847.24, being the amount of said judgment with interest and costs thereon.

12: The defendant has not indemnified the plaintiff for said loss and expense.

Plaintiff demands $5000., with interest thereon and costs.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

I hereby deputize and appoint Frank Conrad, of Trenton, N. J., a Special Deputy to serve the within writ.

Witness my hand and seal this 15th day of January, A. D., 1916.

J. WARREN FLEMING, (L. S.)
Sheriff of Mercer County, by
Harry V. Holden, Under Sheriff.

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Served within Summons and Complaint January 19, 1916, upon Aetna Life Insurance Company, a corporation, def'f by leaving a copy of the same in the office of the Commissioner of Banking and Insurance of the State of New Jersey, at the State House, Trenton, N. J., with a service fee of two dollars, with Thos. K. Johnston, Dep. B. Com.

J. Warren Fleming, Sheriff, by Frank Conrad, Spec. Dep.

Fees:

Sheriff,	$2.24
B. Com.	2.00
	$4.24

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NEW JERSEY SUPREME COURT.

ESSEX COUNTY.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON COMPANY, *Plaintiff*, *vs.* AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Action at Law.* *Order Extending Time.*

It is, on this February 5, 1916, ORDERED, that the time of defendant in above cause to answer therein, be and it hereby is extended until February 15, 1916.

Let the foregoing order be entered.

SAMUEL KALISCH,
J. S. C.

Entered February 7th, 1916, on motion of

COLLINS & CORBIN,
Attorneys of Defendant.

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NEW JERSEY SUPREME COURT.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON Co., *Plaintiff,* *vs.* AETNA LIFE INSURANCE COMPANY, A corporation, *Defendant.*	*Action at Law.* *Notice of Removal.*

To Messrs. Lum, Tamblyn & Colyer,
Attorneys for Plaintiff.

PLEASE TAKE NOTICE, that on Friday, February 11, 1916, at ten o'clock in the forenoon, or as soon thereafter as we can be heard, at the Chambers of Honorable Samuel Kalisch, Justice of the Supreme Court, No. 738 Broad Street, Newark, N. J., we shall present to said Justice a petition of the Aetna Life Insurance Company, a corporation, defendant in above cause, for the removal of the above cause to the District Court of the United States for the District of New Jersey, copy of which petition is hereto annexed; and shall also then and there present to said Justice a bond, copy of which is hereto annexed; and shall also apply for the removal of said cause to said District Court of the United States for the District of New Jersey; and immediately thereafter, we shall file said petition and bond; all according to *to* the Act of Congress in such case made and provided.

Dated February 9, 1916.

Respectfully,

COLLINS & CORBIN,
Attorneys of Defendant.

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(Endorsed.)

"Service of a copy hereof and of within petition and bond is hereby acknowledged this February 9, 1916.

LUM, TAMBLYN & COLYER,
Attys. for Plaintiff."

NEW JERSEY SUPREME COURT.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON CO., *Plaintiff,* *vs.* AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Action at Law.* *Bond on Removal.*

KNOW ALL MEN BY THESE PRESENTS, That we, Aetna Life Insurance Company, a corporation of the State of Connecticut, as principal, and The Aetna Accident and Liability Company of Hartford, Connecticut, a corporation of the State of Connecticut, as surety, are held and firmly bound unto Charles C. Pilgrim, Receiver of the Russell-Robinson Co. in the penal sum of $500., lawful money of the United States, to be paid to the said Charles C. Pilgrim, Receiver of the Russell-Robinson Co., his heirs, executors, administrators, successors or assigns: To which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

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Sealed with our seals, and dated the Fourth day of February, Nineteen Hundred and Sixteen.

WHEREAS, the above named Charles C. Pilgrim, Receiver of the Russell-Robinson Co. has heretofore brought a suit of a civil nature in the Supreme Court of New Jersey against the said Aetna Life Insurance Company, and

WHEREAS, the said Aetna Life Insurance Company simultaneously with the filing of this bond intends to file its petition in said suit in such State Court for the removal of said suit into the District Court of the United States in the District where said suit is pending, to wit, the District Court of the United States in and for the District of New Jersey, according to the provisions of the Act of Congress in such case made and provided.

NOW, THEREFORE, the condition of this obligation is such that if the said petitioner, Aetna Life Insurance Company, shall enter in the District Court of the United States for the District of New Jersey within thirty days from the date of filing said petition in said State Court a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court, if said District Court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said suit, if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

AETNA LIFE INSURANCE COMPANY,

(SEAL) By J. S. ROWE,
Vice President.

Exhibit D. 1.

Attest:

E. C. HIGGINS,
Secty.

THE AETNA ACCIDENT AND LIABILITY COMPANY, OF HARTFORD, CONNECTICUT.

