INDEX

PAGE

Notice of Appeal and Grounds 1

Summons 2

Complaint 3

Notice of Motion to Strike Out Complaint.. 13

Order Striking Out Complaint 14

Rule for Judgment Final 15

New Jersey State Library

Notice of Appeal and Grounds.

Filed May 19th, 1928.

New Jersey Supreme Court

HUDSON COUNTY.

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THE NATIONAL BANK OF NORTH HUDSON, AT UNION CITY, N. J., a corporation of the United States, Plaintiff, v. NATIONAL SURETY COMPANY, a corporation duly authorized to transact business of insurance in the State of New Jersey, Defendant.	Action at Law

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To WILLIAM L. RAE, Esq., Attorney of Defendant, or to whom it may concern:

Sir:

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PLEASE TAKE NOTICE, that the plaintiff in the above-entitled cause appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following ground, to wit:

Because the Supreme Court erred in striking out the plaintiff's complaint and giving judgment for the defendant instead of denying the defendant's motion to strike out the complaint, and

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adjudging that the plaintiff's complaint discloses a cause of action.

Respectfully yours,

ISAACS & GUNTHER,
Attorneys of Plaintiff.

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Summons.

Filed July 14th, 1927.

(Seal) THE STATE OF NEW JERSEY TO NATIONAL SURETY CO., a Company duly authorized to transact the business of insurance in the State of New Jersey:

20 YOU ARE SUMMONED to answer the annexed complaint of THE NATIONAL BANK OF NORTH HUDSON AT UNION CITY, N. J., a corporation of the United States, in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to the said complaint with the Clerk of the New Jersey Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed com-
30 plaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, William S. Gummere, Chief Justice of the New Jersey Supreme Court at Trenton, this 12th day of July, in the year of our Lord Nineteen hundred and twenty-seven.

EDWARD J. KELLEHER,
Clerk.

ISAACS & GUNTHER,
40 Attorneys.

Complaint.

Filed July 14th, 1927.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

THE NATIONAL BANK OF NORTH HUDSON, AT UNION CITY, N. J., a corporation of the United States, Plaintiff, v. NATIONAL SURETY COMPANY, a company duly authorized to transact the business of insurance in the State of New Jersey, Defendant.	Action at Law

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The plaintiff, The National Bank of North Hudson, at Union City, N. J., a corporation existing under and by virtue of the laws of the United States, having its banking house and principal place of business in the City of Union City, in the County of Hudson and State of New Jersey, says:

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1. That at the times herein stated plaintiff was and still is a corporation of the United States.

2. That at the times herein stated defendant, National Surety Company, was and still is a corporation authorized to do and transact business in the State of New Jersey.

3. That prior to November 9th, 1916, plaintiff appointed Edward R. Westerburg, as its Cashier,

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and George J. Brower, as its Assistant Cashier and employed as one of its employees, Helen L. Gould.

4. The said Edward R. Westerburg continued as such Cashier of the plaintiff Institution until July 22nd, 1926, and the said George J. Brower continued as said Assistant Cashier until June 19th, 1926.

5. On the 9th day of November, 1916, the defendant did deliver over and unto the plaintiff, a bond number 1008027 in the sum of $100,000, known as a Banker's Blanket Bond indemnifying the plaintiff Institution against loss by the dishonest or negligent acts of its employees and officers, a copy of which bond is annexed hereto and made a part hereof.

6. That for considerations in the said bond therein mentioned, the said plaintiff Institution did, on November 9th, 1916, pay to the defendant the premium in said bond contained and did yearly and annually thereafter pay the premiums until the said bond was cancelled on the 9th day of November, 1926.

7. That for the considerations in the said bond therein mentioned the said defendant, upon receipt of said payment premiums by it received annually, did yearly bind themselves upon a like obligation.

8. That between the years 1921 and the 22nd day of July, 1926, the said Edward R. Westerburg was dishonest and in connection with his said position, as Cashier, stole and embezzled from plaintiff and certain of its depositors upwards of $235,483.02, included in which amount is contained the monies

and bonds stolen and embezzled by the said George J. Brower and the said Helen L. Gould from the said plaintiff Institution, which monies and things were the property of the plaintiff Institution and of its said depositors to whom plaintiff was legally liable.

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9. The said Edward R. Westerburg has repaid to the plaintiff Institution the sum of $50,000.

10. Plaintiff has performed all the terms and conditions of said bond upon its part.

11. That upon discovery by plaintiff of facts indicating that the said losses had been sustained by it because of the dishonesty of its said employees and officers, it immediately and forthwith so notified the defendant, National Surety Company, in writing on July 23rd, 1926, at its office in the City of New York, and State of New York advising said defendant that the said defalcations aggregated the sum of $109,813.02 as far as plaintiff could at that time ascertain.

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12. On July 31st, 1926, plaintiff received from the defendant the sum of $100,000.

13. Subsequent to July 31st, 1926, from time to time, plaintiff discovered additional losses sustained by it by reason of the said dishonesty of the said employees and officers aggregating the sum of $126,483.02, in excess of the sum of $109,813.02 reported to the said defendant, thus making the total losses as sustained by plaintiff Institution in the sum of $235,483.02.

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14. The plaintiff did, as it discovered from time to time the additional losses so sustained by it

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notify the said defendant, National Surety Company, which said defendant is obligated to the plaintiff, to pay to the said plaintiff an additional sum of $85,483.02 in addition to the sum of $100,000 by it received from the said defendant by the said plaintiff in accordance with the terms and tenor of
10 its said bond, and by reason further, that the said bond and the renewal thereof constitute separate and distinct contracts, for which and on which defendant is liable for the losses sustained aforesaid.

15. Plaintiff has demanded payment on the said sum of $85,483.02 from the defendant but that defendant has refused and still refuses to pay the said sum or any part thereof.

20 Plaintiff demands as damages the sum of $85,483.02 with interest and costs of this suit.

ISAACS & GUNTHER,
Attorneys of Plaintiff.

C O P Y

NATIONAL SURETY COMPANY
Home Office 115 Broadway New York City
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BANKER'S BLANKET BOND

In consideration of the premium of Eight Hundred Twelve and 50/100 ($812.50) Dollars paid by The National Bank of North Hudson, West Hoboken, N. J., hereinafter referred to as the Underwriter, for a period of one year from the date hereof, and of subsequent annual premiums, each premium being based upon the total number of the
40 Insured's officers, clerks, and other employees, em-

ployed at the Insured's offices covered hereunder at the beginning of the year for which such premium is paid (all the officers, clerks and other employees employed at the offices covered hereunder during the currency of this bond being hereinafter referred to as Employees), the Underwriter hereby undertakes and agrees to indemnify the Insured and hold it harmless from and against any loss, to an amount not exceeding One Hundred Thousand ($100,000.00) Dollars of money currency, bullion, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks or other similar securities, hereinafter referred to as Property, in which the Insured has a pecuniary interest or for which it is legally liable, sustained by the Insured subsequent to noon of the date hereof and while this bond is in force and discovered by the Insured subsequent to noon of the date hereof and prior to the expiration of twelve months after the termination of this bond as provided in Condition 11— 10 20

(A) Through any dishonest act of any of the Employees, wherever committed and whether committed directly or by collusion with others;

(B) Through robbery, theft, hold-up, destruction or misplacement, while the Property is within any of the Insured's offices covered hereunder, whether effected with or without violence, or with or without negligence on the part of any of the Employees; 30

(C) Through robbery, hold-up or theft, by any person whomsoever, while the Property is in transit within twenty miles of any of the offices covered hereunder and in the custody of any of the employees, or through negligence on the part of any of the Employees having custody of the Property while in transit as aforesaid. 40

The foregoing agreement is subject to the following conditions and limitations:

1. The offices of the Insured which are covered hereunder are located as follows:

10 Main Office—West Hoboken, N. J.

If the Insured shall give to the Underwriter notice that it desires any other office to be covered hereunder and shall give the location thereof and the number of officers, clerks, and other employees therein, then, if the Underwriter shall give its written consent thereto, such office shall be covered hereunder from and after the receipt of such notice, and additional premium shall be paid; but no notice to the Underwriter of an increase during any
20 premium year in the number of Employees at any of the offices covered hereunder need be given and no additional premium need be paid, unless such increase shall result from the merger or combination with the Insured of another banking institution.

2. This bond does not cover—

(a) Any loss directly or indirectly effected
30 by means of forgery, unless the forgery be committed by, or with the collusion of, one or more of the Employees.

(b) Any loss resulting from insurrections, riot, civil commotion, or military or usurped power, or from an earthquake, volcanic eruption, or similar disturbance of nature.

