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(Filed June 8, 1928)

New Jersey Supreme Court

Passaic County

William Saxon, Jr., by his next
friend William Saxon, Sr.,
and William Saxon, Sr., indi-
vidually, Edith Saxon, Alfred
S. McCann, and Emma White,

Plaintiffs,

vs.

United States Fidelity and
Guaranty Company, a Corp-
oration of Maryland,

Defendant.

Action at Law

10

COMPLAINT

Plaintiffs residing in the City of Paterson, Coun-
ty of Passaic and State of New Jersey, say that:

20

1. The defendant is a foreign corporation au-
thorized to do business in the State of New Jersey.

2. That on October 7, 1927, and for some time
prior thereto and thereafter, the defendant was the
insurer and surety for Louis Steinberg, whereby the
defendant agreed to pay for any personal injury,
and agreed to defend any action or actions because
of personal injury, and pay cost upon said action,
and interest upon any judgment obtained, which in-
jury shall arise out of the ownership and during the
term of the policy which sum shall not exceed the
sum of Five Thousand (\$5000.00) Dollars, exclusive
of costs and interest.

30

Complaint

3. That while the said contract of suretyship was in force, the said Louis Steinberg on October 7, 1297, caused certain injuries and damage to the plaintiffs, William Saxon, Jr., William Saxon, Sr., Edith Saxon, Alfred S. McCann and Emily White, by reason of the operation and maintenance of the said automobile.

10 4. The said Louis Steinberg, duly notified the defendant of the said injuries to the said plaintiffs, and has fully complied with all terms of the said policy.

5. Thereafter the said plaintiffs instituted suit against Louis Steinberg for the injuries aforesaid in the Passaic County Circuit Court.

6. The said defendant failed to file any proceedings in the said suit and failed to defend the said suit at the time of the trial.

20 7. The said trial resulted in a judgment on April 26, 1928, in favor of the plaintiffs, William Saxon, Jr., for \$500.00, William Saxon, Sr., for \$77.00, Edith Saxon for \$100.00, Alfred S. McCann for \$75.00 and Emily White for \$200.00, being a total sum of \$952.00 and costs.

8. Plaintiff has demanded payment from the defendant of the judgment and costs, but the defendant has failed and refused to pay.

Plaintiffs demand as damages the sum of \$1500.00.

30

David Harrison,
Attorney of Plaintiffs.

Answer

Filed June 6, 1928
 NEW JERSEY SUPREME COURT
 Passaic County

William Saxon, Jr., by his next
 friend William Saxon, Sr.,
 and William Saxon, Sr., indi-
 vidualy, Edith Saxon, Alfred
 S. McCann, and Emma White,

Plaintiffs,

vs.

United States Fidelity and
 Guaranty Company, a Corp-
 oration of Maryland,

Defendant.

Action at Law

10

ANSWER

20

Defendant answering plaintiffs' complaint, says
 that:

(1) Defendant admits the allegations in para-
 graph 1 of the complaint.

(2) Defendant denies the allegations in para-
 graph 2 of the complaint.

(3) Defendant denies the allegations in para-
 graph 3 of the complaint.

(4) Defendant denies each and every allega-
 tion in paragraph 4 of the complaint. 30

(5) Defendant has no knowledge or information
 sufficient to form a belief as to the allegations in
 paragraph 5 of the complaint, excepting that long
 after there had been a default by the said Louis
 Steinberg in the terms of his policy, and long after

Answer

the time to file an answer had expired, plaintiffs' attorney informed the defendant that a suit had been instituted against the said Louis Steinberg.

(6) Defendant has no knowledge or information sufficient to form a belief as to the allegations in paragraph 6 of the complaint.

(7) Defendant has no knowledge or information sufficient to form a belief as to the allegations in paragraph 7 of the complaint.

10 (8) Defendant admits that plaintiffs' attorney requested the defendant's attorneys to secure payment of the certain alleged judgments and that payment was refused.

FIRST SEPARATE DEFENSE

There is no privity of contract shown between the plaintiffs or either or any of them and this defendant, and there is no liability on the part of the defendant to the plaintiffs or any or either of them.

SECOND SEPARATE DEFENSE

20 (1) The policy of insurance issued by the defendant to Louis Steinberg contained the following provision:

30 "B-1, Immediate written notice of any accident with the fullest information obtainable at the time must be forwarded to the Home Office of the Company or to its authorized representative. If a claim is made on account of such accident, the Assured shall give like notice thereof, and if suit is brought to enforce such a claim, the Assured shall immediately forward to the Company every summons or other process as soon as same shall have been served on him."

(2) That the said Louis Steinberg did not give

Answer

the defendant immediate notice of the happening of the said accident with the fullest information obtainable at the time, and although a claim was thereafter made against him on account of such accident, said Louis Steinberg, the assured, did not give immediate notice thereof to the defendant, and although it is alleged that suit was brought to enforce such claim, the assured did not immediately forward to the Company every summons or other process as soon as same were served on him, and did not at any time send the summons and complaint served upon him in the case of the said plaintiffs to the defendant. 10

THIRD SEPARATE DEFENSE

- (1) Said policy of insurance further provides:

"B-4. The Assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the Company on account of any claim; nor, except at Assured's own cost, settle any claim; nor, without the written consent of the Company previously given, incur any expense, except as provided herein for immediate surgical relief at time of accident." 20

- (2) That the assured did voluntarily assume liability to the plaintiffs.

FOURTH SEPARATE DEFENSE

- (1) Said policy of insurance issued by the said defendant to the said Louis Steinberg contained the following provision: 30

"B-5. Whenever requested by the Company, the Assured shall aid in securing information, evidence and the attendance of witnesses in effecting settlements and in defending suits hereinbefore referred to. The

Answer

Assured shall at all times render to the Company all reasonable cooperation and assistance."

10 (2) That the said Louis Steinberg violated the terms and conditions of the said policy as aforesaid in that he failed, neglected and refused all requests of the defendant Company to aid it in securing information and evidence, and failed and neglected to render to the Company reasonable co-
operation and assistance, and on the contrary failed and neglected to co-operate with the Company in any way; and he willfully permitted judgment by default to go against him.

McDermott, Enright & Carpenter,
Attorneys for Defendant.

20

30

Reply

Filed June 13, 1928
 NEW JERSEY SUPREME COURT
 Passaic County

William Saxon, Jr., by his next
 friend William Saxon, Sr.,
 and William Saxon, Sr., indi-
 vidualy, Edith Saxon, Alfred
 S. McCann, and Emma White,

Plaintiffs,

vs.

United States Fidelity and
 Guaranty Company, a Corp-
 oration of Maryland,

Defendant.

Action at Law

10

REPLY

20

The plaintiffs replying to the answer of the de-
 fendant herein say that:

1. They deny all the allegations contained in the
 First Separate Defense of the answer.
2. They deny all the allegations contained in the
 Second Separate Defense of the answer.
3. They deny all the allegations contained in the
 Third Separate Defense of the answer.
4. They deny all the allegations contained in
 the Fourth Separate Defense of the answer.

David Harrison,

Attorney of Plaintiffs.

Postea

Filed March 20, 1930
 NEW JERSEY SUPREME COURT
 Passaic County.

10 William Saxon, Jr., by his next
 friend William Saxon, Sr.,
 and William Saxon, Sr., indi-
 vidually, Edith Saxon, Alfred
 S. McCann, and Emma White,
 Plaintiffs, } Action at Law

vs.

United States Fidelity and
 Guaranty Company, a Corp-
 oration of Maryland,
 Defendant. }

20 **POSTEA**

This case was tried before the Honorable William B. Mackay and a jury on March 11, 1930.

On motion duly made by the attorneys for the defendant at the close of the case, the court directed a verdict in favor of the defendant and against the plaintiffs.

William B. Mackay,
 Circuit Judge.

Substitution of Attorney

Filed March 21, 1930
NEW JERSEY SUPREME COURT
Passaic County

William Saxon, Jr., by his
friend, William Saxon, Sr.,
and William Saxon, Sr., in-
dividually, Edith Saxon, Al-
fred S. McCann, and Emma
White,

Plaintiffs,

vs.

United States Fidelity and
Guaranty Company, a cor-
poration of Maryland,

Defendants,

10

Action at Law

SUBSTITUTION OF ATTORNEY

20

I hereby agree to substitute in my name, place
and stead, Louis C. Friedman, as attorney of record
for the plaintiffs in the above stated cause.

David Harrison,

Attorney of Plaintiffs.

I hereby consent to the above substitution.

Louis C. Friedman

Dated March 19, 1930.

30

Notice of Appeal and Grounds of Appeal

Filed March 28, 1930.

NEW JERSEY SUPREME COURT

Passaic County

| | | | |
|----|---|---|---------------|
| 10 | William Saxon, Jr., by his next friend, William Saxon, Sr., and William Saxon, Sr., individually, Edith Saxon, Alfred S. McCann, and Em- ma White, | } | Action at Law |
| | Plaintiffs, | | |
| | vs. | | |
| | United States Fidelity and Guaranty Company, a cor- poration of Maryland, | } | Defendant. |
| | Defendant. | | |

20 **NOTICE OF APPEAL AND GROUNDS OF
APPEAL**

To McDermott, Enright & Carpenter,
 Attorneys of Defendant:
 Please take notice:

30 That the plaintiffs in the above cause hereby ap-
 peal from the whole of the judgment entered against
 them in the above cause and from every part there-
 of to the New Jersey Court of Errors and Appeals
 in the last resort in all causes and that the follow-
 ing are the grounds of appeal.

1. The trial court committed error in directing a verdict against the plaintiffs and in favor of the defendant.
2. The trial court should have refused to direct

Notice of Appeal and Grounds of Appeal

a verdict against the plaintiffs and in favor of the defendant and therefore committed error.

3. The trial court committed error in not permitting the case to go to the jury.

4. The trial court committed error in failing to non-suit the plaintiffs.

Louis C. Friedman,
Attorney of Plaintiffs.

Service of a copy of the within is hereby acknowledged this 26th day of March, 1930. 10

McDermott, Enright & Carpenter.
Attorneys of Defendant.

20

80

*Testimony*NEW JERSEY SUPREME COURT
Passaic County Circuit.

10 William Saxon, Jr.; by his
next friend, William Saxon,
Sr., and William Saxon, Sr.,
individually, Edith Saxon,
Alfred S. McCann, and Em-
ma White,

Plaintiffs,

vs.

United States Fidelity and
Guaranty Company, a cor-
poration of Maryland,

Defendant.

Paterson, N. J., March 11, 1930.

20 Tried Before: Honorable William B. Mackay,
Judge, and a jury.

Appearances:

For the Plaintiffs: David Harrison, Esq.,
(By Louis C. Friedman.)

For the Defendant: McDermott, Enright & Car-
penter (By Carl Kuebler, Esq.)

(A jury was called and sworn and counsel for the
respective parties opened the case to the jury.)

30

Mr. Friedman—I offer in evidence the
policy of insurance issued or executed by
the United States Fidelity and Guaranty
Company to Louis Steinberg. Have you
any objections?

Testimony

Mr. Kuebler—No objection.

(Paper marked Exhibit P-1 in evidence.)

Mr. Friedman—I also offer in evidence the petition and order of the appointment of next friend in the case of William Saxon, Junior, by his next friend, William Saxon, Senior, and William Saxon, Senior, individually, Edith Saxon, Alfred S. McCann, and Emma White, plaintiffs, against Louis Steinberg, defendant. The appointment being made in the Passaic County Circuit Court. 10

(Paper marked Exhibit P-2 in evidence.)

Mr. Friedman—I also offer in evidence the complaint in an action-at-law commenced in the Passaic County Circuit Court between William Saxon, Junior, by his next friend, William Saxon, Senior, and William Saxon, Senior individually, Edith Saxon, Alfred S. McCann, and Emma White, plaintiffs, versus Louis Steinberg, defendant. 20

(Paper marked Exhibit P-3 in evidence.)

Mr. Friedman—I also offer in evidence rule for judgment interlocutory by default, Passaic County Circuit Court, in favor of the plaintiffs, William Saxon, Junior, by his next friend, William Saxon, Senior, and William Saxon, Sr., individually, Edith Saxon, Alfred S. McCann and Emma White, plaintiffs, versus Louis Steinberg, defendant. 30

(Paper marked P-4 in evidence.)

Mr. Friedman—I also offer in evidence a rule for judgment in the Passaic County Circuit Court and the taxed bill of costs which is attached to it in the case of William Saxon Junior, by his next friend, William Saxon.

Louis Steinberg—direct

Senior, and William Saxon, Senior, individually, Edith Saxon, Alfred S. McCann, and Emma White, plaintiffs, versus Louis Steinberg, defendant.

I might say at the last trial the name of Emma was changed to the name of Emily White.

(Paper marked P-5 in evidence.)

Mr. Friedman—The plaintiff rests.

10

The Plaintiff rested.

DEFENDANT'S TESTIMONY

LOUIS STEINBERG, sworn.