(SEAL) By A. R. SEXTON,
Res. Vice President.

Attest:

G. N. DYER,
Res. Ass't Secretary.

STATE OF CONNECTICUT, }
COUNTY OF HARTFORD, } *ss:*

BE IT REMEMBERED, on the 4 day of February, Nineteen hundred and Sixteen, before me, the subscriber, a Notary Public, personally appeared, J. S. Rowe, the Vice President of the Aetna Life Insurance Company, a corporation of the State of Connecticut, one of the parties mentioned in the within bond, to whom I first made known the contents thereof, and thereupon he acknowledged that the within bond was the voluntary act and deed of the said Aetna Life Insurance Company, a corporation of the State of Connecticut, made by virtue of authority from its Board of Directors, for the uses and purposes therein mentioned.

LEONARD J. COLLINS,
Notary Public. (SEAL)

Exhibit D. 1.

STATE OF CONNECTICUT, }
HARTFORD COUNTY, } *ss:*

I, George A. Conant, Clerk of the County of Hartford and of the Superior Court of said State within and for said County, which is a Court of Record, and keeper of the seal thereof.

DO HEREBY CERTIFY, that Leonard J. Collins whose name is subscribed to the certificate or proof of acknowledgment on the annexed instrument was at the time of taking such acknowledgment or proof duly authorized to take the same and was a Notary Public within and for said State, dwelling in said County, duly appointed, commissioned and sworn, and authorized by the laws of this State to administer oaths for general purposes and to take the acknowledgment or proof of deeds to be recorded in this State; that I am well acquainted with his handwriting and verily believe that the signature to the said acknowledgment or proof is genuine.

(SEAL)

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Seal of said Superior Court at Hartford, in said County, this 4th day of February, A. D. 1916.

GEORGE A. CONANT,
Clerk.

Exhibit D. 1.

THE AETNA ACCIDENT AND LIABILITY COMPANY.

(STAMP)

HARTFORD, CONNECTICUT.
(AETNA)

CERTIFICATE OF AUTHORITY OF RESIDENT VICE-PRESIDENT.

KNOW ALL MEN BY THESE PRESENTS, that A. R. Sexton, has been and is hereby appointed Resident Vice-President of The Aetna Accident and Liability Company, of Hartford, Connecticut, at Hartford, Connecticut, and as such Resident Vice-President, has full power and authority to sign and execute on behalf of The Aetna Accident and Liability Company, any and all bonds and undertakings, and all bonds and undertakings signed by him, when sealed and attested by a Resident Assistant Secretary, shall be valid and binding upon the Company as if said bonds and undertakings had been signed by the President and duly sealed and attested.

This appointment is made under and by authority of the following By-Laws adopted by the Board of Directors of The Aetna Accident and Liability Company at a meeting duly called and held on the 28th day of December, 1911.

Article 8. Resident Officers.
Attorneys-in-Fact and Agents.

Section 1: The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President,

Exhibit D. 1.

the Secretary or the Board of Directors, may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 2: Resident Vice-Presidents, may, subject to the provisions and limits in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the President or any other Officer could bind it; such bonds and undertakings, however, to be attested in every instance by a duly appointed Resident Assistant Secretary.

In Witness Whereof, THE AETNA ACCIDENT AND LIABILITY COMPANY has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 4th day of February, A. D. 1916.

THE AETNA ACCIDENT AND LIABILITY COMPANY,

(Seal) By D. N. GAGE,
Secretary.

State of Connecticut, }
County of Hartford, } *ss:*

On this 4th day of February, A. D. 1916, before me personally came D. N. Gage, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability

Exhibit D. 1.

Company, the corporation, described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

JAMES F. McEVITT,
Notary Public.

My Commission expires Jan. 31, 1918.

(SEAL)

THE AETNA ACCIDENT AND LIABILITY COMPANY. (STAMP)

HARTFORD, CONNECTICUT.
(AETNA)

CERTIFICATE OF AUTHORITY OF RESIDENT ASSISTANT SECRETARY.

KNOW ALL MEN BY THESE PRESENTS, That G. V. Dyer, has been and is hereby appointed Resident Assistant Secretary of The Aetna Accident and Liability Company, of Hartford, Connecticut, and as such Resident Assistant Secretary has power and authority to affix the seal of the Company to, and attest on behalf of the Company, any and all bonds and undertakings, and all bonds and undertakings sealed and attested by him, when signed by a duly appointed Resident Vice-President, shall be as valid and binding upon the Company as if said bonds and undertakings had been sealed and attested by the Secretary.

This appointment is made under and by authority of the following By-Laws adopted by the Board of Directors of The Aetna Accident

Exhibit D. 1.

and Liability Company, at a meeting duly called and held on the 28th day of December, 1911.