(c) Any loss resulting from the act or acts of any of the Directors of the Insured other than those employed as salaried officials.

40 (d) Any loss the result of any loan made

by the Insured or by any of the Employees, whether authorized or unauthorized, unless such loan be made with intent on the part of such Employees to defraud the Insured.

3. No statement made by or on behalf of the Insured, whether contained in the application or otherwise, shall be deemed to be a warranty of anything except that it is true to the best of the knowledge and belief of the person making the statement. 10

4. The Insured shall give to the Underwriter written notice of any loss hereunder as soon as possible after the Insured shall learn of such loss, and within ninety days after learning of such loss shall file with the Underwriter an itemized proof of claim duly sworn to. 20

5. The value of any securities for the loss of which claim shall be made hereunder shall be determined by the average market value of such securities on the day preceding the discovery of such loss. If such securities have no quoted market value, their value shall be determined by agreement or by arbitration.

6. No action or proceeding shall be brought under this bond in regard to any loss, unless begun within twelve months after the Insured shall learn of such loss, or, in case such limitation be void under the law of the place governing the construction hereof, then within the shortest period of limitation permitted by such law. 30

7. In case of recovery, whether made by the Insured or the Underwriter, on account of any loss hereunder, from any source other than insurance or suretyship, the net amount of such recovery less 40

the actual costs and expenses of making same, shall be applied to reimburse the Insured in full for such loss, and the excess, if any, shall be paid to the Underwriter, and the Insured shall execute all necessary papers to secure to the Underwriter the rights herein provided for.

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8. The amount of this bond shall not be reduced by any payment on account of any act resulting in a loss hereunder, except as to other acts committed prior to the giving by the Insured to the Underwriter of notice of such loss; provided, however, that in no event shall the Underwriter be liable on account of any one loss or series of losses caused by the acts or omissions of any Employees or combination of Employees, or caused by the same
20 casualty or event, for a greater amount than that specified in line 11 hereof; and provided further that the Insured shall pay to the Underwriter, upon demand, and additional premium, computed pro rata upon the sum so paid, from the date of such notice to the end of the current premium year.

9. If the Insured shall, in the application for this bond, state its intention to carry fidelity suretyship upon any of the Employees, and shall, in the com-
30 putation of the premium for this bond, receive credit for such suretyship, then, in case a loss shall be sustained through the dishonest act of any Employee, covered, or stated to be covered, by such fidelity suretyship, the Underwriter shall be liable hereunder only for that part of such loss which is in excess of the amount of the fidelity suretyship carried or stated to be carried on such Employee.

10. If the Insured shall hold, as indemnity
40 against any loss covered hereunder, any valid and

enforceable security, other than the fidelity suretyship, if any, for which credit has been given accordance with the preceding section, the Underwriter shall be liable hereunder only for which proportions of such loss as the amount of this bond bears to the aggregate amount of this bond and such other security. 10

11. This bond shall terminate—(a) thirty days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate this bond, or (b) upon the receipt by the Underwriter of a written request from the Insured to terminate this bond. This bond shall terminate as to any Employee—(a), as soon as the Insured shall learn of any default hereunder committed by such Employee, or (b) fifteen days after the receipt by the 20 Insured of a written notice from the Underwriter of its desire to terminate this bond as to such Employee.

Signed, Sealed and dated the 9th day of November, 1916.

NATIONAL SURETY COMPANY,
FRANKLIN HAUSS,
Resident Vice-President. 30

Attest:

H. HENNEBERGER,
Resident Asst. Secretary.

Rider to be attached to and form a part of Bond No. 1008027 executed by the National Surety Company for an indefinite period commencing November 9th, 1916, in favor of The National Bank of North Hudson, West Hoboken, N. J. 40

WHEREAS, the Insured has been carrying fidelity suretyship listed in the schedule attached hereto and marked "A", and

WHEREAS, said suretyship has, upon the issuance of this bond, been cancelled.

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NOW, it is agreed that this bond shall be construed to cover any loss hereafter discovered, which, if said suretyship had not been cancelled, would have been recoverable thereunder, but which, as a result of such cancellation, is not recoverable.

PROVIDED HOWEVER, that such loss be of such a nature as is covered by this bond.

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IN WITNESS WHEREOF, the Underwriter has caused this instrument to be signed by its officers proper for the purpose, and its corporate seal hereto affixed this 9th day of November, 1916.

NATIONAL SURETY COMPANY,
By FRANKLIN HAUSS,
Resident Vice-President.

Attest

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H. HENNEBERGER,
Resident Assistant Secretary.
(Seal)

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Notice of Motion to Strike Out Complaint.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

THE NATIONAL BANK OF NORTH HUDSON, AT UNION CITY, N. J., a corporation of the United States, Plaintiff, v. NATIONAL SURETY COMPANY, a corporation duly authorized to transact business of insurance in the State of New Jersey, Defendant.	Action at Law.

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To Messrs. ISAACS & GUNTHER,
Attorneys for Plaintiff.

Gentlemen:

TAKE NOTICE that on Tuesday, the 16th day of August, 1927, at ten o'clock in the forenoon, Daylight Savings Time, at the Court House, Jersey City, New Jersey, I will move before Hon. Henry E. Ackerson, Circuit Court Judge, and Supreme Court Commissioner to strike out complaint filed in the above entitled action on the ground that it appears affirmatively on the face of the collateral and from the copy of the bond annexed thereto that the obligation of the defendant was continuous and single from November 9, 1916 to November 9, 1926, and that the defendant's maximum liability to the plaintiff for the said period was $100,000.00, which said sum was paid by the defendant to the

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plaintiff on July 31, 1926, and that thereby the defendant's entire obligation was paid and satisfied.

Respectfully yours,

WILLIAM L. RAE,
Attorney for Defendant.

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Order Striking Out Complaint.

Filed November 9th, 1927.

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

20

THE NATIONAL BANK OF NORTH HUDSON, AT UNION CITY, N. J., a corporation of the United States,
Plaintiff,

v.

NATIONAL SURETY COMPANY, a corporation duly authorized to transact business of insurance in the State of New Jersey,
Defendant.

} Action at Law

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This matter being opened to the court by William L. Rae on motion to strike out the complaint in this cause, on the ground that the same does not set forth a legal cause of action, due notice of such motion having been duly served upon the plaintiff and the said plaintiff appearing by Isaacs & Gunther, its attorneys, and Julius Lichtenstein of counsel, and the defendant appearing by William L. Rae, its attorney, and the court having

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heard and considered the argument of the respective counsel, and it appearing that the application of the said defendant should be granted;

It is on this 2nd day of November, 1927,

ORDERED, that the complaint heretofore filed in the above entitled action, be and the same is hereby stricken out, with costs on the said motion allowed to the said defendant, and that plaintiff have ten days from this date in which to file an amended complaint if it desires so to do. 10

Signed HENRY E. ACKERSON,
Sup. Court Commissioner.

Rule for Judgment Final.

Filed May 9th, 1928. 20

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

THE NATIONAL BANK OF NORTH HUDSON, AT UNION CITY, N. J., a corporation of the United States, Plaintiff, v. NATIONAL SURETY COMPANY, a corporation duly authorized to transact business of insurance in the State of New Jersey, Defendant.	Action at Law

30

This matter being opened to the court by William L. Rae, Esq., attorney of the defendant in 40

the above entitled cause, and it appearing that on the second day of November, 1927, the Honorable Henry E. Ackerson, sitting as Supreme Court Commissioner, on motion of the said William L. Rae, Esq., signed an order whereby the complaint filed by the plaintiff in the said cause was stricken 10 out on the ground that the same does not set forth a legal cause of action;

And it appearing that it was adjudged by said order that the said plaintiff have ten days from November 2, 1927, in which to file an amended complaint, if it desired so to do, and it further appearing that the plaintiff has failed to file an amended complaint within said time or at any time;

It is on this fifth day of May, 1928, ORDERED that judgment be, and the same is hereby entered 20 in favor of defendant and against the plaintiff.

JAMES MINTURN,
J. S. C.

Entered May 9, 1928.

On motion of
WILLIAM L. RAE, Atty.

A true copy.

30 FRED L. BLOODGOOD,
Clerk.

66 OCT.T.1928

New Jersey Court of Errors and Appeals

THE NATIONAL BANK OF NORTH HUDSON, AT UNION CITY, NEW JERSEY, a corporation of the United States, Plaintiff-Appellant, v. NATIONAL SURETY COMPANY, a company duly organized to transact business in the State of New Jersey, Defendant-Respondent.	Action at Law.

