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WITNESS FOR PLAINTIFF:

EXHIBITS.

Notice of Appeal.

NEW JERSEY SUPREME COURT

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs-Appellants, vs. UNION INDEMNITY COMPANY, a corporation, Defendant-Appellee.	Action at Law.

To McDermott, Enright & Carpenter, Attorneys of Defendant-Appellee.

Take Notice that the Plaintiffs-Appellants, Abraham Shyowitz and Mollie Shyowitz, appeal to the New Jersey Court of Errors and Appeals from the whole of the judgment of nonsuit entered in this cause.

Dated June 3rd, 1927.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs-Appellants.

Service acknowledged June 15, 1927.
McDERMOTT, ENRIGHT & CARPENTER.

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ,
Plaintiffs-Appellants,

vs.

UNION INDEMNITY COMPANY, a corporation,
Defendant-Appellee.

The plaintiffs-appellants hereby file the following grounds of appeal in the above-entitled cause:

1. The Court erred in refusing to admit in evidence, Policy of Insurance LOL 8847 of the Union Indemnity Company, a corporation.

2. The Trial Court erred in granting the motion for a nonsuit before the close of the plaintiffs' case.

3. The Trial Court erred in refusing to permit the witness, Thomas D. Saxe, to answer the following question, propounded by counsel of the plaintiffs-appellants:

"As a matter of fact was this done in accordance with the practice which you had in issuing all policies and noting all changes of ownership?"

4. The Trial Court erred in refusing to permit the witness, Thomas D. Saxe, to answer

the following question, propounded by counsel of the plaintiffs-appellants:

"Did you issue any other policies for this company?"

5. The Trial Court erred in refusing to permit the witness, Thomas D. Saxe, to answer the following question, propounded by counsel of the plaintiffs-appellants:

"What have you to say with regard to endorsements of change of ownership as compared with the policy in this instance?"

6. Because the Court erred in granting a nonsuit in favor of the defendant, over the objection of counsel for the plaintiffs-appellants, contrary to the law of the case, to which an exception was duly taken.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs-Appellants.

Dated June 3rd, 1927.

Complaint.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law. Complaint.

The plaintiffs, residing in the City of Passaic, in the County of Passaic and State of New Jersey, say:

1. They are the owners of premises, No. 345-347 Madison Avenue, Passaic, N. J.

2. The defendant, being an indemnity company is a corporation duly authorized to insure owners, landlords and tenants against public liability.

3. In consideration of the payment of a certain premium amounting to $11.85 the defendant insured the plaintiffs, Abraham Shyowitz and Mollie Shyowitz under Policy L. O. L. 8847, a true copy of which is hereto attached and made a part hereof.

4. Thereafter and while said policy was in force and effect Annie Blumkin, a tenant living in the premises, No. 345-347 Madison Street, Passaic, N. J., claimed that she sustained bodily

injuries as a result of an alleged fall while walking down the stairs in said premises.

5. Immediately upon the occurrence of said accident to the said Annie Blumkin, the plaintiffs gave immediate notice with the fullest information obtainable to the agents of the said insurance company to the effect that a claim had been made on account of such accident.

6. Thereafter an action was instituted by the said Annie Blumkin, and Samuel Blumkin, her husband in the Common Pleas Court of the County of Passaic. Notice of said action was immediately given to the defendant company and a copy of the summons and complaint was duly delivered to the agent of said defendant with a request that said company defend said action in accordance with condition "C" of said policy.

7. The said defendant company refused to defend the said action and refused to comply with the obligations it assumed under the terms of said policy with the result that the said plaintiffs were forced to obtain and engage counsel to represent them in said action.

8. The said plaintiffs were forced to expend the sum of One Thousand Dollars in and about the preparation of trial, payment of fees and costs and all other expenses necessary to defend the said action, all of which the said defendants were under the terms of said policy obligated to pay.

Wherefore plaintiffs demand of the defendant

the sum of One Thousand Dollars together with interest and costs of suit.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs.

No. L. O. L. 8847

Owners, Landlords and Tenants Public Liability

UNION INDEMNITY COMPANY

Executive Offices:
830-836 Union St.,
New Orleans, La.

Great Eastern Dept.
100 Maiden Lane
New York.

In Consideration of the payment of the estimated premium and of the statements contained in the Schedule hereinafter set forth which statements the Assured makes on the acceptance of this Policy and warrants to be true, the Union Indemnity Company herein called the Company, does hereby agree to indemnify the Assured designated in the said Schedule Against Loss From the Liability Imposed by Law upon the Assured, for damages on account of bodily injuries accidentally suffered or alleged to have been suffered while this Policy is in force, including death resulting at any time therefrom, by any person or persons not employed by the Assured, except such as are excluded by Condition "A" hereof, while within the premises described in Statement No. 4 of the Schedule, or upon the sidewalk or other ways or yards, or vacant property, immediately adjacent thereto provided for the use of the public subject to the following conditions:

Condition A. This policy does not cover loss from liability for injuries or death under any compensation law or agreement or plan, unless extended by writer or endorsement to specifically cover such liability, nor caused by: (1) Any minor employed by the Assured contrary to any law restricting the age of employment or any minor employed under fourteen years of age where no statute restricts the age of employment; (2) Any elevator attendant employed by the Assured under the age fixed by law for elevator attendants, or under the age of eighteen years where no age is fixed by law or any person in or about any elevator while such elevator is in charge of such attendant nor suffered or caused by (3) Any person during the making of additions to or structural alterations in or extraordinary repairs of any elevator plant, unless a written permit is granted by the Company specifically describing the work; but no elevator shall be used for any service while additions, alterations, or repairs of any kind are being made in or about such elevator; (4) Any person engaged in making addition to or alterations in the building or engaged in making repairs of any kind when more than ten days' time is required for the whole work; (5) Any person before the premises have been completed ready for occupancy; (6) Any person by reason of the manufacture or presence of any material intended for use as an explosive; (7) Any person while

in or about any elevator, escalator or moving platform not described in Statement No. 4 of the Schedule as covered under the Policy; (8) Any person through the use of horses or other draft animals, or any vehicle including automobiles; (9) Any person or persons in consequence of any professional error, mistakes or malpractice, actual or alleged, by any Physician, Dentist, Chiropodist or any other person engaged in a professional occupation.

Condition B. Upon the occurrence of an accident the Assured shall give immediate written notice thereof with the fullest information obtainable at the time to the Executive Office of the Company in New Orleans, Louisiana, or New York, N. Y., or to its duly authorized agent. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all cooperation and assistance in his power.

Condition C. If thereafter any suit is brought against the Assured shall immediately forward to such Executive Office of the Company every summons or other process as soon as the same shall have been served on him, and the Company will defend such suit, whether groundless or not, in the name and on behalf of the Assured; the expenses incurred by the Company in defending such suit, including costs, if any, taxed against the Assured will be borne by the Company whether verdict is for or against the Assured irrespective of the limits of liability expressed in the Policy. In addition to the payment of expenses and costs as provided herein, the Company will reimburse the Assured for interest accrued on such part of the amount of the judgment after entry and payment thereof as shall not exceed the limits of liability expressed, in the *amount of the Company's liability as expressed in the Policy. The Company shall have the right to settle any claim or suit at any time.

Condition D. The Assured shall not voluntarily assume any liability, nor shall the Assured, without the written consent of the Company previously given, incur any expense or settle any claim, except at his own cost, nor interfere in any negotiations for settlement or in any legal proceedings conducted by the Company on account of any claim; except that the Assured may provide at the time of the accident, and at the cost of the Company, such immediate surgical relief as is imperative. Whenever requested by the Company the Assured shall aid in securing information and evidence and the attendance of witnesses, and in effecting settlements and in prosecuting appeals. No action shall lie against the Company to recover upon any claim or for any loss under this Policy, unless brought after the amount of such claim or loss shall have been fixed* after trial of the issue or by agreement be-

*Policy, whether or not the amount of such judgment shall exceed the

*and rendered certain either by final judgment against this Assured.

tween the parties with the written consent of the Company, nor in any event unless brought within two years thereafter.

Condition E. The insolvency or bankruptcy of the Assured 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 Insured is returned unsatisfied in an action brought by the injured, 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 this Company under the terms of this Policy, for the amount of the judgment in the said action not exceeding the limits of liability expressed in this Policy.

Condition F. In case of payment of loss under this Policy the Company shall be subrogated to the amount of such payment to all rights of the Assured against any person or corporation as respects such loss.

Condition G. If the Assured carries other valid insurance against loss and expense arising from an accident covered by this Policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss and expense than the amount hereby insured bears to the total amount of his insurance.

Condition H. No assignment or change of interest under this Policy whether voluntary or

involuntary shall bind the Company unless the written consent of the Company is endorsed hereon, signed by its President or Secretary, but in the event of the death of the Assured, if an individual, this insurance shall continue in force for the benefit of the executors, administrators or trustees of the estate of the Assured for a period, within the terms of this Policy of thirty days from twelve o'clock midnight of the date of such death and not later unless consented to by endorsement as above.

Condition I. The premium is based on the data given in the Schedule.

Condition J. This Policy may be cancelled by the Company at any time by written notice to the Assured at the address given herein, stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company, or by the Assured on retiring from the business to which this insurance relates, the Company shall be entitled to the earned premium, pro rata, when determined. If cancelled by the Assured, except on retiring from said business, the Company shall be entitled to the earned premium calculated by the customary short rate table. In either case the earned premium shall be computed on the said date, but the Company shall retain at least the sum stated in Statement 12 of the Schedule, it being agreed that this sum shall be the minimum earned premium. The check of the Company mailed to the address of the Assured as given herein shall be a sufficient tender.

CONDITION K. Any of the authorized inspectors of the Company shall have the right and opportunity, whenever the Company so desires, to inspect the plant, works, machinery, and appliances of the Assured; and the Company or any of its inspectors may suspend this insurance because of any defect or dangerous condition found in the same. Notice of such suspension and the reason therefor and of the reinstatement of the insurance must be in writing. The pro rata part of the premium for the period of such suspension computed as provided herein shall be returned to the assured on demand.

CONDITION L. No condition or provision of this Policy shall be waived or altered by anyone unless by endorsement hereon signed by the President or Secretary of the Company, nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract or in any part of it.

CONDITION M. No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by the President or the Secretary of the Company.

CONDITION N. 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 in which the business operations herein described are conducted such specific statutory provision shall supersede any such

condition in this contract inconsistent therewith.

CONDITION O. The liability of the Company for loss from an accident resulting in bodily injuries to or in death of one person only is limited to Five Thousand Dollars ($5,000) and, subject to the same limit for each person, the total liability of the Company for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($10,000).

CONDITION P. The period of time during which this Policy shall be in force is Twelve months beginning on the 14th day of March, 1922, at twelve and one minute o'clock A. M., and ending on the 14th day of March, 1923, at twelve and one minute o'clock A. M., standard time, at the place where this Policy has been countersigned.

CONDITION Q. The estimated premium for this Policy is $11.85.

SCHEDULE.

Statement 1: Name of Assured Fannie Burg.

Statement 2: Address of Assured 345-347 Madison Ave., Passaic, N. J.

Statement 3: The Assured is An Individual.

Statement 4: The location of the premises, the number and kind of elevators, if any, their position in building and the number of landings; the floor areas (in square feet) of build-

ing or buildings; the street frontage (in lineal feet) are as follows:

Location of Premises No. 345-347 Madison Ave., Passaic, New Jersey.

Elevators, Kind
Dumbwaiters if any covered hereunder.
Landings
Position in Bldg.
Area of ground Fl.
Total Area 9114.
Street Frontage 57.

Statement 5: The Premium is Computed as follows:

Elevators	———	@ $ ———	$ ———	Payable	
Elevators	———	@ $ ———	$ ———	1st year ———	% $ ———
Area	———	@ $ c	$ ———	2nd year ———	% $ ———
Area	9114	@ $ .08 c	$ 7.29	3rd year ———	% $ ———
Frontage	57	@ $ .08 c	$ 4.56		

Total Annual Premium 11.85

Statement 6: There is no elevator, escalator, or moving platform at any location designated which is not disclosed above, except the following, which are not covered under this Policy: No exceptions.

Statement 7: The premises are occupied as follows: Dwellings.

Statement 8: The interest of the Assured in the premises is that of: Owner.

Statement 9: The assured conducts no business on the premises except as follows: No exceptions.