ARTICLE 8. Resident Officers, Attorneys-in-Fact and Agents.

Section 1: The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President, any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent and revoke the power and authority given him.

Section 3: Resident Assistant Secretaries may, subject to the provisions and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond, and may bind the Company thereby as fully and to the same extent as the Secretary or any other Officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

IN WITNESS WHEREOF, THE AETNA ACCIDENT AND LIABILITY COMPANY has caused these presents to be signed by its Secretary, and its corporate seal to be hereto affixed, this 4th day of February, A. D. 1916.

THE AETNA ACCIDENT AND LIABILITY COMPANY,

(SEAL) By D. N. GAGE,

Secretary.

Exhibit D. 1.

STATE OF CONNECTICUT,
COUNTY OF HARTFORD, } *ss:*

On this 4th day of February, A. D., 1916, before me personally came D. N. Gage, to me known, who, being by me duly sworn, did depose and say: that he resides in the City of Hartford, State of Connecticut; that he is the Secretary of The Aetna Accident and Liability Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

JAMES F. McEVITT, (SEAL)
Notary Public.

My Commission Expires Jan. 31, 1918.

STATE OF CONNECTICUT,
COUNTY OF HARTFORD, } *ss:*

On this 8th day of February, 1916, before me personally came A. R. Sexton, to me known, who, being by me duly sworn, did depose and say: That he resides in the City of Hartford; that he is Resident Vice-President of THE AETNA ACCIDENT AND LIABILITY COMPANY, the corporation described in, and which executed the within instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said Company; that he signed his name thereto by like order; that he is acquainted with G. V. Dyer; that he knows

Exhibit D. 1.

him to be the Resident Assistant Secretary of said Company; that the signature of said G. V. Dyer, subscribed to said instrument, is in the genuine handwriting of said G. V. Dyer, and was thereto subscribed by like order of said Board of Directors, and in the presence of him, the said A. R. Sexton.

JAMES F. McEVITT, (SEAL)
Notary Public.

My Commission Expires Jan. 31, 1918.

At a regular meeting of the Board of Directors of THE AETNA ACCIDENT AND LIABILITY COMPANY, duly called and held on the 28th day of December, A. D. 1911, the following By-Law adopted.

ARTICLE 8. Resident Officers, Attorneys-in-Fact and Agents.

Section 1: The President, any Vice-President or the Secretary may from time to time appoint Resident Vice-Presidents, Resident Assistant Secretaries, Attorneys-in-Fact and Agents to represent and act for and on behalf of the Company, and either the President any Vice-President, the Secretary or the Board of Directors may at any time remove any such Resident Vice-President, Resident Assistant Secretary, Attorney-in-Fact or Agent, and revoke the power and authority given him.

Section 2: Resident Vice-Presidents may, subject to the provisions and limits named in their certificate of authority, sign and execute on behalf of the Company any and all bonds and undertakings and other writings obligatory in the nature of a bond,

Exhibit D. 1.

and may bind the Company thereby as fully and to the same extent as the President or any other officer could bind it; Such bonds and undertakings, however, to be attested in every instance by a duly appointed Assistant Secretary.

Section 3: Resident Assistant Secretaries may, subject to the provisions, and limits named in their certificate of authority, affix the seal of the Company to and attest on behalf of the Company and all bonds and undertakings and other writings obligatory in the nature of a bond ,and may bind the Company thereby as fully and to the same extent as the Secretary or any other officer could bind it; such bonds and undertakings, however, to be signed and executed in every instance by a duly appointed Resident Vice-President.

Section 4: Attorneys-in-Fact, may, subject to the provisions and limits named in their certificate of authority, execute and deliver and attach the seal of the Company to any and all bonds and undertakings and other writings obligatory in the nature of a bond on behalf of the Company, and any such instrument executed by any such Attorney-in-Fact when attested by any other Attorney-in-Fact shall be as binding upon the Company as if signed, sealed, and attested by any Officer of the Company.

Exhibit D. 1.

STATE OF CONNECTICUT, }
COUNTY OF HARTFORD, } *ss:*

I, D. N. Gage, of THE AETNA ACCIDENT AND LIABILITY COMPANY, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said Original By-Law.

Given under my hand and the seal of the Company, at Hartford, Connecticut, this 8th day of February, 1916.

(SEAL) D. N. GAGE,
Secretary.

(Endorsed)

"Accepted and approved February 11, 1916.

SAMUEL KALISCH,
J. S. C."

"Filed Feb. 14, 1916.

WM. C. GEBHARDT,
Clerk."

Exhibit D. 1.