APPELLANT'S BRIEF.

Statement of Facts.

This action is brought upon a contract termed a "Brokers Blanket Bond" (pp. 6 to 11 of State of Case), which purports to indemnify the plaintiff bank against loss by the dishonest or negligent acts of the said bank's employees and officers.

The complaint herein (Paragraph 8) charges that plaintiff's cashier stole and embezzled from plaintiff and certain of its depositors upwards of $235,483.02 all between the years 1921 and the 22nd of July, 1926, which sum included moneys and bonds stolen by other servants.

Defendant having paid $100,000.00 to the plaintiff moved to strike out the complaint (p. 13) and

Henry E. Ackerson, sitting as Supreme Court Commissioner did, upon the hearing of the motion, order that the complaint be struck out (p. 14), upon the ground that the obligation of the defendant was continuous and single and that defendant's liability was only $100,000.00.

Plaintiff's contention is that the original bond and the existing bond are separate and distinct obligations entitling the plaintiff bank to recover to the amount of each separate bond for defalcations occurring during the continuance thereof.

The defendant company, however, claims that the first bond was a continuing bond in the sum of $100,000.00, covering the entire period of the obligation of the bond from November 9th, 1916 to November 9th, 1926, and that the payment to the bank of the sum of $100,000.00 constituted an entire liquidation of the Surety Company.

POINT ONE.

Motion to strike out complaint being in nature of general demurrer admits truth of all facts well pleaded.

In *O'Brien* v. *Steiger,* 129 Atl. 484, 101 N. J. L. 526, it is said:

> "A motion to strike out a complaint is in the nature of a general demurrer. A general demurrer admits the truth of all the facts well pleaded."

To the same effect *Malone* v. *Brotherhood,* 110 Atl. 696, 94 N. J. L. 347.

The complaint herein having been dismissed on motion to strike, it must be admitted we submit

that all allegations of thefts and embezzlements during the different years are true, as alleged in the complaint.

POINT TWO.

The rule of construction applicable to insurance contracts is to be applied in the construction of this bond.

In *25 Corpus Juris* at page 1089, it is said:

> "It is well established that guaranteeing the fidelity of employees and persons holding a position of trust is a form of insurance, and that such a contract is subject to the rules applicable to insurance contracts generally and not to the rules applied to ordinary sureties for accommodation."

In *First Nat. Bank* v. *National Surety Co.,* 228 N. Y. 469, 127 N. E. 479, it is said:

> "Although the instrument denominates itself a bond, it is a contract or policy of insurance. A contract guaranteeing or indemnifying an employer against any breach of fidelity on the part of the employee is generally regarded as, and in the matter of interpretation is, a contract of insurance."

POINT THREE.

Insurance contracts guaranteeing the honesty of employees are made for an adequate consideration to accomplish the purpose for which they are made, and should, if ambiguous, be liberally construed in favor of the insured.

In *Kean* v. *Maryland Casualty Co.,* 221 App. Div. 184, 223 N. Y. Supp. 373, it was held that ambiguity in bankers and brokers blanket bond should be resolved against insurer, if construction in favor of the insured may be fairly adopted without giving the language a forced or unnatural meaning. The reason being that such contracts are prepared by the insurance company.

> *Connell* v. *Commonwealth Cas. Co.,* 96 N. J. L. 510 (Court of Errors and Appeals).

> "The rule of interpretation and construction is of course fundamental, that the meaning of the instrument (insurance policy) must be gathered from its provisions as a whole, and that if doubt arises from such perusal, the benefit of the doubt must be given to the insured."

To the same effect

> *Gans* v. *Columbia Ins. Co.,* 99 N. J. L. 44.

Justice Kalisch said, in *Michler* v. *New Amsterdam Cas. Co.,* 139 At. 725 (not yet officially reported):

> "Where there is an ambiguity found in a contract of this nature (theft policy) such a provision should be most strongly construed in a sense so as not to work an injustice to an insured."

In *American Surety Co.* v. *Pauly,* 170 U. S. 133, 42 L. Ed. 977, the court held that a bond made by a surety company insuring a bank against any fraud or dishonesty of its cashier, if susceptible of two constructions, one favorable to the bank and the other favorable to the insurance company, will be given a construction most favorable to the bank when it was prepared by the Surety Company. The court saying "this is a well established rule in the law of insurance."

POINT FOUR.

The renewal of this insurance bond by the payment of a subsequent annual premium, in legal effect constituted a separate and distinct contract for the period of time or year for which such renewal was paid regardless of liability incurred thereunder in previous years.

In *25 Corpus Juris, 1109,* it is said:

> "The rule generally recognized is that a renewal of a fiduciary policy or bond constitutes a separate and distinct contract, for the period of time covered by such renewal, unless it appears to be the intention of the parties, as evidenced by the provisions thereof that such

> policy or bond and the renewal thereof shall constitute one continuous contract."

Aetna Casualty & Surety Co. v. *Commercial State Bank,* 13 Fed. 2nd, 474. Reversed on facts but not on the law, 19 Fed. 2nd, 969.

A bond given by a surety company to a bank to assure fidelity of its cashier in consideration of its premium paid which kept it in force for one year, but renewable from year to year, is in effect a separate contract for each year of renewal, and binds the surety company to indemnify the bank for losses in any one of such years, to the extent of the penalty named, regardless of the amount of any liability incurred thereunder in previous years. The court said:

> "It may well be that the contract is a continuing one. Whether the formal new contract is made at the end of the year is not the test. The coal jobber who has a contract for the purchase of certain of the output of a mine from month to month, or year to year, has one continuing contract, but each payment of the prescribed price buys an additional ton of coal. The continuity of the contract has no bearing except to fix the prices. So the question here is, what did the defendant (bank) buy the first year, what did he buy the second year, what did he buy the third year? When the first year ended all the future liability of plaintiff (surety) was at an end, unless and until another year's premium should be paid. By the payment of that premium and its acceptance the plaintiff said as plainly as if it had made a new bond, that it in consideration for the premium, would stand for the same insurance for that year as it had for the first. Any other

conclusion arises from the false conception of the situation and relation of the parties."

> *Maryland Casualty Co.* v. *Bank*, 246 Fed. 892.
>
> Certiorari denied 246 U. S. 670; 62 L. ed. 931.

"The contract made by the delivery and acceptance of the policy with the rider attached stated in the body of it the date of the commencement of the period within which the losses insured against must occur or have occurred. The policy recited that its consideration was a premium payable in advance based upon an annual rate per hundred dollars of suretyship. * * * That contract was what is known as a term policy, under which the insurance contracted for covers only losses occurring before the expiration of the stated term. Further action by the parties, having the effect of creating a new contract, was required to make the defendant liable for any loss or losses occurring after January 10, 1914. Such further action, if taken, would not in the absence of a stipulation to that effect, either increase or diminish the amount for which the insurer, under its original contract, had already become liable in consequence of losses incurred during the period covered by the contract, though such losses had not been discovered when the new contract was made having the effect of insuring against losses occurring in a later period."

> *Proctor Coal Co.* v. *U. S. Fidelity Co.*, 124 Fed. 424.

"I think the contention of counsel for defendant that these renewals are separate and

distinct contracts is sound. It is urged that certain language in the bond shows that it was intended to be a continuous contract covering the period of the bond or of any subsequent renewals. The language referred to this: 'Make good and reimburse to the employer all and any pecuniary loss sustained by the employer, etc., occurring during the continuance of this bond or any renewal thereof, and discovered during said continuance or within six months thereafter.' I am unable to agree with the argument of plaintiff as to the proper construction to be put upon this language. I think it should be construed so as to read in this way: 'Occurring during the continuance of this bond or any renewal thereof and discovered during the continuance of this bond or during the continuance of any renewal.' * * * I do not think the language is sufficient to justify the conclusion that this was a continuous contract of suretyship running through the whole period covered by the original bond and the two renewals."

Campbell Milk Co. v. *U. S. Fidelity Co.,* 146 N. Y. Supp. 92, 161 App. Div. 738.

Held that an indemnity bond of $2,500 for the term of a year, and the renewal certificates thereof, constituted distinct contracts, making guarantor liable for defaults made during their respective periods covered by the bond of the renewal up to the amount of $2,500 for each year.

U. S. Fidelity, etc., Co. v. *Williams,* 96 Miss. 10, 49 So. 742.

"These bonds are separate and distinct contracts, and do not constitute a continuing

bond, as contended by counsel for appellee. Each bond is liable for such losses, and only such losses, as occur during its separate life, which is fixed by the contract for one year each, and discovered during the continuance or renewal, or within six months after the expiration of the year, but always limiting the right of recovery to losses which actually happen within the life of the particular bond."