Statement 10: All elevators, escalators and moving platforms have been accepted from the builders as satisfactory, except as follows: No exceptions.

Statement 11: No similar insurance has been declined or canceled by any Company during the past two years, except as follows: No exceptions.

Statement 12: The minimum premium for this Policy is: $6.00.

Statement 13: There is no other Elevator or General Liability Insurance carried by the Assured on the premises, except as follows: No exceptions.

In Witness Whereof the Union Indemnity Company has caused this Policy to be executed by its President and Secretary, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

W. IRVING MOSS
President
ARTHUR S. HUEY
Secretary

Countersigned by
Thos. D. Saxe
Authorized Agent.

Complaint

(Endorsed):

READ YOUR POLICY.

No. L. O. L. 8847

$11.85

UNION INDEMNITY COMPANY

Cash Capital $1,000,000.00
Executive Offices:
830-836 Union St. New Orleans, La.
Great Eastern Department
100 Maiden Lane, New York
Owners, Landlords, and Tenants
Public Liability
Issued to Fannie Burg
Date of Expiration March 14, 1923.
Thomas D. Saxe

Answer.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law. Answer.

The defendant, Union Indemnity Company, a corporation authorized to transact business in the State of New Jersey, by way of answer to the plaintiffs' complaint says that:

1. Defendant admits on information and belief the allegations contained in paragraph 1 of the complaint.

2. Defendant admits the allegations contained in paragraph 2 of the complaint.

3. Defendant denies the allegations contained in paragraph 3 of the plaintiffs' complaint and refers to said contract, a copy of which is annexed to the complaint, as proof thereof.

4. Defendant has no knowledge or information sufficient to form a belief as to the facts alleged in paragraph 4 of the complaint.

5. Defendant denies the allegations contained in paragraph 5 of the complaint.

6. Defendant admits the allegations contained in paragraph 6 of the plaintiffs' complaint.

7. Defendant admits that it refused to defend said action, but denies that it refused to comply with the obligations it assumed under the terms of the policy annexed to the plaintiffs' complaint, being a policy between Fanny Burg and Union Indemnity Company.

8. Defendant denies the allegations contained in paragraph 8 of the plaintiffs' complaint.

FIRST SEPARATE DEFENSE.

On or about March 14, 1922, one Fanny Burg, was the owner of property known as 345-347 Madison Avenue, Passaic, New Jersey, and secured from the Union Indemnity Company a liability policy known as "Owners, Landlords and Tenants Public Liability Policy." Thereafter on or about November 1, 1922, said Fanny Burg disposed of the aforesaid property.

SECOND SEPARATE DEFENSE.

At the time of the sale of said property and subsequent thereto no compliance was made with condition "H" of said policy, which provides that no assignment or change of interest, whether voluntary or involuntary, shall bind the Company unless the written consent of the Company is endorsed on said policy and signed by the President or Secretary of the Company. Reference is made to said condition in full.

THIRD SEPARATE DEFENSE.

Said policy of insurance provides, condition "L," that no condition or provision of the policy shall be waived or altered by any one unless by endorsement thereon, signed by the President or Secretary of the Company, nor shall notice to any agent or knowledge possessed by any agent or by any other person be held to effect a waiver or change in said contract or in any part of it. No endorsement was ever placed upon said policy in any way changing the terms or conditions thereof.

FOURTH SEPARATE DEFENSE.

There is no privity of contract between Abraham Shyowitz and Mollie Shyowitz and the Union Indemnity Company.

FIFTH SEPARATE DEFENSE.

The defendant reserves the right to move at the trial of said cause of action to strike out the complaint on the ground that it fails to set forth the cause of action against the defendant, Union Indemnity Company.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Defendant.

Reply.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law. Reply.

The plaintiffs, replying to the answer filed by the defendant in the above-entitled cause, say:

Plaintiffs join issue with the defendant as to paragraphs one to eight.

AS TO FIRST SEPARATE DEFENSE.

The plaintiffs admit the allegations alleged in said paragraph but allege that the said policy was obtained through Thomas D. Saxe, who had full authority to execute and deliver same under the terms of said policy.

AS TO SECOND SEPARATE DEFENSE.

The plaintiffs have no knowledge with regard to condition of said policy, but allege that they complied with the said policy in every respect and gave due notice to the said defendant, through its agent, Thomas D. Saxe, who issued an endorsement upon said policy, changing interest to plaintiffs, to which said endorsement and policy plaintiffs beg leave to refer for greater certainty. That the said plaintiffs had no knowledge as to any provision in said policy but that the said Thomas D. Saxe claimed that the said plaintiffs were fully protected under and by virtue of endorsement written on said policy.

AS TO THIRD SEPARATE DEFENSE.

Plaintiffs have no knowledge or information as to provision "L" referred to in said defense but allege that the said defendant, by its agent, Thomas D. Saxe, issued an endorsement, insuring and protecting the interest of the plaintiffs. That the same was done in accordance with authority vested in said Thomas D. Saxe and that said policy was in full force and effect. That the said defendant had knowledge of the said endorsement by Thomas D. Saxe for it retained the premium thereafter and still retains the same and continued said policy in full force and effect from the day of the endorsement up to the time of the expiration of the said policy.

AS TO FOURTH SEPARATE DEFENSE.

Plaintiffs deny each and every allegation contained in said defense.

Reply

As to Further Defense to the First, Second, Third and Fourth Separate Defenses in Answer:

1. The said defendant, by retaining the premium, waived its right to rescind policy and repudiated its liability after the said action.

2. The said defendant had full knowledge of the said endorsement and approved the issuance of the same by retaining the premium.

3. The said defendant is estopped from raising any of the defenses referred to in its said answer.

4. The said Thomas D. Saxe, agent, had full authority to issue the endorsement upon said policy under and by virtue of the terms of said policy.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs.

Order.

NEW JERSEY SUPREME COURT,

Passaic County.

Abraham Shyowitz and Mollie Shyowitz, Plaintiffs, vs. Union Indemnity Company, a corporation, Defendant.	Action at Law. Order.

This matter coming on to be heard before the Honorable Charles C. Black, Justice of the Supreme Court, in the presence of Harry H. Weinberger, Esq., of the firm of Weinberger & Weinberger and of the firm of McDermott, Enright and Carpenter, and it appearing to the Court that notice of application for amendment to the complaint was duly given to the attorneys of the defendant and it appearing to the Court that the said motion should be granted;

It is, on this 5th day of December, 1925, Ordered that the plaintiffs be permitted to file the amendment to the complaint, hereto attached and that said count be added to the said complaint and that the said defendant be permitted to file an answer thereto within 20 days from the date hereof, the usual time being allotted to the plaintiffs to file answering pleading to said answer, and a copy of this order and the proposed supplemental count be served

on the defendant's attorneys within 10 days from the date hereof which copy may be certified by the attorneys of the plaintiff.

CHAS. C. BLACK,
Justice.

Entered Dec. 8, 1925,
on motion of
Weinberger & Weinberger,
Attorneys of Plaintiffs.

Proposed Supplemental Count to Present Complaint.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Proposed Supplemental Count to Present Complaint.

AS AND FOR THE SECOND COUNT.

1. All of the allegations alleged in Paragraphs One, Two, Three, Four and Five of the first count of the said complaint, are made a part of this count.

2. Thereafter an action was instituted by the said Annie Blumkin, and Samuel Blumkin in the Supreme Court of New Jersey.

3. Notice of said action was immediately given to the defendant company. A copy of the summons and complaint was duly delivered to the defendant and its agents, with the request that said company defend said action in accordance with condition "C" of said policy.

4. That the said defendant company refused to defend the said action and refused to comply with the obligations it assumed under the terms of the said policy, with the result that the plaintiffs were compelled to engage counsel to represent them in said action and to defend the said action.

5. That on November 19th and 20th, 1925, the said action was tried in the Passaic Circuit of the New Jersey Supreme Court before Honorable Clifford L. Newman and a jury and two general verdicts rendered, one in favor of the plaintiff, Annie Blumkin in the sum of Fifteen hundred dollars and the other in favor of Samuel Blumkin in the sum of One thousand dollars, which said verdicts became judgments against the said plaintiffs herein, Abraham Shyowitz and Mollie Shyowitz, who were insured under the said policy by the said defendant company and who are obligated to pay the said judgments.

6. That in addition thereto the said plaintiffs

Proposed Supplemental Count to Present Complaint

were forced to expend the sum of Fifteen hundred dollars, in payment of fees and costs and expenses necessary to defend the said action, all of which the defendant company was, under the terms of said policy, obligated to do and pay.

7. That the said plaintiffs, in addition to the foregoing will be compelled to expend considerable moneys in and about the preparation of an appeal to further prosecute the said action on review to the Appellate Courts, for the purpose of avoiding, if possible, the payment of these judgments, and that the said defendant be compelled to pay the additional expenditures, fees and costs which it may be obligated to expend in and about the prosecution of the said appeal in accordance with the terms and provisions of the policy of insurance.

Wherefore, the plaintiffs demand of the defendant the sum of Five thousand dollars together with interest and costs of suit on the second count.

WEINBERGER & WEINBERGER,
Attorneys for Plaintiffs.

Answer to Second and Supplemental Count.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law. Answer to Second and Supplemental Count.

1. Defendant repeats its answers to paragraphs 1, 2, 3, 4 and 5 of the First Count of the complaint with the same force and effect as if set forth herein in full.

2. Defendant has no knowledge or information sufficient to form a belief as to the facts contained in paragraph 2 of the Second Count.

3. Defendant denies the allegations contained in paragraph 3 of the Second Count.

4. Defendant denies the allegations contained in paragraphs 4, 5, 6 and 7 of the Second Count.

FIRST SEPARATE DEFENSE.

Defendant repeats the first separate defense to the First Count.

Answer to Second and Supplemental Count

SECOND SEPARATE DEFENSE.

Defendant repeats the second separate defense to the First Count.

THIRD SEPARATE DEFENSE.

Defendant repeats the third separate defense to the First Count.

FOURTH SEPARATE DEFENSE.

Defendant repeats the fourth separate defense to the First Count.

FIFTH SEPARATE DEFENSE.

The defendant reserves the right to move at the trial of said cause of action to strike out the Second Count on the ground that it fails to set forth a cause of action against the defendant, Union Indemnity Company.

SIXTH SEPARATE DEFENSE.

Defendant assumed no obligations to these plaintiffs under any policy referred to in the complaint.

McDERMOTT, ENRIGHT & CARPENTER,
Attorneys of Defendant.

Reply to Answer to Second and Supplemental Count.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law. Reply to Answer to Second and Supplemental Count.

Plaintiffs, replying to the answer to the second and supplemental count filed by the defendant, say that:

AS TO FIRST, SECOND, THIRD AND FOURTH SEPARATE DEFENSES TO SECOND AND SUPPLEMENTAL COUNT.

Answers to the first, second, third and fourth separate defenses to the first count, are hereby reiterated and made a part of this count.

AS TO FIFTH SEPARATE DEFENSE.

Plaintiffs deny each and every allegation contained in this defense.

AS TO SIXTH SEPARATE DEFENSE.

Plaintiffs deny each and every allegation contained in this defense.

Dated, December 29th, 1925.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs.

Amended Answer.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law. Amended Answer.

The defendant, Union Indemnity Company, a corporation authorized to transact business in the State of New Jersey, by way of answer to the plaintiffs' complaint says that:

ANSWER TO FIRST COUNT:

1. Defendant admits on information and belief the allegations contained in Paragraph 1 of the complaint.

2. Defendant admits the allegations contained in Paragraph 2 of the complaint.

3. Defendant denies the allegations contained in Paragraph 3 of the plaintiffs' complaint and refers to said contract, a copy of which is annexed to the complaint, as proof thereof.

4. Defendant has no knowledge or information sufficient to form a belief as to the facts alleged in Paragraph 4 of the complaint.

Amended Answer

5. Defendant denies the allegations contained in Paragraph 5 of the complaint.

6. Defendant admits the allegations contained in Paragraph 6 of the plaintiffs' complaint.

7. Defendant admits that it refused to defend said action, but denies that it refused to comply with the obligations it assumed under the terms of the policy annexed to the plaintiffs' complaint, being a policy between Fanny Burg and Union Indemnity Company.

