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Notice of Appeal.

SECOND DISTRICT COURT OF NEWARK.

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

vs.

MARYLAND CASUALTY Co., of Balti-
more, a corporation,
Defendant.

10

To KALISCH & KALISCH, Attorneys of Plaintiff,

TAKE NOTICE that the defendant, Maryland Cas-
ualty Co., of Baltimore, a corporation, hereby ap-
peals to the New Jersey Supreme Court from the
judgment of the Second District Court rendered
in the above stated action on the Sixth day of
April, One Thousand Nine Hundred and Twenty-
five.

20

Dated, April 9, 1925.

FRANK G. TURNER,
Attorney of Defendant.

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40

Summons.

To any Constable in said County or to
the Sergeant-at-Arms of The Second
District Court.

ESSEX COUNTY,
THE STATE OF NEW JERSEY, } ss. :

- 10 SUMMON Maryland Casualty Co., of Baltimore, a
corporation, to appear before the Second District
Court of the City of Newark, to be held in the City
Hall, Broad Street (between Green and Franklin
Streets), in the said City, on the twenty-fifth day
of March, Nineteen Hundred and Twenty-five, at
ten o'clock in the forenoon to answer unto Nathan
Rosenberg, trading as Royal Tire Exchange, in an
action upon contract to the damage of the plaintiff
20 Three hundred and fifty dollars and costs, hereof
fail not.

WITNESS, Louis R. Freund, Esq., Judge of said
Court of Newark, aforesaid, the seventeenth day of
March in the year One Thousand Nine Hundred
and Twenty-five.

JAMES E. GARRIGAN.
Clerk.

30 (Seal)

State of Demand.SECOND DISTRICT COURT OF THE CITY OF
NEWARK.

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

vs.

MARYLAND CASUALTY Co., of Balti-
more, a corporation,
Defendant.

Action at Law. 10

The plaintiff having a place of business in the City of Newark, County of Essex and State of New Jersey, complaining of the defendant, says that:

20

1. The defendant is an insurance company engaged in the business, among other things, of contracting to indemnify owners and users of automobile trucks against damages which they may be called upon to pay for injuries to persons or property; and further contracting to defend, at its own expense, suits brought against assureds, for injuries caused to others or damages caused to others' property, in consideration of a certain fixed premium paid by the assured to the defendant company.

30

2. On or about November 12, 1921, the defendant company in consideration of the premium of \$38.50, paid to it by the plaintiff, assured its policy to the plaintiff agreeing to cover the plaintiff against damages recovered against him, among other things, in case of injury or death of one person, to the sum of \$5,000.00, or, in case of injuries or death to more than one person, to the sum of

40

State of Demand.

\$10,000.00, in the event of the injury or death being caused by the use and occupation of one Ford Sedan, 1921 model, #5379716—Gas, said indemnity agreement to remain in force for a period of one year from said date.

10 3. On or about November 10, 1922, and while the above policy was in force and while the said Ford Sedan was being operated by Moses Rosenberg, agent of Nathan Rosenberg within the terms and provisions of the policy, an accident occurred by reason of which it was alleged one, Joseph Kobich was run into and struck by said Ford Sedan operated by the said Moses Rosenberg, agent of Nathan Rosenberg, in which accident the said Joseph Kobich was alleged to be very slightly injured. As
20 required by the terms of said policy, plaintiff immediately notified said defendant company.

30 4. Suit was instituted on behalf of Joseph Kobich against the said Nathan Rosenberg, who was and still is one of the officers of the plaintiff company, to recover damages from this plaintiff, resulting from the accident hereinbefore referred to, which said action was instituted on or about March 24, 1923. The plaintiff forwarded the summons and complaint to the Newark Office of the defendant company pursuant to the terms of the policy and although plaintiff had performed each and every thing required of him to be performed under the terms and provisions of the policy, the defendant company refused to furnish a defense pursuant to the terms of the policy, and the plaintiff was therefore obliged to retain counsel to prepare a defense and to try the case. The trial of the case resulted
40 in a verdict in favor of this plaintiff.

State of Demand.

5. The plaintiff for the purpose of defending the case retained Michael Estrin, an Attorney at Law of the State of New Jersey, and has received for the services rendered in connection with the suit, a bill in the sum of Three hundred and fifty (\$350.00) dollars, which sum plaintiff is obliged to pay. Plaintiff has demanded that the defendant reimburse him for the amount that he is obliged to pay by reason of the defendant's default and the defendant has refused to do so. 10

Plaintiff demands the sum of Three hundred and fifty dollars (\$350.00) and costs of this suit.

KALISCH & KALISCH,
Attorneys of Plaintiff.

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Specification of Points.

NEW JERSEY SUPREME COURT.

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

10

vs.

MARYLAND CASUALTY Co., of Balti-
more, a corporation,
Defendant.

To the Plaintiff:

20 TAKE NOTICE, that the following is a Specification
of the Determinations of the District Court with
which the appellant is dissatisfied in point of law.

1. The Court refused to nonsuit the plaintiff
on the ground that no notice is required by the
policy was given by the plaintiff to the defendant.

2. The Court refused to nonsuit the plaintiff
on the ground that there was no proof that the
30 automobile involved in the accident was the auto-
mobile mentioned in the policy.

3. The Court refused to nonsuit the plaintiff on
the ground that the plaintiff had not complied with
the terms of the policy.

4. The Court refused to nonsuit the plaintiff on
the ground that there could be no recovery on the
policy.

40

Specification of Points.

5. The Court refused to nonsuit the plaintiff on the ground that the proofs were that he had not paid the attorney whose fees he sought to recover from the defendant.

6. The Court refused to give judgment for defendant on the same grounds as the motion for nonsuit. 10

7. The Court refused to give judgment for the defendant on the ground that the policy insured the Royal Tire Exchange, a corporation and did not insure the plaintiff.

8. The Court erroneously held:

“There seems to be a misnaming of the assured. Unless it appears that the misnaming is the result of fraud on the part of the assured, I will hold that the intended contract between the parties was at that time to indemnify the owner of that car, whatever the true description of that owner may be and that this action may prevail.” 20

9. The Court erroneously held:

“I say unless fraud be established; unless it be shown that the misnaming of the assured was the result of fraud on the part of the assured or its agent, I will hold the true contract between the parties was the contract indemnifying—the other terms being out of the way—the real Royal Tire Exchange.” 30

Specification of Points.

10. The Court erroneously held:

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“Under such circumstances, it would appear that the Royal Tire Exchange is the trade name of Rosenberg, and that Nathan Rosenberg is the owner of that car; that he was sued as such, and that the car was operated by one in his employ, and that the suit against him was one of the suits within the anticipation of this policy. That disposes of that.”

11. The Court erroneously held:

20

“With these findings of fact, I think that the negotiations between the insurance company and the insured or his representative, the nature of their negotiations, the letter of April 4, 1923, and the investigation by the representative of the company, the report of his investigation to the company, all tend to show waiver on the part of the company of the failure to give due notice of the accident and that the fact that notice of the accident was not given immediately as the policy requires, does not vitiate the policy, because of that waiver.”

30

12. The Court erroneously held:

40

“Finding that the Company has waived its requirement of timely notice of accident by its conduct, the company then continues liable under the terms of the policy. If that be the case, they were to supply or furnish to the assured, proper counsel and whatever may be necessary in the conduct of its case, so far as the court costs and counsel fees are concerned.”

Specification of Points.

13. The Court erroneously held:

“Then I find as a fact they refused to furnish counsel. The assured, justified in seeking his own salvation, sought counsel, and retained him.”

14. The Court erroneously gave judgment in favor of the plaintiff and against the defendant for Three Hundred and Fifty Dollars. 10

FRANK G. TURNER,
Attorney of Defendant.

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Case.

SECOND DISTRICT COURT,

NEWARK, NEW JERSEY.

10

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

vs.

MARYLAND CASUALTY Co., of Balti-
more, a corporation,
Defendant.

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Transcript of stenographer's notes of evidence
taken in the above entitled matter before Hon.
Louis R. Freund, District Court Judge, at the Sec-
ond District Court, Newark, N. J., on Wednesday,
April 1, 1925.

APPEARANCES:

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KALISCH & KALISCH, Esqs., (By Isidor Kalisch,
Esq.) Attorneys for Plaintiff.

FRANK G. TURNER, Esq., Attorney for De-
fendant.

40

Moe Rosenberg. Called by Plaintiff. Direct.

MOE ROSENBERG, sworn on behalf of Plaintiff.

DIRECT EXAMINATION BY MR. KALISCH:

Q. Mr. Rosenberg, on November 10th, 1922, were you driving an automobile on Clinton Avenue near Wright Street, Newark? A. Yes, sir.

Q. And did you run into anybody that day? A. 10
No, sir.

Q. Will you please tell the Court what you observed happened to the man whom you afterwards discovered was Mr. Kobich and who afterwards sued your father? A. I was driving up Clinton Avenue at Somerset Street. I believe the hour was six-thirty. Traffic was kind of congested and cars were rolling along at an easy rate of speed and I could not make much speed if I wanted to. I was 20
about the distance of the party—Kobich who he claimed to be afterwards—from eight to ten feet and he probably fell there and I stopped. I stopped right then and there and I must have been a foot and a half away from him.

Q. When you stopped? A. Exactly. I got out of the car and with this he picked himself up and dusted himself off. When I was sitting in the car I didn't know I was near him. When I got out of the car I thought I was near him. 30

Q. Do you know whether your car struck Kobich or not? A. No, it positively did not.

Q. Did traffic stop? A. Exactly; and with this, the officer had left his post. He seen traffic was at a standstill and he came over. That left us out there at the intersection of Clinton Avenue and Wright Street, and he left his post and wanted to see what was the matter and with this he found somebody was hurt and I was right near the auto- 40

Moe Rosenberg. Called by Plaintiff. Direct.

mobile and he was under the impression I ran him over. Kobich resisted the officer and he wanted to go to work. He said, "Let me go, there is nothing the matter with me; I got business to attend to." The officer was under the impression I ran him over and—

10 Mr. Turner: I object to the statement "the officer was under the impression I ran him over."

The Court: Objection sustained.

A. (continuing) —with this Kobich said, "Let me go, I have a truck working in the market." The officer pushed him into the car and said, "He will have to go to the hospital," and he resisted and said, "There is nothing the matter with me." We went up to the City Hospital and nothing was the matter with him, and with this the officer at the City Hospital asked me for my driver's license, and when I didn't have the license with me, the officer called up the presiding officer at the precinct and with that the presiding party at the bench said, "You will have to bring him down there." Mr. Kobich, my Dad, the officer and I went down and the presiding party at the bench, seeing I did not have my license with me, kept me there for bail, and in the event I did have my license with me, the entire thing would be dismissed.