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON CO., *Plaintiff.*	*Action at Law.*
vs.	
AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Petition for Removal.*

To the Honorable Supreme Court of the State of New Jersey:

Your petitioner, AETNA LIFE INSURANCE COMPANY, a corporation, respectfully shows to this Honorable Court that the matter and amount in dispute in the above entitled suit exceeds the sum of value of $3,000.00, exclusive of interest and costs; that the controversy in said suit is, and at the time of the commencement of said suit was, between citizens of different states, that your petitioner, the defendant in above entitled suit, was at the time of the commencement of said suit and still is a resident of and a citizen of the State of Connecticut, having been organized and incorporated under the laws of that State, and a non-resident of the State of New Jersey; that the plaintiff, Charles C. Pilgrim, Receiver of the Russell-Robinson Co., was then and still is a resident and citizen of the city of Newark in the County of Essex and the State of New Jersey; and that said Russell-Robinson Co.

Exhibit D. 1.

was a corporation organized and incorporated under the laws of the State of New Jersey.

Your petitioner further shows that the time within which it is required to answer the complaint in above suit has not yet expired; that it has not filed an answer to said complaint; and that no special bail was or is required in this suit.

Your petitioner offers herewith a good and sufficient surety for its entering in the District Court of the United States for the District of New Jersey within thirty days from the date of filing this petition a certified copy of the record in this suit, and for paying all costs that may be awarded by said District Court if said Court shall hold that this suit was wrongfully or improperly removed thereto, said surety being by bond in the penal sum of $500.00, conditioned as required by an act of Congress in such case made and provided.

Your petitioner prays this Honorable Court to proceed no further herein except to make the order of removal required by law and to accept the said surety and bond and cause the record herein to be removed into said District Court of the United States for the District of New Jersey, pursuant to the act of Congress in such case made and provided.

And your petitioner will ever pray, etc.

AETNA LIFE INSURANCE COMPANY,

J. S. ROWE,
Vice President.
Petitioner.

(SEAL)

COLLINS & CORBIN,
Attorneys of Petitioner.

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STATE OF CONNECTICUT,
COUNTY OF HARTFORD, } *ss:*

J. S. Rowe, of full age, being duly sworn according to law on his oath says: That he is Vice President of AETNA LIFE INSURANCE COMPANY, a corporation of the State of Connecticut, the defendant in the within entitled cause, and the petitioner named in the foregoing petition; that said Aetna Life Insurance Company, at the time of the commencement of the within mentioned suit, was and still is a resident and citizen of the State of Connecticut, having been organized and incorporated under the laws of that State; that the foregoing petition is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

J. S. ROWE.

Subscribed and sworn to at Hartford, Conn., this 4 day of February, 1916, before me, the subscriber, a Notary Public in and for said county and state, duly sworn, as witness my hand and official seal.

LEONARD J. COLLINS,
(SEAL) *Notary Public.*

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STATE OF CONNECTICUT,
HARTFORD COUNTY, } *ss:*

I, George A. Conant, Clerk of the County of Hartford, and of the Superior Court of said State within and for said County, which is a Court of Record, and keeper of the seal thereof.

DO HEREBY CERTIFY that Leonard J. Collins whose name is subscribed to the certificate of proof of acknowledgment on the annexed instrument was at the time of taking such acknowledgment or proof duly authorized to take the same and was a Notary Public within and for said State, dwelling in said County, duly appointed, commissioned and sworn, and authorized by the laws of this State to administer oaths for general purposes and to take the acknowledgment or proof of deeds to be recorded in this State; that I am well acquainted with his handwriting and verily believe that the signature to the said acknowledgment or proof is genuine.

(SEAL)

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Seal of said Superior Court at Hartford, in said County, this 4th day of February, A. D. 1916.

GEORGE A. CONANT,
Clerk.

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(Endorsed)

"Accepted February 11, 1916.

SAMUEL KALISCH,
J. S. C.

Filed Feb. 14, 1916.

WM. C. GEBHARDT,
Clerk.

NEW JERSEY SUPREME COURT.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON CO., *Plaintiff.* *vs.* AETNA LIFE INSURANCE COMPANY, a corporation, *Defendant.*	*Action-at-Law.* *Order for Removal.*

On due notice to attorneys for plaintiff in above cause, IT IS on this Eleventh day of February, 1916, on motion of Collins & Corbin, attorneys for defendant therein, ORDERED, that the petition of said defendant for the removal of said cause to the District Court of the United States for the District of New Jersey be and the same hereby is accepted, and that the bond presented with said petition be and it hereby is ac-

cepted and approved, and that said petition and bond be filed, and that this Court proceed no further in said suit.

Let the foregoing ORDER be entered.

SAMUEL KALISCH,
J. S. C.

Entered February 11th, 1916.

On motion of

COLLINS & CORBIN,
Attorneys of Defendant.

(Endorsed)

"Filed Feb. 14, 1916.

WM. C. GEBHARDT,
Clerk."