8. Defendant denies the allegations contained in Paragraph 8 of the plaintiffs' complaint.

FIRST SEPARATE DEFENSE:

On or about March 14, 1922, one Fanny Burg was the owner of property known as 345-347 Madison Avenue, Passaic, New Jersey, and secured from the Union Indemnity Company, a liability policy known as "Owners, Landlords and Tenants Public Liability Policy." Thereafter on or about November 1, 1922, said Fanny Burg disposed of the aforesaid property.

SECOND SEPARATE DEFENSE:

At the time of the sale of said property and subsequent thereto, no compliance was made with condition "H" of said policy, which provides that no assignment, or change of interest, whether voluntary or involuntary, shall bind the Company unless the written consent of the Company is endorsed on said policy and signed by

the president or secretary of the Company. Reference is made to said condition in full.

THIRD SEPARATE DEFENSE:

Said policy of insurance provides, condition "L," that no condition or provision of the policy shall be waived or altered by any one, unless by endorsement thereon, signed by the president or secretary of the Company, nor shall notice to any agent or knowledge possessed by any agent or by any other person be held to effect a waiver or change in said contract or in any part of it. No endorsement was ever placed upon said policy in any way changing the terms or conditions thereof.

FOURTH SEPARATE DEFENSE:

There is no privity of contract between Abraham Shyowitz and Mollie Shyowitz and the Union Indemnity Company.

FIFTH SEPARATE DEFENSE:

The defendant reserves the right to move at the trial of said cause of action to strike out the complaint on the ground that it fails to set forth a cause of action against the defendant, Union Indemnity Company.

SIXTH SEPARATE DEFENSE:

The policy of insurance upon which this suit is based contained in Paragraph "D" the following condition:

"No action shall lie against the Company to recover upon any claim or for any loss under this policy, unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against this assured after trial of the issue or by agreement between the parties with the written consent of the Company, nor in any event unless brought within two years thereafter."

No amount has been rendered certain by a final judgment against the assured in accordance with said provision of Condition "D."

ANSWER TO SECOND COUNT:

1. Defendant repeats its answers to Paragraphs 1, 2, 3, 4 and 5 of the First Count of the complaint with the same force and effect as if set forth herein in full.

2. Defendant has no knowledge or information sufficient to form a belief as to the facts contained in Paragraph 2 of the Second Count.

3. Defendant denies the allegations contained in Paragraph 3 of the Second Count.

4. Defendant denies the allegations contained in Paragraphs 4, 5, 6 and 7 of the Second Count.

FIRST SEPARATE DEFENSE:

Defendant repeats the first separate defense to the First Count.

SECOND SEPARATE DEFENSE:

Defendant repeats the second separate defense to the First Count.

THIRD SEPARATE DEFENSE:

Defendant repeats the third separate defense to the First Count.

FOURTH SEPARATE DEFENSE:

Defendant repeats the fourth separate defense to the first count.

FIFTH SEPARATE DEFENSE:

The defendant reserves the right to move at the trial of said cause of action to strike out the Second Count on the ground that it fails to set forth a cause of action against the defendant Union Indemnity Company.

SIXTH SEPARATE DEFENSE:

Defendant assumed no obligations to these plaintiffs under any policy referred to in the complaint.

SEVENTH SEPARATE DEFENSE:

The policy of insurance upon which this suit is based contains in Paragraph "D" the following condition:

"No action shall lie against the Company to recover upon any claim or for any loss under this policy, unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against this assured after trial of the issue or by agreement between the parties with the written consent of the Company, nor in any event unless brought within two years thereafter."

No amount has been rendered certain by a final judgment against the assured in accordance with said provision of Condition "D."

McDERMONT, ENRIGHT & CARPENTER,
Attorneys for Defendant.

Reply to Amended Answer.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law.

The plaintiffs, replying to the amended answer filed by the defendant in the above-entitled cause, say:

AS TO FIRST, SECOND, THIRD, FOURTH, FIFTH AND SIXTH SEPARATE DEFENSES:

The plaintiffs deny each and every allegation contained in said defenses.

AS TO FIRST, SECOND, THIRD, FOURTH, FIFTH SIXTH AND SEVENTH SEPARATE DEFENSES TO SECOND COUNT:

The plaintiffs deny each and every allegation contained in said defenses.

WEINBERGER & WEINBERGER,
Attorneys of Plaintiffs.

Rebutter.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law.

The defendant rebutting the reply filed by the plaintiffs in the above entitled cause, say:

1. Defendant denies each and every affirmative allegation contained in plaintiffs' answer to the First Separate Defense set forth in the answer.

2. Defendant denies each and every allegation contained in the reply of the plaintiffs to the second Separate Defense set forth in the defendant's answer.

3. Defendant denies each and every allegation set forth in the plaintiffs' reply to the defendant's Third Separate Defense.

4. Defendant further alleges that it had no knowledge of the plaintiffs' purchase or the change of ownership of the property known as 345-347 Madison Avenue, Passaic, New Jersey, except upon information and belief until the institution of this suit and that defendant had no information to the effect that said property had

been conveyed until defendant was requested to defend a suit involving an alleged accident.

5. The defendant in answer to the plaintiffs' further defense to the First, Second, Third and Fourth Separate Defenses in the answer states that it denies the allegations contained in Paragraphs 1, 2, 3 and 4 of said further separate defense and alleges that it denies retaining said premium with knowledge or proof of change of ownership and further alleges that there was no duty upon the defendant to return said premium and that no money, premium or consideration was paid by the plaintiffs to the defendant for insurance upon said property or as consideration for said policy.

McDermott, Enright & Carpenter,
Attorneys for Defendant.

Rebutter to Second Count.

NEW JERSEY SUPREME COURT,

Passaic County.

Abraham Shyowitz and Mollie Shyowitz, Plaintiffs, vs. Union Indemnity Company, a corporation, Defendant.	Action at Law.

The defendant rebutting the reply filed by the plaintiffs in the above entitled cause, says that:

1. The defendant repeats the allegations, 1, 2, 3, 4 and 5, set forth in the rebutter of the First Count with the same force and effect as if set forth herein in full.

McDermott, Enright & Carpenter,
Attorneys of Defendant.

Postea.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action at Law. Postea.

This case was tried before the Honorable Joseph A. Delaney and a jury in the New Jersey Supreme Court, Passaic County Circuit, on February 2nd and 3rd, 1927. At the close of the plaintiffs' case the Court ordered a judgment of non suit in favor of the defendant and against the plaintiffs.

JOS. A. DELANEY,
Judge.

Judgment of Non-suit.

NEW JERSEY SUPREME COURT.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs, vs. UNION INDEMNITY COMPANY, a corporation, Defendant.	Action-at-Law.

This case was tried before the Honorable Joseph A. Delaney and a jury in the New Jersey Supreme Court, Passaic County Circuit, on February 2nd and 3rd, 1927. At the close of the plaintiffs' case the Court ordered a judgment of non-suit in favor of the defendant and against the plaintiffs.

Whereupon it is adjudged that the complaint of the plaintiffs be dismissed, and that the defendant, Union Indemnity Company, a corporation do recover of the said plaintiffs, Abraham Shyowitz and Mollie Shyowitz its costs which have been taxed at the sum of Thirty-nine dollars and ten cents.

Costs $39.10.

Judgment entered February 9, 1927.

WM. S. GUMMERE,
C. J.

Testimony.

PASSAIC SUPREME COURT.

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ,
Plaintiffs,
vs.
THE UNION INDEMNITY COMPANY, a corporation,
Defendant.

Before: Hon. Joseph A. Delaney and a jury.

Paterson, N. J., February 2, 1927.

Appearances:

Weinberger & Weinberger, Jacob I. Jaffe, Esq., for the plaintiff.

McDermott, Enright & Carpenter, by Carl S. Keebler, for the defendant.

A jury being empanelled and found satisfactory, they were sworn.

Mr. Joseph Weinberger opens for the plaintiff.

Mr. Keebler opens for the defendant.

Mr. H. Weinberger: May I interrupt for the purpose of the record? Does counsel contend that this policy does not bear an endorsement by Mr. Saks, an assignment of interest—

Mr. Keebler: I claim there is no valid assignment under the terms of the policy.

Mr. Weinberger: I take it we can stipulate

a good many of the facts in this case so as to expedite the matter. I therefore—Mr. Keebler, I have a list here you might look at and see if there is any objection to offering that, as is, for the record.

Mr. Keebler: I have been over this with Mr. Weinberger. I went over that on a previous day and I told him at that time if he testified these were correct charges I would not object, with one objection and that is to the item of "Witnesses, subpoenaes, etc.," one hundred and fifty dollars. Any sums paid to witnesses are not taxed costs, and any additional sum I do not believe the company would be liable for.

Mr. Weinberger: I think counsel is right about that matter, and we will have that stricken off the list.

The Court: All right.

Mr. Weinberger: We offer in evidence that statement as amended and ask that it be marked Exhibit P2 for the plaintiff. May I offer the policy first so as to keep the record straight? Policy 8847, policy of the Union Indemnity Company. I ask that that policy be marked in evidence. LOL 8847, Owners, Landlords and Tenants Public Liability Policy of the Union Indemnity Company, issued originally to Fannie Burg of No. 345-347 Madison Avenue, Passaic, for the property Number 345-347 Madison Avenue, Passaic, and an endorsement appearing thereon dated November third, 1922, the title in this policy is hereby vested in the name of Abraham Shyowitz and Mollie Shyowitz, his wife, and not as heretofore. Then the number of the policy and so forth. Signed Thomas D. Saks, agent. I ask that that policy be marked Exhibit P1.

Mr. Keebler: I object to the admission of this policy in evidence. In the first place, the policy does not conform to the pleadings in this case, in that it contains an alleged endorsement by the agent which is not a copy of the policy contained in the pleadings. In the second place, there is no privity of contract, between the plaintiffs and defendant, even under the policy as exists at the present time. The policy is one issued to Fanny Burg, and there is no assignment or change of interest endorsed on the policy as required by Provision H of the policy, which reading from the policy itself provides: That no assignment or change of interest under this policy whether voluntary or involuntary shall bind the company unless written consent is endorsed hereon signed by the president or secretary. The endorsement or purported endorsement on this policy is signed by Thomas Saks, agent, and not by the president or secretary of the company. For the further reason that the agent Saks had no authority to make any such endorsement according to the terms of the policy and according to Condition H of the policy. For the further reason that the policy in Condition L that no condition or provision of this policy shall be waived or altered by anyone unless by endorsement hereon signed by the president or secretary of the company, nor shall notice to any agent nor shall knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract or in any part of it.

For this reason I object to the admission of the policy in evidence. The policy of course being entirely the basis of the action here, if

the policy does not bind and is not, as we contend, a contract existing between the plaintiff and defendant in this action, it certainly cannot be admissable in evidence.

Mr. Weinberger: My friend reads several provisions of the policy as the reason why the policy should not be admitted in evidence. Obviously those reasons must be before the Court before he can read them. The policy either goes in or it does not, but there must be some legal objection to the policy. No legal objection has been offered. That is the policy of the defendant company, it goes in evidence as the document of the defendant. That is what we are offering it for. Their pleadings admit the policy. If later on we come to the question as to whether or not there is a bar or defense under the policy, that is another question. I don't understand how this objection has any application to the offer. We offer the policy, a document of the defendant, issued by them.

The Court: As I understand it, the primary point is it is not evidential for the reason it is not a contract between the plaintiff and defendant in this suit.

Mr. Keebler: That is my point, your Honor.

Mr. Weinberger: The policy itself is being offered. It provides an agreement between the plaintiff in this case and the defendant company. Counsel asks to invalidate that assignment by referring a provision under the contract. I will meet that when the time comes. I am now offering the contract—

The Court: Have it marked for identification

Policy marked Exhibit P1 for identification for the plaintiff.

Plaintiff's Witness, Thomas D. Saxe, Cross

THOMAS D. SAXE, sworn for the plaintiff.

Direct-examination by Mr. H. Weinberger:

Q. You live in the City of Passaic? A. I do.
Q. You have lived there how long? A. All my life.
Q. What is your business? A. Insurance.
Q. On the date of the issuance of this policy, were you the authorized agent of the Union Indemnity Company? A. I was.

Mr. Keebler: I object to that policy, I don't think it is in evidence. It is marked for identification but not in evidence.

Mr. Weinberger: I am not putting it in evidence.