Other cases holding like contracts to be separate contracts for each year are:

Dauvers Saving Bank v. *National Surety Co.,* 166 Fed. 671;
Florida Cent. & Pa. R. R. v. *Amer. Sur. Co.,* 99 Fed. 674;
Long Bros. v. *U. S. F. & G. Co.,* 110 S. W. 29 (Mo.);
Com. Bank v. *Amer. Bond. Co.,* 187 S. W. 99 (Mo.);
Hawley v. *U. S. F. & G. Co.,* 90 N. Y. Supp. 893; Aff. 76 N. E. 1096;
Ladies of Mod. Mac. v. *Ill. Sur. Co.,* 163 N. W. 7 (Mich.);
Brady v. *N. W. Ins. Co.,* 11 Mich. 425;
Ins. Co. v. *Walsh,* 54 Ill. 164.

The question which confronts us is what does the clause quoted mean.

"In consideration of the premium of Eight Hundred twelve and 50/100 ($812.50) Dollars paid by The National Bank of North Hudson, West Hoboken, N. J., hereinafter referred to as the insured, to the National Surety Company, hereinafter referred to as the Underwriter, for a period of one year from the date

hereof, and of subsequent annual premiums, each premium being based upon the total number of the Insured's officers, clerks and other employees, employed at the Insured's offices covered hereunder at the beginning of the year for which such premium is paid (all the officers, clerks and other employees employed at the offices covered hereunder during the currency of this bond being hereinafter referred to as Employees), the Underwriter hereby undertakes and agrees to indemnify the Insured and hold it harmless from and against any loss to an amount not exceeding One Hundred Thousand ($100,000.00) Dollars of money, currency, bullion, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks or other similiar securities, hereinafter referred to as Property, in which the Insured has a pecuniary interest or for which it is legally liable, sustained by the Insured subsequent to noon of the date hereof and while this bond is in force and discovered by the Insured subsequent to noon of the date hereof and prior to the expiration of twelve months after the termination of this bond as provided in Condition II.

This bond shall terminate—(a) thirty days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate this bond, or (b) upon the receipt by the Underwriter of a written request from the Insured to terminate this bond. This bond shall terminate as to any Employee—(a) as soon as the Insured shall learn of any default hereunder committed by such Employee, or (b) fifteen days after the receipt by the Insured of a written notice from the Underwriter

> of its desire to terminate this bond as to such employee.
>
> Attached to this bond is a rider reading as follows:
>
> Rider to be attached to and form a part of bond No. 1008027 executed by the National Surety Company for an *indefinite period,* commencing November 9, 1916 in favor of the National Bank of North Hudson, West Hoboken, N. J."

Judge Ackerson in dismissing the plaintiff's complaint apparently gave no weight to the fact that the above quoted clause is ambiguous. We submit that a clause creating so much litigation and such different and divergent views in so many states is clearly ambiguous.

It being ambiguous it should be interpreted most favorable to the insured as we have shown above.

Judge Ackerson in deciding to strike out the complaint relied much on the Tennessee case of *Fourth and First Nat. Bank* v. *Fidelity and Deposit Co.,* 281 S. W. 785, also reported in 45 A. L. R. 610. It is directly contrary to the holding of District Judge Lindley in *Aetna Casualty and Surety Co.* v. *Com. State Bank,* 13 Fed. 2nd, 474, which last named decision we believe to be is the sounder rule for the construction of this contract.

There are, however, distinguishing features between the Fourth and First Nat. Bank case (supra) and the instant case. The contract there provided:

> "In consideration of the premium of Twenty-six hundred nine and 50/100 Dollars ($2,609.50) paid by Fourth and First National Bank and First Savings Bank & Trust Com-

pany, as their interests may appear, Nashville, hereinafter referred to as the insured to the Fidelity & Deposit Company of Maryland, hereinafter referred to as the underwriter, *for a period of one year from the date hereof, and of subsequent annual premiums,* each premium being based upon the total number of the insured's officers, clerks and other employees, employed at the insured's offices covered hereunder at the beginning of the year for which such premium is paid (all the officers, clerks, and other employees employed at the offices covered hereunder during the currency of this bond being hereinafter referred to as employees), the underwriter hereby undertakes and agrees to indemnify the insured and hold it harmless from and against any loss, to any amount not exceeding Fifty thousand Dollars ($50,000.00), of money, currency, bullion, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, or other similar securities, hereinafter referred to as property, in which the insured has a pecuniary interest or for which it is legally liable, sustained by the insured subsequent to noon of the date hereof and while this bond is in force and discovered by the insured subsequent to noon of the date hereof and prior to the expiration of twelve months after the termination of this bond as provided in condition II."

That contract provides that the liability of the bonding company shall not exceed $50,000, "subsequent to noon of the date hereof and while this bond is in force." Such cases are not applicable as pointed out in *Maryland Cas. Co.* v. *First Nat. Bank,* 246 Fed. 892, where it is said, at pages 899, 900:

"Rulings made in cases involving contracts which contained stipulations for renewals and such provisions as one stating that the named amount of insurance was to cover losses occurring during the continuance of the bond or any renewal thereof, or one stating that the liability of the insurer should not be cumulative, or one stating that the liability should not be for more than a stated sum, whether the loss occurred during the term of the policy or bond or a continuance thereof, or other similar provision, are not applicable to the facts of the instant case. As above indicated, the contract made by the bond with the rider attached made no provision for a renewal or extension of the liability it imposed and contained no provision similar to those just mentioned. The insurer was not acting under any obligation imposed upon it by its original contract when, in consideration of the payment of a premium of $691.25, $18.75 of which amount was the premium for insuring the fidelity of said Campbell in the sum of $7,500, it insured the plaintiff for another term beginning January 10, 1914, as evidenced by its renewal receipt bearing that date and by a new schedule, which was attached to the original bond. The period covered by the bond before the rider was attached was three-fourths of a year. The period covered by the renewal receipt and the additional schedule was one year. The total amount of insurance was the same in both. The premium stated for the three-fourths of a year was in amount exactly three-fourths of the premium charged for insurance for the whole year. From these facts it fairly may be inferred that the charge for insurance against losses occurring after January 10,

> 1914, was exactly what it would have been if no contractual relation had existed between the parties prior to that date and the insurance against losses occurring after that date had been evidenced by an entirely new instrument. Nothing in the instruments evidencing the new contract indicated that the amount of insurance for which it provided was to be diminished or affected in any way as a result of the circumstance that under a previously existing contract between the parties there had been in force the same amount of insurance against similar losses occurring during a former period. The conclusion is that the effect of the bond and rider was to insure, to the extent of $7,500, Campbell's fidelity during a period ending January 10, 1914, and that the contract made by the renewal receipt and the attaching of a new schedule to the bond was one for the same, but an additional amount of insurance against losses occurring during a period commencing January 10, 1914."

In the Fourth & First National Bank case (supra) the contract was what is known as a "term policy" (246 Fed. 899). The policy before us makes no provision that the policy shall run until terminated.

The learned Judge in striking out the complaint herein compares this fidelity bond we are here trying to interpret, with a life insurance policy. We are unable to follow the learned judge in this reasoning.

We are here concerned with knowing what the parties intended by the terms of the bond, whether it was a continuous bond or whether, upon the payment of the yearly premiums, a new contract arose.

Under a life insurance policy that situation does not arise. Necessarily the obligation of the part of the insurance company to pay arises at the death of the insured. There are no other possible contingencies. In a bond given for possible losses from the dishonesty of servants limited as to the amount of such liability, conditions may arise, just as they have arisen here, which affect the construction of the contract materially.

Did the parties contract that, in the event of $100,000 being stolen the first year and the yearly premiums being thereafter paid from year to year and losses occurring during those subsequent years, there was to be no liability for the last thefts, because, forsooth, there had been $100,000 stolen during the first year? We do not deny that parties could so contract but we do insist that it is doing violence to this language of this contract to so construe it.

It will be admitted that had we taken a new company each year we would have just what we claim this contract intended to give the bank, that is, insurance for full $100,000.00 for each year's defalcations. But because we held on to the original company, paying them annually, we must in effect be penalized. This, we think, is a very strong reason for refusing to construe this contract as respondent would have it construed.

It seems to us that it is most important to note that there was no obligation resting upon the bank to continue the bond after the first year. None whatever. The bank could, each year, under the bond here sued on, change the insurance companies. We submit that where there was no obligation to continue the policy that each payment must necessarily have created a new contract. To hold that such renewal did not constitute a new

contract the terms should be clear and unequivocal.