30 Q. Did you afterwards produce your license?

A. Yes, I did.

Q. Did they discontinue the charges against you?

A. Yes, exactly; refunded me my bail.

Q. You told the doctors this man fell, is that the idea? A. Exactly. If I had gone further, surely

40 I would hit him.

Moe Rosenberg. Called by Plaintiff. Cross.

Q. When was the first knowledge that you had that anyone claimed that he was injured by your automobile? A. Why, I believe within the time of about ten to twelve days, or a day later or earlier than that. We had a letter from Mr. Silverman, an attorney, and with this we turned our policy over to Mr. Estrin.

Q. And after that you were finished? A. Exactly. 10

Q. Was your father in the car with you? A. Yes.

Q. Was he sitting in front? A. Yes, he was on my right side.

CROSS EXAMINATION BY MR. TURNER:

Q. On or about the 11th day of January, 1923, were you visited by an investigator from the Maryland Casualty Company? A. Of my interviews with them? 20

Q. What is your name? A. Moe Rosenberg.

Q. Weren't you visited by an investigator of the Maryland Casualty Company? A. Not to my knowledge.

Q. Did you have a conversation with an adjuster or an investigator? A. No, sir. 30

Q. Didn't you say to him this:

Mr. Kalisch: I object at this time. Well, go ahead.

Q. (continuing)—"I am employed by my father as salesman." That is true? A. I am a salesman, yes, sir.

Q. "He trades as the Royal Tire Exchange, 282 Halsey Street, Newark, New Jersey." Is that true? A. Mostly. 40

Moe Rosenberg. Called by Plaintiff. Cross.

Q. On the night of November 10, 1922, at six p. m. I was driving west on Clinton Avenue, Newark, N. J., bound home." Is that true? A. Yes, sir.

Q. "I was driving my father's Ford sedan No. 5379716"? A. Yes.

10 Q. "I was accompanied by my father, Nathan Rosenberg," is that true? A. Yes.

Q. "I was running between ten and twelve miles an hour." True? A. Yes.

Q. "As I approached the safety isle located at Wright Street on Clinton Avenue, I slowed down on nearing the same and was running about eight miles per hour passing alongside of same." Right? A. Yes.

20 Q. "I had gotten half way past the safety isle and I was about two feet from the safety isle when a man ran off the sidewalk from my right directly in front of me." Is that right? A. Yes, sir.

Q. "He was not more than three feet ahead of me." Is that true? A. Yes.

Q. "He was running for a trolley car which was pulling along the safety isle." Is that right? A. Yes.

30 Q. "I applied my brakes but was unable to stop until after my right front fender struck the man on the left side." Did you say that? A. No, sir.

Q. "The man was picked up alongside of my right front wheel." Did you say that? A. No, sir.

Q. You say you did not say that? A. No, sir.

BY THE COURT:

40 Q. When you say "No, sir," you mean you did not say it? A. Exactly.

Moe Rosenberg. Called by Plaintiff. Cross.

BY MR. TURNER:

Q. "He complained that his arm hurt." Did he complain that his arm hurt? A. No, sir, not at the time.

Q. You don't remember that at all? A. No, sir.

Q. "The officer who was doing traffic duty came over and had me take the man to the City Hospital." Is that true? A. Yes. 10

Q. "After examination, the man went home." Is that true? A. Yes.

Q. "I was placed under arrest for not having my license with me and held under twenty-five dollars bail for hearing on Thursday, November 16, 1922." Is that true? A. Yes, sir.

Q. "When I was given a suspended sentence." A. No, sir. I beg to differ with you. 20

The Court: The question is "did you say that."

The Witness: No, sir.

Mr. Turner: He denies saying this to any investigator.

The Court: The question asked him was, did you say that; is that so. To that he answered yes, to the original question. To the question as to whether he made any statement to the investigator, he answered no. 30

Q. Do you know whether you were given a suspended sentence or not? A. I didn't exactly have a suspended sentence at the time.

The Court: Was there a sentence?

The Witness: Why, I just presented my driver's license and I had my bail refunded to me. 40

Moe Rosenberg. Called by Plaintiff. Cross.

The Court: You don't know what the final disposition of the proceedings was?

The Witness: Other than my money was refunded. I wasn't slated.

Q. "I have been a licensed driver one year, two months." Is that true? A. Yes, sir.

10 Q. "My present license number is 15152, 1923, and 39198, 1922." Is that correct? A. That was the number on the car.

Q. "I was unable to get any witnesses on account of the officer ordering the man to the hospital." Is that true? Did you get any witnesses? A. No witnesses at the time other than my father who was with me.

20 Q. Other than your father? Do you remember saying, "I was unable to get any witnesses on account of the officer ordering the man to the hospital? A. The reason I didn't go through the form of getting any witnesses, the man wasn't hurt. He wanted to attend to his business.

Q. But the officer did order him to the hospital? A. Yes.

Q. And you had to take him there? A. Yes, sir.

Q. And you didn't have a chance to get any witnesses? A. Very true.

30

The Court: Did you make such a statement to the investigator of the company?

The Witness: Not that I can recollect.

Q. Do you say now you never made such a statement as that to anybody?

Mr. Kalisch: I object to that.

The Court: Objection sustained.

40

Moe Rosenberg. Called by Plaintiff. Cross.

Q. Anybody representing the Maryland Casualty Company?

Mr. Kalisch: I object to that. He wouldn't know who the man represented.

The Court: Objection sustained.

Q. Do you remember seeing this gentleman in connection with that case (indicating Albert A. Miller)? A. No, sir, not that I can remember. 10

Q. You did not? A. No.

Q. Will you say you did not see him? A. Not that I can recall, sir. I see faces day in and day out.

Q. But you are not interviewed by men from insurance companies day in and day out? A. No, sir. 20

Q. Are you able to say positively now you did not see this gentleman from the Maryland Casualty Company in reference to this happening? A. Yes, sir; I haven't see him exactly.

Q. You say you did get a letter a few days after this, November 10th, didn't you? A. From whom?

Q. A lawyer? A. Yes.

Q. On what date did you get this letter? A. Oh, I think from the defendant, that is the party who was alleged to be hurt, that is his attorney. I think we had a letter from him about—well, probably fourteen to eighteen days after the accident. 30

Q. Fourteen to eighteen days after the accident? A. Yes.

Q. So that you got a letter from him in November of 1922? A. Yes, sir.

Q. And in that letter he claimed that this man, Joseph Kobich, had a claim against you or your father on account of this alleged accident? 40

Moe Rosenberg. Called by Plaintiff. Cross.

10 Mr. Kalisch: I object to the contents of the letter for the reason this man is not the plaintiff in this suit, and the only person who may be interrogated as to the contents of that letter is the man who received it and is insured under the policy. As a matter of fact, I think we shall prove the insurance company has the letter itself.

The Court: If you will establish the addressee of the letter, establish this witness' knowledge of the letter, you may examine him.

Q. What did you do with the letter that you got?

A. Well, I will be truthful. I just take care of the work pertaining to matters of business, and other work pertaining to my father he takes care of that.

20 Q. Did you get a letter?

The Court: You personally?

The Witness: Yes, sir.

Q. Wasn't there a letter addressed to you? A. Mr. Nathan Rosenberg. There was no letter that came to my name.

Q. You told us about the letter. You saw the letter, didn't you? A. No, sir.

30 Q. How did you know about it? A. Other than the letter we had received from Silverman.

The Court: Did you see that letter?

The Witness: Yes.

Q. What did you do with the letter? A. Why, my father, Mr. Rosenberg—why, he in turn gave it to our attorney, Mr. Estrin.

Moe Rosenberg. Called by Plaintiff. Cross.

Q. You turned it over to Mr. Estrin or your father did to Mr. Estrin, your father's attorney? A. Exactly.

Q. Did you turn it over promptly to Mr. Estrin on the receipt of the letter? A. Yes, sir.

Q. Do you recall having received more than one letter in reference to this claim of Mr. Kobich? A. Why, I guess we received about two or three letters from Mr. Silverman. The first letter my dad got in touch with him on the phone and saw him personally about it because there was no accident. He wanted to know what the thing was all about. It was dismissed at the time, and, until Mr. Estrin got strong after Mr. Silverman to see what his intentions were.

Q. The three letters, were they all turned over to Mr. Estrin? A. I believe my father can answer that.

The Court: Tell us what you yourself know.

The Witness: I am unaware of that and I am ignorant of that.

Q. There were three letters. The last letter was that turned over to Mr. Estrin by your father, if you remember?

Mr. Kalisch: I object unless this witness knows.

A. No, sir.

Q. If you know? A. No, sir.

Q. Did you have a conversation with your father about it? A. No, sir; I didn't have anything to do with it. We were insured and that was sufficient.

Nathan Rosenberg. Called by Plaintiff. Direct.

NATHAN ROSENBERG, plaintiff, sworn.

DIRECT EXAMINATION BY MR. KALISCH:

Q. Mr. Rosenberg, your first name is Nathan? A. Yes.

10 Q. And you had a policy of insurance with the Maryland Casualty Company? A. Yes.

Q. And is this your policy (handing witness paper)? A. Yes, sir.

Mr. Kalisch: I offer this policy in evidence. Policy received in evidence and marked Exhibit P-1.

20 Q. Did your automobile, while you were in the car with your son on November 10th, at Clinton Avenue, hit anybody? A. No, sir.

Q. Did you get a letter from a lawyer about that claim? A. From Mr. Silverman, yes.

Q. And what was the date of that letter, about?

Mr. Turner: I object; I think he ought to produce the letter.

A. About two weeks after.

30 Q. What was the date, was it in November or December? Do you remember? A. The beginning of December.

Q. What did you do with that letter? A. First, I kept it a few days, didn't pay any attention to it.

Q. What did you do with that letter eventually? A. Turned it over to Mr. Estrin.

Q. That is all I want to know. Did you get out of the car before Mr. Kobich got into the car with the police officer? A. No, sir.

Nathan Rosenberg. Called by Plaintiff. Direct.

Q. Did anybody say from the time that he got in the car with the officer up to the time you got him to the hospital that your car had hit him? A. No, sir.