Q. As the authorized agent of the Union Indemnity Company, did you issue Policy LOL 8847? A. I did.
Q. Have you received the payment therefor? A. I did.
Q. You received it as the authorized agent of the company? A. I did.

Mr. Weinberger: I offer it in evidence.

Mr. Keebler: I object to it for the same reasons stated heretofore.

The Court: Have you any further examination of this witness?

CROSS-EXAMINATION by Mr. Keebler:

Q. You issued the policy to Fanny Burg, did you not? A. I did originally, yes, sir.

Plaintiff's Witness, Thomas D. Saxe, Re-direct

Q. Fannie Burg applied to you for the policy? A. Through her broker.
Q. Did you make out an application for Fannie Burg for the policy? A. I don't remember whether I did or didn't. I know I had the policy issued.
Q. You had the policy issued by the New York office of the Company? A. They mailed it in to me, yes.
Q. They mailed the policy to you? A. Yes.
Q. They issued the policy based upon facts which you supplied them? A. Yes, sir.
Q. You then countersigned the policy? A. I did.
Q. And delivered it to Fannie Burg? A. Delivered it to her broker.
Q. The endorsement referred to by Mr. Weinberger, the purported endorsement was signed by you? A. It was.

RE-DIRECT EXAMINATION by Mr. Weinberger:

Q. And in accordance with the practice of the company, did you notify the company of the fact that this policy was delivered after you received it from the home office in New York? A. Yes, sir.
Q. And you received the premium therefor? A. I did.
Q. And made remittance to the company in accordance with your practice too? A. Yes, sir.
Q. They got the money? A. Yes, sir.

Q. Which paid for the policy of insurance? A. Yes, sir.

Q. And thereafter when you endorsed this policy, November third, nineteen hundred and twenty-two—I show you specifically the endorsement in Exhibit P1 for identification and ask you if that is your signature? A. I did.

Q. Did you fix it so the title under the policy was thereafter invested in the name of Abe Shyowitz and Mollie Shyowitz as the assured for the same policy? A. I did.

Mr. Keebler: I object to it as calling for a conclusion.

Mr. Weinberger: I will withdraw the question.

Q. Thereafter did you put the endorsement appearing thereon, dated November third, nineteen hundred and twenty-two, which I read to you, appearing in the policy, attached to the policy as part of it? Title in this policy is hereafter vested in the name of Abraham Shyowitz and Mollie Shyowitz as owners and not as heretofore attached to and forming part of Policy LOL 8847. A. I did.

Q. Did you send a copy of that to the insurance company in accordance with the practice to notify them of a change of ownership? A. I did.

Q. You are the authorized agent of this company? A. I am.

Q. And were at that time? A. I was.

Q. You had occasion to issue a good many policies? A. I did.

Q. And did issue policies? A. Yes, sir.

Q. Was this the practice in each one of the instances? A. (No audible response.)

Q. I don't get the answer? A. Yes, sir.

Mr. Weinberger: I now offer the policy.

Mr. Keebler: I object to the policy for the same reasons stated heretofore in the original offer. This is a policy which is not binding upon the defendant as far as these plaintiffs are concerned. The contract is between Fannie Burg and the Union Indemnity Company.

Mr. Weinberger: Now, I offer it as Exhibit P1 in evidence.

Mr. Keebler: I object to it for the same reasons stated heretofore.

The Court: Proceed with your case. I shall withhold my judgment on it presently.

Mr. Weinberger: I am prepared to argue the question.

The Court: That is what I want to get to. I would like the question argued.

(Counsel present argument to the Court.)

The Court: I understand the whole situation and no further argument, as I see it, will change the Court's determination. I am quite satisfied that the position of the defendant is correct, and I shall sustain the motion, not to allow this policy in evidence. I shall order a non-suit entered and an exception will be noted to the Court's ruling, so Mr. Weinberger may be in a position to take the matter up.

Mr. Weinberger: So that we may have our record straight and get your Honor's ruling then, may I offer my evidence so as to have my case in, so that the Supreme Court won't later say that we didn't offer our evidence. Your Honor is going to exclude this policy upon the theory, no matter what evidence I offer, your Honor won't receive it.

The Court: Yes, that is, of course, based upon the argument you gentlemen made, which we assume is the position you would take on an application asking the Court to direct a verdict. We haven't any desire to put you in a position that would interfere with your rights in the court above.

Mr. Weinberger: We are over the period under the Statute of Limitations and we would be barred in this action if a nonsuit is granted and I would like to have my record—

Mr. Keebler: I don't think his action is barred. I think he can go up on a refusal of the Court to admit the contract in evidence just as easy.

The Court: What harm is done the defendant by accepting the plaintiff's counsel's proposition.

Mr. Keebler: Over my objection with the understanding the Court will make the same ruling.

The Court: The Court has made a ruling but counsel desires to perfect the record. Can there be any serious objection to that?

Plaintiff's Witness, Thomas D. Saxe, Re-direct

Mr. Keebler: I don't want to consent to the contract going in.

The Court: The contract is not going into evidence, I have ruled on that.

Mr. Keebler: I don't understand Mr. Weinberger's proposition.

The Court: The Court will withhold it's determination on the admission of the contract in evidence. If counsel has further evidence to offer he may do so. I will then make the ruling on it's admission in evidence which I have already indicated.

RE-DIRECT EXAMINATION by Mr. Weinberger:

Q. Referring to Exhibit P1 for identification, after you affixed this signature of yours to this particular binder, you sent the binder to the company, did you?

The Court: The witness has already testified to that.

Q. After you did that whom did you deliver the policy to? A. Barney Richmond, broker.

Q. The company retained the premium? A. They did.

Q. This policy, referring to Exhibit P1, is dated the fourteenth day of March, nineteen hundred and twenty-two? A. Yes, sir.

Q. The premium was paid for what time? A. Twelve months.

Q. The change was noted on what date? A. November third, nineteen twenty-two.

Q. Within the year? A. Yes, sir.

Q. The company retained the excess premium from the third of November down to the date of the expiration of the policy, so far as you know? A. They did.

Q. As a matter of fact was this done in accordance with the practice which you had in issuing all policies and noting all changes of ownership?

Mr. Keebler: I object to that.

The Court: I shall sustain the objection. We are not interested in the general practice. What was done in this particular case.

Q. What have you to say as to what you did in this case, was it in conformity with the rules of your company or not?

Mr. Keebler: I object to that. That is covered by the terms of the contract itself and not by the action of any agent.

The Court: That is true, however I will admit it.

Mr. Keebler: I ask an exception.

The Court: Your exception will be noted This case is not going to the jury, you know.

Q. How long were you the agent for this company? A. Well, I guess about two years.

Q. Did you issue any other policies for this company? A. Yes—

Mr. Keebler: I object to it as immaterial.

The Court: I shall sustain the objection.

Mr. Weinberger: If your Honor please—

The Court: An exception is noted.

Q. Have you had occasion to issue policies with regard to owners, landlords and tenants public liability? A. Yes, sir.

Q. What have you to say with regard to endorsements of change of ownership as compared with the policy in this instance?

Mr. Keebler: I object to it.

The Court: I will sustain the objection.

Mr. Weinberger: I ask my exception.

The Court: Your exception is noted.

Q. Were these premises the same premises that are described in the policy, the property you insured for Shyowitz and wife? A. Yes, sir, the same premises.

Mr. Weinberger: I guess you admit that notification of the accident and notice of suit and trial and judgment, and the amount of damage agreed upon as per stipulation so we can have it as part of the record.

Mr. Keebler: We were called upon to defend a suit and refused to defend it by reason of the fact that we did not cover Abraham and Mollie Shyowitz.

The Court: Have you everything in the record you desire now, Mr. Weinberger?

Mr. Weinberger: For the purpose of the record I take it your Honor is going to dispose of this case on the one question of law.

The Court: Yes. I will order a non-suit entered in this matter.

Exhibit P1 in Evidence for Plaintiff

Mr. Keebler: Maybe I should make the motion simply to move for a non-suit.

The Court: I have ordered a non-suit entered

Mr. Weinberger: To which I respectfully except.

Exhibit P1 in Evidence for Plaintiff.

Policy of insurance; heretofore appearing in the record, forming a part of the complaint ir this action.

Exhibit P2 in Evidence for Plaintiff.

Shyowitz vs. Union Indemnity Co.

Disbursements.

Creditors	Amount of bill	Interest on money
George P. Kelley—testimony	$146.50	
W. W. Russell "	136.00	3.92
Reporter Co.—State of Case	234.90	10.57
G. P. Kelley—testimony	25.00	1.80
J. F. Lee "	33.50	4.50
W & W & Jaffe Services	500.00	
W & W Appeal "	350.00	
	$1,425.90	$56.79
Other disbursements		
Photographer	50.00	
	$1,625.90	
Interest on disbursements	56.79	
	$1,682.69	
Amount of Judgment	2,500.00	
Interest on Judgment to February 1, 1927	177.00	
Costs	218.27	
Total amount due		$4,577.96
		150.00
		$4,427.96

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No. L O.L. 8847

OWNERS, LANDLO

Uni

EXECUTIVE OFFICES:
830-836 Union St.,

READ YOUR POLICY
No. L.O.L. 8847
$ 11.85
Union Insurance

2	Days
3	"
4	"
5	"
6	"
7	"
8	"
9	"
10	"
11	"
12	"
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80	"
85	"
90	" or 3 Months
105	"
120	" or 4 Months
135	"
150	" or 5 Months
165	"
180	" or 6 Months
195	"
210	" or 7 Months
225	"
240	" or 8 Months
255	"

54 OCT.T.1927

No. L O.L. 8847

20-3
5m—6001-11000
3-21

OWNERS, LANDLORDS AND TENANTS PUBLIC LIABILITY

Union Indemnity Company

EXECUTIVE OFFICES:
830-836 Union St.,
NEW ORELANS, LA.

GREAT EASTERN DEP'T:
100 Maiden Lane,
New York.

In Consideration of the payment of the estimated premium and of the statements contained in the Schedule hereinafter set forth, which statements the Assured makes on the acceptance of this Policy and warrants to be true, the

UNION INDEMNITY COMPANY

herein called the Company, does hereby agree to indemnify the Assured designated in the said Schedule AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED, for damages on account of bodily injuries accidentally suffered or alleged to have been suffered while this Policy is in force, including death resulting at any time therefrom, by any person or persons not employed by the Assured, except such as are excluded by Condition "A" hereof, while within the premises described in Statement No. 4 of the Schedule, or upon the sidewalk or other ways or yards, or vacant property, immediately adjacent thereto provided for the use of the public subject to the following conditions:

CONDITION A. This Policy does not cover loss from liability for injuries or death under any compensation law or agreement or plan, unless extended by rider or endorsement to specifically cover such liability, nor caused by—(1) Any minor employed by the Assured contrary to any law restricting the age of employment or any minor employed under fourteen years of age where no statute restricts the age of employment; (2) Any elevator attendant employed by the Assured under the age fixed by law for elevator attendants, or under the age of eighteen years where no age is fixed by law, or any person in or about any elevator while such elevator is in charge of such attendant nor suffered or caused by—(3) Any person during the making of additions to or structural alterations in or extraordinary repairs of any elevator plant, unless a written permit is granted by the Company specifically describing the work; but no elevator shall be used for any service while additions, alterations or repairs of any kind are being made in or about such elevator; (4) Any person engaged in making additions to or alterations in the building or engaged in making repairs of any kind when more than ten days' time is required for the whole work; (5) Any person before the premises have been completed ready for occupancy; (6) Any person by reason of the manufacture or presence of any material intended for use as an explosive; (7) Any person while in or about any elevator, escalator or moving platform not described in Statement No. 4 of the Schedule as covered under the Policy; (8) Any person through the use of horses or other draft animals, or any vehicle including automobiles; (9) Any person or persons in consequence of any professional error, mistakes or malpractice, actual or alleged, by any Physician, Dentist, Chiropodist or other person engaged in a professional occupation.

CONDITION B. Upon the occurrence of an accident the Assured shall give immediate written notice thereof with the fullest information obtainable at the time to the Executive Office of the Company in New Orleans, Louisiana, or New York, N. Y., or to its duly authorized agent. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in his power.