Direct Examination by Mr. Kuebler:

20 Q. Mr. Steinberg, where do you live? A. Well, I live now 401 Twenty-eighth Street.

Q. In Paterson? A. Yes, sir.

Q. Where did you live on October 7, 1927? A. 25 Temple Street. The store on 24 Temple Street.

Q. Did you live there— A. Yes.

Q. (Continuing)—through to the month of April, 1928? A. Yes, sir.

Q. You are subpoenaed here today, are you not? A. Yes, sir.

80 Q. Did you produce the letters which you were subpoenaed to produce addressed to you on April 27, 1928, March 29, 1928, and March 21, 1928, and March 12, 1928, from McDermott, Enright, and Carpenter of Jersey City? A. I don't remember.

Q. You didn't produce the letters then? A. I don't remember if I did or not.

Louis Steinberg—direct

Q. Do you remember receiving the letters? A. I don't remembr at all about that.

Q. You don't remember receiving any letters?
A. No, sir, I do not, I do not.

Q. You never turned any such papers over to Mr. Silverstein, the agent in this case? A. Any paper I got, why, I turned it over to Mr. Silverstein.

Q. You did? A. Yes.

Q. You received a policy, didn't you, from the United States Fidelity and Guaranty Company? A. Yes, I received from Mr. Silverstein. 10

Q. When did you receive that paper? A. I don't remember when I did.

Q. You never paid a premium on the policy, did you?

Mr. Friedman—Jut a moment. I object to that, if your Honor pleae. There is no such defense in the answer. That was not set up as a defense. 20

The Court—Does that make any difference?

Mr. Kuebler—It is not a defense, your Honor.

The Court—Well, I will sustain the objection.

Q. Mr. Steinberg, the policy which you received is not in your possession now, is it? The policy which you received, the policy of the United States Fidelity and Guaranty Company— 30

By the Court:

Q. Where is it? A. (No answer.)

Louis Steinberg—direct

By Mr. Kuebler:

Q. Covering you for automobile liability insurance, it is not in your possession? A. Why, I haven't got it with me now, but I think what's his name, Lawyer Harrison, I guess had it.

Q. Lawyer Harrison was the attorney for the Saxon people, was he not? A. Yes. He demand for it and I gave it to him.

10 Q. He came to you for it?

Mr. Friedman—"He demanded it."

A. He demanded it.

Q. He demanded it. When did he demand it?

A. Well, that was—

Mr. Friedman—I don't know how that is material, your Honor.

20 The Court—Yes, I will permit it.

Q. When did he demand it? A. When the accident was.

Q. How long after the accident? A. Well, I couldn't tell you exactly how long it was.

Q. Was it a month after the accident? A. I really couldn't tell you when.

Q. You don't know? He demanded of you and you gave it to him? A. Yes.

30 Q. Did he come to your house to demand it of you? A. No.

Q. Did you give it to him personally? A. Yes.

Q. When did you give it to him personally? A. That was right in his office.

Q. You went to his office and gave him the poli-

Louis Steinberg—direct

cy personally? A. No, I—I gave it to somebody.

Q. At his office? A. Yes.

Q. Well, did he demand it of you by conversation over the telephone? A. No, sir.

Q. Did he write you a letter? A. Just I received a letter about the policy, to tell him where I was insured, and I told him I would send the policy over.

Q. Now, Mr. Steinberg, I show you a letter dated April 3, 1928, addressed to McDermott, Enriht and Carpenter, 75 Montgomery Street, Jersey City, and ask you if that is your signature on that letter (handing a paper to the witness). A. Yes, sir. 10

Mr. Kuebler—I ask to have it marked for identification.

(Paper marked D-1 for identification.)

Mr. Kuebler—That is all. 20

Mr. Friedman—No questions.

No Cross-Examination.

Mr. Friedman—I would like to have your Honor instruct the last witness to be here. I may have to use him later on.

The Court—Is he under subpoena?

Mr. Friedman—No, sir.

The Court—You had better subpoena him, 30 then.

JAMES D. CARPENTER, sworn.

Mr. Kuebler—If your Honor please, I will withdraw Mr. Carpenter.

Charles Silverstein—direct

CHARLES SILVERSTEIN, sworn.

Direct Examination by Mr. Kuebler:

Q. Mr. Silverstein, where do you live? A. 331 Twentieth Avenue, Paterson.

Q. You are in business in Paterson? A. Yes.

Q. What business are you in? A. Insurance.

Q. Were you in that business of October, 1927?

10 A. Yes.

Q. And prior thereto? A. Yes.

Q. Did you write a policy of automobile liability insurance with the United States Fidelity Guaranty Company to Louis Steinberg? A. Yes, I did.

Q. Did you deliver that policy to him? A. Yes.

Q. Was the policy ever returned to you? A. No.

20 Q. Do you recall an accident being reported to you? A. Yes.

Q. By Mr. Steinberg in October, 1927? A. Yes.

Q. And did you report that accident? A. I did.

Q. Whom did you send your report to? A. I gave it to Mr. Rumsey's office.

Q. That is Garrison and Rumsey of Paterson? A. Yes.

30 Q. What is your custom in making out reports? Who do you report to? A. Well, I fill out the company's form, the accident report, and I give it in to Mr. Rumsey, and Mr. Rumsey sends it to the Branch Office, I presume.

Q. What relation is Rumsey's office to your office? A. Mr. Rumsey is the agent for the company; I am the broker.

Charles Silverstein—cross

Q. And all your relations with the United States Fidelity and Guaranty Company's matters are with Mr. Rumsey's office? A. Yes.

Q. And you make a report and send it to Garrison and Rumsey? A. Yes.

Q. Mr. Silverstein, were suit papers in a suit growing out of that accident, between William Saxon, Junior, by his next friend William Saxon, Senior, and William Saxon, Senior, individually, Edith Saxon, Alfred S. McCann and Emma White, against Louis Steinberg, ever delivered to you? A. Well, it is hard for me to remember whether I received those papers. If I received them, of course, I would give them over to Mr. Rumsey, to Garrison and Rumsey and Company. 10

Q. Do you keep a written record in your office of the papers you receive and the papers you turn over to Mr. Rumsey? A. Not for such papers, no.

Q. Do you recall ever receiving these papers? A. I don't know whether I ever received such papers. 20

Mr. Kuebler—That is all.

Cross-Examination by Mr. Friedman:

Q. Just one more question, please. Mr. Silverstein, Mr. Steinberg got this policy of insurance through you, didn't he? A. Yes. 30

Q. He came to you and reported to you that he had had an accident? A. Right.

Q. Did you know how soon that was after the accident happened? A. Well, it is hard for me just to say the time. Perhaps, two or three days later, or five days, something like that.

Q. And did you ask him questions? A. Yes.

Charles Silverstein—cross

Q. You had a form furnished you by the company? A. Yes.

Q. And did you fill out that form? A. Yes.

Q. You filled out that form from information you got from Mr. Steinberg? A. Yes.

Q. And you asked him whether he knew anything more about the accident? A. Yes, I did.

Q. And he gave you all the information he had? A. Yes.

10 Q. Then, you took that form and gave it to Mr. Rumsey? A. Yes.

Q. An authorized agent of the United States Fidelity and Guaranty Company? A. Yes.

Q. You knew where Mr. Steinberg lived at the time of the accident? A. Yes.

Q. The company never sent you to communicate with Mr. Steinberg, did it? A. No.

20 Q. You never received word from Mr. Rumsey to get in touch with Mr. Steinberg about an accident? A. I don't think so.

Q. Now, do you know what happened with that report you gave to Mr. Rumsey, the authorized agent of the insurance company? A. Well, I presumed he forwarded these to the Branch Office, at Newark.

30 Q. Do you remember whether or not Steinberg brought a Summons and Complaint to your office wherein he was being sued by Saxon and McCann and those people? A. I could answer if I would receive them, I would hand it over to Mr. Rumsey,

Q. Well, do you remember whether or not you got them? A. I believe I did not get it.

Q. You don't think you got it? A. I didn't get it.

Simon D. Rumsey—direct

By the Court:

Q. That is, the suit papers? A. The suit papers, yes, I understand that.

Mr. Friedman—That is all.

SIMON D. RUMSEY, sworn.

10

Direct Examination by Mr. Kuebler:

Q. Mr. Rumsey, what business are you in? A. Insurance agent.

Q. Where? A. 179 Ellison Street, Paterson.

Q. You are an agent for the United States Fidelity and Guaranty Company? A. For the past eighteen years.

Q. And have you a record of receiving a report of an accident, covering an assured, Louis Steinberg? A. Yes, we received a report of the accident. 20

Q. When was the report of the accident received? A. (Referring to paper) October 10, 1927.

Q. Did you receive any suit papers, arising out of that accident, in a suit instituted by William Saxon Junior, by his next friend, William Saxon, Senior, and William Saxon, Senior, individually, Edith Saxon, Alfred S. McCann and Emma White, against Louis Steinberg? A. I never did receive any suit papers in this particular case. 30

Q. Have you any record of any such papers being received? A. There would have been on our records if we had transmitted it. We would not have

Simon D. Rumsey—cross

a record if we received it, but when we transmit it to the company, we would.

Q. Who would they have been received from in this case, if they had been received? A. They might have been received from our assured or his broker.

Q. Who was the broker? A. Charles Silverstein.

10 Q. But you have no record of their being received? A. No, none whatever.

Q. Who has charge of the detail work in your office in connection with the receipt of such papers and the forwarding of them to the Newark Branch?

A. Miss Roberts. She is the head clerk. Yes.

Q. Miss Robert? A. Yes.

Mr. Kuebler—That is all.

20 Cross-Examination by Mr. Friedman:

Q. May I see those papers, the report of the accident? A. (The witness handed papers to counsel.) They are buried, not the top one. Those are the cancellations.

Q. Will you please find the report for me to save some time? This report is made three days after the accident, isn't it? Three days, Mr. Rumsey?

A. Well, I didn't look, but I think it happened on the seventh, didn't it?

80 Q. Yes, and the report is October 10? A. That would be the time we got the report, yes.

Q. Is this the original? A. No, this is the copy that we keep for our office of the original. The original goes to the company.

Q. You haven't got the original here? A. Oh, no.

Goldy Robbins—direct

By the Court:

Q. It is a duplicate original, is it? A. Yes, I think it is a carbon copy.

Mr. Kuebler—I may have the original; I am not sure.

Q. Are they made in duplicate? A. I think they are. My head clerk is here. I think she can answer that. 10

Mr. Kuebler—I simply have a carbon. The original is with the Home Office.

The Court—I suppose they are both originals, if it is a duplicate original, and if they are made at the same time.

Mr. Kuebler—Oh, I have it.

The Court—Are they the same?

Mr. Friedman—Yes, it is all right. 20

By Mr. Friedman:

Q. Did you ever get a Summons and Complaint from Mr. Steinberg or Mr. Silverstein? A. No, I did not.

Mr. Friedman—That is all.

GOLDY ROBBINS, sworn. 30

Direct Examination by Mr. Kuebler:

Q. Miss Robbins, by whom are you employed?

A. By Garrison, Rumsey and Company.

Q. Paterson? A. Yes, sir.

James D. Carpenter—direct

Q. What is your position? A. The head clerk and bookkeeper.

Q. Do you have charge of reports of accidents received and suit papers received? A. Yes, sir.

10 Q. Have you any record of any suit papers, having been received, arising out of the accident which occurred on October 17th, 1927, in a suit in the Passaic County Circuit Court, in which William Saxon, Junior, by his next friend, William Saxon, Senior, and William Saxon, Senior, individually, Edith Saxon, Alfred S. McCann and Emma White are the plaintiffs, and Louis Steinberg is the defendant?
A. No, sir.

Mr. Kuebler—That is all.

Mr. Friedman—That is all.

By the Court:

20 Q. Did you ever receive any such papers? A. No, sir.

JAMES D. CARPENTER, recalled.

Direct Examination by Mr. Kuebler:

Q. Mr. Carpenter, you are an attorney-at-law of the State of New Jersey and a Counsellor-at-law?

80 A. I am.

Q. And a member of the firm of McDermott, Enright and Carpenter of Jersey City? A. Yes.

Q. When did you first have any connection with this suit of Saxon and others against the United States Fidelity and Guaranty Company and under what circumstances? A. If you let me see those papers, I can, perhaps tell you.

James D. Carpenter—direct

Q. (Mr. Kuebler handed papers to the witness.)

A. Let me see the rest of the file.

Q. (Mr. Kuebler handed papers to the witness.)

A. There is a letter from Mr. Ingraham to me. Will you see if it is there? On March 7, 1928, the Newark Office of the United States Fidelity and Guaranty Company sent to my firm the file in this matter of Saxon and Steinberg, and suggested that it was advisable to undertake the defense of the matter, with stipulation that with the assured that we would not be responsible for the outcome because of the fact that he had not sent forward any suit papers. So, on March 12, 1928, I wrote Mr. Steinberg a letter, after going over the whole file, a copy of which I have here, informing him that we had been retained by the United States Fidelity and Guaranty Company to look after its interest in the violation of the terms of the policy, and I requested—which required him to send all suit papers to the company as soon as they were received by him.

would not be responsible for any judgment that might be recovered in the accident, because of his matter; stated that apparently the suit was started about December 16 preceding, that would be 1927, I believe—and that no notice of such a suit had been started had been received by the Company. I think the plaintiff's lawyer wrote to the Company on February 16, that is two months later, telling them that suit had been started. By that time, the time to answer had gone by.

I informed him that the Company had instructed us to advise him, that is, Mr. Steinberg, that it

Mr. Friedman—All this is in answer to what question?