I, WILLIAM RIKER, JR., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file in my office.

In testimony whereof I have set my hand and the seal of said County at Trenton, this fourteenth day of February, A. D. nineteen hundred and sixteen.

(SEAL)

WM. C. GEBHARDT,
Clerk.

Exhibit D. 1.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY. } *ss.*

I, GEORGE T. CRANMER, Clerk of the District Court of the United States, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original Copy of Proceedings on file, and now remaining among the records of said Court, in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the Seal of the said Court, at Trenton, in said District, this twenty-second day of September, nineteen hundred and sixteen.

(SEAL)

GEORGE T. CRANMER,
Clerk District Court, U. S.

By ROBERT S. CHEVRIER,
Deputy.

Exhibit D. 2.

Exhibit D. 2.

Judgment record in case of Rose Zamelsky, Admx., etc. v. Russell-Robinson Company, impleaded, etc.

NEW JERSEY SUPREME COURT.

ROSE ZAMELSKY, Admrx., etc., of Louis Zamelsky, deceased, *vs.* RUSSELL-ROBINSON COMPANY, Impleaded, &c.	*In Tort.* *On Postea & R. to S. C.* *Kalisch & Kalisch, Attorneys.*

As yet of the twelfth day of April, A. D. nineteen hundred and twelve.

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice.

WILLIAM RIKER, Jr.,
Clerk.

ESSEX COUNTY, *ss.*

Russell-Robinson Company, a corporation, and Wm. L. Blanchard Company, a corporation, the defendants in this suit, were summoned to answer unto Rose Zamelsky, administratrix of all and singular of the goods and chattels, rights and credits which were of Louis Zamelsky, deceased, in an action of tort and thereupon the said plaintiff by Kalisch & Kalisch, her attorneys, complains:

For that whereas the said defendants heretofore, to wit, on the fifth day of April, nineteen hundred and ten, at Newark, in the County of

Exhibit D. 2.

Essex, were in possession of the premises Numbers 230-232 Market street in the City of Newark in the County of Essex aforesaid; that the said defendants were engaged in the work of remodeling and repairing the aforesaid premises, which said premises had been damaged by fire.

And the plaintiff avers that the said defendants entered into a contract with the said Louis Zamelsky, deceased, wherein and whereby the said defendants undertook to sell to the said Louis Zamelsky, deceased, the iron, beams, pipes, and scrap-iron then and there on the premises 230-232 Market street, in the City of Newark and County of Essex aforesaid, and that by the terms of said agreement of sale, then and there entered into between the said defendants and the said Louis Zamelsky, deceased, it was undertaken and agreed that the said Louis Zamelsky, deceased, was to enter upon said premises and remove said iron, beams, pipes and scrap-iron of whatever kind, from the premises aforesaid, and to employ such agents, servants and laborers as the said Louis Zamelsky, deceased, should deem requisite and necessary for the purpose of aiding him in the removal of said iron, beams, pipes and scrap-iron from the premises aforesaid; that on the day and year aforesaid, the said Louis Zamelsky, deceased, according to the agreement above mentioned, did lawfully enter upon the premises aforesaid, for the purpose of removing the said iron, beams, pipes and scrap-iron sold by the said defendants to the said Louis Zamelsky, deceased, as aforesaid.

And the plaintiff avers that during the remodeling of said building on the said premises aforesaid, the said defendants by its servants, agents and laborers, were engaged in taking

Exhibit D. 2.

down the interior brick partition wall or division wall, and were so engaged while the said Louis Zamelsky, deceased, was in the act of removing said iron, beams, pipes and scrap-iron from the cellar or basement of said building; whereupon it became and was the duty of the said defendants to use due and proper care in the removal of the walls so as to avoid injuring persons rightfully and lawfully upon the said premises, and to use due and proper care to maintain the said premises in a reasonably safe condition.

Yet the said defendants not regarding its duty in that behalf, did not use due and proper care in the removal of the walls so as to avoid injuring persons rightfully and lawfully upon the said premises, and did not use due and proper care to maintain the said premises in a reasonably safe condition, but wholly failed and neglected so to do.

And the plaintiff further avers that on the fifth day of April, nineteen hundred and ten, while the said Louis Zamelsky, deceased, was lawfully engaged in removing the said iron, beams, pipes and scrap-iron from the cellar or basement of the said building aforesaid, the said defendants by its servants carelessly, negligently and improperly and without any warning to the said Louis Zamelsky, deceased, did pull down a certain brick partition wall on the said premises, whereby the said wall did fall and strike with great force and violence the body of the said Louis Zamelsky, deceased, who was then and there lawfully engaged in removing the aforesaid iron, beams, pipes and scrap-iron, and by means whereof, he, the said Louis Zamelsky, deceased, then and there received mortal wounds from which he died.