CONDITION C. If thereafter any suit is brought against the Assured to enforce such a claim for damages, the Assured shall immediately forward to such Executive Office of the Company every summons or other process as soon as the same shall have been served on him, and the Company will defend such suit, whether groundless or not, in the name and on behalf of the Assured; the expenses incurred by the Company in defending such suit, including costs, if any, taxed against the Assured will be borne by the Company whether verdict is for or against the Assured irrespective of the limits of liability expressed in the Policy. In addition to the payment of expenses and costs as provided herein, the Company will reimburse the Assured for interest accrued on such part of the amount of the judgment after entry and payment thereof as shall not exceed the limits of liability expressed in the Policy, whether or not the amount of such judgment shall exceed the amount of the Company's liability as expressed in the Policy. The Company shall have the right to settle any claim or suit at any time.

CONDITION D. The Assured shall not voluntarily assume any liability, nor shall the Assured, without the written consent of the Company previously given, incur any expense or settle any claim, except at his own cost, nor interfere in any negotiations for settlement or in any legal proceeding conducted by the Company on account of any claim; except that the Assured may provide at the time of the accident, and at the cost of the Company, such immediate surgical relief as is imperative. Whenever requested by the Company, the Assured shall aid in securing information and evidence and the attendance of witnesses, and in effecting settlements and in prosecuting appeals. No action shall lie against the Company to recover upon any claim or for any loss under this Policy, unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against this Assured after trial of the issue or by agreement between the parties with the written consent of the company, nor in any event unless brought within two years thereafter.

CONDITION E. 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 Insured is returned unsatisfied in an action brought by the injured, 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 this Company under the terms of this Policy, for the amount of the judgment in the said action not exceeding the limits of liability expressed in this Policy.

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CONDITION F. In case of payment of loss under this Policy the Company shall be subrogated to the amount of such payment to all rights of the Assured against any person or corporation as respects such loss.

CONDITION G. If the Assured carries other valid insurance against loss and expense arising from an accident covered by this Policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss and expense than the amount hereby insured bears to the total amount of his insurance.

CONDITION H. No assignment or change of interest under this Policy whether voluntary or involuntary shall bind the Company unless the written consent of the Company is endorsed hereon, signed by its President or Secretary, but in the event of the death of the Assured, if an individual, this insurance shall continue in force for the benefit of the executors, administrators or trustees of the estate of the Assured for a period, within the term of this Policy of thirty days from twelve o'clock mid-night of the date of such death and not loter unless consented to by endorsement as above.

CONDITION I. The premium is based on the data given in the Schedule.

CONDITION J. This Policy may be canceled by the Company at any time by written notice to the Assured at the address given herein, stating when the cancellation shall be effective. It may be canceled by the Assured by like notice to the Company. If canceled by the Company, or by the Assured on retiring from the business to which this insurance relates, the Company shall be entitled to the earned premium, pro rata, when determined. If canceled by the Assured, except on retiring from said business, the Company shall be entitled to the earned premium calculated by the customary short-rate table. In either case the earned premium shall be computed on the said data, but the Company shall retain at least the sum stated in Statement 12 of the Schedule, it being agreed that this sum shall be the minimum earned premium. The check of the Company mailed to the address of the Assured as given herein shall be a sufficient tender.

CONDITION K. Any of the authorized inspectors of the Company shall have the right and opportunity, whenever the Company so desires, to inspect the plant, works, machinery and appliances of the Assured; and the Company or any of its inspectors may suspend this insurance because of any defect or dangerous condition found in the same. Notice of such suspension and the reason therefor and of the reinstatement of the insurance must be in writing. The pro rata part of the premium for the period of such suspension, computed as provided herein, shall be returned to the Assured on demand.

CONDITION L. No condition or provision of this Policy shall be waived or altered by anyone unless by endorsement hereon signed by the President or Secretary of the Company, nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract or in any part of it.

CONDITION M. No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by the President or the Secretary of the Company.

CONDITION N. 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 in which the business operations herein described are conducted, such specific statutory provision shall supersede any such condition in this contract inconsistent therewith

CONDITION O. The liability of the Company for loss from an accident resulting in bodily injuries to or in death of one person only is limited to Five Thousand Dollars ($ 5,000) and, subject to the same limit for each person, the total liability of the Company for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand Dollars ($ 10,000)

CONDITION P. The period of time during which this Policy shall be in force is Twelve months beginning on the 14th day of March 1922, at twelve and one minute o'clock A. M., and ending on the 14th day of March 1923, at twelve and one minute o'clock A. M., standard time, at the place where this Policy has been countersigned.

CONDITION Q. The estimated premium for this Policy is $ 11.85

54 OCT.T.1927

November 3rd, 1922.

Title in this policy is hereby vested in the name of Abraham Shyowitz and Mollie Shyowitz, his wife, as owners, and not as heretofore.

Attached to and forming part of policy # LOL--8847 of the Union Indemnity Company, issued to Fannie Burg.

Agent.

Passaic, New Jersey		covered hereunder						

*(State whether passenger; freight; passenger and freight; sidewalk; one-story inside building; or hand hoist or escalator or moving platform.)

Statement 5: The Premium is computed as follows:

Elevators.....@ $.....=$.....
Elevators.....@ $.....=$.....
Area.....@ .....c.=$.....
Area 9114 @ .08 c.=$ 7.29
Frontage 57 @ .08 c.=$ 4.56

PAYABLE

1st year.....%=$.....
2nd year.....%=$.....
3rd year.....%=$.....

Total Annual Premium $ 11.85 ×3=$.....Less 10% = $.....

Statement 6: There is no elevator, escalator or moving platform at any location not reported above, except the following, which are not covered under this Policy: No exceptions.

Statement 7: The premises are occupied as follows: Dwellings

Statement 8: The interest of the Assured in the premises is that of Owner
(State whether owner, trustee, lessee, or tenant.

Statement 9: The Assured conducts no business on the premises, except as follows: No exceptions.

Statement 10: All elevators, escalators and moving platforms have been accepted from the builders as satisfactory, except as follows: No exceptions.

Statement 11: No similar insurance has been declined or canceled by any Company during the past two years, except as follows: No exceptions.

Statement 12: The minimum premium for this Policy is $ 6.00

Statement 13: There is no other Elevator or General Liability Insurance carried by the Assured on the premises, except as follows: No exceptions.

In Witness Whereof the UNION INDEMNITY COMPANY has caused this Policy to be executed by its President and Secretary, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

Countersigned by

W. Irving Mass
President.

Arthur J. Huey
Secretary.

Authorized Agent

54 OCT.T.1927

HJB 3/15/22

SCHEDULE

Statement 1: Name of Assured Fannie Burg

Statement 2: Address of Assured 345-347 Madison Avenue, Passaic, New Jersey
(State street and town and county and state where HEAD OFFICE is located.)

Statement 3: The Assured is An Individual
(State whether individual or co-partnership or corporation or receiver or other trustee.)

Statement 4: The location of the premises; the number and kind of elevators, if any, their position in building and the number of landings; the floor areas (in square feet) of building or buildings; the street frontage (in lineal feet) are as follows:

LOCATION OF PREMISES	ELEVATORS				Area of Ground Floor in Square Feet	Number of Stories	Total Area in Square Feet	Street Frontage in Lineal Feet
	Number	*Kind	Landings	Position in Building				
345-347 Madison Avenue		Dumbwaiters if any					9114	57
Passaic, New Jersey		covered hereunder						

*(State whether passenger; freight; passenger and freight; sidewalk; one-story inside building; or hand hoist or escalator or moving platform.)

Statement 5: The Premium is computed as follows:

Elevators	@ $		=$	PAYABLE	
Elevators	@ $		=$	1st year	%=$
Area	@		c.=$	2nd year	%=$
Area 9114	@ .08		c.=$ 7.29	3rd year	%=$
Frontage 57	@ .08		c.=$ 4.56		

Total Annual Premium $ 11.85 ×3=$ Less 10% = $

Statement 6: There is no elevator, escalator or moving platform at any location not reported above, except the following, which are not covered under this Policy: No exceptions.

Statement 7: The premises are occupied as follows: Dwellings

Statement 8: The interest of the Assured in the premises is that of Owner
(State whether owner, trustee, lessee, or tenant.

Statement 9: The Assured conducts no business on the premises, except as follows: No exceptions.

Statement 10: All elevators, escalators and moving platforms have been accepted from the builders as satisfactory, except as follows: No exceptions.

Statement 11: No similar insurance has been declined or canceled by any Company during the past two years, except as follows: No exceptions.

Statement 12: The minimum premium for this Policy is $ 6.00

Statement 13: There is no other Elevator or General Liability Insurance carried by the Assured on the premises, except as follows: No exceptions.

In Witness Whereof the UNION INDEMNITY COMPANY has caused this Policy to be executed by its President and Secretary, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

W. Irving Moss
President.

Arthur J. Hoey
Secretary.

Countersigned by

Authorized Agent

SHORT RATE TABLE.

Not Applicable to Iowa Risks.

ONE YEAR PREMIUM EARNED	Ann'l Prem. Per Cent.
1 Day	2
2 Days	4
3 "	5
4 "	6
5 "	7
6 "	8
7 "	9
8 "	9
9 "	10
10 "	10
11 "	11
12 "	12
13 "	13
14 "	13
15 "	14
16 "	14
17 "	15
18 "	16
19 "	16
20 "	17
25 "	19
30 "	20
35 "	23
40 "	26
45 "	27
50 "	28
55 "	29
60 "	30
65 "	33
70 "	36
75 "	37
80 "	38
85 "	39
90 " or 3 Months	40
105 "	45
120 " or 4 Months	50
135 "	55
150 " or 5 Months	60
165 "	65
180 " or 6 Months	70
195 "	73
210 " or 7 Months	75
225 "	78
240 " or 8 Months	80
255 "	83
270 Days or 9 Months	85
285 "	88
300 " or 10 Months	90
315 "	93
330 " or 11 Months	95
360 " or 12 Months	100

THREE YEARS PREMIUM EARNED	Ann'l Prem. Per Cent.
1 Month	10
2 Months	17
3 "	20
4 "	23
5 "	27
6 "	30
7 "	33
8 "	37
9 "	40
10 "	43
11 "	47
12 "	50
13 "	53
14 "	57
15 "	60
16 "	63
17 "	67
18 "	70
19 "	72
20 "	73
21 "	75
22 "	77
23 "	79
24 "	80
25 "	81
26 "	83
27 "	85
28 "	86
29 "	88
30 "	90
31 "	91
32 "	93
33 "	95
34 "	96
35 "	98
36 "	100

Marked Exhibit P-1
for Identification
Date
JOHN F. LEE, JR.
Stenographer

READ YOUR POLICY

No. L.O.L. 8847

$ 11.85

Union Indemnity Company

CASH CAPITAL, $1,000,000.00

EXECUTIVE OFFICES:
826-836 Union Street, New Orleans, La.
GREAT EASTERN DEPARTMENT:
160 Maiden Lane, New York.