James D. Carpenter—direct

Mr. Kuebler—The question was when he first became interested in the case, I believe.

The Court—I thought you asked him what he did.

Mr. Kuebler—I think I did, your Honor.

A. I also told Mr. Steinberg—

10

Mr. Friedman—I object to that. There is no question pending.

Q. Mr. Carpenter, is that copy of the letter which you have in your hand, a copy of the letter which you sent on March 12? A. Yes, that is a carbon copy.

Q. Did you receive any answer to that letter? A. No.

20

Mr. Kuebler—I ask for the letter in evidence.

The Witness—And the letter was never returned.

(Paper marked Exhibit D-2 in evidence.)

(Mr. Kuebler read Exhibit D-2 to the jury.)

Q. Now, did you receive any answer to that letter, Mr. Carpenter? A. No.

30

Q. Did you receive any communication by phone or otherwise from the assured in response to that letter? A. Well, where is that letter you marked in evidence a little while ago? I want to get the date of it. I wrote to Mr. Steinberg again on March 21.

James D. Carpenter—direct

Q. Have you a copy of the letter which you sent to him on March 21? A. Yes, here it is (handing a paper to counsel).

Mr. Kuebler—I offer the letter in evidence.

Mr. Friedman—No objection.

(Paper marked Exhibit D-3 in evidence.)

(Mr. Kuebler read Exhibit D-3 to the jury.)

10

Q. Did you receive any reply to that letter by mail or by 'phone? A. I did not, so I wrote him again on March 29, 1928. I sent this letter by registered mail so as to be sure he got it.

Mr. Kuebler—I offer in evidence the letter of March 29, 1928, to Louis Steinberg, with a registered mail—

Mr. Friedman—No objection.

Mr. Kuebler—(Continuing) —receipt and request card signed.

20

(Paper marked Exhibit D-4 in evidence.)

The Witness—That is signed by his wife.

Mr. Friedman—You don't know that.

The Witness—I was not at the ceremony.

(Mr. Kuebler read Exhibit D-4 to the jury.)

Q. Did you receive any response to that letter?
A. Yes, I did.

Q. What was the nature of the response? A. I received on Good Friday, March 6th, 1928, a letter.

30

By the Court:

Q. March? A. April 6th, I should say, 1928, a letter dated April 3, 1928. It was postmarked Pater-

James D. Carpenter—direct

son, April 5, 1928, at twelve-thirty P. M., which is marked Exhibit D-1 for identification. A few minutes, before getting that letter, about nine-fifteen in the morning, just as I opened the office, or entered the office, the telephone was ringing and Mr. Steinberg was on the telephone and he said he was unable to come in, but he would call the next day, Saturday morning at ten-thirty.

10 By Mr. Kuebler:

Q. Did you make a notation of that on the letter? A. He said he would be down Thursday or Friday. I received the letter Friday morning, and just before I got the letter, or perhaps a few minutes before, he called up, and then I looked and found the letter. It was in the office, and I made a note at the time that I received it, and it is still here.

20 Q. That notation is in your handwriting, then?
A. Yes.

Mr. Kuebler—I offer in evidence the letter of April 3rd, 1928, from Louis Steinberg to McDermott, Enright and Carpenter.

(Paper previously marked D-1 for identification now becomes Exhibit D-1 in evidence.)

30 By the Court:

Q. What date did he say over the telephone that he would be on hand? A. The following morning, Saturday at ten o'clock.

James D. Carpenter—direct

Q. That would be what date? Do you recall?

A. It was the seventh.

Q. April 7th? A. Yes. Good Friday was the sixth, and he said he would be in the seventh at ten o'clock.

(Mr. Kuebler read Exhibit D-1 to the jury.)

By Mr. Kuebler:

10

Q. Did he call the next day at ten A. M.? A. He did not.

Q. Did he call at any time the next day? A. He did not, not the next day or any other day. He never came.

Q. Did you write anything further to him after that? A. Yes, I wrote him on April 17th, and I have a carbon copy of the letter and the registry receipt, because I sent that also by registered mail. 20

Mr. Kuebler—I offer in evidence letter of April 17th, 1929, to Louis Steinberg, with post office receipt and return receipt of registered mail.

Mr. Friedman—No objection.

(Paper marked Exhibit D-5 in evidence.)

(Mr. Kuebler read Exhibit D-5 to the jury.)

30

Q. Mr. Carpenter, did Mr. Steinberg ever come to your office after you sent that letter? A. He never came.

Q. Did you ever hear anything from him at all? A. No.

Mr. Kuebler—That is all.

James D. Carpenter—cross

Cross-Examination by Mr. Friedman:

Q. Mr. Carpenter, where did you receive the Summons and Complaint in this case, the case of Saxon against Steinberg? A. I never received that. Mr. Harrison, the plaintiffs' attorney sent me a copy of the Complaint, but I never received any from the defendant, from Mr. Steinberg.

10 Q. Well, did you ever receive a Summons and Complaint in the case of Saxon against the defendant, Steinberg? A. No, sir.

Q. Did the United States Fidelity and Guaranty Company ever send you any papers in the case? A. Yes, they sent me this file, but that is all.

Q. And when d'd they send you that file? A. The date I first gave you. It was March seven. That was the date of the letter. I don't know whether I got it the eighth or the ninth. We never saw a copy of the Summons in the case.

20 Q. Is this letter written from your office, to your knowledge? A. Yes, I wrote that myself on March 12th.

Q. And that letter states that the United States Fidelity and Guaranty Company has just sent you papers in December. A. Why, sure, that is the report and the letters.

Q. Written notice of the accident? A. Yes, sure. Here is that (handing a paper to counsel.)

30 Q. Well, then, you got the written notice of an accident from Steinberg? A. Well, it is the one sent the defendant, Steinberg, to the broker and by the broker forwarded and later on it came to me.

Q. Well, do you know whether or not the Company or its authorized agent ever got the Summons and Complaint from Steinberg? A. No, they never did according to their file. They never got it and nobody else connected with the Company.

James D. Carpenter—cross

Q. You never saw it? A. I never saw it.

Q. You were notified, or your office was, that suit had been commenced against Steinberg by Mr. Harrison, the attorney for Saxon?

Mr. Kuebler—I object to it, your Honor.

A. Yes, sir, the plaintiff's attorney, yes, two months later.

Q. Is that the first notice you had?

10

The Court—He answered it.

Q. Is that the first notice you had of the pendency of the suit? A. Yes, the Company was first notified by Mr. Harrison of the pendency of this suit under date of February 16, 1928, which was, as I understand it, two months after the suit was started.

20

Q. And that was previous to the time Mr. Harrison moved for interlocutory judgment? A. I know nothing about that.

Q. Don't you know anything about the interlocutory judgment? Were you ever notified that Mr. Harrison was going to take an interlocutory judgment? A. I think we were.

Q. And he asked you at that time whether or not you were going to defend the case? A. I presume so. I told him we were not, because of this man's default.

30

Q. Yes, I find no fault with you, but I say, Mr. Harrison did notify you? A. Oh, yes.

Q. Yes. A. You know, you can't defend a case without a client.

Q. Well, now, I understand that. This file that you have from the United States Fidelity and Guaranty Company—I will withdraw that. What infor-

James D. Carpenter—cross

mation were you looking for from Mr. Steinberg? Why did you want him down to your office, Mr. Carpenter?

Mr. Kuebler—I object to it as immaterial, your Honor. On the terms of the policy which is in evidence, he was under an obligation to co-operate with us.

10 Mr. Friedman—That is it, your Honor. Co-operation; I am going to show co-operation, and I am just going to lay the foundation to connect it up later on.

The Court—To connect what up? What are you going to show? What do you want to show?

Mr. Friedman—I want to show that there was co-operation, all that was necessary.

20 The Court—You mean on the part of Steinberg?

Mr. Friedman—Yes.

The Court—Well, he has been on the witness-stand.

Mr. Friedman—I beg your pardon.

The Court—He has been on the witness-stand.

Mr. Friedman—I know that. That calls for rebuttal. I didn't want to cross-examine him on that.

30 The Court—I will sustain the objection.

Q. You felt you couldn't go ahead with the defense of this suit because you didn't have the proper information, Mr. Carpenter.

James D. Carpenter—cross

Mr. Kuebler—I object to it for the same reason, your Honor.

The Court—Well, I suppose Mr. Carpenter is the agent of the Company for the purpose, isn't he? I suppose that anything that might throw any light on the question at issue in this case might be relevant. Just repeat the question, please.

(The last question was read by the reporter.) 10

The Court—I will sustain the objection.

Q. Why didn't you file an answer on behalf of Steinberg to the Summons and Complaint of Saxon and the plaintiffs, after you were notified by Mr. Harrison, the plaintiff's attorney? A. Notified of what?

Q. Why didn't you file an answer? A. Because of this man's default. 20

Q. What was the default? A. The default? He had failed and neglected and I think, refused to give the Company any co-operation.

Mr. Friedman—I object to what he thinks.

A. He refused. Just let me answer. And he also refused to send on the suit papers. I didn't know that any suit had been started, except what the plaintiff's attorney did, and it looked as if he was, Steinberg was, co-operating with the plaintiffs' attorney. 30

Mr. Friedman—If your Honor please, Mr. Carpenter is a lawyer, and I am not asking for any conclusions.

James D. Carpenter—cross

The Court—No.

Mr. Kuebler—He asked for a reason.

Mr. Friedman—I asked for his reasons, not for any conclusions or what Mr. Carpenter thought.

The Witness—The reason why I refused to—

10 The Court—His reason is because of his thought, do you see? That is his reasoning power, his thought. That is what he is trying to give you.

Mr. Friedman—I suppose the reason ought to be based upon facts, not on a conclusion.

The Court—It is based upon—as you say, he is a lawyer. Now, you have got an expert witness and you are asking for an expert opinion. He can give you his thought.

20 Q. You say he failed to co-operate with you and that is why the Company told you not to file an answer; is that right? A. Why, part of it, yes. He had not done what he should have done under the policy. He did not give the defendant any co-operation.

Q. That is why the Company advised you not to file an answer? A. Because of his default, yes.

Q. Yes.

30 By the Court:

Q. Well, at that time, which you say was two months after the accident—after the suit was started, did you receive this notice? A. That is the first time that the Company had any information that such a suit had been started, was two months after the suit had been started.

Q. I see. The time to file an answer after the

James D. Carpenter—cross

starting of the suit would be what? A. The time to file an answer is twenty days after the papers are served on a man.

Q. So, when you first received the notice, Steinberg was in default? A. He certainly was.

Q. An answer could not be filed except by application to the Court? A. Or by the consent of plaintiffs' attorney.

Mr. Friedman—And the plaintiffs' attorney consented. 10

Mr. Kuebler—I object to that as immaterial.

Mr. Friedman—Well, it has been brought out by the witness himself.

The Court—Did he say so?

Mr. Friedman—The plaintiffs' attorney agreed to extend them time for filing an answer, didn't he? 20

Mr. Kuebler—I object to that; I think it is immaterial, whether he did or not.

By Mr. Friedman:

Q. Didn't he? A. He said he would.

The Court—Well, all right.

A. But it looked to me—

Q. Just a moment. 30

Mr. Kuebler—Let him answer.

Mr. Friedman—That is not proper. I object to it. I want him to be fair.

James D. Carpenter—cross

The Court—Well, all right. Put your next question.

Mr. Friedman—And I expect the witness to be fair too.

The Court—Put your next question.

10 Q. Now, what part of the policy did Mr. Steinberg fail to comply with? A. If you let me see it, Mr. Friedman, I will tell you.

Q. (Counsel handed a paper to the witness.)
A. There were two, Mr. Friedman.

Q. Yes. A. One was paragraph B-1, and paragraph B-5. B-1 and B-5.

Q. B-1 and B-5?

The Court—What about B-4?

A. And B-4. B-1, B-4, and B-5.

20 By Mr. Friedman:

Q. Those three paragraphs? A. Yes, sir.

Q. Now, your report or written notice which you sent—I will withdraw that. Your Company has certain forms which the assured fills out after the happening of an accident; isn't that so? A. Yes.

Q. And in those forms you ask the different questions? A. Yes.

30 Q. Now, all those questions which you have in that form were satisfactorily answered by the assured, weren't they? A. No.

Q. For instance, which question was not answered properly? A. Well, if you will let me explain it—

James D. Carpenter—cross

Q. Well, now, I don't want any explanations. I want the question answered. A. All right. He says here under this blank, how the accident happened, "Give full description" and he answered, "I made a left-hand turn; the other fellow skidded into me on account of going too fast."

Well, I could not gather from that whether he was at fault or the other fellow was at fault."

Q. Yes. Well, your agent asked him questions there, who made out the report, didn't he? A. No, he did not. 10

Q. Well, didn't you— A. The broker is the agent of the insured.

Q. And the broker gave the report to your agent, Mr. Rumsey, your authorized agent, didn't he? A. The broker is the agent for Steinberg.

The Court—"The broker is the agent for Steinberg," he says. 20

Mr. Friedman—Yes.

Q. Well, Steinberg only gave that report to Mr. Rumsey, your authorized agent? A. Sure, sure.

Q. Mr. Rumsey never raised any objections?

Mr. Kuebler—I object to it as immaterial.