Q. And you say your car did not hit him? A. No, sir.

Q. Were you with your boy when he brought back the license to the police court or weren't you there? 10
A. Yes.

Q. (By Mr. Turner) You were there? A. Yes.

Q. (By Mr. Turner) Did they give him back his deposit? A. Yes, the next day.

Q. (By Mr. Turner) He brought his license and they gave him back the deposit? A. Yes.

Q. Now, some time after this lawyer's letter, if you may term it so, you were served with a summons and complaint at the suit of Joseph Kobich against yourself for injuries, were you not? A. Yes. 20

Q. And you gave the papers to Mr. Estrin? A. Yes.

Q. When the case came up was there a lawyer from the company there to defend you or somebody else? A. Somebody else.

Q. Who was he? A. Mr. Estrin.

Q. The case was tried when, do you remember?
A. My lawyer has a copy of the papers. 30

Q. At any rate, did you receive a bill from Mr. Estrin for his services? A. Yes.

Q. What court was this tried in, before what judge, Judges Mountain or Dungan? A. Up on High Street.

Q. I show you this bill dated March 4, 1925, and ask you if this is the bill you received from Mr. Estrin for services rendered in this case? A. Yes.

Q. You have not paid it as yet? A. No, sir. 40

Nathan Rosenberg. Called by Plaintiff. Cross.

Mr. Kalish: I offer the bill in evidence.

Mr. Turner: I object to it on the ground that the bill is incompetent and immaterial.

10 The Court: It may be offered for the purpose of showing that the attorney is in a position to claim his fee, having submitted the bill under the statute. I will admit it for that purpose.

Mr. Turner: I pray an exception.

CROSS EXAMINATION BY MR. TURNER:

Q. Now, what was the engine number of the automobile that you had that was insured by the Maryland Casualty Company?

20 Mr. Kalisch: I object to that. The policy speaks for itself.

Mr. Turner: The policy shows the private number of his automobile.

The Court: If he knows.

A. No, sir; but we only have one car at a time.

The Court: Only one Ford car at a time?

The Witness: Yes.

30 The Court: And that is the car upon which you received an insurance policy?

The Witness: Yes, sir.

Q. Now, did you see Mr. Miller of the casualty company, this gentleman sitting here? A. No. He was to see me one evening.

40 Q. And that evening, was your son there; was Moe there that evening, do you recollect? A. I don't think he was in the store at the time, only myself.

Nathan Rosenberg. Called by Plaintiff. Cross.

Q. Did you tell Mr. Miller how this accident happened?

Mr. Kalisch: I object on the ground he said there was no accident; that he did not hit the man. I object to the question.

The Court: I will allow it.

10

A. He asked me what happened and why I didn't notify them right away, and I said, "Nothing happened; there was nothing to be notified."

Q. Or did you say this to Mr. Miller: "On the 11th day of January, 1923, I, Nathan Rosenber, of 49 Seymour Avenue, Newark, N. J., was present at the time my son, Moe Rosenberg, made the above statement, and I wish to state I was accompanying him at the time of the said mentioned accident and that my version is the same as outlined by him." Did you say that?

20

A. No, sir.

Q. What did you say?

The Court: What does "version" mean?

The Witness: I don't know.

Q. What did you say?

30

Mr. Kalisch: I object on the ground there is no evidence at this time that he said anything.

The Court: Objection sustained.

Mr. Turner: I pray an exception.

Q. You say now you did not say anything? A. No, sir. He asked me why I did not notify them and I said there was nothing to be notified. We were stopped for not having a license there and

40

Nathan Rosenberg. Called by Plaintiff. Cross.

that is the reason I turned these over to my attorney.

Q. He asked you why you did not notify him of what? A. Of any accident.

Q. What accident? A. We sent that letter from Mr. Silverman and then he came up to see me and said why we didn't notify.

10 Q. You have had some talk with Miller about the accident? A. He was talking to me, not me with him.

Q. What did you say to Mr. Miller? A. He came up to see me; he was talking to me.

Q. What did you say about the accident to Mr. Miller and the letter from Mr. Silverman? A. He was to see if we had an accident, and I told him we didn't have any accident whatever.

20 Q. Is that all that you said? A. Yes. He said, "In case of accident then you had to report right away," and I said, "I know that, but we didn't have an accident."

Q. You did know you had taken a man to the hospital? A. Sir?

Q. Did you go with the man to the hospital? A. Yes, the officer put the man in our car.

30 Q. What did you take the man to the hospital for if there was no accident. The officer said, "Take him there whether he got hit or not."

Q. What hospital did you take him to? A. The City Hospital.

Q. How long were you at the City Hospital? A. Ten minutes. He was examined and walked out.

Q. Mr. Kobich fell down in front of your car? A. I wasn't driving the car myself. He fell right about ten feet before the car. He claimed that himself.

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Nathan Rosenberg. Called by Plaintiff. Cross.

Q. Mr. Kobich brought suit against you for this same happening, did he not? A. Yes.

Q. And after you were served with papers in the suit, you sent these suit papers to the Maryland Casualty Company, did you not? A. No, sir; to my lawyer.

Q. To whom? A. Mr. Estrin.

10

The Court: See if you cannot get to the cause of the accident. Your contention is that you were not notified of the accident, and, therefore, not liable under the policy. You do not deny having received notice of the suit.

Mr. Turner: He said he turned the papers over to his attorney. We claim they did not notify us; give us immediate notice of this accident, as required by the policy.

20

The Court: In order to be protected under the indemnity for anything that may result from an accident they must give you notice of the accident?

Mr. Turner: Immediately.

The Court: You claim then that that is a condition precedent to your liability on the accident for expenses arising from suit, even though they failed to give you notice of the accident, but gave you proper notice of suit?

30

Mr. Turner: They must give us notice immediately.

The Court: Your contention then is that if there were an accident and they failed to give you notice thereof and subsequently a suit was brought based upon that accident, of which they did give you proper notice, you would not be liable for the expense incurred (the legal ex-

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Michael I. Estrin. Called by Plaintiff. Direct.

penses incurred them that suit), where you have failed to put in a defense for them and they were obliged to resort to other counsel?

Mr. Turner: That is our contention.

10 MICHAEL I. ESTRIN, sworn on behalf of Plaintiff.

DIRECT EXAMINATION BY MR. KALISCH:

Q. You are a practicing attorney of the City of Newark and have been for how long? A. Five years.

Q. And Mr. Nathan Rosenberg is a client of yours? A. He is.

20 Q. Do you recall whether he ever turned over to you a letter from Mr. Silverman in which letter some claim was made against Mr. Rosenberg on behalf of Mr. Kobich? A. He did.

Q. Do you remember about when that letter was dated?

Mr. Turner: I think the letter ought to be produced.

30 Mr. Kalisch: I want to show why we can't produce it. I will withdraw this witness for a moment.

40

Nathan Rosenberg. Recalled. Direct.

Michael I. Estrin. Recalled. Direct.

NATHAN ROSENBERG, recalled, on behalf of plaintiff.

BY MR. KALISCH:

Q. How many letters did you get? A. One letter.

Q. Did you turn that letter over to Mr. Estrin? 10

A. Yes.

MICHAEL I. ESTRIN, recalled on behalf of plaintiff.

CONTINUED DIRECT EXAMINATION BY MR. KALISCH:

Q. You got that letter from Mr. Rosenberg? A. 20
I did.

Q. What did you do with it? A. When he gave me the policy I took the letter and went to the Maryland Casualty Company and presented the letter to Mr. Tucker.

Q. Who is Mr. Tucker? A. Manager of the Maryland Casualty Company.

Mr. Turner: That is not true and I must object to it. 30

The Court: The qualification of Mr. Tucker will be stricken out.

Q. Who did you see? A. Mr. Tucker.

The Court: Where?

The Witness: In the office bearing the name of the Maryland Casualty Company.

Michael I. Estrin. Recalled. Direct.

The Court: Where was he?

The Witness: Three hundred and something
Essex Building, Newark.

10 Q. Where was his office, in that main office? A.
His office is right in the waiting room where the
stenographers, are partitioned off from one room
on one side and one on the other. He was in one of
those offices.

The Court: His name was on the door?

The Witness: Stewart B. Tucker, Manager.

The Court: Was on the door?

The Witness: Yes.

20 Q. You say you saw Mr. Tucker there? A. I did.
Q. Did you give him that letter? A. I did.
Q. What was the date of the letter which you
gave him? A. I am not positive but some time in
the beginning of December.

Q. And how shortly after the date of that letter
was it you brought it over and gave it to Mr.
Tucker? A. I talked the matter over with Mr. Sil-
verman the same day and I took the letter and went
over to Mr. Tucker's office at that time.

30 Q. What I want to know is this: How long a
time after the date of that letter was it you went to
see Mr. Tucker? The date of the letter and the time
you saw Mr. Tucker? A. I think the letter was
dated December 9, and I saw Mr. Tucker there
the 10th or 11th.

Q. Did you tell Mr. Tucker your connection with
the case? A. I did.

Q. That you were the attorney for Mr. Rosen-
berg? A. I told him that.

Michael I. Estrin. Recalled. Direct.

Q. Now, what was your conversation with Mr. Tucker? A. I discussed the matter thoroughly with Mr. Tucker and I told him that I was surprised that Mr. Silverman, who was a lawyer in the same suite as myself, was handling the proposition, and I told him what my client had told me.

Q. What did you tell Mr. Tucker that your client had told you? A. That he told me how the thing occurred; that there was nothing about the matter; that he didn't strike the man or anything, and I was surprised that Mr. Silverman, who used to be a partner of mine, bringing a suit or threatening suit or handling a claim of that kind.

10

Q. What did Mr. Tucker say? A. Tucker took the letter at that time.

Q. Did you ever get that letter back? A. No, I never got that letter back. He took the letter at that time and then I left the office and he told me he would look into the matter and see what is what. Subsequently—I don't know just how it was—Silverman came to talk to me about the proposition of settlement, and I went over to see Mr. Tucker, and I said, "Mr. Tucker—

20

Mr. Turner: I think the time ought to be fixed, if the Court please.

30

Q. Do you know about? A. I think maybe about a week or two after the date I brought him the letter I spoke to Mr. Silverman about it and took the matter up with him, and I went back to Mr. Tucker various times at intervals of perhaps a week to tell what progress I was making with Mr. Silverman, and, finally at one time or other, Silverman said he would take two hundred and fifty dollars, and I told Mr. Tucker of the proposition and Mr. Tucker

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Michael I. Estrin. Recalled. Direct.