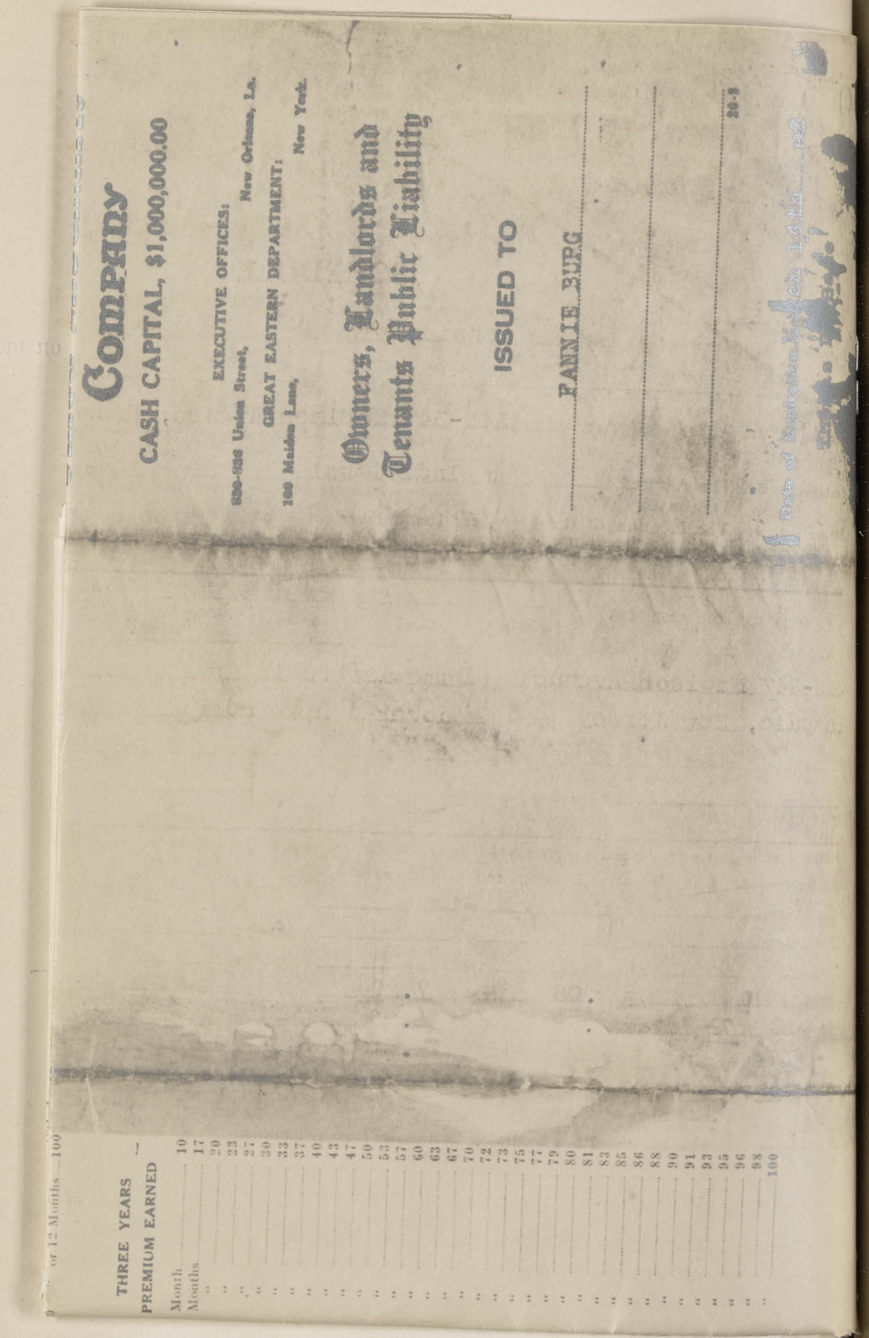
Owners, Landlords and Tenants Public Liability

ISSUED TO

FANNIE BURG

20-3

Date of Expiration March 14th 1916



New Jersey Court of Errors and Appeals

ABRAHAM SHYOWITZ and MOLLIE SHYOWITZ, Plaintiffs-Appellants, *vs.* UNION INDEMNITY COMPANY, a corporation, Defendant-Appellee.	On Appeal from New Jersey Supreme Court.

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

Statement.

This case was tried before the Honorable Joseph A. Delaney and a jury in the New Jersey Supreme Court, Passaic County Circuit, on February 2 and 3, 1927. The Court ordered a judgment of nonsuit in favor of the defendant and against the plaintiff.

Statement of Facts.

The defendant, Union Indemnity Company, is an insurance company duly authorized, among other things, to insure owners, landlords and tenants against public liability. It issued a policy No. LOL-8847 to Fanny Burg of 345-347 Madison Avenue, Passaic, N. J., insuring her for the public liability which she might incur by reason of her ownership of said property. Said policy was effective for twelve months, beginning March 14, 1922.

It was signed by the president and secretary of the Company and countersigned by Thos. D. Saxe, authorized agent. The premium, amounting to $11.85, was paid to the Union Indemnity Company by the assured Fanny Burg. A copy of the policy is annexed to the complaint (State of Case, pp. 6-16).

This suit was instituted by Abraham Shyowitz and Mollie Shyowitz alleging that while the policy was in force and effect, one Annie Blumkin, living in the premises, sustained bodily injury as the result of a fall while walking about the said premises; that the plaintiffs gave notice of said claim to the defendant; that suit was instituted against the plaintiffs by Annie Blumkin and Samuel Blumkin in the Common Pleas Court, Passaic County, and that the defendant refused to defend said action and that the plaintiffs were forced to expend money in preparation for trial and the defense of said suit. The policy, it will be recalled, was issued to Fanny Burg.

A supplemental count was later added to the complaint alleging that Annie Blumkin and Samuel Blumkin instituted suit against the plaintiffs in the Supreme Court, Passaic County; that the defendants were requested to defend said suit and refused to defend same and that the trial of said cause of action resulted in a verdict of $1,500 in favor of Annie Blumkin and $1,000 in favor of Samuel Blumkin. The plaintiffs claimed reimbursement of said sums together with attorney's fees and cost of appeal.

In answer to both counts, the defendant denies receiving any premium from the plaintiffs Abraham Shyowitz and Mollie Shyowitz, denied any knowledge or information of any accident and admitted that it refused to defend the plaintiffs in the suit in the Common Pleas Court of Passaic County, as well as the suit in the Supreme Court,

Passaic County. It denied that it refused to comply with any of its obligations under the terms of its policy issued to Fanny Burg.

In further defense of said suit the defendant alleged that on November 1, 1922, Fanny Burg disposed of the aforesaid property, although the defendant had no knowledge of the purchase of said property by Abraham Shyowitz and Mollie Shyowitz, except upon information and belief, until the institution of said suit and the defendant had no information to the effect that said property had been conveyed, until the defendant was requested to defend the plaintiffs in an accident involving said property. It was further alleged by the defendant that at the time of the sale of said property and subsequent thereto, no compliance was made with condition "H" of said policy, which provides as follows (State of Case, p. 10):

> "Condition H. No assignment or change of interest under this Policy whether voluntary or involuntary shall bind the Company unless the written consent of the Company is endorsed hereon, signed by its President or Secretary, but in the event of the death of the Assured, if an individual, this insurance shall continue in force for the benefit of the executors, administrators or trustees of the estate of the Assured for a period, within the terms of this Policy of thirty days from twelve o'clock midnight of the date of such death and not later unless consented to by endorsement as above."

The defendant also set forth as a defense the provisions of Condition "L" of said policy (State of Case, p. 12):

> "Condition L. No condition or provision of this Policy shall be waived or altered by anyone unless by endorsement hereon signed by the President or Secretary of the Company, nor shall notice to any agent, nor shall

knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract or in any part of it.''

In addition the defendant by its answer alleged that there was no privity of contract between Abraham Shyowitz and Mollie Shyowitz and the Union Indemnity Company.

A copy of the Policy is annexed to the complaint in the State of Case and it will be seen that it *does not include any endorsement of change of ownership.*

At the trial the original policy was produced, to which was annexed what purported to be an endorsement of change of ownership. It was typewritten on a plain slip of typewriter paper and read as follows:

''The title in this Policy is hereby vested in the name of Abraham Shyowitz and Mollie Shyowitz his wife, as owners and not as heretofore. Attached to and forming a part of Policy No. LOL-8847 of the Union Indemnity Company issued to Fanny Berg.

THOS. D. SAXE,
Agent.''

We objected to admission of the policy on the following grounds:

1. The policy did not conform to the pleadings in that annexed to it was an alleged endorsement of change of ownership by the agent which was not a copy of the policy contained in the pleadings.

2. Because there was no privity of contract between the plaintiffs and the defendant.

3. Because there was no assignment or change of interest endorsed on the policy, as required by provision ''H'' of the policy.

4. Because the agent, Thos. B. Saxe, did not have authority to make any such endorsement of

change of ownership by reason of Condition ''H'' of the policy.

5. Because there was no endorsement annexed to the policy as provided by Condition ''L'', waiving or altering any condition or provision of the policy, and because said condition further provided that notice to any agent, or knowledge possessed by any agent or by any other person should not be held to effect a waiver or change in the contract or in any part of it.

The only witness produced was Thos. D. Saxe, the agent, who testified that he was the authorized agent of the defendant, Union Indemnity Company, on the date of the issuance of the policy and that the policy was issued to Fanny Berg. Mr. Saxe did not issue this policy himself. He had it issued by the New York office of the Company.

''Q. You had the policy issued by the New York office of the Company? A. They mailed it into me, yes.
Q. They mailed the policy to you? A. Yes.
Q. They issued the policy based upon facts which you supplied them? A. Yes, sir'' (State of Case, p. 47, ls. 10-15).

Mr. Saxe then testified that he signed the policy and delivered it to Fanny Burg. He testified that he received the premium for the policy and delivered it to the Company and that he signed and annexed what purported to be an endorsement, to policy, on November 3, 1922. He testified that as far as he knew, the Company retained the premium which, of course, was the original premium of $11.85 and paid by Fanny Burg. There is no evidence that any additional premium was ever paid by Abraham Shyowitz and Mollie Shyowitz.

The Court, after argument of counsel and consideration of the law, refused to admit the policy in evidence (State of Case, p. 49, l. 30), and ordered a non-suit entered in favor of the defendant.

POINT I.

The Court properly refused to admit in evidence the policy of insurance.

The entire case centered about the policy of insurance which the defendant contended was not a contract between the plaintiffs in this suit and the defendant Company.

In the first place, the alleged policy as offered in evidence did not conform to the policy annexed to the Summons and Complaint. An examination of the complaint will show that the policy annexed thereto, does not contain any endorsement whatsoever of change of ownership, but is distinctly a policy between Fanny Burg and the Union Indemnity Company. Thus, according to the pleadings, there was no privity of contract between the plaintiffs in this suit, Abraham and Mollie Shyowitz, and the defendant.

The policy as offered did contain, what purported to be, an endorsement of change of ownership, but this endorsement did not conform with the requirements of provision "H" of the policy. It was signed "Thos. D. Saxe, Agent"; whereas the policy provided that such endorsement should be signed by the President or Secretary of the Company.

It has been held in this State repeatedly that conditions of policies such as condition "H" in this policy are valid, limit the authority of the agent, and cannot be waived.

One of the early cases in this State was *Catoir* v. *The American Life Insurance and Trust Company,* 33 N. J. L. 487, decided by the Court of Errors and Appeals. In that case suit was instituted on a life insurance policy of the plaintiff's

wife. A quarterly premium was due on September 8th, but was not paid. Twenty-three days thereafter the plaintiff tendered to the agent the premium, which was refused because of the sickness of the wife. At the trial the plaintiff tried to show verbally a waiver of the condition of the policy as to payment of premiums made by the agent. The policy contained conditions providing that the agent was not authorized to accept premiums other than the first one, receipt of which was acknowledged in the policy. The Court held (p. 491):

> "He is estopped by accepting the policy, from setting up in this case, powers in the agent at that time, in opposition to the limitation of the conditions. It being clear, from the policy, in what respect the authority of the agent was restricted at the time of the policy, there is nothing in the plaintiff's evidence to justify a jury in finding that any additional authority was afterwards given by the company, either express of implied to relieve the plaintiff from a strict payment of the premium when due."

The policy also provided that it should be void and of no effect if the quarterly premiums were not paid on or before the day specified. In this connection the Court held (p. 489):

> "There can be no objection to a provision of this kind. It is salutary and wise for the solvency and success of corporations like the defendants. The insurance is accepted upon those terms. They form part of the written contract upon which the claim for the benefit of it is based, and the plaintiff is bound to a strict performance of them, unless such performance is legally modified by the company."

The Court later says:

> "The result of the non-payment of that premium was to forfeit the policy, unless the

> plaintiff showed that the company had legally waived the payment as it became due. * * * It will be seen at once, that it is an effort to show a verbal waiver of performance by an agent of the company in opposition to the terms of the written policy, and that under seal.
>
> He is estopped by accepting the policy, from setting up in this case, powers in the agent at that time, in opposition to the limitation of the conditions. * * * In the face of a distinct written expression of a want of power in the policy, the plaintiff has no right to infer a power to the contrary against the company by any uncertain signs."

This case was followed in *McClave* v. *Mutual Reserve Fund Life Asso.,* 55 N. J. L. 187.

There a policy was written upon the life of "A" insuring "B" at "A's" death. The policy was not to be binding until delivered to "A" in good health. The agent delivered it to "B" after "A's" death. The agent was General State Agent and his authorization provided "the authority of this agent shall extend no further than as above stated. He shall not make, alter or discharge any contract." The policy provided:

> "No agent of the Association has authority to make, alter or discharge contracts and no alteration of the terms of this contract shall be valid unless said alteration shall be in writing and signed by the President or Vice-President and one other officer of the Association."