Exhibit D. 2.

And the plaintiff avers that her said action was begun within twenty-four calendar months after the death of the said Louis Zamelsky, deceased, and that the said Louis Zamelsky, deceased, at the time of his death was married and was forty years of age, and that he left him surviving his widow, the plaintiff, and four children, to wit: Jacob, age fifteen years; Sarah, age eleven years; Tilly, age seven years; and Benjamin, age five years; and that they are his next of kin and that they have sustained pecuniary loss, damage and injury from and by reason of the death of the said Louis Zamelsky, deceased, whereby and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff as administratrix of the said Louis Zamelsky, deceased, to demand of and from the said defendants, the sum of fifteen thousand dollars ($15,000) and therefore she brings her suit, etc.

And the said plaintiff brings into court her letters of administration granted on the estate of the said Louis Zamelsky, deceased, by Isaac Shoenthal, surrogate of Essex County aforesaid, on the thirtieth day of September, nineteen hundred and ten.

And the said defendant, Russell-Robinson Company, by Collins & Corbin, its attorneys, comes and defends the wrong and injury when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff hath above thereof complained against it. And of this the said defendant puts itself upon the country, &c.

And the said defendant, Wm. L. Blanchard Co., by Pitney, Hardin & Skinner, its attorneys,

Exhibit D. 2.

comes and defends the wrong and injury when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, in manner and form as the said plaintiff hath above thereof complained against it, and of this it, the said defendant, puts itself upon the country.

Therefore, let a jury thereupon come before our Chief Justice or some other justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Newark, in and for the County of Essex, on the first Tuesday of April, in the year of our Lord, one thousand nine hundred and thirteen, by whom, etc., and the same day is given to the parties aforesaid there, etc.

And now at this day, to wit: the third day of June, A. D., nineteen hundred and thirteen, before our said Supreme Court at Trenton comes the said plaintiff, by her attorneys aforesaid, and the justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, that is to say, on the 20th day of May, 1913, at a Circuit Court held at Newark in and for the County of Essex, by his Honor Frederic Adams, a Circuit Court judge of the State of New Jersey to whom by a previous order made by the Honorable William S. Gummere, Chief Justice of the State of New Jersey, the within cause was referred to according to the form of the statute in such case made and provided, comes as well the within named plaintiff as the within named defendants, by their respective attorneys within mentioned; and the jurors of the jury whereof mention is within made, being summoned, also come, who to speak

Exhibit D. 2.

the truth of the matters within contained, being chosen, tried and sworn upon their oath say that the defendants are guilty in manner and form as the plaintiff hath complained against them, and they assess the damages of the said plaintiff, on occasion thereof, over and above her costs and charges by her about her suit in this behalf expended to the sum of six thousand dollar—, $6000.) and for those costs and charges the sum of

But because our said Court are not yet here advised what judgment to give of and upon the premises a day is therefore given, to wit, the fifth day of March, A. D. nineteen hundred and fourteen, to hear the judgment of the Court thereupon at which day before our said Court it is considered that the said plaintiff do recover against the said defendant, Russell-Robinson Company, impleaded with Wm. L. Blanchard & Co., her said damages by the jury in form aforesaid found to six thousand dollars and also seventy-four dollars and thirty-four cents for her costs and charges aforesaid, by the Court now here adjudged to the said plaintiff and with her assent, which said damages, costs and charges in the whole amount to six thousand and seventy-four dollars and thirty-four cents.

Judgment signed this fifth day of March, A. D. nineteen hundred and fourteen, as of June 3rd, A. D. nineteen hundred and thirteen, *nunc pro tunc.*

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

Exhibit D. 2.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

IN TESTIMONY WHEREOF, I have set my hand and the seal of said Court at Trenton, this twenty-fifth day of September, A. D. nineteen hundred and sixteen.

(SEAL)

WM. C. GEBHARDT,
Clerk.

Findings by the Court.

(Filed March 14, 1917.)

NEW JERSEY SUPREME COURT.

CHARLES C. PILGRIM, Receiver of The Russell-Robinson Co., *Plaintiff*,	
vs.	*Action at Law.*
AETNA IIFE INSURANCE COMPANY, a Corporation, *Defendant.*	

FINDINGS OF FACT

This action was instituted on a public liability policy of insurance issued by the defendant company, dated November 18, 1909, covering a period of twenty-four months beginning on that date.

By the policy the defendant agreed to indemnify the plaintiff against loss and expense resulting from claims upon the plaintiff for damages on account of bodily injuries or death accidentally suffered by any person not employed by the plaintiff by reason of the business described and conducted at the locations named in the warranties therein stated.

The plaintiff company conducted and carried on the business of a general contractor and builder.

The plaintiff's business was in said policy described as follows, under the heading:

CLASSIFIED DESCRIPTION OF THE BUSINESS.