10 said to me, "We would perhaps spend one hundred dollars." "I don't know," I said, "as far as I am concerned, I wouldn't give him a nickel, I am able to fight the case." He said to me at that time, "If we can get rid of the matter and dispose of it, I think that is the best thing." He was supposed to hear from the home office that night, but it took him quite some time, until the day Mr. Rosenberg received the summons and complaint which he brought in to me on the day it was served upon him, and I took the summons and complaint immediately and brought it to Mr. Tucker's office. He wasn't there at the time, and the next day, or the day after, I received the summons and complaint together with a letter from Mr. Tucker.

20 Q. Did you have any telephone conversation with Mr. Tucker before you got this letter or the return of the summons and complaint? A. If I am not mistaken, he called me up before I received the letter from him and gave me a sort of argument and passed an innuendo and thought the whole thing was funny. He sort of intimated that because Silverman and I were in the same suite there was something peculiar about the whole transaction.

30 Q. Did you subsequently get this letter from the Maryland Casualty Company (handing witness paper)? A. Yes, to which was pinned the summons and complaint I brought to him.

Q. Signed by Mr. Tucker? A. Yes.

Q. Did you ever talk to Mr. Tucker after the receipt of it?

Mr. Turner: I object to a conversation after the receipt of a letter.

Michael I. Estrin. Recalled. Direct.

Mr. Kalisch: Just to show Mr. Tucker wrote the letter.

The Court: I will admit it.

Q. You received that letter from Mr. Tucker?
A. I did.

Mr. Kalisch: I offer the letter in evidence. 10
Letter from the Maryland Casualty Company signed by Mr. Tucker received in evidence and marked Exhibit P-3.

Q. Did you defend this case in the upper court that was brought by Mr. Kobich against Rosenberg? A. I did. I always kept Mr. Tucker informed as to whether or not the case was on the list or how it stood. If I saw it on the list I would go and notify him or call him up. Usually I used to go and see him personally. 20

Q. Mr. Tucker is not in court, is he? A. No, he is not.

Q. Did you render services in the trial of this case? A. In the trial and investigation and also in an attempt to settle.

Q. You started your investigation after suit was started against your people? A. I did.

Q. What did your service consist of in preparing the case? A. My investigation of the first proposition was the doctor. I found out by being in the same suite as myself, I could, therefore, get who the doctor was, although Jake Silverman did not want to let me know. I went to the doctor's office about three different times to see him. 30

Q. Without going into all you did, about how many hours did you spend in the investigation of that case in order to properly prepare it for de- 40

Michael I. Estrin. Recalled. Direct.

fense? A. The investigation of the case included four visits to the various precincts, of the City Headquarters and City Hospital and the doctor and seeing—what is his name again?—looking for the boss that Mr. Kobich used to work for. I spent approximately twelve hours at a minimum.

10 Q. In your bill how much did you figure? Charge per hour? A. Ten dollars per hour.

Q. In other words, there is a charge of one hundred dollars in your bill? A. One hundred dollars.

Q. Did you file an answer? A. I did. I requested Mr. Tucker that is by giving the papers, in the letter he wrote to me, an answer must be filed by somebody and I filed it.

20 Q. You did not file an answer until after the papers were given to you? A. Positively not. I handed it over to him.

Q. You also tried the case and watched it on the list? A. I did.

Q. How long did you wait upon the trial of the case after it got in the day's call up to the Court House? A. On Friday the call was issued and I started in to wait around there on Monday morning to see how the list was.

30 Q. Was it in the day's call for Monday? A. I think it was somewhere toward the middle of the list.

Q. What I want to know is, how many days after it got in the day's call did you wait around for the case to be reached, so you had to be there? A. I was at the Court House two different days and the day itself of the trial.

40 Q. I note you charged fifty dollars for attendance for those two days and one hundred dollars for the trial. A. I don't know just what.

Michael I. Estrin. Recalled. Cross.

The Court: Two hundred dollars for appearance in court and trial.

The Witness: It also included appearing at the opening of the term to answer the call. I appeared there and I also spent a lot of time in this case trying to get Mr. Silverman to adjourn the matter from time to time so that I could bring it past the two year period.

10

Q. We are not interested in that. So that you charged fifty dollars for each day's attendance and one hundred dollars for the actual trial, making two hundred dollars altogether? A. Approximately that.

Q. You filed an answer, didn't you? A. I did.

Q. And you charged twenty-five dollars for that? A. I did.

20

Q. And there is also a charge in the bill of twenty-five dollars for incidental expenses. That included what? A. Twelve dollars I had to pay for the clerk for a jury on the day of the trial and expenses in connection with filing the answer, and I think I used a taxi about three different times.

Q. At any rate, incidental expenses in addition to the twelve dollars, was thirteen dollars? A. Approximately.

30

Q. Will you say whether you consider that a reasonable charge for the services you rendered in this case? A. Extremely.

Q. I understand you got a non-suit. A. I did.

CROSS EXAMINATION BY MR. TURNER:

Q. Now, this case was tried before what judge? A. Judge Mountain.

Q. And did Mr. Kobich testify in this case? A. He did.

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Michael I. Estrin. Recalled. Cross.

Q. Did he testify as to whether this automobile of the plaintiff here, Mr. Rosenberg, whether that automobile struck him?

10 Mr. Kalisch: I object. The record is the best evidence of what he testified to, not what this witness' recollection of what his testimony was. On the second ground, what Mr. Kobich testified to at that trial is not binding on these plaintiffs.

The Court: Objection sustained.

Mr. Turner: I pray an exception.

Q. Tell us what Mr. Kobich testified to in the trial of this action before Judge Mountain.

20 Mr. Kalisch: I will object.

A. He testified at the trial that he was standing on the curb, that is, the northerly curb of Clinton Avenue near the church, I think it was, talking to a friend of his who had come in from Asbury Park or somewhere, and this friend was giving him instructions about some work he had to do that night. He had been working for a produce market on Commerce Street who had a branch in Asbury Park and Newark, and that he was in a hurry to get the trolley car which was going east on Clinton Avenue. He testified he stopped to look to see whether there were any vehicles coming up and about twenty-five or thirty feet away from him he saw the vehicle of the plaintiff, and Nathan Rosenberg's car, which it later developed, driven by Moe Rosenberg, going at a rate of approximately twenty-five miles an hour, if not more—certainly not less—that there was another automobile going in the same direc-

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Michael I. Estrin. Recalled. Cross.

tion abreast of the Rosenberg automobile; that he looked all the time at both of these automobiles coming and before he knew it he was struck. He was asked what he did to avoid the accident. He said, "I have a right in the street. I looked for the automobiles," and he didn't turn to his right or left and, "before I know it I was hit."

Q. Did he say he was hit by the Rosenberg automobile? A. Yes, he did. 10

Q. Then you non-suited on the ground he was guilty of contributory negligence, did you not? A. Yes, sir.

Q. Now, Mr. Silverman, you said, had offices in the same suite? A. Yes.

Q. Did you have the same entrances to your office? A. Yes, sir, and the same stenographer. 20

The Court: If you are laying the foundation for an attack upon the attorneys in the matter, I do not want to hear it at this time.

Mr. Turner: I am not laying any foundation for an attack at this time.

Q. You said that you did learn of the doctor who had treated Mr. Kobich? A. Yes, sir.

Q. And you learned that from Mr. Silverman? A. Not directly from Silverman. 30

Q. But you learned it through Mr. Silverman's office? A. Yes.

Q. Now, in what connection in this investigation did you have to see this doctor? A. Here is a summons and complaint that alleges personal injuries to the extent of ten thousand dollars, and I felt that if there is a suit brought for ten thousand dollars, they are going to have some kind of proof, and I went out to see what it was about and prepare for it. 40

Michael I. Estrin. Recalled. Cross.

Q. Did you expect his doctor was going to tell you what his proof was?

Mr. Kalisch: I object as immaterial.

A. Yes, he did tell me.

10 The Court: How is it material in this issue?

Mr. Turner: Here he is charging one hundred dollars for an investigation. I think we ought to be prepared to show and can show it is a high and improper charge, one hundred dollars for an investigation of a case.

The Court: The question is whether or not he visited this doctor.

Mr. Turner: My question is as to the necessity.

20

Mr. Kalisch: I will withdraw any objection; go ahead.

Q. How long did you spend there with the doctor? A. I waited in the doctors' office one time about half an hour before I saw him during the visiting hours, and the next morning, on Sunday morning, I spent about the same time. If you want to know what I found out, I can tell you.

30 Q. You say the doctor did tell you the extent of the injuries to Mr. Kobich? A. Yes.

Q. And whatever the doctor told you you believed? A. What is that?

Q. I say, whatever the doctor told you you believed?

Mr. Kalisch: Answer that yes or no.

40 A. No, I didn't believe what he told me.

Michael I. Estrin. Recalled. Cross.

Q. Why did you go around to these different precincts in Newark? A. To see whether there was any report, who made the report; to try to find out if there were any witnesses to it that I could interview; to find out just what happened and to see what the man's injuries were as indicated by the examination in the hospital at that time. I didn't know which hospital it was. Clinton Avenue and Elizabeth Avenue has got three different precincts. In other words, it has got the Sixth, the Fourth and the Motor Cycle precincts, and are detailed from the First Precinct, and I went to the Sixth Precinct to find out what the record was. I went to the Fourth and they didn't have any record there. I went to Headquarters and they didn't have any record there, and I went to these precincts again and I made the lieutenants bring out their blotters. I thought perhaps the complaint would be wrong as to it and I made a thorough examination which took me plenty of time. 10

Q. Don't you know that Police Headquarters has a bureau of records where you could go? A. Yes, I went to the bureau of records first. 20

Q. Did you find case No. 1280 there? A. I don't know what case I found.

Q. You found this case, didn't you? A. Yes, subsequently, after I had been there twice. 30

Q. Have you a recollection of what the record shows?

Mr. Kalisch: I object to any reference to any copy for the purpose of using it at this trial.

The Court: How do you know Mr. Turner is going to use it? 40

Michael I. Estrin. Recalled. Cross.

Mr. Turner: I asked him if he recollects what the record shows in case No. 1280, not the file or record.

The Witness: I do remember.

Q. Look at this and see if this is a copy of the record (handing witness paper)? A. I think it is.

10

Mr. Turner: I would ask that it be marked for identification.

Paper received and marked D-1 for identification.

Q. When you visited the bureau of records you learned of the facts set forth in D-1 for identification? A. I did, finally, yes, sir.

20

Q. Having learned all of those facts, why did you go anywheres else? A. Because I didn't get the record from the bureau right. When I went there the first time they told me they had no record. That is why I went to the various precincts. I thought the original record would be in the precincts, which one, I did not know.