The Court referring to the case of *Catoir* v. *The American Life Insurance and Trust Company* holds:

> "An agent cannot bind the defendant to any stipulations other than those set forth in the policy."

In *Dewees* v. *The Manhattan Insurance Company,* 35 N. J. L. 366, it appeared from the evidence that the policy covered a store, stock and furniture. At the time of the fire the building was used in part as a stable and the agent was fully acquainted with these uses as was the owner. There was a clause in the policy making it void, unless the company consented to its use for more hazardous conditions. The plaintiffs tried to vary the terms of the written agreement by showing this knowledge.

Chief Justice Beasley speaking for the Court, said (p. 372):

> "Nor do I think, if this court would sustain the present action that it could be practicable to preserve in any useful form, the great primary rule that written instruments are not to be varied or contradicted by parole evidence * * * A rule of law admitting such evidence would be a repeal of the principle giving a controlling efficacy to written agreements."

Knowledge of an agent cannot in view of this decision alter the terms of a written contract.

The Court of Errors and Appeals reached the same conclusion in *Franklin Fire Insurance Company* v. *Martin,* 40 N. J. L. 568.

In *Millville Mutual Marine and Fire Insurance Co.* v. *Mechanics and Workingmen's B. & L.,* 43 N. J. L. 652, it was held that where there is no limitations upon an agent's authority, he is considered a general agent of the Company. The situation is different, however, where there are expressed limitations in the policy. There were no limitations in the policy issued in the Millville case and there was no evidence to charge the insured with knowledge of any limitations on the agent's authority. The Court refers (p. 657), to *Catoir* v. *The American Life Insurance and Trust Company* and holds, that the power will be re-

garded as general *in the absence of express limitations in the policy* or of notice to the insured of the existence of the restrictions.

In speaking of the Catoir case, the Court said (p. 657):

> "There Mr. Justice Beadle in delivering the opinion of the Court, denied the right of the agent to dispense with a condition in the policy exclusively, for the reason that the policy contained an express limitation of authority."

In the case of *Snyder* v. *Dwelling House Insurance Company,* 59 N. J. L. 544, the Court of Errors and Appeals reverses the Supreme Court, 59 N. J. L. 18, and holds that a stipulation in a contract as to any provision or condition of the policy being changed or waived by none other than an officer, applies to conditions and provisions of the policy which relate to the formation and continuance of the contract of insurance. The case holds that where an agent is entrusted with policies and given authority to issue policies, he is clothed with authority to bind the Company in reference to any condition of the contract, whether precedent or subsequent.

Of course, in the case at bar, the agent Saxe did not issue the policy and there is no proof that he had authority to issue the policy. It was issued by the New York office and merely delivered by him. Even if he did have authority to issue the contract, according to the Snyder decision, he would only be clothed with authority to bind the Company in reference to conditions precedent or subsequent to the contract. He could not even then waive the terms of the contract. The Court at the top of page 548, referring to the instructions given to the jury below states:

> "These instructions were in conformity with the principle adjudged in Carson v. Jersey City Insurance Co."

This indicates that the Snyder decision has not changed the law which holds that provisions such as we are considering in the Fanny Burg policy relates to the formation and continuance of the policy and cannot be waived, except in the manner provided by the policy itself.

The Court of Errors and Appeals again in *Dimmick* v. *Metropolitan Life Insurance Company* (p. 398), refers to *Carson* v. *Jersey City Insurance Company,* 43 N. J. L. 300, and holds:

> "The Supreme Court held that a stipulation in a policy that 'no agent of this company is authorized in any respect to change the terms and conditions of this policy, and they shall neither be changed nor waived except in writing, signed by the President and Secretary,' did not apply to a condition that was to be performed after the loss had occurred, such as the furnishing of proofs of loss, and that a condition of this character might be waived by parole; but the decision recognized that the stipulation did apply to those conditions and provisions in the policy which relate to the formation and continuance of the contract and are essential to its binding force while it is running."

The term for which a policy is to run and the name of the assured that is covered by the policy, are provisions which relate to the formation and continuance of the contract. Unless the assured is specified, no policy could exist.

In *Wheeler* v. *United States Casualty Company,* 71 N. J. L. 396, the Supreme Court held that where the policy provided that no condition or provision should be waived or altered by any one unless by written consent of an officer of the Company at

the Home Office, that this condition could only be waived or altered by written consent in accordance with the policy. The Court held (p. 398):

> "There is another insuperable objection to the first count. It refers to the copy of the policy annexed to the declaration and made part thereof. The policy provides that 'no condition or provision shall be waived or altered by anyone unless by written consent of an officer of the company at the home office.' *The term for which the policy was to run is one of these 'conditions and provisions which relate to the formation and continuance' of the contract,* and not a condition to be performed after the loss has occurred. It is only to the latter class of cases that such a provision has been held to be inapplicable. Snyder *v.* Insurance Co., 30 Vroom 544, p. 548."

This case was affirmed by the Court of Errors and Appeals in 73 N. J. L. 677.

Chesansky v. *Merchants' Fire Ins. Co. et als.,* 131 Atl. 910, follows *Snyder* v. *Insurance Co.*

This, as previously stated, only gives the agent authority to bind the Company in reference to conditions of the contract precedent or subsequent, to waive any notice of proof of loss and may bind the Company by his admissions in respect thereto, but does not give him the power to bind the Company with provisions which relate to the formation and continuance of the insurance.

The policy issued to Fanny Burg terminated upon the transfer of the property to Abraham and Mollie Shyowitz. It could only continue by strict compliance with the provisions of condition "H" of the policy.

In *Raiken* v. *Commercial Casualty Co.,* Atl. 135, 479, the policy contained a provision that no assignment should be valid unless the written consent of the Company be endorsed thereon, signed

by its President, Vice-President, Secretary or Treasurer. The Court, on p. 480, held:

> "No such consent was ever given and we think it is clear that without that consent, the mere assignment of the grantors or a request to the Insurance Company to transfer the policy to the plaintiff would be of no validity."

Knowledge of change of ownership alone is not sufficient to effect insurance to the new owner. The agent Saxe contends that he sent a copy of the purported endorsement to the Insurance Company. There is no evidence that the Company received such a copy. Such action by the agent was not binding as it was not in compliance with the terms of the policy.

Nor can it be said that the defendant is estopped from setting up its defenses to the policy because the agent testified that he mailed a copy of the purported endorsement to the Company. In the absence of proof that the defendant Company received such notice, no estoppel can be claimed.

In *Plockzek* v. *St. Paul Fire Marine Insurance Co.,* 91 Atl. 812-813, the agent had notice of change of ownership, and the Court held:

> "I shall therefore assume that the defendant was notified of the change of ownership, but that of itself would not be sufficient to maintain the validity of the policy under its terms. By the terms of the policy the change of ownership invalidates the instrument, unless a note of the change is endorsed on or appended to the policy. This is part of the contract, and is appealed to by the defendant, and must therefore enter into the judgment to be pronounced by this Court. The requirement has not been met."

Also:

Dewees v. *The Manhattan Insurance Company,* 35 N. J. L. 366, p. 371.

As claimed by the appellant, it is a well settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed in favor of the assured so as to uphold the contract. *Snyder* v. *Dwelling House Insurance Co.,* 59 N. J. L. 544.

In the case at bar, however, there is no question involved as to the construction of the provision or provisions of the policy. They are clear and explicit and our Courts do not favor the introduction of evidence for the purpose of reconstructing the contract as a basis for the liability alleged in the complaint.

Kupferschmidt v. *Agricultural Insurance Company,* 80 N. J. L. 441. The Court of Errors and Appeals, at p. 446, quotes Justice Tindale as follows:

> "The general rule is that such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence dehors the instrument for the purpose of explaining it according to the surmise or alleged intention of the parties to the instrument is utterly inadmissible."

The same argument and the same law advanced in connection with the legal significance of condition "H" of the policy, of course, applies also to condition "L". According to condition "L", condition "H" could not be changed except by an endorsement on the policy signed by the President or Secretary of the Company. There was no such endorsement annexed.

The appellants in their brief refer to *John Sommer Faucet Co.* v. *Commercial Casualty Co.,* 89 N. J. L. 693, as holding:

> "The construction and effect of a written instrument is a matter of law to be determined by the Court and not by the jury."

We admit this to be the law and are further aware that where the construction of an instrument depended upon extrinsic facts, as to which there is a dispute, its construction is a mixed question of law and fact and presents a jury question. In the case at bar, however, there is no mixed question of law and fact and there is no question of construction to make it a jury question. The contract was in writing. The only questions raised were legal questions concerning the legal effect of the provisions which certainly presented questions to be determined by the Court and therefore the admissibility of the contract was properly a question for the Court.

For the foregoing reasons, we submit that the Court placed the proper legal interpretation upon the policy and the decision of the Court was correct in not admitting it as a contract of insurance between the plaintiffs Abraham and Mollie Shyowitz and the defendant.

POINT II.

The Court properly granted the non-suit in favor of the defendant.

Under this point we incorporate the argument contained in Point I.

The suit was brought by plaintiffs on a policy written in favor of Burg. Upon the failure of the plaintiffs to prove that a valid contract of insurance existed between the plaintiffs and the defendant at the time of the alleged accident, there was no evidence which would require the defendant to interpose a defense.

The appellants argued further, however, that by the acceptance and retention of the premium, the defendant is estopped to deny the authority

of the agent to issue the endorsement and is estopped to deny that liability attached to the purported policy. The appellants lose sight of the fact that not one cent of the premium was ever paid by the plaintiffs Abraham and Mollie Shyowitz to the defendant. It is admitted that a premium of $11.85 was charged to Fanny Burg; that it was paid to Mr. Haxe and remitted to the defendant Company. This is the only premium that was ever collected. The record is silent as to any evidence which might even tend to show that when the property was purchased by Abraham and Mollie Shyowitz, that premium on this policy was taken into consideration in the adjustments made at the closing. The retention of a balance of a premium may estop a Company from denying liability under a policy to the person who paid the premium, but it would be going beyond the bounds of reason to say that such estoppel could be taken advantage of by a third party not even a party to the contract and who had paid no consideration to the Company. In all of the cases cited by the appellant, the plaintiffs sought to enforce the theory of estoppel where they themselves had actually paid the premium to the Insurance Company.

For the foregoing reasons, we respectfully submit that the Court properly ordered a judgment of non-suit in favor of the defendant.

POINT III.

For the foregoing reasons, we respectfully submit that the judgment appealed from should be affirmed.

McDermott, Enright & Carpenter,
Attorneys of Defendant-Appellee.

Carl S. Kuebler,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS

Abraham Shyowitz and Mollie Shyowitz, Plaintiffs-Appellants, vs. Union Indemnity Company, a corporation, Defendant-Appellee.	On Appeal from the New Jersey Supreme Court.

BRIEF OF PLAINTIFFS-APPELLANTS.

The facts briefly in this case are as follows:

On March 14, 1922, one, Fanny Burg, applied for and received a policy of insurance from the Union Indemnity Company, a corporation, through its agent, Thomas D. Saxe, insuring the said Fanny Burg for all damages which might arise because of injuries sustained on the premises known as #345-347 Madison Street, Passaic, N. J., of which she was then the owner, said policy to run for a period of one year. While the policy was in force and effect, she sold the premises to the present plaintiffs. Thereafter, on November 3rd, 1922, plaintiffs secured the following endorsement from Thomas D. Saxe, the *company's agent,* which was attached to the policy:

"Title in this policy is hereby vested in the name of Abraham Shyowitz and Mollie Shyowitz, his wife as owners and not as heretofore.

"Attached to and forming part of Policy #LOL-8847 of the Union Indemnity Co., issued to Fannie Burg.

Thomas D. Saxe, Agt."

On January 15th, 1923, a tenant named Annie Blumkin was hurt on the premises and immediately sued the present plaintiffs, who were then landlords of the said premises. The company refused to defend this suit, despite the fact that they were given notice of the accident and all other prerequisites mentioned in the policy were carried out. The present plaintiffs were forced to engage independent counsel to defend the suit incurring expenditures, which inclusive of the judgments amount to $4,427.96, which was admitted at the trial. An action was instituted against the Union Indemnity Company in the Passaic County Supreme Court in order that the plaintiffs might be indemnified for the losses sustained by them in defending this suit and also for the amount of judgments aggregating $2,500 recovered against them on the 21st of November, 1925. This action was tried in the Passaic County Supreme Court before Honorable Joseph A. Delaney, sitting as a Circuit Court Judge trying Supreme Court issues, and a jury on February 2nd and 3rd, 1927. During the course of the trial the Court refused to admit in evidence the policy of insurance in question and entered a judgment of nonsuit in favor of the defendants and against the plaintiffs. Wherefore the plaintiffs now appeal to this Court.