A. That is not his job.

Q. Well, now, you don't know whether it is or not. A. Oh, but I do. 30

Q. He accepted the answers to the questions, didn't he, and turned it over to the company? A. He accepted the blank.

Q. Yes, which was filled out. A. Yes, and if he only had on here his name and that an accident

James D. Carpenter—cross

happened a certain date, he would have to forward it.

Q. Your Company never raised any objections to the way these questions were written out, did they? A. No, you don't get the point of it.

Q. Probably I don't. A. The point is that he gave this information, but never did anything else.

Q. Well, now, just answer my questions, Mr. Carpenter. A. I am trying to.

10 Q. You never wrote Mr. Steinberg a letter demanding of him certain information, did you? A. Those are the only letters I wrote him, but if he had come in, I would have got that information, if he would have told me.

Q. You say you never wrote him any letters asking for any information? A. Those are the only ones I wrote.

Q. Will you please answer my question?

20

The Court—We might as well take a recess, as long as we can't get through.

(A recess was taken until 2:15 o'clock P. M.)

Afternoon Session, 2:15 P. M.

JAMES D. CARPENTER, resumed.

30

Cross-Examination (continued) by Mr. Friedman:

Q. Mr. Carpenter, you never wrote him a letter, Mr. Steinberg, asking for any information about the accident, which he had had, did you? A. I wrote no letters except those, and I did not ask him

James D. Carpenter—cross

for any information in those letters, as I recall it.

Q. Did you ever write to him and ask him for the names of any witnesses and their addresses?

The Court—He has already answered that.

Q. Did the U. S. Fidelity Guaranty Company ever request Mr. Steinberg's aid in securing information, evidence and the attendance of witnesses in effecting settlements and in defending suits growing out of an accident which he had? A. That was one of the reasons I was asking him to come to see me. I wanted to find out about it.

10

Q. Well, I am asking you whether you ever had in those words? A. Oh, not to use those words; I never had a chance.

Q. But those are the words of the policy, aren't they? A. Part of them.

Q. Pardon? A. Part of them.

20

Q. Yes. Well, what is not part of the policy that I have read to you—I will withdraw that. The last sentence of B-5 of the policy says, "The assured shall at all times render to the Company, all reasonable co-operation and assistance." Now, there is not any letter that you ever sent or any request by telephone or otherwise asking for co-operation and assistance, was there. Mr. Carpenter?

A. Certainly was. That was the purpose of writing all those letters.

30

Q. Well, irrespective of what the purpose of what your letters was— A. Yes.

Q. (Continuing) —I say, you never in writing or verbally used the language of the provision of the policy B-5, asking for reasonable co-operation

James D. Carpenter—cross

and assistance? A. No, I didn't quote this policy.

By the Court:

Q. But, you did ask for his assistance, didn't you? A. I did. I asked him to come in so that I could talk it over with him, and he did not come after he said he would. He didn't.

10

By Mr. Friedman:

Q. Your fourth separate defense reads as follows: "that the said Louis Steinberg violated the terms and conditions of said policy as aforesaid, in that he failed and neglected and refused all requests of the defendant company to aid it in securing information and evidence"; that is not so, is it? A. I think it is.

20

Q. According to the wording of the policy itself? A. I think it **absolutely is**.

Q. Well, according to the wording of your defense, you never asked that in writing or verbally, using that language?

The Court—Isn't that all argumentative now?

Mr. Friedman—Pardon?

30

The Court—Isn't that all argumentative?

Mr. Friedman—Well, it might present—

The Court—I mean, isn't your question an argument with counsel as to the effect of certain words, what you believe them to be and what he believes them to be? Isn't it argumentative?

Louis Steinberg—direct

Mr. Friedman—No, sir, they state a fact in their fourth separate defense.

The Court—Well, he has stated and already testified that it was necessary to get this man there to get the facts.

Mr. Friedman—Yes, but I am cross-examining the witness whether or not he used the language.

The Court—You may cross-examine the witness, but don't argue with him. 10

Mr. Friedman—That is all.

Mr. Kuebler—We rest, your Honor.

The Defendant Rested.

Plaintiffs' Testimony in Rebuttal.

LOUIS STEINBERG, recalled in rebuttal. 20

Direct Examination by Mr. Friedman:

Q. You had an accident around October or the latter part of November, 1927? A. Yes.

Q. An automobile accident? A. Yes.

Q. And were you served with a Summons and Complaint? A. Yes, sir.

Mr. Kuebler—I object to it, your Honor. It is not proper rebuttal. 30

The Court—Well, I will permit that. It now appears that he was served.

Louis Steinberg—direct

Q. And what did you do with that Summons and Complaint right after it was served upon you?

Mr. Kuebler—I object to that.

A. I gave it to my agent.

The Court—That is not proper rebuttal.

10

Mr. Friedman—Their defense is, your Honor, that we did not serve them with a Summons and Complaint.

The Court—He has already testified to that.

Mr. Friedman—I don't remember if he did or not. Of course, if he did, I will withdraw it.

20

The Court—He says he don't remember receiving letters from McDermott, Enright and Carpenter. He said, "any paper I got, I turned over to Silverstein." He says he received the policy from Mr. Silverstein.

Mr. Friedman—I don't think he asked him about the Summons and Complaint.

The Court—Well, you asked him if he were served and I permitted that.

Mr. Friedman—On cross-examination, yes.

30

The Court—Just now, just a moment ago. Now, you ask him what he did with the papers.

Mr. Friedman—Yes.

The Court—He has already, on direct examination, testified as to all papers that he may have received and what he did with them.

Mr. Friedman—I just wanted to clarify the situation. That is all, Mr. Steinberg.

Charles Silverstein—direct

CHARLES SILVERSTEIN, recalled in rebuttal.

Direct Examination by Mr. Friedman:

Q. All the papers that Mr. Steinberg gave you after this accident which he had, what did you do with them? A. Well, I only received one paper. That was the accident report.

Q. Well, now, what did you do with the papers that you got? What did you do with them? A. 10
Well, that is the only paper that I received.

Q. What did you do with that? A. I gave it over to Mr. Rumsey. That was the accident report.

The Court—He has already testified to that.

Q. You don't know—withdraw that. Can you say positively, Mr. Silverstein, that you did not receive a Summons and Complaint from Mr. Steinberg? 20

Mr. Kuebler—I object to that, as not proper rebuttal testimony.

Mr. Friedman—In their defense, they say we did not send proper papers over. I have to rebut that.

The Court—He said all he received was a report. 30

The Witness—An accident report.

The Court—That is all he received.

Mr. Friedman—Well does that end foreclose me from going further?

The Court—I think that covers it, doesn't it?

Charles Silverstein—direct

Mr. Friedman—I don't think an answer should foreclose me—

By the Court:

Q. Other than the report, did you receive anything else? A. Not at all.

Q. Nothing at all.

10 By Mr. Friedman:

Q. Well, do you say that positively, or don't you remember? A. I can say it positively. If I would receive any the Company would have them on file.

Q. And you say the reason you did not get it is because the Company hasn't got it on file? A. No, I say if I would have gotten it, the Company would have it.

20 Q. And you say the reason you didn't get it is because the Company hasn't got it? A. Well, of course, that is right.

Q. So the reason you say, if I understand you correctly— A. Yes.

Q. —that you did not get the Summons and Complaints— A. Yes.

Q. —is because the Company hasn't got it on file; is that correct? A. Well, that is true, yes, sure.

30 Q. That is all. A. If I would get it, the Company would have it.

Q. Just a moment. Didn't you tell me just before I came in the courtroom here, out in the hall—

A. Yes.

Motion for Direction of a Verdict

The Court—Now, now, no hearsay, this is not a defendant. This is only a witness, you can't make evidence.

Mr. Friedman—Can't I neutralize the evidence?

The Court—You can't make evidence with a witness and produce hearsay evidence with a witness that you have called.

Mr. Friedman—A statement made by the same witness? 10

The Court—You called this witness as your witness. Now, you want to bring some hearsay testimony that you had with him, but he is not a party to the suit.

Mr. Friedman—Supposing I am surprised by the testimony of the witness?

The Court—I don't care whether you are surprised or not. I don't care whether you are surprised legally or naturally. 20

Mr. Friedman—That is all. I rest.

Both Sides Rested.

MOTION FOR DIRECTION OF VERDICT

Mr. Kuebler—I move for a direction of a verdict in this case, on the first ground, that there is no privity of contract between the plaintiffs in this action and the defendant.

(Mr. Kuebler argues.) 20

Mr. Kuebler—Furthermore, and secondly, I move for a direction because there is nothing in the evidence which shows that the plaintiffs had any legal right to bring this action. I would like to call your Honor's at-

Motion for Direction of a Verdict

tention to the fifth paragraph of the contract.

(Mr. Kuebler argues.)

Mr. Kuebler—Now, on the further ground, my motion for a direction of verdict is based upon the fact that the policy of insurance provides, and I refer to clause D-1.

(Mr. Kuebler argues.)

10

Mr. Kuebler—I further move for a direction of a verdict on the ground that the assured failed to co-operate with the insurance company in the defense of this case, although Section B-5 of the policy provides, "That whenever requested by the Company, the insured shall aid in securing information and evidence and attendance of witnesses in effecting settlements and defending suits, hereinabove referred to; that assured shall at all times render to the company all reasonable co-operation and assistance."

20

I move on the further ground that the assured has by his action placed the company in a position by which the company could not be held responsible in this case, and I base that upon paragraph B-4 of the policy.

Mr. Friedman—I also move for a direction of a verdict.

30

The Court—What do you say first, in answer to the motion of counsel for the defendant?

(Mr. Friedman replied.)

The Court—I do not think you have made out a case that entitled you to go to the jury.

(Lengthy discussion.)

Motion for Direction of a Verdict

The Court—If the statute or the policy itself creates a privity of contract, then there is a privity of contract which would entitle the third party to sue, and if there is nothing in the contract—in other words, if the insurance company stands sponsor to this third party, or the statute so provides, then, it would create a liability.

Now, the statute does create a liability, but only under certain conditions, as I read it. This case of Knabe against the Independent Indemnity Company was a case that went to the jury on a policy, but they followed the statute, and, of course, they held that the indemnity insurer is wholly released from liability under the policy, covering the automobile, on the ground that the insured failed to notify it of liability. Where there was evidence that notice was given as soon as reasonably possible within the Public Laws of 1924, Page 352, insured being out of the state when the accident occurred, so a third party can maintain the action, but certain things have to be shown or proven before the action can be maintained, and you have not made out your case. That is the way I feel about it.

Mr. Friedman—Will your Honor permit me—

The Court—Now, the case is closed and these motions are made, and I have no right to sit here for an hour discussing it and arguing and debating.

I am going to grant this motion for a di-

Exhibit P-1

rection of a verdict and will allow you an exception.

Mr. Friedman—I pray an exception.

EXHIBIT P-1

No. AL 905977

Automobile Policy

Liability and Property Damage Form

Expires June 14th, 1928.

10

Issued to Louis Steinberg, Paterson, N. J.

United States Fidelity and Guaranty Company

738 Broad St., Newark, N. J.

Cash Capital \$6,000,000.

Baltimore, Md.

Charles Silberstein

Insurance

Room 614, Fabian Bldg., Paterson, N. J.

Phone Sherwood 6079

Please Read Your Policy

20

United States

Fidelity and Guaranty Company

Baltimore, Maryland

(Hereinafter called the Company)

In consideration of the premium and subject to the terms, limits and conditions set forth herein

Does hereby Insure

the Assured named and described as such in the Schedule of Statements hereto,

30

Against liability for loss and/or expense, arising or resulting from claims upon the Assured for damages in consequence of an accident occurring within the limits of the United States and Canada during the term of this policy, by reason of the ownership, maintenance or use, (including the carrying of goods thereon and the loading and un-

Exhibit P-1

loading thereof when commercially used) of the automobile or any of the automobiles enumerated and described herein resulting in

Injury to persons—(a) Bodily injuries, or death resulting at any time therefrom, suffered by any person or persons, excepting: (a) the Assured's employe or employes while engaged in operating or caring for any of the Assured's automobiles, (b) any other employe of the Assured who is injured when engaged at the time of such injury in performing any duty for the Assured in connection with the trade, business or occupation of the Assured.

10

Damage to property of others—(b) Damage to or destruction of property, including the loss of use thereof, excepting property of the Assured or property in the custody of the Assured and for which the Assured is legally responsible; or property carried in or on any automobile of the Assured.

20

Limits of liability for personal injury—The Company's liability to one or all Assureds under Clause A above is limited to Five Thousand Dollars (\$5,000.00) to any one person; and subject to the same limit for each person, the Company's total liability from loss from any one accident is limited to Ten Thousand Dollars (\$10,000.00)

Limits of liability for property damage—The Company's liability to one or all Assureds under Clause B above on account of any one accident is limited to One Thousand Dollars (\$1,000.00) irrespective of whether property of one or more than one person is damaged or destroyed.

30

Exhibit P-1

Higher limits permitted—The above limits of liability under Clauses (A) and (B) shall apply to each of the automobiles covered hereunder, unless other limits are specified in the Schedule of Statements.