30

Q. Are you prepared to say now you went to the different precincts and they did show you their records in each precinct? A. They did, yes, sir. I went to one lieutenant in the Sixth Precinct twice.

Q. And they showed you their record? A. Yes, sure; they will show me their blotter any time in the day; they will show it to me.

Q. Now, you say you have charged fifty dollar day for attendance when the case was not on. Do you mean to say you spent your whole day at the Court House? A. I didn't spend my whole day, but I didn't make any appointments for those two days,

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*Michael I. Estrin. Recalled. Redirect.
Motion for Non-Suit.*

so if it was necessary for me to be at the court, I would be there.

Q. Where did you spend your time those two days? A. In my office.

REDIRECT EXAMINATION BY MR. KALISCH:

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Q. All the time in your office or back and forth?
A. I went up to the Court House to try and find out how things stood.

Mr. Kalisch: I want to suggest at this time before I rest—I understood from Mr. Turner, but perhaps I did misunderstand him—that there was no question involved in the case except the question of notice.

20

The Court: The question of notice of the accident?

Mr. Kalisch: Yes. I want to put on someone to testify about the reasonableness of the fee charged by Mr. Estrin. It is not his suit. It is the suit of the man that has got to pay it, and I would like to introduce evidence as to the reasonableness of the fee anyway.

The Court: The opening did not reveal to me the fact that the defense would embrace the question of the reasonableness of the charges. I will afford you an opportunity if you can do it at this time, unless a stipulation be made obviating necessity of that, to prove the reasonableness of the charges.

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Mr. Kalisch: Under those circumstances, plaintiff rests.

Mr. Turner: The defendant moves for a non-suit in this case on the ground that no immediate notice, as required by the policy, was given by the plaintiff to the defendant.

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Motion for Non-Suit.

10 On the further ground, there is no proof that the automobile that was involved in this happening, nor the automobile that is referred to in the policy, at least, is owned by the plaintiff here. He simply says that he owned an automobile of a certain type, but he does not identify it as the automobile mentioned in this policy.

The Court: He says it was the only automobile he had, and that is the automobile upon which he obtained insurance. That is the testimony of Mr. Nathan Rosenberg.

Mr. Turner: I understand, but that does not show this automobile mentioned in that policy as his automobile. That is my point.

The Court: Motion denied.

20 Mr. Turner: I further submit that under the policy the proofs show that the plaintiff had not complied with the terms of the policy, and there can be no recovery as to that.

I further submit that as to the attorney's fees in the case, the proofs are that the plaintiff employed this attorney and he has not paid the attorney. Certainly, he could recover from the defendant until he had paid the attorney. 30 The mere incurring of an indebtedness is not sufficient. He cannot recover until the attorney is paid, and the testimony is he has not paid the attorney.

The Court: Motion denied.

Mr. Turner: I pray an exception. At this time I offer in evidence D-1 for identification.

Mr. Kalisch: I object.

The Court: Objection sustained.

40 Mr. Turner: I pray an exception.

Albert A. Miller. Called by Defendant. Direct.

ALBERT A. MILLER, sworn on behalf of defendant.

DIRECT EXAMINATION BY MR. TURNER:

Q. Mr. Miller, you are connected with what company? A. The Maryland Casualty Company.

Q. Did you go to the bureau of records of the Newark Police Department? A. I did. 10

Q. And did you get a transcript there of the card case No. 1280? A. Yes.

Q. I show you Exhibit D-1 for identification, and ask you if that shows the contents of that case on that card in the bureau of records. A. That is an exact copy.

Q. A true copy? A. Yes.

Mr. Turner: I renew my offer to put it in evidence. 20

Mr. Kalisch: I object.

The Court: Objection sustained.

Mr. Turner: I offer it for the purpose of contradicting the testimony of the last witness.

The Court: What does it contradict? The testimony was that they told him they didn't have it, and the second time he went there he located it. I will sustain the objection. 30

Mr. Turner: I pray an exception.

Q. Do you know the plaintiff, Mr. Nathan Rosenberg? A. Yes.

Q. And do you know his son, Moe Rosenberg? A. Yes.

Q. Now, subsequent to January 8th, 1923, did you have any interview with those two gentlemen?

Albert A. Miller. Called by Defendant. Direct.

Mr. Kalisch: I object on the ground he does not establish the same date. It does not contradict.

The Court: I will allow it.

Q. After that date, did you have an interview with them? A. Yes.

10 Q. I show you, "Report of Automobile Accident" and ask you if that has any relation to the plaintiff in this case? A. Yes.

Q. On what date was that received? A. January 10th, 1923.

Q. Does that relate to the Royal Tire Exchange of 288 Halsey Street, Newark? A. Yes.

Mr. Turner: I offer the report in evidence.

20 The Court: One of the records of your office?

The Witness: There is no record that it came from the assured.

The Court: It is a report from your office?

The Witness: It is a report. That was the first notice.

Mr. Kalisch: Then I object to it. I didn't so understand it was just an office copy, and I therefore object. It has no binding upon this plaintiff.

30

The Witness: It does not necessarily mean it is an office copy.

Mr. Kalisch: I object on the ground it is not connected with this plaintiff at this time.

The Court: Objection sustained. You say January 10th your office had a record of the alleged accident involving plaintiff's car?

The Witness: That was the first notice, yes.

40

Albert A. Miller. Called by Defendant. Direct.

Q. Now, up to January 8th, 1923, had you received any notice or word of an accident in so far as this plaintiff is concerned?

Mr. Kalisch: I object, unless the accident relates to this particular witness, and if it attempts to cover the Maryland Casualty Company and its entire office force there, I object. 10

The Court: What is your capacity with the company?

The Witness: Investigator.

The Court: In charge of the office?

The Witness: No.

The Court: Objection sustained unless the question purports to this witness.

Q. After that notice of January 8, 1923, did you see Mr. Nathan Rosenberg, the plaintiff in this case? A. Yes. 20

Q. Did you see his son, Moe Rosenberg? A. Yes.

Q. Did you have a conversation with them? A. Yes.

Q. Did you have a memorandum made of that conversation? A. Yes.

Q. I show you a paper and ask you if that contains the facts of that conversation (handing witness paper)? A. Yes. 30

Q. Will you tell us the date of that conversation? A. Yes.

Q. Who was present at that conversation? A. Mr. Rosenberg, Sr., and Mr. Rosenberg, Jr.

Q. And did you have a conversation in reference to the alleged accident to one Joseph Kobich? A. Yes.

Albert A. Miller. Called by Defendant. Direct.

Q. Now, tell the Court where the conversation took place? A. At the Royal Tire Exchange on Halsey Street, Newark.

10 Q. And will you tell the Court what the conversation was, what you said to them and what they said to you? A. The first thing I asked them why it was they did not let us know about the accident before, and they said it was so slight they didn't think it was necessary to report it.

Q. What else? A. And they had received two or three letters from an attorney and they paid no attention to it whatever; then finally got another letter which threatened suit.

Q. Did you ask them concerning the facts of the accident? A. Yes, I took down the details in writing, their exact words of what occurred.

20 Q. And what did they say occurred at the time?

Mr. Kalisch: Are you referring now to the writing?

Mr. Turner: No.

Q. What did they say to you, the substance of what they said to you after the accident? A. Can I refer to this?

30 Mr. Kalisch: I object.

The Court: No, you can't use that.

40 Q. Tell us your recollection, the substance of that conversation? A. As far as I can remember it, he stated that on the night of November 10, 1922, they were proceeding west on Clinton Avenue about in the neighborhood of between six-thirty and seven-thirty o'clock; that when they came to the safety isle at the junction of Wright Street and

Albert A. Miller. Called by Defendant. Direct.

Clinton Avenue and Elizabeth Avenue, and, I think Somerset Street, just as they were about to pass the safety isle, a man ran from the right hand curb towards the safety isle. Young Mr. Rosenberg stated he applied the brakes to the car, but could not stop in time to avoid striking the man with the right front fender. The man was knocked down a little to the right of the car. The police officer, who was on duty at the corner, came over and ordered that the man be taken to the hospital, which they did. And they later—well, young Rosenberg was arrested and placed under twenty-five dollars bail for not having a license.

10

Q. Now, was the senior Mr. Rosenberg present at that conversation? A. Yes; he also signed the statement made by young Rosenberg.

20

The Court: Signed the statement?

The Witness: Yes, signed the statement.

The Court: You haven't that original statement here, have you?

The Witness: No.

Q. Do you know where the original statement is? A. Yes, in Baltimore.

Q. Can you procure it? A. Yes.

30

The Court: I think that is an important factor, if there is a signed statement admitting the accident on that date.

The Witness: Yes, sir, and also signed by young Rosenberg and signed by the senior Rosenberg.

The Court: It is four o'clock now. If those statements are in existence, signed statements, they are important factors in this action. As a

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Albert A. Miller. Called by Defendant. Direct.

10 matter of fact, they are outstanding factors ir-
respective of whether I decide now the ques-
tion of the notice of the suit—that is, whether
the company's liability is not predicated upon
former notice of the accident; but before I
decide that, I wish such testimony to go in. It
comes to my mind that where this action is
based to indemnify this plaintiff for expendi-
tures for services, the original notice of the ac-
cident may not be a factor, obviating the re-
quirement of the policy, if subsequent and
proper notice of suit be given. This is not a
suit to recover liability indemnity from the
company. This is a suit to recover certain ex-
penses, and those expenses arise out of the
starting of a suit by an alleged plaintiff in
20 the other action. It may be the case that no-
tice by the defendant in the other action—the
plaintiff in this action—proper notice of the
suit will be sufficient to warrant his recovery
of a judgment here even though they did not
give a proper notice of the accident. Until I
so determine, I think these original statements
that you say are in your possession are im-
portant factors. We will adjourn this case
30 until April 6, 1925.

40

SECOND DISTRICT COURT,

NEWARK, NEW JERSEY.

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

vs.

MARYLAND CASUALTY Co., of Balti-
more, a corporation,
Defendant.

10

Continuation of stenographer's notes of evidence taken in the above entitled matter, before Hon. Louis R. Freund, District Court Judge, at the Second District Court, Newark, N. J., on Monday, April 6th, 1925.

20

APPEARANCES:

As before stated.

ALBERT A. MILLER, recalled on behalf of defendant.