The following language of Judge Lindley in *Aetna Casualty and Surety Co.* v. *Commercial State Bank,* 13 Fed. 2nd, at page 245, is strikingly pertinent:

> "Here defendant paid an annual premium for insurance. Under plaintiff's theory, if there were a loss of $10,000 the first year, not discovered until the end of the three years' period, then, though defendant had paid premiums for the second and third years, it would have no protection for those years, no insurance, for the reason that the penalty of the bond would be completely exhausted by the first year's losses, and nothing would remain to cover losses in the second and third years. In such case, the second and third years' premiums would be paid by defendant for nothing whatever. No sane man would say that this was the intention of the defendant, and the court is most loathe to believe that it was the intent of plaintiff, a widely known insurance company, dependent upon the good will and esteem of the public and its customers for its commercial welfare, so to frame its contract of indemnity as to extract premiums from the insured without giving anything in return. Brief indeed would be its life of business prosperity and public esteem, were it known that it would be guilty of such a game of "heads I win, tails you lose'. Rather than impute to it such an abhorrent suggestion of lack of commercial integrity and fair dealing, the court prefers to find as he believes the facts clearly indicate, that each year's premium was to buy one year's insurance of $10,000. There is no

fact or circumstance warranting a finding that the parties intended that the first year's premium bought insurance of $10,000 but that the three years' premiums bought insurance of only $3,333⅓ per year."

It is respectfully submitted that the decree striking out the complaint should be reversed.

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[48030]

66 OCT.T.1928

New Jersey Court of Errors and Appeals

THE NATIONAL BANK OF NORTH HUDSON at Union City, a corporation of the United States, *Plaintiff-Appellant*, *v.* NATIONAL SURETY COMPANY, a corporation duly authorized to transact business of insurance in the State of New Jersey, *Defendant-Respondent.*	Action at Law.

BRIEF FOR RESPONDENT.

Statement of Facts.

This is an appeal from an order of Henry E. Ackerson, Jr., sitting as Supreme Court Commissioner, striking out plaintiff's complaint.

The complaint sets forth that on November 9, 1916, the defendant issued to the plaintiff a blanket bond by way of protection against dishonesty on all the employees of the bank. The material provisions of this bond as set forth in a copy of the bond annexed to the complaint are as follows:

> "In consideration of the premium of Eight Hundred twelve and 50/100 ($812.50) Dollars paid by The National Bank of North Hudson, West Hoboken, N. J., hereinafter referred to as the insured, to the National Surety Company, hereinafter referred to as the Underwriter, for a period of one year from the date

hereof, and of subsequent annual premiums, each premium being based upon the total number of the Insured's officers, clerks and other employees, employed at the Insured's offices covering hereunder at the beginning of the year for which such premium is paid (all the officers, clerks and other employees employed at the offices covered hereunder during the currency of this bond being hereinafter referred to as Employees), the Underwriter hereby undertakes and agrees to indemnify the Insured and hold it harmless from and against any loss to an amount not exceeding One Hundred thousand ($100,000.00) Dollars of money, currency, bullion, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks or other similar securities, hereinafter referred to as Property, in which the Insured has a pecuniary interest or for which it is legally liable, sustained by the Insured subsequent to noon of the date hereof and while this bond is in force and discovered by the Insured subsequent to noon of the date hereof and prior to the expiration of twelve months after the termination of this bond as provided in Condition II.

"This bond shall terminate—(a) thirty days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate this bond, or (b) upon the receipt by the Underwriter of a written request from the Insured to terminate this bond. This bond shall terminate as to any Employee—(a) as soon as the Insured shall learn of any default hereunder committed by such Employee, or (b) fifteen days after the receipt by the Insured of a written notice from the Underwriter of its desire to terminate this bond as to such employee."

This bond was issued November 9, 1916, and was continued in force until the 9th day of November, 1926, as shown by the complaint. During the currency of this bond and between the years 1921 and

the 22nd day of July, 1926, three employees of the plaintiff were dishonest and stole and embezzled from the plaintiff, the sum of $235,483.02. The defendant was advised of the defalcations, then known to aggregate upwards of $109,000.00 and on July 31, 1926, the defendant paid to the plaintiff the sum of $100,000.00. Thereafter and subsequent to July 31, 1926, the plaintiff discovered additional losses aggregating $126,000.00 in excess of the sum of $109,000.00. One of the fraudulent employees of the bank repaid an additional sum of $50,000.00 and the plaintiff demanded a further sum of $85,-483.00 to cover the balance of the defalcation.

The defendant company takes the position that the preliminary bond issued on November 9, 1916, was a continuous bond in the sum of $100,000.00 running for an indefinite period and the obligor's maximum liability for the period from November 9, 1916, to November 9, 1926, was $100,000.00 and that the payment by it to the bank of the sum of $100,000.00 was complete liquidation of any indebtedness upon the part of the defendant.

The plaintiff on the other hand claims that the original bond ran for one year and that thereafter in each succeeding year separate and distinct contracts came into existence, and that the defendant's maximum liability for each year was $100,000.00, although they absolutely eliminate the clause setting forth how the bond shall terminate. In other words they say that every year there was a termination of the bond, but still claim to have the right of holding the defendant liable for embezzlements occurring during any period from 1916 to 1926, although the bond provides that the defendant shall only be liable—subsequent to noon of the date hereof and while this bond is in force and discovered by the Insured subsequent to noon of the date hereof and prior to the expiration of

twelve months after the termination of this bond as provided in Condition II, so that in the same breath the plaintiff claims that a new contract arose each year, but that the bond was a continuing one so far as the provisions for discovering the loss within twelve months from its termination.

Plaintiff has grouped his arguments under four points.

POINTS I, II and III.

In so far as the first three points raised by appellant's brief are concerned, the respondent admits them as an academic proposition to be a correct exposition of the law, merely pointing out that there is no ambiguity in the undertaking of the National Surety Company.

As was set forth in the case of *Fidelity Deposit Co.* v. *Champion Ice Co.,* 117 S. W. Rep. 396:

> "So that in no event and under no condition could the surety company be held responsible for a loss exceeding $2500 unless the plain unmistakable language of the contract is to be disregarded. There is no ambiguity in the language limiting the liability nor can there be any doubt that it was immaterial when the loss occurred provided it was within the period covered by the terms of the bond and the continuation certificate.
>
> "The lower Court however took the position that each continuance certificate was a separate independent contract and hence the surety company was liable in an amount not exceeding $2500 each year. In other words according to this construction of the bond the surety company might have been required to pay if there had been a defalcation of $2500 in each year. In other words according to this construction of the bond the surety com-

pany might have been required to pay if there had been a defalcation of $2500 in each of the five years, a total of $12,500. In our opinion this is not the fair construction of the bond.

"It is true that under our construction of the contract the surety company would not be liable for any embezzlement occurring during the periods covered by the continuation receipt provided the employee embezzled during the period of the original bond the full amount specified therein, but we are unable to perceive how this fact can operate to make the surety company responsible for losses it did not agree to protect the employer against. It would do violence to the plain letter of the undertaking to say in the fact of the contract that the surety company was responsible in any sum exceeding $2500."

In the case of the *Fourth & First Bank & Trust Company* v. *Fidelity & Deposit Company of Maryland*, 281 S. W. Rep. 785, also 45 A. L. R. 610, the same question of ambiguity was raised. This case deals with the identical bond as we are discussing in the present case and the Tennessee Supreme Court, in disposing of the bank's contention, said:

"As suggested by Mr. Justice WILLIAMS in Green *v.* Fidelity & G. Co., *supra*, bonds like this one represent progress in the business of indemnity insurance. They extend the time for discovery of loss, and remove the difficulty fatal to so many cases, experienced by the obligee in proving when the defalcation occurred and against what period or separate contract it should be charged.

"A construction of the bond to avoid this burden upon the obligee is the strongest construction we could give to it, generally speaking, against the bonding company. Such a construction will usually favor the obligee, as an examination of the decided cases will disclose. * * * However, in this instance we

do not think there is any grave uncertainty in the terms employed.

"It is insisted that under the construction given to the bond by the chancellor, which we are following, the bank during the fourth year of the bond was paying a large premium for no indemnity. It is said that the defalcations of the three previous years in their aggregate exceeded $50,000.00 that the bank had paid for coverage for these years, and that for the last year it got no protection at all for the premium paid, if its total recovery was limited to $50,000.00. This argument ignores the feature of this bond, previously pointed out, that, as in a life policy, 'the whole premiums are balanced against the whole insurance.' In 1923 this bond stood as indemnity for losses of the three past years as well as current losses.