10 Defense of suits—In addition to the above, the Company does hereby agree (1) To defend in the name and on behalf of the Assured any suit brought against the Assured to enforce a claim, whether groundless or not, on account of damages suffered or alleged to be suffered under the circumstances hereinbefore described;

Payment of expenses—(2) To pay the expenses incurred in defending any suit described in the preceding paragraph, also the interest on any judgment within the limits of the insurance hereby granted and any costs taxed against the Assured on account thereof;

20 Reimbursement of expense—(3) To reimburse the Assured for the expense incurred in providing such immediate surgical relief as is imperative at the time of any accident covered hereunder;

30 Omnibus coverage—(4) To extend the insurance provided by this policy so as to be available, in the same manner and under the same conditions as it is available to the named Assured, to any person or persons while riding in or legally operating any of the automobiles covered hereunder, and to any person, firm or corporation legally responsible for the operation thereof, (excepting always a public garage, automobile repair shop and/or sales agency and/or service station and agents and employes thereof), provided such use or operation is with the permission of the named Assured; or, if the named Assured is an individual, with the per-

Exhibit P-1

mission of an adult member of the named Assured's household other than a chauffeur or a domestic servant. In no event shall the extension of insurance provided in the foregoing clause be construed to cover the purchaser of the automobile or automobiles covered by this policy, if sold, or the transferee or assignee of this policy except by the written consent of the Company endorsed hereon.

Insolvency Provision—(5) The insolvency or bankruptcy of the Assured hereunder shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of this policy, and in case execution against the Assured is returned unsatisfied because of such insolvency or bankruptcy in an action brought by the injured or his or her personal representative in case death results from the accident, then an action may be maintained by the injured person or his or her personal representative against the Company under the terms of the policy for the amount of the judgment in the said action, not exceeding the amount of the policy.

This Policy is subject to the following conditions:

Exclusions—Paragraph A—The policy shall not cover any liability of the assured. 1. Under any Workmen's Compensation agreement, plan or law, or, 2. While any of the insured automobiles is being used for other purposes than specified in the Schedule of Statements of this policy; or, 3. While being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event; or, 4. While rented to others or used to carry passengers for a consideration, actual or implied; or, 5. When used in any race or speed

Exhibit P-1

contest; or, 6. When used for towing or propelling a trailer unless such privilege is endorsed hereon, or such trailer is also insured by the Company (incidental assistance to a stranded automobile on the road is permitted); or, 7. When used to transport high explosives (carrying of loaded cartridges for gun or pistol, permitted); or, 8. For any liability assumed by the Assured for others under any oral or written contract or agreement.

10 Accidents, Claims, Suits, Settlements—Paragraph B.—1. Immediate written notice of any accident with the fullest information obtainable at the time must be forwarded to the Home Office of the Company or to its authorized representative. If a claim is made on account of such accident, the Assured shall give like notice thereof, and if suit is brought to enforce such a claim, the Assured shall immediately forward to the
20 Company every summons or other process as soon as same shall have been served on him.

2. No action by the Assured shall lie against the Company until the amount of the damages for which the Assured is liable by reason of any casualty covered by this policy is determined, either by a final judgment against the Assured or by agreement between the Assured and the plaintiff with the written consent of the Company; nor unless such action is brought within two years after
30 the rendition of such final judgment. If the limitation of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the State or Province in which it is claimed the Assured is liable for any such loss as is covered hereby, such specific statutory pro-

Exhibit P-1

vision shall supersede any condition in this policy inconsistent therewith.

3. The Company reserves the right to settle any claim or suit.

4. The Assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the Company on account of any claim; nor, except at Assured's own cost, settle any claim; nor, without the written consent of the Company previously given, incur any expense, except as provided herein for immediate surgical relief at time of accident. 10

5. Whenever requested by the Company, the Assured shall aid in securing information, evidence and the attendance of witnesses in effecting settlements and in defending suits hereinbefore referred to. The Assured shall at all times render to the Company all reasonable co-operation and assistance. 20

6. In case of payment of loss and/or expense under this policy the Company shall be subrogated to all rights of the Assured against any person, co-partnership, corporation or estate as respects the amount of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company such rights.

Changes, Waivers, Endorsements—Paragraph C.—1. No change or waiver of any of the terms, conditions or statements of this policy shall be valid unless set forth in an endorsement attached hereto, and signed by an executive officer of the Company, or the Superintendent of the Automobile Department. 30

Exhibit P-1

2. Notice given to or the knowledge of any agent or any other person, whether received or acquired before or after the date of the policy, shall not be held to waive any of its terms, conditions or statements; nor to preclude the Company from ascertaining any defense under said terms, conditions or statements unless set forth in a duly executed endorsement attached hereto.

10 Cancellations—Paragraph D.—1. This policy may be canceled at any time by either of the parties hereto upon written notice to the other party stating upon what date thereafter (not less than five days thereafter when canceled by the Company) cancelation shall be effective, upon which date, at twelve o'clock noon, the policy shall terminate.

20 2. Registered mailing of such notice by the Company or the Assured to the stated address of the other party or the return of the policy by the Assured shall be sufficient notice.

3. If canceled by the Company, the earned premium shall be computed upon a pro rata basis; if canceled by the Assured, it shall be computed upon the short rate table printed hereon and the Company shall repay to the Assured in either event the unearned portion of the premium so determined.

80 Assignment—Paragraph E.—1. No assignment of interest under this policy shall bind the Company unless the consent of the Company shall be endorsed hereon.

General—Paragraph F.—1. If the named Assured carries a policy of another insurer against loss covered by this policy, the named Assured shall not be entitled to recover from the Company a

Exhibit P-1

larger proportion of the entire loss than the amount hereby insured bears to the total amount of the named Assured's valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be entitled to indemnity or protection under this policy.

2. The Company shall be permitted, at all reasonable times during the policy period, to inspect any of the automobiles covered hereunder; and if the premium herefor is subject to adjustment, the accounts and records of the Assured in relation thereto shall also be available for inspection and audit by any authorized representative of the Company during the life of this insurance or within one year after the expiration thereof.

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20

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Filed May 28, 1928

PASSAIC COUNTY CIRCUIT COURT

| | | | |
|----|--|---|---------------|
| 10 | William Saxon, Jr., by his next friend William Saxon, Sr., and William Saxon, Sr., indi- vidually, Edith Saxon, Al- fred S. McCann, and Emma White, | } | Action at Law |
| | Plaintiffs, | | |
| | vs. | | |
| | Louis Steinberg, | | |
| | Defendant. | | |

PETITION FOR APPOINTMENT OF
NEXT FRIEND

20 To His Honor, Newton H. Porter, Judge of the
Passaic County Circuit Court:

80 The petition of William Saxon, Sr., one of the
plaintiffs in the above stated cause of action,
humbly shows unto your honor that he is the father
of William Saxon, Jr., an infant under the age of
twenty-one years, to wit of the age of four years,
and that he is advised that the said William Sax-
on, Jr., has a good and just cause of action against
Louis Steinberg, for injuries sustained by the said
William Saxon, Jr., as a result of an accident
while an occupant in the automobile of the plain-
tiff, Alfred S. McCann, by reason of the negli-
gence of the said Louis Steinberg, who owned and
operated his said automobile, so that he ran into

Exhibit P-2

and against the automobile in which the said William Saxon, Jr., was an occupant, and that your petitioner is about to institute an action against the said Louis Steinberg in the above stated Court for the same.

Your petitioner therefore humbly prays your Honor to admit him to prosecute the said action as the next friend of the said William Saxon, Jr., in the City of Paterson, County of Passaic.

And your petitioner will ever pray, etc.

10

William Saxon.

CONSENT

I hereby consent and agree that the above named William Saxon, Jr., shall be at liberty to prosecute this action by me as his next friend according to the prayer of the above petition.

William Saxon.

20

Dated: April 24, 1928.

AFFIDAVIT

State of New Jersey
County of Passaic, ss:

David Harrison, of full age, being duly sworn on his oath deposes and says, that he was present and saw William Saxon, Sr., the plaintiff named in the foregoing stated cause of action, sign the foregoing petition, and also that he was present and saw William Saxon, Sr., the person mentioned in the foregoing petition, sign the consent thereunder

30

Exhibit P-2

written; that they were signed on the 24th day of April, 1928.

David Harrison.

Subscribed and sworn to before me
this 24th day of April, 1928.

Isadore M. Marcus,

Notary Public of N. J.

PASSAIC COUNTY CIRCUIT COURT

10

William Saxon, Jr., by his next
friend William Saxon, Sr.,
and William Saxon, Sr., in-
dividually, Edith Saxon, Al-
fred S. McCann, and Emma
White,

Plaintiffs,

vs.

20

Louis Steinberg,

Defendant.

Action at Law

RULE APPOINTING NEXT FRIEND

It appearing, upon reading the petition of Wil-
liam Saxon, Jr., and the consent of William Saxon,
Sr., thereunder written, and the affidavit of David
Harrison, thereto attached, that the said William
Saxon, Jr., has a good cause of action against the
said Louis Steinberg, and is an infant under the
age of twenty-one years;

It is ordered that William Saxon, Sr., be ad-
mitted to prosecute the said cause of action for
the said William Saxon, Jr., in the aforesaid

Exhibit P-2

Court against the said Louis Steinberg, as the next friend of the said William Saxon, Jr.

On motion of David Harrison, Attorney of Plaintiff.

Dated May 28, 1928.

Let the above rule be entered on the minutes.

Newton H. Porter, Judge.

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Exhibit P-3

EXHIBIT P-3

Filed Dec. 20, 1927

PASSAIC COUNTY CIRCUIT COURT

| | | | |
|----|--|---|---------------|
| 10 | William Saxon, Jr., by his next friend, William Sax- on, Sr., and William Sax- on, Sr., individually, Edith Saxon, Alfred S. McCann, and Emma White, <div style="text-align: right;">Plaintiffs,</div> | } | Action at Law |
| | vs. | | |
| | Louis Steinberg, <div style="text-align: right;">Defendant.</div> | } | |

COMPLAINT**FIRST COUNT**

20 Plaintiff, William Saxon, Jr., by his next friend William Saxon, Sr., residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

1. On or about October 7th, 1927, the plaintiff William Saxon, Jr., was an occupant of an automobile which was operated by the plaintiff, Alfred S. McCann.

80 2. On or about said day, the plaintiff Alfred S. McCann was the owner of said automobile, which he was then and there operating in a careful and diligent manner in an easterly direction on and along Godwin Street, a certain street in the City of Paterson, County of Passaic and State

Exhibit P-3

of New Jersey, which said street runs in a general easterly and westerly direction.

3. On said day, the defendant was the owner of a certain automobile bearing license No. P-3-880, which he was then and there driving in a westerly direction on and along Godwin Street, in the City of Paterson, New Jersey, aforesaid.

4. On the day and year aforementioned, the defendant negligently and carelessly operated his said automobile; and negligently and carelessly operated the same at a high and excessive rate of speed; and negligently and carelessly failed to slacken his speed, as he approached the intersection of Godwin Street and Washington Street, Paterson, New Jersey; and negligently, carelessly and improperly failed to give any signal or warning of his intention to turn southerly into Washington Street from Godwin Street; and negligently, carelessly and improperly failed to observe the right of way of the automobile of the plaintiff, Alfred S. McCann, at said intersection; and negligently, carelessly and improperly failed to exercise vigilance to ascertain the presence of other automobiles at the said intersection; and negligently, carelessly and improperly failed to stop his said automobile as he became aware of the presence of the automobile of the plaintiff, Alfred S. McCann in his pathway, so that as a result thereof, he ran into and against the automobile in which the said plaintiff was an occupant, greatly damaging the automobile and injuring its occupants.

5. As a result of the premises, the plaintiff William Saxon, Jr., was severely injured in and

Exhibit P-3

about his head, arms and shoulders, and was otherwise severely injured in and about his face, over the left eye and under the eye, in the upper lip, left cheek and left forehead, and was otherwise injured, so that as a result thereof, he has become and still is extremely nervous.

10 Plaintiff, William Saxon, Jr., by his next friend William Saxon, Sr., demands as damages the sum of \$10,000.00 on this count.

SECOND COUNT

Plaintiff, William Saxon, Sr., residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

1. He is the father of the plaintiff, William Saxon, Jr., and resides with him in the City of Paterson, New Jersey.

20 2. He repeats all the allegations contained in paragraphs 1, 2, 3, 4 and 5 of the first count and makes them paragraph 2 of this count.

3. As a result of the premises, plaintiff William Saxon, Sr., was compelled to spend divers sums of money in and about endeavoring to cure his said son of his ills.

Plaintiff, William Saxon, Sr., demands as damages the sum of \$500.00 on this count.

THIRD COUNT

80 Plaintiff, Edith Saxon, residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

1. On or about October 7th, 1927, the plaintiff Edith Saxon, was an occupant of an automobile

Exhibit P-3

which was operated by the plaintiff, Alfred S. McCann.

2. She repeats all the allegations contained in paragraphs 2, 3, 4 and 5 of the first count and makes them paragraph 2 of this count.

3. As a result of the premises, this plaintiff was injured in and about her head, arms and shoulders, and was otherwise injured, so that as a result thereof, she has become extremely nervous causing lack of sleep and dizziness. 10

Plaintiff, Edith Saxon, demands as damages the sum of \$1,000.00 on this count.

FOURTH COUNT

Plaintiff William Saxon, Sr., residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

1. He is the husband of Edith Saxon, one of the plaintiffs in this case, and resides with her in the City of Paterson, New Jersey. 20

2. He repeats all the allegations contained in paragraph 1 of the third count and makes it paragraph 2 of this count.

3. He repeats all the allegations contained in paragraphs 2, 3 and 4 of the first count and makes them paragraph 3 of this count.