30

CONTINUED DIRECT EXAMINATION BY MR. TURNER:

Q. Mr. Miller, at the last hearing when you appeared here as a witness, you produced copies of certain statements. Have you got the original statements there signed by Nathan Rosenberg and Moe Rosenberg? A. Yes.

Q. Will you produce those statements? (Witness produces paper.)

40

Albert A. Miller. Called by Defendant. Cross.

Q. The signature of Moe Rosenberg on this paper, was that signed in your presence? A. Yes.

Q. Who signed that? A. Moe Rosenberg.

Q. Is that the father or the son? A. That is the son.

10 Q. And Nathan Rosenberg, was that signed in your presence? A. Yes.

Mr. Turner: I offer that statement in evidence.

Mr. Kalisch: I would like to cross examine the witness before it is admitted.

CROSS EXAMINATION BY MR. KALISCH:

Q. This is in your handwriting? A. Yes.

20 Q. And did you take down the statement as it was given by Moe Rosenberg? A. Yes.

Q. And you took down in each and every particular as he gave it to you? A. Exactly.

Q. Did he give it to you in narrative form or in questions and answers? A. I asked him how it happened and he went on to tell me.

30 Q. So that substantially this paper which is marked "Letter to Home Office" is a narrative of an alleged occurrence as given to you by Moe Rosenberg and to which he afterwards subscribed his name? A. Yes, after he read it and looked it over.

Q. You say now that after looking it over he signed it and gave it to you? A. Yes, sir.

Mr. Kalisch: Is your offer now to put in the statement affecting Moe Rosenberg and Nathan Rosenberg?

40 Mr. Turner: I offer to contradict both. Both signed, and I offer to contradict both wit-

Albert A. Miller. Called by Defendant. Cross.

nesses. He said Nathan Rosenberg signed in his presence.

Mr. Kalisch: I have no objection to its being introduced, subject, however, to my moving to strike it from the record.

Q. Why did you go up there? A. I was instructed to. 10

Q. You went up there January 10th, is that correct? A. January 11th.

Q. Did you know at the time you went up there that Mr. Tucker had already told Mr. Estrin that he should dispose of the case for one hundred dollars if he could?

Mr. Turner: I object to that. There is no proof this witness was present. 20

The Court: He is asking if he knew.

A. I don't know.

Q. Who told you to go up? A. I got the report from Mr. Tucker.

Q. Did Mr. Tucker tell you to go up? A. He never has to tell us to go. When we get the case, we go.

Q. What was the purpose of your going? A. To investigate the accident. 30

Q. You wanted to investigate the accident January 11, 1923? A. Yes.

Q. I see. You didn't have any word about any alleged accident before January 11, 1923? A. No, I did not.

Q. You won't say Mr. Tucker didn't, will you? A. I don't know what he knew.

Q. Who had charge of this case up to the time you got it to investigate it? A. I don't know. 40

Albert A. Miller. Called by Defendant. Cross.

- Q. You are not in charge? A. No.
- Q. Mr. Tucker is? A. I believe he is.
- Q. You know, don't you? A. No, I don't know.
- Q. He stays in the office and has charge of the files? A. I hand them in to Mr. Tucker.
- 10 Q. When there is any further investigating to be done, don't you often receive instructions from Mr. Tucker? A. Yes.
- Q. He authorizes your settlements very often, don't he? A. Very often, yes.
- Q. I mean, you come to him for authorization? A. No, we use our own judgment.
- Q. Not always. When doubtful, you come to him for authorization, don't you? A. Yes.
- 20 Q. And the language of this statement is whose language, yours, the most of it? A. Well, I presume it is partly his and partly mine, but his conversation.
- Q. Didn't you know the number of the Ford sedan before you went up to see him? A. I did not.
- Q. Haven't you a card showing the policy held by each assured of the Maryland Casualty Company in your office? A. No.
- 30 Q. What kind of insurance or date insured? A. No.
- Q. You don't? A. No.
- Q. Where do you keep those records? A. I don't know where they are kept.
- Q. Is there anything on your files to show what you are insuring? A. At the time I went on that case, there was nothing to show that car was insured.
- 40 Q. Then why did you go up on it? A. To find out whether it was or not.

Albert A. Miller. Called by Defendant. Cross.

Q. To find out whether that identical car was insured? A. Yes.

Q. You knew some other car owned by these people was insured? A. Not at that time.

Q. Then, why did you go to investigate the case? A. Because the case was reported.

Q. When you get a report of the accident, you have nothing in the office to determine whether that person has a policy with the Maryland Casualty Company or not? A. No. 10

Q. You went up to investigate an accident not knowing whether the man was insured with your company or not? A. Absolutely.

Q. What report of an accident had you gotten that made you go up? A. The regular form of report given to me by Mr. Tucker.

Q. So, it was in a completed state when you got it from Mr. Tucker? A. On one of our regular reports. 20

Q. It was a carbon, not the original? A. No, it was the original.

Q. It was the original? A. Yes.

Q. Not signed by anybody? A. Yes.

Q. Signed by whom? A. Signed by Nathan Rosenberg.

Q. Do you know the circumstances under which it was signed? A. Why, no, I do not. 30

Q. Did you use your own language in this corroborating statement as to the facts signed by Nathan Rosenberg? A. My own language?

Q. Yes. A. Oh, yes.

Q. Entirely your own language, the whole corroborating statement as to the accident? A. Yes, and read it to him and gave it to him to read himself. 40

Albert A. Miller. Called by Defendant. Cross.

Q. And you read to him that "My conversation is the same as outlined by him," referring to his son? A. Yes.

Q. Did you ask him if he understood what the word "version" was? A. Yes, I explained to him and asked him if he was with him and asked him if that was his understanding.

10 Q. Didn't you use the same language as you put in the statement? A. Yes. Lots of times they don't understand what the word "version" means and I go on and explain to them.

Q. Why did you put it in the statement if they don't understand what it means? A. I want to put it in good language.

Q. What difference does it make as to the English, if you can make your insured understand?

20 A. Its like a paper you draw yourself, if you want it in good English.

Q. Couldn't you have used "my story of the accident is the same as my son's"? A. Sure.

Q. That is good language, isn't it? A. I could have used those words, sure.

30 Q. As a matter of fact, weren't you sent up there by Mr. Tucker with instructions to get a statement from these people indicating that they did not report an accident, and after Mr. Tucker told you that, inasmuch as the attorney representing the claimant would not take one hundred dollars, that you should get a statement showing you were not liable under your policy? A. Absolutely not.

The Court: What is the date of that statement?

Mr. Kalisch: January 11, 1923.

Albert A. Miller. Called by Defendant. Redirect.
Charles T. Savitz. Called by Defendant. Direct.

REDIRECT EXAMINATION BY MR. TURNER:

Q. Now, Mr. Miller, you have been called upon to produce a report here of the accident. Will you see what the date is on that report? A. January 8, 1923.

Q. And until that original report came in, did you have any knowledge that there had been an accident in which Mr. Nathan Rosenberg was involved? A. No. 10

Mr. Turner: I will offer the report in evidence.

Mr. Kalisch: I object.

The Court: Objection sustained.

20

CHARLES T. SAVITZ, sworn on behalf of Defendant.

DIRECT EXAMINATION BY MR. TURNER:

Q. Mr. Savitz, what is your business? A. Real estate and insurance.

Q. Do you know Nathan Rosenberg? A. No, sir, I do not. 30

Q. Do you know Moe Rosenberg? A. No, sir, I do not, neither one of them.

Q. Did you receive this original report of an automobile accident?

Mr. Kalisch: I object to it.

The Court: The question is did he receive that report.

Mr. Kalisch: I withdraw my objection. 40

Charles T. Savitz. Called by Defendant. Direct.

A. I did.

Q. From whom did you receive it?

Mr. Kalisch: I object unless it was delivered by someone he can identify.

The Court: I will allow the question.

10 Q. From whom did you receive it? A. Through the mail.

Q. And from whom?

Mr. Kalisch: I object.

The Court: Objection sustained.

Q. At the same time you received the report, did you receive this letter (handing witness paper)?

A. I did.

20 Q. From Jacob W. Silverman?

Mr. Kalisch: I object to that.

The Court: Objection sustained.

Q. I am asking you now whether this letter and that report came together? A. As I remember it, the two were handed in together, came through the mail.

30 Q. Do you know whether there was any mark on the envelope you received? A. No, I couldn't state that. It came in the morning mail, to the best of my knowledge.

Q. When did you receive the papers? A. That would be very hard for me to state the exact date.

Q. Are you able by reference to the papers to tell? A. No, I can't.

Mr. Kalisch: I object to that.

40

Charles T. Savitz. Called by Defendant. Direct.

Q. What did you do with the papers?

Mr. Kalisch: I object as incompetent, irrelevant and immaterial. There is no connection shown with this plaintiff here; therefore, what he did with the papers is immaterial.

The Court: I will allow it.

10

A. The papers had been received by me in the first morning delivery from Mr. Tucker of the Maryland Casualty Company.

Q. Then after that you had nothing further to do with it? A. No, I had nothing further to do with it.

Mr. Turner: I ask that these papers be marked for identification.

20

Report received and marked D-2 for identification.

Letter received and marked D-3 for identification.

Q. Did you insure the Royal Tire Exchange?

Mr. Kalisch: I object on the ground whether he insured the Royal Tire Exchange today is immaterial.

30

Q. Not today, in January, 1923? A. Yes, we did.

Q. You had the policy in what company? A. In the Maryland Casualty Company.

Q. And did you know that Mr. Rosenberg was connected with the Royal Tire Exchange? A. No, sir; I did not.

Q. The course you followed in the case of this accident report, is that the usual course for such matters in your office?

40

Stuart B. Tucker. Called by Defendant. Direct.

Mr. Kalisch: I object as incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Kalisch: No further cross examination.

10 STUART B. TUCKER, sworn on behalf of defendant.

DIRECT EXAMINATION BY MR. TURNER:

Q. Mr. Tucker, what is your connection with the defendant, the Maryland Casualty Company? A. Manager of the Newark Claim Division.

Q. And as such do you receive reports of automobile accidents in your office? A. I do.

20 Q. I show you a report of an automobile accident bearing date January 8, 1923, and a letter on the letterhead of Jacob W. Silverman, dated December 9, 1922. Did you receive those in your office, and if so, when? A. Yes, these were received January 10, 1923.

Q. Up to that time had you received any notice or had you any knowledge that Nathan Rosenberg, trading as the Royal Tire Exchange, had had an accident in which one Kobich was involved? A. No.