"If the obligations of this bond be considered as recurring annually, its conditions should be likewise treated. If there were distinct contracts of indemnity, each covering a year, then each contract terminated at the end of the year, and, under the provisions of the bond, any loss was required to be discovered and reported prior to the expiration of twelve months after the termination of this bond, that is to say all liability for 1920 losses ceased at the end of 1921. So, according to the bank's own theory, the 1920 premium only purchased protection for losses of that year up to the end of 1921. The bank therefore did not, in 1920, pay for the protection it got in 1923 against the losses of the former year. It was not paying something for nothing in the last year, even though it developed that the first year's losses absorbed the entire penalty of the bond. On the contrary in 1923, it was paying for past protection as well as current and future protection."

POINT IV.

A bond issued for an indefinite term is renewed by the payment of subsequent premium constituting only one contract and is a continuous bond covering the whole period of its currency and the obligor's maximum liability is the amount expressed in said bond.

14 R. C. L., Paragraph 495, bears this statement:

> "Where a policy guaranteeing the fidelity of an employee is renewed, there is still only one contract and one penalty, the renewal certificate being a new policy only in extending the indemnity provided by the original policy to a new period of time, especially where the policy stipulates that it shall not, if renewed lapse at the end of the period for which it is executed, but that the liability of the insurer shall not be cumulative."

In 42 A. L. R. 834, in a note attached to the case of *State ex rel. Freeling* v. *New Amsterdam Casualty Co.,* it is said:

> "The manner in which the renewal of a bond insuring the fidelity of an officer or employee affects the limits of the indemnity depends on the interpretation of the terms of the bond. There is apparently no conflict of opinion on the subject as between jurisdictions, the particular terms of the bond construed being the governing factor of each decision."

The only case in New Jersey which we have been able to discover involving a bond of this character is the case of *Roseville Trust Co.* v. *National Surety Co.,* 95 N. J. L. 138.

In this case there was a judgment below for the full penalty of the bond. Cross appeals were taken and the Court found it unnecessary to pass upon

the bank's contention that the Trial Court was wrong in limiting the right of the obligee to the penalty of the bond because the Court found as a matter of law that the bank had not made known to the surety company certain conditions which came or should have come to the attention of the bank.

The Supreme Court, however, in this case held:

> That the surety company's liability was limited to the penalty of the bond.

The Court of Errors and Appeals in discussing this bond says:

> "In 1912 the surety company by its writing, in consideration of the payment of the annual premium charge each year, continued in force the original bond, for an indefinite term so as to cover, according to its terms and conditions, any of said acts or defaults by Smith committed after the date of the execution of the original bond and before its termination as provided therein."

In the case of *Fourth & First Bank & Trust Company* v. *Fidelity & Deposit Company of Maryland, supra.* So cogent and powerful is the decision of the Tennessee Supreme Court in this case involving exactly the same situation that we are quoting practically the whole opinion:

The Court in its opinion held as follows:

> "The substance of the first paragraph of the bond under consideration, above quoted, is that in consideration of the premium of $2,-609.50 for a period of one year from date and of subsequent annual premiums (based on the number of employees at the beginning of the year for which premium is paid) obligor undertakes to indemnify the obligee against loss to an amount not exceeding $50,000 sustained by the obligee subsequent to the date of the

bond and while the bond is in force and discovered by the obligee subsequent to the date of the bond, and prior to 12 months after termination of the bond as provided in condition II. Condition II provides that the obligee may terminate the bond upon notice and the obligor may terminate the bond upon 30 days' notice.

"The consideration of the bond is the first annual premium of $2,609.50 and subsequent annual premiums, based on the number of employees. The obligation of the bond is to indemnify against loss of money, etc. up to $50,000. The life of the bond, the period it covers, is not fixed. It is to run until terminated as provided in condition II.

"The bond before us in some aspects resembles a life insurance policy. A life insurance policy is not an assurance for a single year, with the privilege of renewal from year to year, by paying the annual premium, but it is an entire contract of assurance for life. Each premium is part consideration of the entire insurance for life. Knickerbocker L. Ins. Co. *v.* Heidel, 8 Lea. 488; New York L. Ins. Co. *v.* Statham, 93 U. S. 24, 23 L. ed. 789, 19 Am. Rep. 512.

"So this bond is written to cover an indefinite period at the pleasure of the parties. Each premium, the first premium and subsequent premiums, is part consideration of the entire risk.

"Neither First Nat. Bank *v.* Fidelity & G. Co., 110 Tenn. 10, 100 Am. St. Rep. 765, 75 S. W. 1076, nor Green *v.* United States Fidelity & G. Co., 135 Tenn. 117, 185 S. W. 726, controls the case here presented. In the former case it was held that, owing to the particular language of the bond used, although the original bond and the renewals be treated as separate contract, still there could be only one recovery of the maximum liability stipulated. In the latter case, although the original bond was effective for a fixed period of one year, and there was a continuation certificate issued each

year, still it was held that the original bond and the renewals did not constitute separate contracts so as to require the obligee to allocate its losses to particular years.

"Learned counsel for the bank presses upon our consideration a line of cases wherein it appears that indemnity bonds and renewals thereof were under consideration. It was held in these cases that the bonds and the renewals were separate and distinct contracts. This was necessarily under the language used. The cases are Campbell Milk Co. *v.* U. S. Fidelity & G. Co., 161 App. Div. 738, 146 N. Y. Supp. 92; Hawley *v.* United States Fidelity & G. Co., 100 App. Div. 12, 90 N. Y. Supp. 893, *id.* 194 N. Y. 549, 76 N. E. 1096; De Jernette *v.* Fidelity & G. Co., 98 Ky. 558, 33 S. W. 828; Long Bros. Grocery Co. *v.* United States Fidelity & G. Co., 130 Mo. App. 421, 110 S. W. 29; Proctor Coal Co. *v.* United States Fidelity & G. Co. (C. C.), 124 Fed. 424, 427, 430; Ladies of Modern Maccabees *v.* Illinois Surety Co., 196 Mich. 27, 163 N. W. 7; Commercial Bank *v.* American Bonding Co., 194 Mo. App. 224, 187 S. W. 99; United States Fidelity & G. Co. *v.* Williams, 96 Miss. 10, 14, 49 So. 742.

"In all these cases the original bond covered a specified period, usually one year. All the bonds under consideration provided for their extension of continuance for other years upon the payment of subsequent annual premiums. The reasoning of these cases may be illustrated by the following from the Supreme Court of Michigan in Ladies of Modern Maccabees *v.* Illinois Surety Co., 196 Mich. 27, 163 N. W. 7. 'Under the stipulations of the bond in the instant case, the renewal did not automatically take place. The plaintiff had to apply for, and the defendant accept, a continuance of the obligation. Neither could compel action on the part of the other. When the plaintiff applied for, and the defendant accepted, the application, both parties became bound for a new term. It was a new contract; its conditions

were the same as the original bond, but it covered a new period, was for a new consideration, and sprang into existence by the affirmative action of both parties.'

"No affirmative action was required by either party to the bond before us to continue it after the first year, or after any other year. The original obligation was not limited to a year. At the end of the first year the bond went on, whether the premium was paid or not. The bank became liable for the premium for the second year, because it was stipulated that premiums were to be paid annually, and defendant's obligation to indemnify against losses continued. If neither party availed itself of the right to terminate afforded by condition 11, the bond ran right along, until other steps were taken to escape its obligation, as by rescission for default in performance.

"In a policy of guaranty insurance, it was provided that, upon the expiration of the original term, the contract should be treated as renewed in the absence of notice from either party. It was held, no notice being given, that the contract was continued for another like term and the insured was liable for the premium. Solvency Mut. Guarantee Co. *v.* York, 3 Hurlst. & N. 588, 157 Eng. Reprint, 603. Surely then, where a policy is not limited to any term but on its face is to run until notice to terminate is given by one party or the other, it must be that the contract persists and the respective liabilities continue up to such notice. The bond contains no clause by which its obligation is avoided or suspended by the failure of the obligee to pay an annual premium. Such consequences result from contract. Dale *v.* Continental Ins. Co., 95 Tenn. 38, 31 S. W. 266; Equitable Ins. Co. *v.* Harvey, 98 Tenn. 636, 40 S. W. 1092.