4. As a result of the premises, this plaintiff has been deprived of the services and society of his said wife, Edith Saxon, and has also been compelled to expend divers sums of money in and about endeavoring to cure his said wife of her ills. 20

Plaintiff, William Saxon, Sr., demands as damages the sum of \$1,000.00 on this count.

Exhibit P-3

FIFTH COUNT

Plaintiff, Alfred S. McCann, residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

1. He repeats all the allegations contained in paragraphs 2, 3 and 4 of the first count and makes them paragraph 1 of this count.

10 2. As a result of the premises, this plaintiff was injured in and about his head, arms and shoulders, and was otherwise severely injured in and about his back.

Plaintiff, Alfred S. McCann, demands as damages the sum of \$1,000.00 on this count.

SIXTH COUNT

Plaintiff, Alfred S. McCann, residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

20 1. He repeats all the allegations contained in paragraphs 2, 3 and 4 of the first count and makes them paragraph 1 of this count.

2. As a result of the premises, his automobile was greatly damaged.

Plaintiff, Alfred S. McCann, demands as damages the sum of \$500.00 on this count.

SEVENTH COUNT

30 Plaintiff, Emma White, residing in the City of Paterson, County of Passaic and State of New Jersey, says that:

1. On or about October 7th, 1927, the plaintiff Emma White, was an occupant of an automobile which was operated by the plaintiff, Alfred S. McCann.

Exhibit P-3

2. She repeats all the allegations contained in paragraphs 2, 3 and 4 of the first count and makes them paragraph 2 of this count.

3. As a result of the premises, this plaintiff was severely injured in and about her head, arms and shoulders, and was otherwise injured in and about her left shoulder and neck and back of the neck, so that as a result thereof, she has become and still is extremely nervous, causing dizziness and lack of sleep.

10

Plaintiff, Emma White, demands as damages the sum of \$3000.00 on this count.

Plaintiffs demand as damages the total sum of \$17,000.00.

David Harrison,
Attorney of Plaintiffs.

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EXHIBIT P-4

Filed April 20, 1928

PASSAIC COUNTY CIRCUIT COURT

| | | | |
|----|--|---|---------------|
| 10 | William Saxon, Jr., by his next friend, William Sax- on, Sr., and William Sax- on, Sr., individually, Edith Saxon, Alfred S. McCann, and Emma White, <div style="text-align: right;">Plaintiffs,</div> | } | Action at Law |
| | vs. Louis Steinberg, <div style="text-align: right;">Defendant.</div> | | |

**RULE FOR JUDGMENT INTERLOCUTORY
BY DEFAULT**

20 The summons and complaint in this cause hav-
 ing been duly served upon the defendant on April
 17th, 1928, and defendant having failed to file an
 answer or taken any other step in response to the
 complaint within the time limited by the Rules of
 Court: It is ordered that judgment interlocutory
 be entered against the defendant, Louis Steinberg,
 and in favor of the plaintiffs William Saxon, Jr.,
 by his next friend William Saxon, Sr., and William
 30 Saxon, Sr., individually, Edith Saxon, Alfred S.
 McCann and Emma White.

And that the damages be assessed by a jury to
 be drawn from the general panel before the Hon-
 orable Clifford L. Newman on the 26th day of Ap-
 ril, 1928.

Exhibit P-4

Rule entered this 19th day of April, 1928, on
motion of David Harrison, Attorney for Plaintiffs.

Newton H. Porter, Judge.

David Harrison, Attorney.

A True Copy.

Dated April 20th, A. D. 1928,

John McCutcheon, Clerk,

By Lloyd B. March,

Deputy Clerk.

No. 202083

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Exhibit P-5

EXHIBIT P-5

Filed May 23, 1928.

PASSAIC COUNTY CIRCUIT COURT

| | | | |
|----|--|---|---------------|
| 10 | William Saxon, Jr., by his next friend, William Sax- on, Sr., and William Sax- on, Sr., individually, Edith Saxon, Alfred S. McCann, and Emma White, <div style="text-align: right;">Plaintiffs,</div> | } | Action at Law |
| | vs. Louis Steinberg, <div style="text-align: right;">Defendant.</div> | | |

RULE FOR JUDGMENT

20 This action having been tried before Judge Newton H. Porter, with a jury, on April 26th, 1928; and the jury having returned a verdict in favor of the plaintiffs William Saxon, Jr., for \$500.00, William Saxon, Sr. for \$77.00, Edith Saxon for \$100.00, Alfred S. McCann for \$75.00 and Emily White for \$200.00 damages:

30 It is ordered that judgment final be entered in favor of the plaintiffs, William Saxon, Jr., William Saxon, Sr., Edith Saxon, Alfred S. McCann and Emily White, and against the defendant, Louis Steinberg, for the sum of \$952.00 and plaintiffs' costs to be taxed.

On motion of David Harrison, Attorney of plaintiffs.

Rule entered this 22nd day of May, 1928.

David Harrison

Exhibit D-1

EXHIBIT D-1

April 3rd, 1928.

McDermott, Enright & Carpenter,
75 Montgomery Street,
Jersey City, N. J.

Re: Saxon vs. Steinberg.

Gentlemen:

This is to acknowledge receipt of your registered letter of March 29th, and I regret I was unable to call at the time you asked me to. 10

However, I expect to be in your office on Thursday or Friday of this week, and will call you on the telephone for a definite appointment.

I trust this is satisfactory.

Yours very truly,

Louis Steinberg.

(Pencil Notation) Rec'd Good Friday, 4-6-28, 20
9:15 A. M.—JDC Jr. S. phoned before I opened
it saying unable to come but will call tomorrow
10 A. M. sharp. C.

March 12, 1928.

Louis Steinberg, Esq.,
24 Temple Street,
Paterson, N. J.

Dear Sir:

10 We have been retained by the United States Fidelity and Guaranty Company to look after its interests in the case brought in the Passaic County Circuit Court by William Saxon, Jr., William Saxon, Sr., Edith Saxon, Alfred S. McCann and Emma White against you, growing out of an automobile accident that happened October 7th, 1927. Apparently this suit was started on or about December 16th, but no notice of the suit was ever received by the United States Fidelity & Guaranty Company until about February 16th, when Mr. Harrison, attorney for the plaintiffs, wrote a letter to the Company.

20 The United States Fidelity & Guaranty Company has instructed us to advise you that it will not be responsible for any judgment that may be recovered in said action because of your violation of the terms of the policy, which require you to immediately send copies of all suit papers to the Company as soon as received by you, and you have not to this date sent the suit papers to the Company.

30 If you wish the Company to defend the action at its expense, but on the understanding that you will be responsible for the payment of any judgment that may be rendered against you, the Company will render you this service. We suggest

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Exhibit D-2

that you call on us immediately concerning making arrangements to this end, and oblige.

Very truly yours,

JDS-GCB.

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Exhibit D-3

EXHIBIT D-3

March 21, 1928.

Louis Steinberg, Esq.,
24 Temple Street,
Paterson, N. J.

Dear Sir:

Re: Saxon vs. Steinberg.

10 Please call on us between 9:30 and 10 o'clock
Saturday morning about the above case.

The Surety Company will not have anything to
do with the defense of it if you do not co-operate.
You certainly have not co-operated in the slight-
est degree up to date.

Very truly yours,

JDC-GCB.

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~~Exhibit D-4~~

EXHIBIT D-4

March 29, 1928.

Louis Steinberg, Esq.,
24 Temple Street,
Paterson, N. J.

Dear Sir:

Re: Saxon vs. Steinberg

-- You did not call on us on Saturday pursuant to
our letter of March 21st. 110

Please call here on Monday next, April 2nd, at
3 P. M. If you do not call at that time and give
us the assistance necessary in the defense of this
case, the United States Fidelity & Guaranty Com-
pany will have nothing further to do with the de-
fense of the case.

Very truly yours,

JDC-GCB

120

(Registered Return Receipt)

Post Office Department

| | | |
|--------------------|-------|---------------------|
| Official Business | | (Post Office Stamp) |
| Registered Article | | Paterson March 30 |
| No. 62969 | 32260 | 4 P. M. 1928 |

Insured Parcel

Return to McDermott, Enright & Carpenter

75 Montgomery St.,

Jersey City, New Jersey.

130

Return Receipt

Received from the Postmaster the Registered or
Insured Article, the original number of which ap-
pears on the face of this Card.

Exhibit D-4

L. Steinberg .

Signature or name of addressee.

Fannie Steinberg

Signature of addressee's agent.

Date of delivery 3-30-28.

10

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April 17, 1928.

Louis Steinberg, Esq.,
24 Temple Street,
Paterson, N. J.

Dear Sir:

Re: William Saxon, Jr., by his next friend,
William Saxon, Sr., and William Saxon,
Sr., individually, Edith Saxon, Alfred S.
McCann and Emma White vs. Louis Stein-
ber.

10

We are instructed by the United States Fidelity
& Guaranty Company to advise you that it will
not defend for you or on your behalf the above
mentioned case which we are informed was
brought against you in the Passaic County Circuit
Court some months ago, because of your violation
of the terms of your policy, among others, in the
following respects:

20

(1) Because of your failure to give the Com-
pany the co-operation called for by the policy.

(2) For your failure to send the Company the
suit papers that we are informed were served up-
on you, within the time required by the policy.

Despite our several letters to you, you have
failed either to send the suit papers to us or to
come and see us or co-operate with the Company
or us in any respect whatsoever.

30

You are therefore advised that for these rea-
sons you will be obliged to defend the case your-
self and pay any judgment that may be recovered
against you.

Very truly yours,
McDermott, Enright & Carpenter.

JDC-GCB

Exhibit D-5

| | |
|--|---------------------|
| Post Office Department | |
| Official Business | 37366 |
| Registered Parcel. | (Post Office Stamp) |
| No. 64270 | Paterson, Apr. 18, |
| Insured Parcel | 2 P. M. 1928, N. J. |
| Return to McDermott, Enright & Carpenter | |
| 75 Montgomery St., | |
| Jersey City, New Jersey. | |

10

Return Receipt.

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this card.

L. Steinberg.

Signature or name of addressee

Fannie Steinberg

Signature of addressee's agent.

Date of delivery 4-18-28

20

New Jersey Court of Errors and Appeals

| | | |
|--|---|---|
| William Saxon et als., Plaintiffs-Appellants, vs. United States Fidelity and Garanty Co., Defendant-Appellee, | } | On Appeal from the Supreme Court, Passaic Circuit. |
|--|---|---|

Brief of Plaintiffs-Appellants

STATEMENT OF FACTS

This is an appeal from the action of the trial court in directing a verdict against the plaintiffs and in favor of the defendant (Case, p. 47, line 35; p. 48, line 1-3; p. 8, Postea). The original action was instituted by William Saxon et als., against Louis Steinberg for injuries arising out of an automobile accident (Case p. 60, complaint; Case p. 66 and 67. Rule for interlocutory judgment by default). The total damages assessed by the jury in favor of all the plaintiffs against the defendant, Louis Steinberg, was \$952 and the plaintiffs' costs to be taxed (Case p. 68, Rule for Judgment). At the time the plaintiffs were injured by the negligence of Louis Steinberg, he, Louis Steinberg was insured by the above defendant, United States Fidelity and Guaranty Co., (Case p. 48, Exhibit P-1, Policy of Insurance) against liability. After the judgment was procured against Louis Steinberg and he was unable to pay, the plaintiffs instituted suit against the insurer, United States Fidelity and Guaranty Co., on the policy which was issued by them to Louis Steinberg, and which policy was executed for the benefit of any person injured or killed by the negligence of

the insured, Louis Steinberg (Case p. 48, line 25-35, p. 49 line 1-13, Policy of Insurance). The policy issued by the defendant was also for the benefit of any person injured or killed by the insured under the provisions of Chapter 153 of the Laws of 1924, page 352. The plaintiffs at the time of the trial against the insurance company offered all the necessary papers of the first trial, in evidence and proved their judgment against the insured, Louis Steinberg and rested (Case p. 12, 13 and 14). The defendant did not move for a non-suit but offered his proofs and rested his case and then moved for the direction of a verdict (Case p. 45, line 25). The plaintiffs-appellants contend that the trial court committed error in directing a verdict in favor of the defendant and against the plaintiffs and will proceed to argue their grounds of appeal.

POINT 1.

THE TRIAL COURT COMMITTED ERROR IN DIRECTING A VERDICT AGAINST THE PLAINTIFFS AND IN FAVOR OF THE DEFENDANT.