30 Q. Up to that time had you had any conversation whatsoever with Mr. Estrin, the attorney sitting here, in this case concerning a compromise of the case between Rosenberg and one Kobich? A. No.

Q. After that notice of January 8, 1923, did you have any conversation with Mr. Estrin? A. Yes.

Q. And did Mr. Estrin come into your office after January 8, 1923? A. Yes.

Stuart B. Tucker. Called by Defendant. Cross.

Q. And talk about the compromise of the Kobich case? A. He did, yes.

Q. Do you know the signature of Mr. Nathan Rosenberg? A. No, I do not.

Q. Did you ever see him sign anything? A. I never did.

Q. Up to that time had you received any notice from anybody that Mr. Rosenberg had an accident in which Mr. Kobich was involved? A. No, this was the original first notice we received. 10

Q. And after you received that first notice, what did you do? A. Well, it took its regular course. We made copies of it, and in the course of our handling claims we made up files and a copy of this is given to one of our adjusters, and in this case it happened to be given to Mr. Miller to make an investigation. 20

Q. After you got that report of the accident of January 8, 1923, did you later receive this statement D-1? A. Yes, this was handed in by Mr. Miller with his report.

CROSS EXAMINATION BY MR. KALISCH:

Q. After the report of this accident, you said Miller handed in the statement as to how it occurred? A. He handed in that statement there. 30

Q. I mean the one signed by Rosenberg. Do you know how many days after? A. Well, I can't tell.

Q. No, I am not asking you to refer to that. I am asking you if you remember? A. No, I don't.

Q. Was it less than a week after? A. Probably it was. We don't generally get them in in less than a week.

Q. Something less than a week after you got this report of the accident, Miller turned in this state- 40

Stuart B. Tucker. Called by Defendant. Cross.

ment signed by the Rosenbergs, is that right? A. Yes.

Q. Did you send Miller out on it? A. Yes.

Q. You did? Why, the report of the accident was received in your office the day after the date of the statement taken by Miller, wasn't it? A. I don't know; I haven't got it.

10

Mr. Kalisch: I did not want to refer to the automobile accident, as to the contents and thus make it evidence. I merely desired to refer witness' attention to the date and show the date of its receipt.

The Court: He may use it as a memorandum. He testifies that the report was received January 10th.

20

Mr. Kalisch: He said the report was turned in and had taken something less than a week after the report of the accident.

The Court: That is the testimony now.

Mr. Kalisch: Yes.

The Court: On January 10th he received a letter and statement.

Mr. Kalisch: Yes.

The Court: And the letter and statement are in evidence. He may use that.

30

Mr. Kalisch: I am merely referring to the date of receiving it.

The Court: The testimony is on January 10th was the date he received it.

Mr. Kalisch: The stamp of the receipt is January 12th. I want to show the testimony is not correct.

The Court: He may use it to refresh his recollection.

40

Stuart B. Tucker. Called by Defendant. Cross.

Q. As a matter of fact, Mr. Tucker, your stamp receipt shows January 12th, 1923, doesn't it? A. It does not.

Q. Will you look at it? A. I am looking at it.

Q. Doesn't it say, "Received January 12, 1923"? A. Yes, but that is not my stamp.

Q. Are your initials F. C.? A. No, sir.

Q. This is your office stamp (indicating)? A. No, sir. 10

Q. Whose stamp is it? A. I have no idea; I presume the Home Office stamp.

Q. Your stamp is the Newark, N. J., division stamp? A. Yes.

Q. And you received it January 10th? A. That is the way it is marked.

Q. I see. A. That is our business mark.

Q. I am not referring to the report, I am referring to your recollection. A. I can't tell only the way it is marked. 20

The Court: You say the report handed in by both Rosenbergs was received about a week after?

The Witness: I don't know.

The Court: That is what you did say?

The Witness: I said they generally come within a week. 30

Q. Now, Mr. Tucker, did you say you never had any conversation with Mr. Estrin around December 9th? A. Yes, I say I never did.

Q. Didn't you have a conversation with him wherein you stated that it apparently was a small matter and if it could be disposed of for one hundred dollars he should do it? A. Not around December 9th. 40

Stuart B. Tucker. Called by Defendant. Cross.

Q. When did you say that? A. After the insured was interviewed and after the report came in. I didn't know about the accident December 9th.

10 Q. Maybe I am wrong as to the date. Mr. Tucker, how long after the report of the accident and statement was obtained by Miller did you tell Mr. Estrin that? A. I don't know.

Q. Was it a couple of days later? A. I wouldn't say it was a couple of days later, no.

Q. Was it before you got the alleged report of the accident in the statement given before by Mr. Miller or after? A. It was afterwards.

Q. After the summons and complaint came in, did you talk to Mr. Estrin? A. Yes, I believe so.

20 Q. You were not there when he delivered the summons and complaint, were you? A. I can't recall that.

Q. Do you remember calling him up on the telephone? A. We did have several telephone conversations.

30 Q. Do you remember telling him that it looked rather funny or phoney, perhaps the term was, that a man in the same suite of offices with Mr. Estrin should bring a suit for ten thousand dollars damages and that you did not like the looks of it? A. I don't remember telling him that, no.

Q. Didn't you say, "Under the circumstances we won't pay a nickel"? A. I did not.

Q. Didn't you follow it up by this letter, referring to P-3? A. I wrote that letter.

40 Q. When you said in this letter, "Under existing circumstances, I will still continue to disclaim liability, and as Mr. Silverman has taken this action, I will not make any settlement whatever * * *." Weren't you referring to a telephone conversation

Stuart B. Tucker. Called by Defendant. Cross.

you had with him wherein you then said you were not going to make any settlement? A. The letter speaks for itself.

Q. I know it does, and so does my question. I want you to speak for yourself. Weren't you referring to that conversation?

The Court: Read the question.

10

(Question repeated by stenographer.)

A. No.

Q. Then why did you use the word "continue" to disclaim liability, if you were not referring to a previous conversation where you did disclaim liability? You didn't say previous conversation, you said "telephone conversation." Mr. Estrin was in my office a good many times with reference to this claim.

20

Q. I see. Well, now, did you at any time when he was in your office and after suit was brought by Mr. Silverman say to him that you did not like the looks of it? A. I don't know what I might have said.

Q. That was your attitude, wasn't it? A. What?

Q. That you did not like the looks of the thing because Mr. Estrin and Mr. Silverman were in the same set of offices? A. The letter speaks for itself.

30

Q. You are still of the same opinion, aren't you?

A. Will it do me any good to change my opinion?

Q. Will you answer the question yes or no? Are you still of the same opinion? A. No, not now. I talked with Mr. Estrin since.

Q. When did you change your opinion about it, after or before you wrote this letter? A. After.

Q. And after suit was tried and Mr. Rosenberg got a verdict for the defendant, isn't that right? A. No.

40

Stuart B. Tucker. Called by Defendant. Cross.

Q. Before that case was tried? A. No, before the case was tried.

Q. You are sure you did not change your view of things because of possible proof to be brought against you by Mr. Estrin? A. Mr. Estrin told me what connection he had with Rosenberg. I don't know whether his brother-in-law or some relation of his, and that is how he got into the case.

Q. Now, when was it that you first said that you will disclaim liability? A. Why, I don't know; I can't tell without my records there.

Q. Was it before this letter that you wrote to Mr. Estrin? A. I think so, yes.

Q. Wasn't it during a conversation with Mr. Estrin? A. That I disclaimed?

Q. That you said in view of that situation the company will not pay anything—

Mr. Turner: I object to that. That is not cross examination at all.

The Court: He can either deny or affirm it.

Q. Is that so or not? A. I didn't get that.

Q. In view of the close association as far as the position of office is concerned between Mr. Silverman, who represented Mr. Kobich that brought the suit, and Mr. Estrin, didn't you say after the ten thousand dollar suit was started, "I will disclaim liability; I won't pay a nickel"? A. I wasn't in authority to disclaim liability.

Q. I didn't ask you whether you were in authority to disclaim liability. I want to know whether you said it? A. I never told Estrin I disclaimed liability.

Q. Then, Mr. Tucker, please tell us why you said in this letter, "I will still continue to disclaim lia-

Stuart B. Tucker. Called by Defendant. Cross.

bility." What were you referring to? A. I presume the letter of disclaimer had been sent out.

Q. Don't you keep files in your office? A. Yes.

Q. Do you mean to say you write letters without finding out what the previous history of the case is?

A. No.

Q. Did you find a letter of disclaimer before this letter? Did you, before you wrote this letter? A. 10
I can't answer that without looking at my files.

The Court: Do you know whether you had disclaimed either by writing, by 'phone, or verbal conversation the liability prior to your letter.

The Witness: What is the date of that letter?

Mr. Kalisch: This is April 4, 1923. 20

The Witness: The letter of disclaimer was sent out before that.

Q. You deny you told Mr. Estrin that? A. Certainly.

Q. When was the letter of disclaimer written with reference to the date when you told Mr. Estrin if he could settle for one hundred dollars to do so?

A. I don't know.

Q. Before or after? A. Did I ever say so? I didn't say I told Estrin he could settle it. 30

Q. Didn't you say a moment ago that you told Mr. Estrin if it could be disposed of for one hundred dollars you would be inclined to do so? A. I don't remember that.

Q. Didn't you say so on the stand? A. I don't remember that.

Q. Will you say you did not tell Mr. Estrin that? A. Yes. 40

Stuart B. Tucker. Called by Defendant. Cross.

Q. Will you say you did not tell him if it will be settled for a small amount of money you would do so? A. No.

Q. You said nothing at all to him about settlement? A. No.

Q. You are sure of that? A. Well, that is my recollection.

10 Q. Is your recollection clear? A. I don't know.

Q. Is it as clear today as it was April 4, 1923? A. Yes.

Q. Just as clear? When you said there "I will not consent to make any offer of settlement whatever," after saying, "under existing circumstances," namely, the suit—

Mr. Turner: I object to that.

20 The Court: The letter is in evidence, P-3.

Q. "Under existing circumstances" mentioned by you, you refer to what circumstances, the circumstances recited in the letter? A. No, under all the circumstances connected with the claim—with the case.

Q. Why didn't you say so? A. I didn't recite the whole history of the case.

30 Q. How is it you merely referred to the connection between Mr. Estrin and Mr. Silverman?

Mr. Turner: I object; the letter speaks for itself.

The Court: Objection sustained.

Q. Why didn't you you put in your letter the policy violation?

40 Mr. Turner: I object on the same ground.

The Court: I will allow it.

Stuart B. Tucker. Called by Defendant. Cross.