"It is an established rule of law that a valid contract of life insurance is not invalidated and nullified by the nonpayment of a premium required to be paid, unless the policy contains

a provision to such effect. Woodfin *v.* Asheville Mut. Ins. Co., 51 N. C. 558; Haas *v.* L. R. A. (N. S.) 747, 121 N. W. 996, 19 Ann. Cas. 58; notes in 16 L. R. A. (N. S.) 747; 19 Ann. Cas. 67; 14 R. C. L. 975; May, Ins. 343.

"As suggested by the North Carolina court in Woodfin *v.* Asheville Mut. Ins. Co. *supra,* in a contract such as the one before us, the payment of the annual premium is to be enforced as part of the consideration, not as a condition.

"Such being the law, and such being the bond, it did not require a new assent or affirmative action of either party to keep the contract in force, but, even on a failure to pay an annual premium, the contract ran on until affirmative action was taken to avoid it. The obligation of the bond was therefore continuous and single.

"The conclusion we have reached finds support in State *ex rel.* Freeling *v.* New Amsterdam Casualty Co., 110 Okla. 23, 42 A. L. R. 829, 236 Pac. 603, construing a bond somewhat similar to the one before us, in which the Supreme Court of Oklahoma distinguished some of the cases relied on herein by the bank."

The Court will note that the case at bar is even stronger than the case of *Fourth & First Bank & Trust Company* v. *Fidelity & Deposit Company* because of the rider attached to and forming part of the bond reading as follows:

"Rider to be attached to and form a part of bond No. 1008027 executed by the National Surety Company for an *indefinite period,* commencing November 9, 1916, in favor of the National Bank of North Hudson, West Hoboken, N. J."

In the case of *State ex rel. Freeling* v. *New Amsterdam Casualty Co.,* 110 Okla. 23, 42 A. L. R. 829, a similar bond was under discussion and a similar contention was made by the State of Okla-

homa. The Supreme Court of Oklahoma in an opinion filed by PINKHAM, C., in deciding against the contention of the State, said that:

"As we understand the contention of plaintiff in error, it is that the payment of the second annual premium and the presentation of the claim therefor by the surety company constitutes a new, separate, and distinct contract of insurance, and that it is entitled to recover, under its first cause of action, $5,000 and under its second cause of action $4,983.68, making a total of $9,983.68.

"It is the theory of the defendant in error, which was followed by the trial court, that the said bond executed by the New Amsterdam Casualty Company, in May, 1916, constituted and was a continuous bond, duly in force and effect up until the time of the discovery of the embezzlement committed by Claude Ray, and that the annual premium paid in January, 1917, did not constitute or make a new bond, but was simply the act which kept alive the old bond for an additional period. In other words, that the issuance of receipts for the annual premium did not constitute or make a new and distinct contract, but was simply a continuation of the contract already in force.

"It will be observed that the only date set out in the bond was May 15, 1916, which was the date from which liability accrues. Evidently this was for the reason that the position held by Claude Ray, was that of a clerk, and therefore a position with no definite terms, and as all the employees carried by the schedule had similiar positions, it is reasonable to infer that the reason for not making a definite date on which the bond would expire was that such employees had their positions for no definite time and that the bond was intended to cover their entire period of service in their then positions.

"In this respect this bond is in the nature of a life insurance policy, in that it will not be kept in force indefinitely unless the annual

premiums thereon are paid, and if the annual premium, paid in January 1917, had been refused, the insurance company would doubtless have exercised the option contained in one of the conditions of the bond, which stated that the surety could cancel the same upon giving thirty days' written notice. That provision of the bond also gives the privilege to the employer of cancelling the same as to any of the employees upon giving written notice to the surety.

"It is to be further observed that the annual premium, paid for 1917, and the receipt or claim set out, refers back to the original bond, specifying the number thereof, to wit, No. 112, and then states that the amount so paid is the annual premium from January 15, 1917 to January 15, 1918.

"There is no statement of any character that this premium receipt renews the old contract or makes a new contract with the same terms and conditions as the original contract, which provisions are found in many cases holding that a new and distinct contract of insurance has been made for the subsequent terms. This receipt does not incorporate the condition of the original bond into a new contract, but expresses on its face that it is the payment of the second annual premium on a certain and distinct bond, No. 112.

"It will further be seen that the New Amsterdam Casualty Company agrees to pay to the State of Oklahoma the amount of any loss which Claude Ray caused the School Land Department, not exceeding, however, the sum set opposite the name of such employee in said schedule or in said acceptance, which was $5000.

"It is urged, with great force and by citation of a number of cases, which, it is contended, support the contention, that the payment of the second premium and the presentation of the claim therefor by the surety company constitutes a new, separate, and distinct contract of insurance.

"Among the cases cited is Florida C. & P. R. Co. *v.* American Surety Co. 41 C. C. A. 45, 99 Fed. 674. The court there holds that the language of the bond involved in that case, that only the last insurance of the employee shall be in force at any one time, had some definite meaning, and that such language must have been used to express clearly the idea that new contracts were to be considered as executed for each new period of time, and that the execution of each new contract, whether by certificate or by renewal, would make an entirely new contract instead of a mere continuation of the old. It is said in the opinion:

" 'Such being the case, the meaning of the part of the contract which declares that upon the execution of a stipulated amount of risk or insurance in behalf of an employee the company shall not be responsible under any previous insurance of said employee becomes clear, and is that, when a new schedule of the amount of insurance in behalf of any employee formerly on the schedule has been executed or completed, and actually or constructively accepted, the old or previous insurance against losses previously committed by him is at an end, and that for these losses the company is no longer liable. The contract further declares that only the last insurance of the employee shall be in force at one time. These provisions are inconsistent with the theory that it was the intention or the idea of the parties that a continuing liability for old and undiscovered losses in continuous provious years was being piled up in each renewed contract.'

"In De Jernette *v.* Fidelity & G. Co. 98 Ky. 558, 33 S. W. 828, cited by plaintiff in error, the renewal certificate reads as follows:

" 'The contract under bond No. 53,939 is hereby renewed in accordance with the tenor of the bond, the guaranty to cover the period above named only.'

"It appears that in the body of the bond in the case cited there was a specific provision that claims could only be made under said bond or any renewal thereof for acts committed during its currency. The bond in that case covered a definite period from January 19, 1891 to January 19, 1892. The court construed the renewal certificate as the making of a new and distinct bond by adopting the terms and conditions of the original bond.

"It may be observed that in a later Kentucky case, United States Fidelity & G. Co. *v.* Citizens Nat. Bank, 147 Ky. 285, 143 S. W. 997, it is held that the original bond and certificate of renewal constitute but one contract, and that but one recovery may be had. In the opinion it is said:

> " 'Each of the certificates refers to the fact that they continue bond No. 292,114, the number of the bond executed March 15, 1904, clearly showing that one obligation existed for all these years. The bond was kept alive in a manner similar to an insurance policy; that is, by the payment of annual premiums. First Nat. Bank *v.* Fidelity & G. Co., 110 Tenn. 10, 100 Am. St. Rep. 765, 75 S. W. 1076, and Fidelity Deposit Co. *v.* Champion Ice Mfg. & Cold Storage Co., 133 Ky. 74, 117 S. W. 393.'

"A determination of the question as to whether the recovery can be had upon the bond in the instant case, which limited the company's liability to $5000 and also a recovery of an additional amount by reason of the renewal certificate, depends upon the facts of the case and the language used in the contract.

"The cases cited by plaintiff in error, and others of similar import, are, we think, inapplicable to the instant case; but aside from this, the proposition submitted by plaintiff in error to the effect that the payment of the second annual premium constituted a new, separate, and distinct contract, of insurance, is

not, we think, sustained by the weight of authorities, including the decision of this court in Southern Surety Co. *v.* Equitable Surety Co., 84 Okla. 23, 202 Pac. 295. Under the rule announced in that case, there was but one contract in the instant case, and the amount named in the bond is the limit of the liability of the defendant in error.