All operations incidental to the following business, in and during the continuance thereof.

Carpentry work in connection with buildings not exceeding four (4) stories in height (no grain elevator construction).

Carpentry work in connection with building exceeding four stories in height (no grain elevator construction).

All operations performed for assured under contract. Premium to be adjusted on the basis of total cost of the work, including all labor, material used or delivered for use, all allowances, bonuses and commissions made, paid or due.

Two operations were excepted from the policy and not included within the warranties and came under the heading of SPECIAL OPERATIONS, reading as follows:

Demolition or wrecking of any structure.

Operation of locomotives and cars by reason of locomotives.

Opposite these two last operations in the column entitled "Estimated Average Number of Employees" the word "None" was written in both instances.

Opposite all of the other operations as stated in the warranties was given the estimated average number of employees, the estimated compensation, the premium rate and estimated premium.

Findings by the Court.

This case having been tried before the Court without a jury by agreement of counsel, I find the following facts:

1. That the policy of insurance as heretofore herein set out was issued by the defendant to the Russell-Robinson Co., on November 18, 1909.

2. That the said Russell-Robinson Co. on April 1, 1910, entered into an agreement with the Real Securities Investment Company, a corporation, whereby the said Russell-Robinson Company was to remodel and repair the premises known and designated as No. 232 Market street in the City of Newark, New Jersey.

3. That the said Russell-Robinson Co. on the same day entered into a similar contract with Frederick G. Agens of said City of Newark, whereby the said company agreed to remodel and repair the premises known and designated as 230 Market street, Newark, N. J.

4. That on April 2, 1910, the said Russell-Robinson Co. entered into a contract with William L. Blanchard Co., whereby the said Blanchard Co. was to perform and do all the mason work and plastering for the restoration of said premises No. 230-232 Market street in accordance with certain specifications.

5. That the contract, amongst other things, provided that the said William L. Blanchard Co. was to take down the center wall of said premises.

6. That on April 5, 1910, the said William L. Blanchard Co. was engaged in doing the work under said contract on said center wall covered by said contract.

7. That the work being done upon said premises was not the demolition or wrecking of any

structure within the meaning of that clause in the policy of insurance.

8. That the said work being done upon said premises was a rebuilding, remodeling and repairing of said structures and was incidental to the business described in the warranties in the policy.

9. That said center wall at that time fell and in falling struck one Louis Zamelsky, who was then and there upon said premises.

10. That the said Louis Zamelsky was not employed by said Russell-Robinson Co.

11. That the said Louis Zamelsky by reason of the wounds received from said falling wall died on the same day.

12. That the Russell-Robinson Company gave notice of said accident to the defendant and performed all the conditions of said policy on its part to be performed.

13. That Charles C. Pilgrim, the plaintiff herein, was duly appointed and qualified as Receiver of Russell-Robinson Co. by our New Jersey Court of Chancery with all powers granted to him as such a receiver, pursuant to the statutes in such case made and provided.

14. That the administratrix of the estate of said Louis Zamelsky, after actual trial of the issue, recovered a judgment against said Russell-Robinson Company in the New Jersey Supreme Court for six thousand dollars ($6,000).

15. That the said Charles C. Pilgrim as receiver paid to the administratrix of the estate of Louis Zamelsky the sum of six thousand eight hundred and forty-seven dollars and twenty-six cents ($6,847.26) on March 30, 1915.

16. The defendant has not indemnified the plaintiff or the Russell-Robinson Co. for the said loss sustained.

RULINGS OF THE COURT.

1. The objection of the defendant that this Court is without jurisdiction is overruled.

2. The clause of the policy providing "All operations performed for the assured under contract" means all work done or performed by any one for the assured, which work was covered by a contract entered into between the assured and the party doing the work.

The work being done by William L. Blanchard Co. at the time of the happening of the accident came within and was covered by this clause of the policy.

3. The exhibits were received subject to be stricken out if not properly proven, or immaterial to the issue. Exhibit P. 6 is stricken out as not being sufficiently proven.

NELSON Y. DUNGAN,
Circuit Court Judge.

Judgment.

Postea and Findings of the Court.

Filed March 14, 1917.

This case was tried before Judge Nelson Y. Dungan to whom it had been duly referred for trial without a jury at the Essex Circuit January 12th, 1917.

After hearing the evidence and the counsel for the plaintiff and for the defendant the Court finds:

1. The statements in paragraphs 1 and 2 of the complaint are supported by the proof.

The statements in paragraphs 3 and 4 are true as supplemented by the policy offered in evidence.

The statements in paragraph 5 are true as supplemented by paragraph 6 of the defendant's first defense of the defendant's answer.

The statements in paragraph 6 are true, being admitted by the answer.