Silverstein was the agent of the defendant as his name appears on their policy and the defendant permitted his name to be on their policy when it was countersigned by its duly authorized agent and representative, Garrison and Rumsey (Case p. 48, Exhibit P-1, line 5-20). On page 13 of Case the following question was asked of Silverstein, the defendant's witness, line 33-35: "Q. What relation is Rumsey's office to your office? A. Mr. Rumsey is the agent for the company; I am the broker." Such a statement from the lips of Silverstein un-

questionably shows that Silverstein was the defendant's agent and not the agent of the insured, Louis Steinberg. Would the defendant permit Silverstein's name on its policy with his business address and business telephone and the word "Insurance" over his name, if Silverstein was not their agent? And when Silverstein was asked what relation he had with Rumsey's office and answered "Rumsey is the agent for the company and I am the broker" didn't that show that Silverstein admitted he was the broker for the company? On page 19, last line, and page 20, Case, line 1-20, it appears from the testimony of Silverstein that he was the one who filled out the accident report form which was furnished him by the company and that he, Silverstein, questioned the insured, Steinberg. Silverstein also filled out the form from information furnished him by Steinberg and from Silverstein's testimony it conclusively appears that Steinberg gave him all the information and data he had about the accident. Doesn't such testimony by Silverstein also prove that the defendant gave apparent authority to Silverstein to procure information for them and even went as far as to furnish printed forms to Silverstein for such purpose? If Silverstein was the agent of the defendant, then all the information given to him by the assured was notice to the company under Chapter 153, page 352 of the laws of 1924. Why didn't the defendant offer in evidence the Accident Report which his witness produced in court (Case p. 22, line 20-35)? Was the defendant afraid of the fullness and completeness of the report which supplied it with all the necessary information it had and not as their defense purports to set up, that

there was lack of co-operation by the assured? On page 3, 4, 5 and 6, Case, are the separate defenses of the defendant. The gist of the defenses under the policy is the failure of the assured to assist, aid and procure information for the defendant and lack of co-operation by the assured and his failure as the defendant alleges to turn over the summons and complaint to the defendant company in time. Steinberg testifies, however, that any paper he got he turned over to Silverstein (Case p. 15, line 8). Steinberg also testifies that he was served with a summons and complaint and gave it to his agent, (Case p. 42, line 1-8). Silverstein testified that he didn't remember whether he ever received the summons and complaint from Steinberg (Case p. 19, line 18-20, lines 12-15), therefore as far as the question of whether or not the summons and complaint was turned over the company, a jury question was presented on the conflicting testimony of Steinberg and Silverstein. Furthermore if Silverstein had the authority from the company to fill out their accident reports for them, with equal propriety he had the apparent authority as far as the insured was concerned to take the summons and complaint from him on behalf of the company, irrespective of whether or not Silverstein was the general agent of the company as the conduct of the company gave Silverstein apparent authority to deal with Steinberg in its behalf. The report of the accident was received October 10, 1927, three days after the accident occurred (Case p. 21, line 22, Case p. 22, line 25-35). If the assured was prompt enough and intelligent enough to report his accident to the company within three days wouldn't he also with equal promptness and intelligence turn over to the company the summons

and complaint with due diligence? Silverstein testified that if he received the summons and complaint he would give them to Garrison and Rumsey, the authorized representatives of the company (Case p. 19, line 14-16, and on page 44, line 10-30). Silverstein testified that the reason he thinks he didn't get the summons and complaint from Steinberg is because the defendant company didn't have it on file. The defendant company wasn't injured or prejudiced in any way even if the summons and complaint wasn't turned over to them by the assured, for the plaintiffs' attorney consented to give an extension of time to the company's attorney to file an answer (Case p. 35, line 10-25).

At any rate the failure of the assured, Louis Steinberg to comply with the provisions of the defendant's policy, does not in any way prejudice the rights of third parties who are injured as the result of the negligence of the insured.

The policy is issued not only for the assured's benefit, but also for the benefit of third parties, as is disclosed by it on page 49 (Case, second paragraph, line 4-15). Irrespective of what the policy says itself, the plaintiffs have a right to sue for benefits under the policy by virtue of the Laws of 1924, Chapter 153, page 352, as the rights for benefits under such a policy are not derived from the assured under the policy but in the first instance spring directly by virtue of the statute and secondly it may be argued that the policy itself confers a right to an injured party, therefore the first ground on which the defendant's counsel moved for a directed verdict, to wit: "that there is no privity of contract between the plaintiffs in this action and the defendant," is unsound.

It was held in the case of Gillard vs. Manufacturers' Insurance Co., of Philadelphia, Pa., (Court of Errors), 107 Atl., p. 446, as follows:

First Column, First Syllabus, in the middle of first column, paragraph 2,

"That since the insurance policy expressly provided for the payment of such indemnity to an injured third party the omissions of the insured to comply with certain details thereof, in case of accident, such as notice of the accident, etc., could not affect the right of the injured party to recover upon the same for damages, adjudicated in a suit at law between the insured and the injured third party, as a basis for the suit upon the policy to recover the amount so adjudicated."

And on page 446 of the opinion, first column, last paragraph, the court said,

"It is insisted that the right of the plaintiff to sue is derivative in character, and depends entirely upon the rights of the insured under the terms of the policy. **The application of this argument is directed to the fact that since the insured failed to give notice of the accident, and of the pendency of the suit to the insurer, as required by him, by the provisions of the policy, the right of the plaintiff in this case to recover is to be determined by the status thus acquired by the insured, which in effect constitutes a breach of the agreement.**"

The Court however held that the policy in the cited case was issued for the benefit of the public and that the policy itself provided to pay any final

judgment recovered by any person on account of the ownership or operation of the automobile covered by the policy. The cited case was on a policy covering a jitney bus, pursuant to P. L. 1916, p. 283, and the case at bar is a policy which is being sued on pursuant to P. L. 1924, p. 352. The act of 1916 legislates about jitney bus policies and the act of 1924 legislates about privately owned automobiles, but the legislation in both acts is akin in character and both acts were passed for the benefit of the public, one act covering autos for public use and the other, autos for private use. However the point is that, the Gillard case, *supra*, held that the failure of the assured to comply with the provisions of the policy of insurance, could not in any way preclude an injured third party from suing on the policy and recovering. The appellants contend this is their position in the case at bar, i. e., No matter what Steinberg, the assured, failed to do under his policy with the defendant, nevertheless, the plaintiffs are entitled to sue on his policy and recover by virtue of Chapter 153 of the laws of 1924, for that act gave them their rights.

The Gillard Case is followed with approval in the following New Jersey Cases. *Turk vs. Goldberg et al.*, 109 Atl., p. 732, where the court said on page 733, first column, in the middle of the second paragraph,

“Gillard vs. Manufacturers’ Casualty Insurance Co., 92 N. J. L., p. 141; 104 Atl., p. 707, affirmed 107 Atl. p. 446, holds that a person who has recovered judgment against the bus owner for injuries resulting from an accident in the operation of the bus on the

public streets may sue the insurance company on the policy, and that he is the only one who can sue for the amount of the judgment; his rights being original and primary as against the insurance company by virtue of the statute."

And in *Connell vs. Commonwealth Casualty*, 115 Atl. p. 352, (Court of Errors), it was held, citing the *Gillard Case*, *supra*, as follows on page 352, second column, fifteen lines from the bottom of the page,

"But, while the policy of insurance remained in force, its legal effect as an indemnity to the travelling public, for whose benefit it was executed and exists, cannot be minimized by any extraneous act or default of the insured, so long as he is conducting the vehicle within the general scope of the purpose for which the jitney car was insured."

And in *Boyle vs. Manufacturers' Liability Insurance Co.*, 115 Atl. p. 383, it was held by the court referring to the *Gillard Case*, *supra*, as follows, second column, p. 383, 6 lines from the top of the page,

"That adjudication demonstrates that the policy of jitney insurance is one of indemnity under the statute for the benefit of the traveling public, and whatever legal rights or equities may subsist as between the insured and insurer by reason of any violation of the terms of the policy can not affect the rights of the public who claim under its provisions after such claim has been substantiated by a judgment at law."

See also *Bess vs. Commonwealth Casualty Co.*, 128 Atl. p. 250, (Court of Errors and Appeals) Case following *Gillard Case*, also,

On page 46 of the state of case, the trial court said, line 33, "The Court—I do not think you have made out a case that entitled you to go to the jury."

This was said by the court after both the plaintiff and defendant had rested their case and it appears that the court had in mind that the plaintiff did not make out a prima facie case against the defendant. If that was the trial court's view it committed error because the court could only legally non-suit the plaintiffs if a prima facie case was not made out against the defendant. True, the plaintiffs failed to prove that the insured, Steinberg, was adjudicated a bankrupt or was insolvent at the time of the trial pursuant to Chapter 153, laws of 1924, page 352, but that failure of proof by the plaintiffs at the time of trial would only be a ground for a non-suit against them and when the defendant failed to move for a non-suit on the ground that the plaintiffs failed to prove the bankruptcy or insolvency of the insured at the time of the trial, it was waived by them and they could not later after resting their own case avail themselves on a motion for a directed verdict of the plaintiffs' failure to prove the bankruptcy or insolvency of the insured, especially where the defendant itself did not prove affirmatively on its own case that the insured, Steinberg, at the time of trial was either not a bankrupt or not insolvent. The defendant's failure at the time of trial to prove that the insured, Steinberg, was either not a bankrupt or not insolvent, proves conclusively that they knew of his financial embarrassment and that he was insolvent at the time of trial.

If the plaintiffs had failed to prove a prima facie case against the defendant, because they failed to prove the bankruptcy or insolvency of the insured, Steinberg, at the time of trial, it was a ground for a non-suit and since the defendant failed to move for a non-suit at all, it is estopped to deny that plaintiffs hadn't established a prima facie case when moving for a directed verdict.

When the defendant moved for a directed verdict, it had in effect admitted that the plaintiffs established a prima facie case but that its, the defendant's, proofs had overcome the plaintiffs' case by such great weight, that only one inference could be drawn by a jury, and at this time it may be well for the court to note that a jury question was presented as to the insured's complying with the policy of insurance and the terms thereof.

Furthermore the assured's failure to comply with the policy is not binding on the plaintiffs and especially at this time where defendant's lawyer was notified by the attorney of the plaintiffs that he was going to move for interlocutory judgment and asked him whether there would be a defense and the defendant's lawyer said no (Case p. 31, line 24-30). The defendant company had notice of the pendency of the suit and were given ample time to defend and it would be unconscionable to let an insurance company sit back laissez-faire and refuse to defend a suit against one of its insured, merely because the insured himself failed to notify the company about some detail of which they had sufficient knowledge, from another source.

The laws of 1924, chapter 153, page 352, provide that the bankruptcy or insolvency of the insured shall not relieve the insurance company

from liability, but that the insured shall have the right to sue the company on the policy after a judgment is recovered against the insured. Therefore plaintiffs' right was given by statute and not by the policy and if plaintiffs failed to comply with the statute by failing to prove the bankruptcy or insolvency of the insured at the time of trial and by reason thereof failed to prove a prima facie case under the statute, a non-suit would have been the proper adjudication by the trial court and if defendant failed at the time of trial to move for a non-suit he in effect admitted that the plaintiffs had complied with all statutory requirements, and if he desired a directed verdict it was incumbent upon him to prove on the defense that the insured at the time of trial was either not a bankrupt or was solvent and that for such reason the plaintiffs had no rights under the statute of 1924. Furthermore the statute of 1924 is incorporated in the defendant's policy, Case p. 51, line 10, and the defendant never set up as a defense the statute of 1924 in their answer and neither did they set up as a defense the section of their policy which incorporates the statute of 1924 (Case p. 3, 4, 5 and 6, defendant's answer), therefore the statute of 1924, Chapter 153, was not available to the defendant as a defense and neither was the section of the policy which incorporated the statute available as a defense, for it was held in the case of *Dellabello vs. R. R. Co.*, reported in 99 N. J. Law, that the Practice Act of 1912, did not abrogate the common law rule, that special defenses have to be specially pleaded. Furthermore the defendant did not ask to amend his answer at the time of trial to set up the statute 1924, nor did he ask to amend

his answer to set the section of the policy which incorporated the statute of 1924.

The only legal question raised on a motion for a directed verdict is whether or not more than one inference can be drawn from the facts by the jury, and the only time the defendant can take advantage on a motion for a directed verdict the failure of the plaintiffs to establish a prima facie case is when the defendant himself has supplied affirmatively the contrary proof on his own case of the proof which the plaintiffs have failed to produce on their side of the case.

Since the statute of 1924 was not raised as a defense by the defendant and neither, the part of their policy which incorporated the statute of 1924, the provisions of the statute of 1924 relating to the bankruptcy or insolvency of the insured and the part of the policy which relates to the same were waived by the defendant.

POINT 2.

THE TRIAL COURT COMMITTED ERROR IN FAILING TO NON-SUIT THE PLAINTIFFS.

The plaintiffs' failure to comply with the statutory requirement of proving the bankruptcy or insolvency of the assured at the time of the trial, merely postponed their right to sue and should not foreclose and bar them forever. Would this court say that the failure to appoint a next friend or an administrator ad prosequendum could be taken advantage of on a motion for a directed verdict barring the right to sue forever, and that is exactly what the learned trial court did in the case at bar?

At most the plaintiffs were under a disability to sue which they now contend was waived by the defendant.

The Court of Errors and Appeals held in the case of Commercial Credit Corporation vs. Boyko, 137 Atl. p. 534, as follows:

"Syllabus 1. Pleading-Common-law rule relative to incidents of pleas to jurisdiction and in abatement is not changed by their abrogation (Practice Act 1912, rule 38).

Practice Act 1912, rule 38 (P. L. 1912, p. 391) abolishing pleas to jurisdiction and pleas in abatement and substituting objections to proceedings on motion, does not change common-law rule relative to legal effect of pleas, if sustained or overruled, as to incidents.