This judgment of nonsuit was erroneous because of the following reasons:

POINT I.

The Court erred in granting a nonsuit in favor of the defendant, over the objection of counsel for the plaintiffs-appellants contrary to the law of the case to which an exception was duly taken.

From a reading of the testimony it appears that Thomas D. Saxe was the *authorized agent* of the Union Indemnity Company and as such had the right to bind the company by his acts.

The following uncontradicted facts appear in the testimony taken during the course of trial (p. 48, line 31):

"Q. Did you send a copy of that to the insurance company in accordance with the practice to notify them of a change of ownership? A. I did.

"Q. *You are the authorized agent of this company?* A. *I am.*

"Q. *And you were at that time?* A. *I was.*

"Q. *You had occasion to issue a good many policies?* A. *I did.*

"Q. *And did issue policies?* A. *Yes.*

"Q. Was this the practice in each one of the instances? A. (No audible response.)

"Q. *I don't get the answer?* A. *Yes.*"

In the case of *Millville Mutual Marine & Fire Insurance Co. vs. Mechanics' & Workmen's Building & Loan Ass'n* (43 N. J. L. 652, Ct. of E. & App.), it was there held that insurance companies are bound by all acts, contracts or representations of their agents, which are within the scope of his real or apparent authority. In the same case it was also held that:

> "One who entrusts authority to another is bound by all that is done by the agent within the scope of his apparent power and cannot screen himself from the consequences thereof upon the ground that no authority was given to do the particular act."

And again on page 654, in the case cited above, it is quoted from Wood on Fire Insurance, Section 392, wherein he forcibly remarks:

> "It would be disastrous to commercial as well as other interests, if a person, by acting through the agency of another, could shield himself from liability for such person's acts, *ad libitum*. Fortunately no such rule exists, and he who entrusts authority to another, in whatever department of business, is bound by all that is done by his agent within the scope of his apparent power, and cannot screen himself from the consequences thereof upon the ground that no authority, in fact, was given him to do the particular act, unless the act was clearly in excess of his apparent authority, or was done under such circumstances as put the person dealing with him upon inquiry as to the agent's real authority."

It appears from the reading of the cases that the true test of agency is what the company holds him out to be and not what he is limited to by his certificate.

In the case at bar, Thomas D. Saxe, authorized agent of the Union Indemnity Company, had issued an endorsement, which authorized the change of ownership from that of Fanny Burg to Abraham Shyowitz and Mollie Shyowitz *and thereby bound the insurance company by his act.*

Therefore, the failure of the agent of the insurance company to comply with the printed condition "H" contained in the policy of insurance which provided for method of change of ownership, can only be attributed to the negligence of the company's agent and not to the plaintiffs, Abraham Shyowitz and Mollie Shyowitz.

In the case of *Schuller vs. Metropolitan Life Insurance Co.* (191 Mo. A. 52), it was held that an insurance company, like other principals, is bound by knowledge of or notice to its agent within the general scope of his authority, notwithstanding a contrary provision in the application of the policy.

The testimony specifically states on page 46, line 22, that the insurance company was notified of the change of ownership by their authorized agent:

> "Q. As the authorized agent of the Union Indemnity Company, did you issue Policy LOL-8847? A. I did.
> "Q. *Have you received payment therefor?* A. *I did.*
> "Q. *You received it as authorized agent of the company?* A. *I did.*"

Then again on page 47, line 30:

> "Q. In accordance with the practice of the company did you notify the company of the fact that this policy was delivered after you received it from the home office in New York? A. Yes.
> "Q. And you *received the premium* therefor? A. I *did.*
> "Q. And made remittance to the company in accordance with your practice too? A. Yes, sir.

> bond with knowledge that the bond was not signed by the employe whose fidelity was insured, as required by the bond, it was estopped to set up the absence of such signature to prevent a recovery on the bond."

This condition the insurance company offers as a defense to their liability, but as is clearly shown in the *Proctor Coal Co.* case, it is of no avail for the insurance company to set up irregularities in the execution of the policy or endorsement.

In Cooley, in his book on Insurance, page 612 it has been set forth that the retention of premiums, or other acts, or even silence, recognizing a policy as a binding obligation, may amount to a ratification.

> *Farmers' Co-operative Ins. Ass'n vs. Taliaferro,* 107 Ga. 326, 33 S. E. 26.
> *Block vs. Columbian Ins. Co.,* 42 N. Y. 393.
> *Pratt vs. Dwelling House Mut. Fire Ins. Co.,* 130 N. Y. 206, 29 N. E. 117, reversing 53 Hun 101, 6 N. Y. Supp. 78.
> *Northwestern Iron Co. vs. Aetna Ins. Co.,* 26 Wis. 78.

In the *case at issue, after notice* was given to the insurance company *through their* agent, Thomas D. Saxe, of such change of ownership, the insurance company *remains silent and failed to bring the fact that the endorsement was irregular to the attention of the plaintiffs.* Nothing was heard from said Union Indemnity Company until a time subsequent to their receiving notice of the injury of Annie Blumkin. It is, therefore, quite clear that the insurance company, by remaining silent and retaining the

premiums on the policy of insurance after they were fully aware of all the facts surrounding said change, had thereby acquiesced and ratified the acts of their agent.

The modern tendency as shown in the case of *Royal Insurance Co. vs. Drury, et als.* (132 Atl. 635), seems to be as follows:

> "The Courts do not wish to encourage technical defenses by insurance companies and that to avoid technical forfeitures they have established the rule that slight acts by insurance companies will constitute a waiver of such defenses. * * * By the great weight of American authority it would now seem to be firmly established as the law of this country."

In view of the various extraneous matter surrounding the policy of insurance in this case, such as to the estoppel of the insurance company after receiving notice of change of ownership and the authority of the agent to make such change and the effect of the waiver of condition "H," the Court erred by granting a nonsuit and by refusing to permit said policy of insurance into evidence and thereby become a question for the jury.

POINT II.

The Court erred in refusing to admit in evidence policy of insurance LOL-8847 of the Union Indemnity Company, a corporation.

Ordinarily the admissibility of a document in evidence is a question for the Court, but where a written instrument or policy of insurance is

surrounded by certain extrinsic facts and circumstances, it presents a question for the jury to determine.

In the case of *John Sommer Faucet Co. vs. Commercial Casualty Co.* (89 L. 693), in the opinion rendered by Justice Black, the following appears: Page 695

> "The construction and effect of a written instrument is a matter of law to be determined by the Court and not by the jury."

Citing:

> *Grueber Engineering Co. vs. Waldron* (71 N. J. L. 597):
>
> "But where the construction of a written instrument depends upon extrinsic facts, as to which there is a dispute, its construction is a mixed question of law and fact and presents a jury question under proper instructions from the Court."
>
> 9 *Cyc.* 592.
> *Kinston Cotton Mills vs. Liability Ass'n Corp.,* 161 N. C. 562.

In the case at bar, this was the precise situation presented to the Trial Court on the motion to nonsuit. In the absence of any extrinsic facts and circumstances the admissibility of the policy in issue would have been a proper question for the ~~jury~~ COURT. However, the question of the authority of the agent, Thomas D. Saxe, to make the change and the question of estoppel arising as to the retention of the premium after notice of the change, presented a mixed question of fact and law, which should have been ultimately left for the jury to determine. Hence, the Trial Court erred in refusing to admit the policy of insurance in evidence.

It was held in the case of *Sarah M. Hope vs. The Maccabees,* a corporation (91 N. J. L. 148), in the opinion by Chancellor Walker, that:

> "Although it is the province of the Court to construe a written instrument, yet, where the effect of such instrument depends not merely on its construction and meaning, but upon collateral facts *in pais* and extrinsic circumstances, the inferences of fact to be drawn from them are to be left to the jury." Citing: *Eltinge vs. United States Bank,* 24 U. S. 59, 6 L. ed. 419, also *West vs. Smith,* 101 U. S. 263, 270, 25 L. ed. 812.

In the case of *C. Stanley Smith vs. Fid. & Deposit Co. of Md.*, 98 N. J. L. 536, it was held in the opinion rendered by Justice Black, that:

> "It is a well-settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed in favor of the assured so as to uphold the contract" (*Snyder vs. Dwelling House Insurance Co.*, 59 N. J. L. 544; *Rickerson vs. Hartford Fire Insurance Co.*, 149 N. Y. 313).

In the case of *Agricultural Insurance Co. of Watertown, New York, vs. Potts* (55 N. J. L. 164), there was a condition in the policy of insurance stating that:

> "No agent is permitted to give the consent of the company in any other case required by the provisions of this policy, or to waive any stipulation or condition contained therein; but in all cases where the consent of the company is required by this policy, other than consent to the assignment of the policy, such consent must be obtained in writing and at the New York City office."

The facts in the case cited above were that the plaintiff applied to the agent of the Agricultural Insurance Co. for additional insurance on her dwelling. The agent of her insurance company undertook to communicate with the insurance company and let the plaintiff know the result. There was testimony in the case from which it could be inferred that the company received actual notice of the facts and directed the agent to cancel plaintiff's policy, which they neglected to do until after the plaintiff's dwelling was destroyed by fire.

Held in the opinion rendered by Justice Garrison that the case thus presented would in his opinion come within the elementary rule of estoppel, that in dealing with others, no one shall be permitted to deny that he intended the natural consequences of his conduct when such conduct has in fact induced others to rely upon it to their loss. The natural consequence of the failure of the company to communicate to the plaintiff its decision was to induce to her that it acquiesced in the further insurance of which she had given notice, and so long as this belief continued she was lulled into false security with respect to her property. After the loss had occurred it was too late for the company to set up for the first time in voidance of its obligations the very state of facts with full knowledge of which it had permitted the plaintiff to rest secured in her proposed protection, and, therefore, held that a motion for a nonsuit was properly refused.

In the case of *New York Life Insurance Co. vs. Eccleston* (96 U. S. 572), a case where the policy provided for a forfeiture in the event of

nonpayment of a premium, the last premium remaining unpaid at the time of the death of the assured. At the time of the trial the plaintiff proved that the company had several times changed its agent and had each time notified the assured where to pay his premiums, and that while waiting for such information the last instalment had become overdue and so remained at the time of the death of the assured.

Mr. Justice Bradley, affirming the charge of the Trial Court, who left the question of fact to the jury, said:

> "Any course of action on the part of the insurance company which leads the party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture though it might be claimed under the express letter of the contract."

And to a like effect are *Phoenix Mutual Life Insurance Co. vs. Doster,* 106 U. S. 30; *Combs vs. Shrewsbury Insurance Co.,* 7 Stew. Eq. 403; *Redstrake vs. Cumberland Insurance Co.,* 15 Vroom 294, 300.

In the cases cited and in the case at bar the question arises as to the legal duties of the principals themselves and not merely the question of an agent growing out of knowledge actually imparted and, therefore, as further stated by Justice Garrison in the case of *Agricultural Insurance Company of Watertown, New York, vs. Sarah V. Potts* (*supra*):

> "Whatever difference of opinion may exist as to the effect of notice to, or of a waiver by, a special agent in a given case, there can be no diversity of sentiment as to the plenary power of a party to a contract to waive any condition intended for his benefit, either before or after forfeiture, whether by express declaration or by conduct so misleading that it estops him afterwards from claiming a forfeiture."

The case at bar and those cited are identical in many respects, therefore the Court erred in granting a motion for nonsuit, when the policy should have been admitted in evidence and thereby leave the jury to determine the effect of a condition set forth in the policy of insurance and the waiver thereof.

We, therefore, respectfully urge for the reasons above stated that the Trial Court erred when it granted a motion of nonsuit and when it refused to admit the policy of insurance in evidence, for by so doing it took away the determination of the effect of the policy of insurance and the conditions printed therein from the jury. We respectfully submit that the judgment of nonsuit should be reversed and a *venire de novo* be granted to the plaintiffs.

Respectfully submitted,

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