The statements in paragraph 7 are supported by the proof.

The statements in paragraph 8 are admitted and supported by the proof.

The statements in paragraphs 9, 10, 11 and 12 are admitted and supported by the proof.

2. The Court ruled that Exhibits P. 3, 4 and 7 are admitted being material to the issue raised and being admitted by the answer of the defendant.

Exhibit P. 5 is admitted, being material to the issue raised by the objections of the defendant.

Exhibit P. 6 is overruled, not having been properly proven.

Judgment.

3. The Court finds for the plaintiff and against the defendant in the sum of five thousand dollars ($5,000) with interest thereon from June 3rd, 1913, amounting to eleven hundred and thirty-two dollars and fifty cents ($1,132.50), making a total of sixty-one hundred and thirty-two dollars and fifty cents ($6,132.50).

NELSON Y. DUNGAN,
Circuit Court Judge.

Whereupon, it is adjudged that the plaintiff recover of the defendant the sum of six thousand one hundred and thirty-two dollars and fifty cents, and his costs, which are taxed at the sum of fifty-one dollars and twenty-two cents, making in the whole the sum of six thousand one hundred and eighty-three dollars and seventy-two cents. Judgment entered March 14, 1917.

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

Notice of Appeal.

Filed and Served March 28, 1917.

NEW JERSEY SUPREME COURT.

CHARLES C. PILGRIM, Receiver of the RUSSELL-ROBINSON Co., *Plaintiff.* *vs.* AETNA LIFE INSURANCE COMPANY, a corporation,.. *Defendant.*	*Action at Law.* *Notice of Appeal.*

To MESSRS. LUM, TAMBLYN & COLYER,
Attorneys of Plaintiff.

TAKE NOTICE, that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Supreme Court had no jurisdiction over the above-entitled suit, for the reason that the same was removable to the United States District Court for the District of New Jersey and was duly and regularly removed to that Court.

2. The evidence at the trial proved that the payment by plaintiff of the judgment recovered by Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co. was not for loss and/or expense arising or resulting from a claim upon said Russell-Robinson Co. for damages by reason of the business described in the warranties of the

policy of insurance mentioned in the complaint, against which defendant agreed by said policy of insurance to indemnify said Russell-Robinson Co.

3. The evidence at the trial proved that the claim of Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co., and the judgment upon that claim, were by reason of the demolition or wrecking by the Russell-Robinson Co. of a structure.

4. The evidence at the trial proved that the claim of Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co., and the judgment upon that claim, were by reason of the doing of certain mason work by the Russell-Robinson Co.

5. Under said evidence the finding by the Trial Court should have been in favor of defendant.

6. The findings by the Trial Court do not support the judgment against defendant.

7. The Trial Court erroneously found that the work being done upon the premises on which Louis Zamelsky was killed was not the demolition or wrecking of any structure within the meaning of the policy of insurance mentioned in the complaint.

8. The Trial Court erroneously found that the work being done upon said premises was a rebuilding, remodeling and repairing of said structures, and was incidental to the business described in the warranties in said policy of insurance.

9. The Trial Court erroneously admitted in evidence a certain contract between the Rus-

sell-Robinson Co. and Frederick G. Agens and a certain contract between the Russell-Robinson Co. and the Real Securities Investment Co., each contract dated April 1, 1910.

10. The Trial Court erroneously admitted in evidence a certain contract between the Russell-Robinson Co. and the Wm. L. Blanchard Co., dated April 2, 1910.

11. The Trial Court erroneously admitted in evidence the charge by the Trial Judge to the jury in the suit by Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, against the Russell-Robinson Co. and the Wm. L. Blanchard Co.

12. The Trial Court erroneously admitted testimony by William L. Blanchard, a witness on behalf of plaintiff, as to the claim upon which Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, recovered a judgment against the Russell-Robinson Co.

13. The Trial Court erroneously admitted testimony by Frank P. Russell, a witness on behalf of plaintiff, as to the claim upon which Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, recovered a judgment against the Russell-Robinson Co.

14. The Trial Court erroneously admitted testimony by Tom Timbernaro, a witness on behalf of plaintiff, as to the claim upon which Rose Zamelsky, administratrix, etc., of Louis Zamelsky, deceased, recovered a judgment against the Russell-Robinson Co.

15. The Trial Court found and determined the cause in favor of the plaintiff and ordered judgment against the defendant for the sum of $5,000.00 with interest thereon from June

3, 1913, amounting to $1,132.50; whereas there was no evidence to warrant such finding, determination and order for judgment.

16. Judgment should have been entered in favor of defendant.

COLLINS & CORBIN,
Attorneys of Appellant.

Clerk's Certificate.

I, William C. Gebhardt, clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court
(L. S.) at Trenton, this thirtieth day of March, A. D., nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.