Syllabus 2. On deciding that plaintiff was under disability to sue, court should dismiss and not direct verdict for defendant.

If plaintiff was without authority to sue on note by reason of its being a foreign corporation, court was deprived of jurisdiction to direct verdict for defendant, and could only strike out summons and complaint and dismiss action."

See also page 536 of the opinion, second column, starting with the third paragraph which says:

"As has already been observed, the defendant in his answer gave notice that a motion would be made or at the trial to strike out the complaint, on the ground

that the plaintiff was ineligible to maintain the action. The record does not disclose that any such motion was made. The matter set up as the ground of the motion, was, at common-law, the disability on part of the plaintiff to maintain its suit."

Chitty, vol. 1, p. 460, says:

"In pleading to the person of the plaintiff or defendant, in respect of disability to sue or be sued, and not merely on account of the non-joinder of another party, the plea should conclude with a prayer, if the plaintiff ought to be answered," etc.

In Tidd's Practice, Vol. 1, p. 689, the learned author says:

"Pleas in abatement to the action of the writ are, that the action is misconceived or was prematurely brought before the cause of it arose," etc. "The general requisites of a plea in abatement are that it should be certain, give the plaintiff a better writ," etc.

And on page 694 the author says:

"The judgment for the defendant on a plea in abatement, whether it be an issue of fact or in law, is that the writ or bill be quashed. * * *"

And the opinion continues further and says:

"In Cowell vs. Oxford, 6 N. J. Law, 432, in an action of debt against an executor to recover the amount of a legacy which has been bequeathed to the plaintiff by the testator, the plaintiff having failed to file a

refunding bond, on a plea of abatement, filed by the defendant, the action was quashed.

In *Smith vs. Van Houten*, 9 N. J. Law, page 381, it was there decided that, if a defendant would take advantage of the infancy of the plaintiff suing alone, the proper mode of raising the objection, in courts proceeding, according to the course at common law, is by plea in abatement; and, upon the fact of infancy appearing, the justice of the peace before whom the case was tried might have admitted a guardian for the plaintiff or should have dismissed the suit.

In *Allerton vs. Grundy*, 67 N. J. Law, page 55, it was held at page 58, 50 Atl. page 352, that the true practice seems to be where a foreign corporation sues, without authority to sue under the Corporation Act, to plead in abatement.

By rule 38 of the Practice Act of 1912 (P. L. 1912, p. 391), relating to dilatory pleas, it is provided:

“Pleas to the jurisdiction and pleas in abatement are abolished. In lieu thereof objection shall be made on motion. The evidence necessary to determine the question may be taken by affidavit, or as the court may direct. The action of the court upon such motion may be reviewed on appeal after final judgment.”

And the opinion continues further on page 536, first column (1,2) fourth paragraph:

“The abrogation of pleas to the juris-

diction and pleas in abatement and substituting therefor an objection to the proceedings on motion, did not operate to change the common-law rule, relating to the legal effect of such pleas if sustained or overruled, as to their incidents. Therefore, when the trial judge decided that the plaintiff labored under disability to maintain the action by reason of its being a foreign corporation, without authority to sue in this state, at the time the action was instituted, the proper course for him to pursue was to strike out the complaint and summons and dismiss the action. The fact appearing that the plaintiff was without authority to sue, the court was deprived of jurisdiction to deal with the cause, and hence could not properly direct a verdict for the defendant."

The Boyko Case, *supra*, and the authorities it cites, prove conclusively that at most the plaintiffs labored under a disability and the trial court at most should have non-suited the plaintiffs and not directed a verdict against them.

The plaintiffs also at the close of the defendant's case moved for a directed verdict (Case p. 46, line 28) and contend that the trial court should have granted it in their favor because the provisions of the statute of 1924, Chapter 153, page 352, relating to the bankruptcy or insolvency of the insured were waived and further because the failure of the insured to comply with the provisions of the policy were not binding on the plaintiff-

iffs. This contention should really have been argued under point 1, where the appellants contend the trial court committed error in directing a verdict for the defendant.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the trial court be instructed to direct a verdict in favor of the plaintiffs and against the defendant or least that a trial de novo issue with the plaintiffs' costs to be taxed. Respectfully submitted May Term 1930.

LOUIS C. FRIEDMAN,
Attorney of Plaintiffs-Appellants.

JACOB L. BERNSTEIN, Of Counsel.

Jacob L. Bernstein
of Counsel

New Jersey Court of Errors and Appeals.

WILLIAM SAXON *et al.*,
Plaintiffs-Appellants,

VS.

UNITED STATES FIDELITY AND
 GUARANTY COMPANY,
Defendant-Appellee.

On Appeal from
 Supreme Court,
 Passaic Circuit.

**BRIEF OF McDERMOTT, ENRIGHT &
 CARPENTER FOR DEFENDANT-
 APPELLEE.**

Statement of Facts.

This case was tried in the Passaic Circuit before the Honorable William B. Mackay and a jury. On motion made by the defendant the Court directed a verdict in favor of the defendant from which the plaintiffs appeal. The plaintiffs some time previous instituted a suit in the Passaic County Circuit Court against Louis Steinberg to recover for personal injuries sustained in an automobile accident, which they claimed were due to the negligence of Louis Steinberg. He did not appear to defend that suit and the United States Fidelity & Guaranty Company which covered him for automobile liability insurance did not appear for him for reasons which will be shown. A default judgment was entered and damages assessed. The plaintiffs in the Circuit Court action thereupon instituted suit in the New Jersey Supreme Court, Passaic County, against the United States Fidelity & Guaranty Company, a corporation of

Maryland, to recover the amount of the judgments entered in their favor in the Passaic County Circuit Court.

In defense of this action the defendant alleges that:

1. There is no privity of contract between the plaintiffs and the defendant.

2. Paragraph B-1 requiring the assured to give immediate notice to the Company and to immediately forward to the Company every summons or other process served on him has been violated.

3. Paragraph B-4 requiring the assured not to voluntarily assume liability to the plaintiffs has been violated.

4. The assured violated paragraph B-5 in that he failed and neglected to render reasonable cooperation and assistance to the Insurance Company (State of Case, pp. 4-6).

The testimony disclosed that Garrison & Rumsey of Paterson were the local agents for the Insurance Company and that Charles Silverstein was the broker, agent for the assured (State of Case, p. 18, ll. 26-38). The broker admitted that the assured gave him a report of the accident which he turned over to the agent, but did not give him any other papers (State of Case, p. 44, ll. 7-15). He never received the suit papers in the Passaic County Circuit Court from the assured. Simon D. Rumsey, the agent for the Insurance Company, did not receive the suit papers (State of Case, p. 21, l. 31). Goldy Robbins, an employee of Garrison & Rumsey, did not receive said suit papers (State of Case, p. 24, l. 20).

When the Insurance Company learned that a suit had been started on December 16, 1927, approximately two months before, against the assured, the matter was referred to McDermott, Enright & Carpenter and handled by James D. Carpenter, Jr., Esq. He testified that he addressed a letter, Exhibit D-2, to the assured, Louis Steinberg on March 12, 1928 and received no reply. This was followed by letter, Exhibit D-3, on March 21, 1928, to which he received no reply. On March 29, 1928, letter, Exhibit D-4, was forwarded by registered mail. Return receipt was received but no reply. Mr. Carpenter testified (State of Case, p. 29, l. 120) that he received a letter from the assured, Exhibit D-1, dated April 3, 1928, stating that the assured would be in his office Thursday or Friday; that the letter was received on Good Friday, at which time Steinberg telephoned that he would be in the following morning, ten o'clock sharp, but he did not call. Mr. Carpenter testified that on April 17, 1928, he addressed and forwarded the letter, Exhibit D-5, to the assured, advising him that the Insurance Company would not defend the action pending against him in the Passaic County Circuit Court because of his failure to co-operate with the Company and because of his failure to send the Company the suit papers which were served upon him within the time required by the policy.

POINT I.

The trial Court properly directed a verdict in favor of the defendant.

At the close of the trial the defendant moved for a direction of a verdict on various grounds, and first, because there was no privity of contract

between the plaintiffs in this action and the defendant.

The policy of insurance, Exhibit P-1, pages 48 and 49, contains the following provision :

"UNITED STATES
FIDELITY & GUARANTY COMPANY
BALTIMORE, MARYLAND

(Hereinafter called the Company)

In consideration of the premium and subject to the terms, limits and conditions set forth herein

Does hereby Insure

the Assured named and described as such in the Schedule of Statements hereto,

Against liability for loss and/or expense arising or resulting from claims upon the Assured for damages in consequence of an accident occurring within the limits of the United States and Canada during the term of this policy, by reason of the ownership, maintenance or use (including the carrying of goods thereon and the loading and unloading thereof when commercially used), of the automobile or any of the automobiles enumerated and described herein resulting in

Injury to persons—(a) Bodily injuries, or death resulting at any time therefrom, suffered by any person or persons, excepting: (a) the Assured's employe or employes while engaged in operating or caring for any of the Assured's automobiles, (b) any other employe of the Assured who is injured when engaged at the time of such injury in performing any duty for the Assured in connection with the trade, business or occupation of the Assured."

This is clearly a policy of indemnity written for the benefit of the assured and only obligates the Insurance Company to the assured for the liability specified by its terms. By the terms of this policy no liability was cast upon the Insurance Company to third parties, but the Insurance Company was merely under obligation to reimburse the assured for the obligation arising to injured parties under the terms of the policy.

The appellant seems to have misconceived the policy, as he states in paragraph two, page five, of his brief, that the policy was issued for the benefit of third parties. We repeat that an inspection of the policy fails to disclose any such fact.

The appellant is apparently further misled by the fact that there are several cases in the State, which are quoted in appellants' brief, which hold that policies of jitney insurance are for the benefit of the traveling public. Such liability is by virtue of the terms of the policy of insurance covering auto busses, as required by Chapter 136 of the Laws of 1916, to the effect that a \$5,000 policy shall be filed in the chief fiscal office of the City in which the bus is operated and that, such policy shall be for the benefit of every person suffering loss, damage or injury.

All of the cases upon which the appellants rely, such as *Gillard v. Manufacturer's Insurance Company*, 93 N. J. L. 216; *Turk v. Goldberg*, 109 Atl. page 732; *Connel v. Commonwealth Casualty Company*, 115 Atl. page 352; *Boyle v. Manufacturer's Liability Insurance Company*, 96 N. J. L. 380, and *Bess v. Commonwealth Casualty Company*, 128 Atl. page 250, are jitney bus cases and have no relation to the case at bar.

It is true that Chapter 153 of the Laws of 1924 provides that every policy of insurance against

loss or damage resulting from accident or injury, etc., caused by motor vehicles, etc., shall contain a provision,

“That the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy.”

The policy issued by the defendant contains such provision (State of Case, p. 51, par. 5).

This Act and this provision in the policy does not directly concern the case at bar. An examination of the complaint in this suit (State of Case, pp. 1 and 2) will clearly show that the suit is not brought on the theory that the injured was insolvent or bankrupt or that an execution was returned unsatisfied because of the insolvency or bankruptcy of the assured. There is no evidence that any execution whatever was issued. There is no evidence at all which in no way relates to bankruptcy or insolvency of the assured.

The policy of insurance involved in this case does not give any privity to these plaintiffs to sue the Insurance Company, except under the circumstances provided by Chapter 153 of the Laws of

1924, and inasmuch as that is not pleaded in the plaintiffs' complaint and not proven in the testimony, there is no privity between the parties. The very fact that it became necessary for the Legislature to enact this provision into the laws of our State, requiring such a clause to be inserted in the policies of automobile liability insurance, is further argument that there is no privity between the plaintiffs and the defendant in the absence of the circumstance referred to under said law.

The appellants again misconceived our case at the middle of page 11 of the appellants' brief, in which it is argued that Chapter 153 of the Laws of 1924 is not set up as a defense. We do not raise the statute as a defense but merely as an argument in proving that there is no privity of contract between the parties to this suit.

For these reasons we submit that the Court properly directed a verdict in favor of the defendant.

POINT II.

The trial Court was not called upon to nonsuit the plaintiffs.

The appellants argue that the trial Court committed error in failing to nonsuit the plaintiffs and yet a careful examination of the testimony will show that *no motion to nonsuit the plaintiffs was made and the plaintiffs never submitted to a voluntary nonsuit*. We submit that it is within the discretion of trial counsel to move for a nonsuit or for a direction of a verdict. The plaintiffs had their day in court. The facts presented in the case justified the motion of the defendant for a direction of a verdict and the Court properly granted same.

The cases which the appellant refers to in connection with this point are instances where the plaintiff was under some incapacity to sue, such as infancy or lack of authority of a corporation to do business within the State. These cases have no application to the case which is now before the Court.

The plaintiffs William Saxon *et al.*, were not under any incapacity to sue. They had capacity to sue, did sue and failed to prove any legal basis for holding the defendant.

We submit that with no motion for a nonsuit before the Court there was no obligation upon the Court to grant a nonsuit and in fact no occasion for the Court to so act.

POINT III.

For the foregoing reasons, we submit that the appeal in the above-entitled cause should be dismissed and the judgment in the New Jersey Supreme Court, Passaic County, affirmed.

Respectfully submitted,

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Defendant-Appellee.

CARL S. KUEBLER,
Of Counsel.