"In Walker on Fidelity Bonds, p. 135, it is said:

> " 'It is now well settled that where a fidelity bond is issued for one year or other stated period, and is thereafter periodically renewed or continued in force by the issuance of certificates which specifically refer to and adopt the terms of the original instrument, and where that instrument provides that the total liability of the surety shall not exceed the penal sum named therein, and where there are defaults occurring during the original terms and also during more than one renewal term, in such case the liability of the surety is limited to the penalty of the original bond. The mere statement of the proposition would seem to be sufficient to indicate the rule by which the surety's liability is to be gauged, but a determined effort has been made, in a number of cases, to treat each renewal certificate as an independent contract, and to hold the surety for loss under the original bond, and under the renewals where loss occurred for such respective losses up to the penalty of the bond, and of each certificate. The rule is, however, as above indicated, that the surety is only liable for the penalty of the bond.' "

United States Fidelity & G. Co. v. *Shepherd's Home Lodge*, 174 S. W. 487 (Ky.), Court held:

"Where the plaintiff lodge was guaranteed by the defendant surety company against loss arising from defalcation of an officer, there

being a series of 3 bonds, a greater part of the loss having taken place during the time covered by the second bond, while such loss was not discovered until that bond had been renewed for another period of a year and where the language of all the bonds was that they continued against loss that should 'occur during the continuation of said term or of any renewal thereof on discovery during the said continuation or within three months thereafter.' The contract was a continuing one and the recovery of the lodge upon the bond was not limited to the loss occurring during the last renewal, but included the total loss from the renewal of the policy *up to the limit of its guarantee.*"

United States Fidelity & G. Co. v. *Citizens National Bank*, 143 S. W. 996 (Ky.):

An employer's indemnity bond insuring a bank against loss by reason of the fraud of its cashier stipulated that insurer during the term of one year or any subsequent renewal of the term, would reimburse the bank for loss sustained by the fraud of the cashier committed during the term or any renewal thereof and discovered during the term or any renewal thereof or within six months thereafter. Each renewal certificate continued the bond for a year. Held that the original bond and certificate of renewal constituted but one contract, and the bank could recover for any loss sustained during the period of the bond and renewal certificates and discovered within six months after the expiration of the last certificate.

American Bonding Co. v. *Morrow*, 96 S. W. 613 (Ark.). The Court held:

"The language of the bond is that selected and employed by the insurer and when doubtful or ambiguous must be given the strongest interpretation against the insurer it will reasonably bear.

> "The language of these instruments is not susceptible of any reasonable interpretation other than it was intended to extend the liability over the period of the renewal, but to limit the total liability for the whole period of the renewal contract to the amount named. It is expressly stipulated in the bond. There is no ambiguity about it.
>
> "See also John Church Co. *v.* Aetna Indemnity Co., 80 S. E. 1093 (Ga.); Pearson *v.* United States Fidelity & G. Co., 164 N. W. 919 (Minn.); Rankin *v.* United States Fidelity & G. Co., 99 N. E. 314 (Ohio); Southern Surety Co. *v.* Equitable Surety Co., 202 Pac. 295 (Okla.)."

We have read the cases cited by appellant in support of its contention. All of these cases with the exception of the *United States Fidelity & G. Co.* v. *Citizens National Bank*, 13 Fed., 2nd 474, dealt with the situation in which the original bond covered a specified period for one year. All these bonds provided for the further extension or continuation for other years upon the payment of subsequent annual premiums.

So in the case of *Maryland Casualty Co.* v. *First National Bank*, 246 Fed. 892, cited by appellant:

> The contract was a term policy and further action by the parties having the effect of creating a new contract, was required to make the defendant liable for any loss or losses occurring after January 10, 1914.

In the case of *Proctor Coal Co.* v. *United States Fidelity & G. Co.*, 124 Fed. 429, the Court said:

> "A renewal of a policy constitutes a separate and distinct contract with the same terms and conditions as is evidenced by the bond which is renewed because the renewal receipt recites that it is renewed in accordance with the terms of the bond. This was also a term policy."

Campbell Milk Co. v. *U. S. Fidelity Co.*, 146 N. Y. Supp. 92, cited by appellant:

> This was a term policy running for a year and had to be renewed by the affirmative action of the parties.

U. S. Fidelity Co. v. *Williams*, 96 Miss. 10, cited by appellant:

> These bonds ran for one year each, and the company in this case was only responsible for a loss discovered during the continuation of each bond or within six months after its expiration. Again affirmative action of the parties was required to effectuate a renewal.

In the case of *Danvers Savings Bank* v. *National Surety Co.*, 166 Fed. 671, cited by appellant:

> A surety bond for an employee issued on an application made by the employer, was expressly limited to the term of one year but provided for its renewal on the payment of a like or agreed premium annually, "so long as the employer may wish to continue this bond and the company shall consent to receive such premium. Held, that renewals were left as a matter of future contract between the parties, and that where new applications therefor were required and made they and not the original application governed as to the renewal terms based thereon.

In the case of *Florida Cent. & Pa. R. R.* v. *American Surety Co.*, 99 Fed. 674:

> In this case the liability was expressly limited to losses which should occur and be discovered during the continuance of the contract and the bond contained the following provision * * * "and it is agreed further that the company, upon the execution of a stipulated amount of risk or insurance under the term of this bond in behalf of any em-

ployee, shall not thereafter be responsible to the employer under any previous insurance of said employee, it being mutually understood that it is the intention of this provision that but one (the last) insurance of the employee shall be in force at one time, unless otherwise provided. The bond stated no time of its duration but the notice of acceptance of each subsequent schedule stated the term of insurance was to be for a year. Held that a new contract was made annually and on each renewal under the above provision the liability of the insurer for any past and undiscovered defalcation of an employee terminated.

Long Bros. Grocery Co. v. *U. S. Fidelity & G. Co.*, 110 S. W. 29, cited by appellant:

> This was a case on a term policy running for a year requiring affirmative action of both parties to renew it.

Judge Ackerson in his opinion below quoting from the opinion of the Fourth & First Bank & Trust Co., *supra*, said:

> "The reasoning of these cases referring to cases cited by appellant may be illustrated by the following from the Supreme Court of Michigan in Ladies of Modern Maccabes *v.* Illinois Surety Co. 196 Mich. 27, 163 N. W. 7.
>
> "Under the stipulations of the bond in the instant case, the renewal did not automatically take place. The plaintiff had to apply for, and the defendant accept, a continuance of the obligation. Neither could compel action on the part of the other. When the plaintiff applied for, and the defendant accepted, the application, both parties became bound for a new term. It was a new contract; its conditions were the same as the original bond, but it covered a new period, was for a new consideration, and sprang into existence by the affirmative action of both parties."

The only case cited by counsel for the appellant which directly disputes the reasoning in the Fourth & First Bank & Trust Co. is the case of *Aetna Casualty & Surety Co.* v. *Commercial State Bank.* This case was decided in the United States District Court and it was reversed on the facts in 19 Fed. 2nd 961, the Circuit Court of Appeals saying "we deem it unnecessary to pass on the question as to whether there was a single or triple liability." In the opinion below by Judge LINDLEY, the Court utterly lost sight of the fact that the policy afforded the bank protection for the entire period covered by the policy and its renewals and that a loss occurring during the first year could be recovered even if not discovered until several years thereafter.

We confess we are unable to follow counsel for the appellant in their attempt to distinguish the case at bar from the Fourth & First Bank & Trust Company. Obviously the case cannot be distinguished because the identical bonds were under discussion in both cases.

Counsel for the appellant say in their brief, page 14,—the policy before us makes no provision that the policy shall run until terminated. This of course is not so. The bond being for an indefinite period necessarily runs until terminated. Counsel for the appellant also argue that the bank would in effect be paying a premium for nothing in the event that $100,000. was stolen the first year. The answer to this is a very simple one. If $100,000. was stolen the first year and was discovered, the bank would of course terminate the policy and start a fresh policy. If it was not discovered within several years, under the bank's present theory, it would have no protection for the loss occurring during the first year, because it was not discovered within time.

Counsel also argue that there was no obligation to continuing the bond after the first year, but counsel overlook the fact that under the present policy the bank in order to concel the policy would have had to send to the underwriter a written request for the termination of the bond. Until it did so the policy went on.

In a life insurance policy the same situation will apply. The assured could of course terminate the insurance at any time, but certainly the payment by him of a yearly premium as provided for in the policy cannot by any stretch of the imagination be construed as the making of a new contract.

In this policy the whole premiums are balanced against the whole insurance, and this bond stood as indemnity for losses occurring from November 9, 1916, up to the termination thereof and for twelve months thereafter.

If the court will examine the complaint it will appear very plainly that the bank does not separate the losses from embezzlement into years, but claims a right to recover for any loss occurring during the duration of the bond. With this we absolutely concur, except that we add thereto the phrase, up to the maximum liability of the bond, which in this case was $100,000.

We again assert that having paid the bank the sum of $100,000. the entire liability under this bond was liquidated.

It is respectfully submitted that the order striking out the complaint and the judgment for the defendant entered thereon should be affirmed.

William L. Rae,
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with Respondent.

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INDEX

Page

Notice of Appeal and Grounds 1

Summons .... [illegible]

Complaint .... [illegible]

Notice of Motion to Strike Out Complaint .... [illegible]

Order Striking Out Complaint .... [illegible]

Rule for Judgment Final .... [illegible]