Q. (Question repeated by stenographer.) A.
That is not the letter of disclaimer.

Mr. Turner: The letter referred to is the letter to Mr. Estrin, the attorney.

The Court: It is the letter disclaiming for the first time or after the first time certain liabilities. The question is whether the letter did not recite certain reasons. That is the letter disclaiming liability. Whether there is I am not concerned at this time. Why didn't your letter then, which from its language seemed to disclaim any liability, why didn't your letter then express all of the reasons, if it did not, for such disclaiming? 10

The Witness: Because the prior letter disclaimed. 20

Q. Was there any conversation at all between you and Mr. Estrin in regard to a possible settlement of one hundred dollars by that Kobich claim?
A. I will say no.

Q. There was not? A. No.

The Court: Didn't you say on the stand before that if it could be settled for one hundred dollars it would be possible to do so? 30

The Witness: I don't recall.

The Court: If you did make that statement on the stand before, you now state it was in error?

The Witness: Yes, I do.

Q. If you had not previously had a conversation with Mr. Estrin wherein some reference to a possible settlement of one hundred dollars was made, 40

Stuart B. Tucker. Called by Defendant. Cross.

how was it you refer to a possible settlement of one hundred dollars in your letter?

Mr. Turner: I object.

The Court: The letter is in evidence.

A. It says I will not make any offer of settlement.

10 Q. Just read the third paragraph. After the suit was started for ten thousand dollars, then Estrin did say something that the case could be settled for about one hundred dollars and you were foolish to let it go to suit? How is it you did not tell us that before when I asked you if you did not have another conversation with Mr. Estrin about a possible settlement and you said no? A. You were talking before the case went to suit.

20 Q. You understood I was talking before the case went to suit? A. Yes.

Q. Before when you said it could be settled for one hundred dollars you didn't mean that either, did you? A. No.

Q. Is there anything else you did not mean in your testimony this morning? A. I don't know.

30 Q. What did you talk about, if you can remember, on the many visits Mr. Estrin made to you from some time after the accident up to the time when the suit was started by Kobich against Rosenberg? A. Why, he came in there and said he ought to take care of the case because probably there would be a suit filed, which was filed afterwards, and the many times Mr. Estrin was in the office was after the suit was filed.

40 Q. How about before? A. Well, he was in the office before. I said he was in a very few times, but after the suit was filed he was in there a good many times about the defendant.

Stuart B. Tucker. Called by Defendant. Cross.

Q. Didn't Mr. Estrin report back to you that the one hundred dollar proposition Silverman would not take was that he came back with a counter proposition of two hundred and fifty dollars and Mr. Estrin said "that is too much and you ought not to pay it"? A. I don't remember any such thing.

Q. Will you say he didn't say it? A. Yes, I will say he didn't. 10

Q. You say he did not say anything about one hundred dollars at that time? A. Yes, at that time.

Q. In view of the fact you already disclaimed liability. Mr. Tucker, why did you not merely return the summons and complaint to Mr. Estrin for the assured? A. It was returned, wasn't it?

Q. I know, but why didn't you return it without saying anything more as long as you disclaimed liability? A. I don't know just what you mean. 20

Q. You had disclaimed liability and the summons and complaint against the assured or your company is given to your company to be taken care of and you returned the summons and complaint, didn't you? A. Yes.

Q. I am correct about that? A. Yes.

Q. Why didn't you, without anything more, merely return the summons and complaint and say we have disclaimed and have nothing more to do with it? A. I did return the summons and complaint. 30

Q. But why did you write this letter? A. Mr. Estrin would come over and almost insisted we take care of it.

Q. But you had disclaimed? A. Yes, that is what I told you.

Q. In other words, why did you write this letter after the disclaimer had already been signed? 40

Stuart B. Tucker. Called by Defendant. Cross.

Mr. Turner: I object. It has been answered three or four times already.

The Court: Objection sustained.

Q. (By Mr. Turner) You did not defend this case, did you? A. No.

10 Q. Do you know whether you investigated any other part of the case? Whether there was any investigation of any other part of this case? A. Except of obtaining a statement from the assured. We had an investigation, certainly. We have a form of investigation we go through. I think in this particular case we got the police record, a statement from the assured and a statement from the witness.

20 Q. Do you know when you got that? A. Why, I don't know. Along about the same time.

Q. Will you please get your file and just from your file tell us when you got the investigation in connection with these statements you have just referred to? A. Now, what do you want?

30 Q. The date the investigation was had under your instructions in which investigation you obtained some names of witnesses and their statements other than the assured. A. I explained with the witness who is Nathan's son.

Q. Well, the police blotter you referred to. A. This is dated January 11th. This was a dictated report.

Q. The report was made up on the 15th, and dictated on the 11th, wasn't it? A. Yes.

BY THE COURT:

40 Q. Does the report show when you first obtained information as to this accident other than that ob-

Nathan Rosenberg. Called by Defendant. Direct.

tained through the plaintiff or his son? A. No, that is the only notice we got.

Q. When did you get your police blotter information? A. It is not there; it must have been a subsequent report. It was not in the original.

Mr. Turner: I will offer in evidence the report just asked for by counsel. 10

The Court: He made no reference to it. He merely wanted to know whether your records would aid your own witness in getting dates. There is no examination on that report.

NATHAN ROSENBERG, recalled on behalf of defendant. 20

DIRECT EXAMINATION BY MR. TURNER:

Q. I show you this paper, D-2 for identification, and ask you if the signature, Nathan Rosenberg, on that paper is not your signature? A. Yes, it is mine.

Mr. Turner: I offer D-2 for identification in evidence. 30

D-2 for identification marked Exhibit D-2.

Q. What did you do with that report, D-2? A. Do with what?

Q. What did you do with that report? Who did you give it to? A. To my broker. He took it himself; he brought it in and took it with him.

Q. Who took it with him? A. Mr. Miller.

Nathan Rosenberg. Called by Defendant. Cross.

Q. Who is your broker? Who handles your insurance? A. At that time it was done by a friend of mine. He got the car insured.

Q. Did you pay Mr. Savitz for your policy? A. No, sir.

Q. Do you know Mr. Savitz at all? A. No.

10 Q. When you turned over this report of the accident, D-2, did you turn over with it a letter from Jacob W. Silverman, dated December 9, 1922? A. I don't remember. The broker was with that paper.

Q. You don't know whether you turned this letter over or not? A. No.

CROSS EXAMINATION BY MR. KALISCH:

20 Q. This Exhibit D-2, this report of the automobile accident, is that all in your handwriting? A. No.

Q. It is not? A. No.

Q. Refer to the numbers now and tell us what numbered lines are in your handwriting? A. The name is my writing and the address is my writing. The fifth is my writing, also the sixth, and that is all.

Q. The rest of it is not in your writing? A. No, sir.

30 Q. Except your signature? A. That is all.

Q. And Mr. Miller brought this up and you say that is what you put in this form and the balance you did not put in? A. Not at all. He said he handed me this for my protection and he wanted me to sign it.

Albert A. Miller. Recalled. Direct.
Moe Rosenberg. Called in Rebuttal. Direct.

ALBERT A. MILLER, recalled on behalf of defendant.

DIRECT EXAMINATION BY MR. TURNER:

Q. Mr. Miller, I show you Exhibit D-2, "Report of Automobile Accident," and ask you whether you took that to Mr. Rosenberg, the last witness? A. No, I did not. 10

Q. Did you ever see that until it came into your office? A. I saw it when given to me by Mr. Tucker.

Q. And that was when? A. That was January 10th.

Q. Up to January 10th, had you ever seen that? A. No.

Q. Did you write any part of this report? Is there any part in your handwriting? A. No. 20

Mr. Kalisch: No cross examination.

Mr. Turner: Defendant rests.

MOE ROSENBERG, recalled in rebuttal.

DIRECT EXAMINATION BY MR. KALISCH: 30

Q. I show you a paper, Mr. Rosenberg, signed Moe Rosenberg, and after looking at it, can you tell us whether that is your signature? A. The signature is mine.

Q. Is that your father's signature below? A. As much as I seen, it is.

Q. It looks like it? A. Yes.

Q. Did you ever read this statement? This statement purported to have been given by you to Mr. 40

Moe Rosenberg. Called in Rebuttal. Direct.

Miller and signed by you? A. Not to my recollection.

Q. I see. Not to your recollection? A. No.

Q. Do you remember talking to Mr. Miller about this alleged claim of Kobich? A. No, I do not, I don't remember now. I see my signature with that of my father. I do remember Miller was there at the time we both were there.

Q. And you recall his asking you about the facts, Mr. Miller? A. Why, he was very hasty at the time; I can't recall.

Q. Did he ask you about anything? A. He did ask me a little bit about the accident.

Q. And did he ask you the number of your car, 537916? A. Yes, he did.

Q. Identifying the maker's number? Did he ask you whether you were employed by your father as a salesman? A. Yes, he did.

Q. And that your father trades as the Royal Tire Exchange? A. Yes.

Q. Did you tell him before you signed any statement that you had an accident wherein a man was struck by your automobile?

Mr. Turner: I object as leading.

The Court: Question allowed.

A. No, I did not.

Q. You testified here Wednesday what your recollection of the situation was, did you? A. Very true.

Mr. Turner: I object. The testimony speaks for itself.

The Court: That is what it could be at the best.

Moe Rosenberg. Called in Rebuttal. Direct.

Q. I ask you whether you told Mr. Miller that while you were running about eight miles per hour passing the safety isle, that a man was struck by you, although you applied your brakes, because you were unable to stop until after your right front fender struck the man on the left side? Did you ever tell him that? A. No, I did not.

10

The Court: How old are you?

The Witness: Twenty-two.

The Court: Associated with your father in business?

The Witness: Yes.

The Court: Do you sign papers without reading them?

The Witness: I didn't read it at the time; I explained a few facts to him. I don't remember at the time writing anything for him.

20

Q. Well, now, did he read it to you as I have read, indicating an accident? A. Not that I can recollect, no.

Q. Well, if he had read to you a description of an accident, would you have signed your name that someone had been struck by your automobile?

Mr. Turner: I object as incompetent.

30

The Court: Objection sustained. The testimony was that he did not strike anyone and it was not read to him.

Q. What did the man say in order to get you to sign your name after he had written this paper that I show you?

Mr. Turner: I object.

40

The Court: Objection sustained.

Moe Rosenberg. Called in Rebuttal. Cross.

Mr. Turner: He swore that he never saw the man and never made any statement at all.

The Court: He states he never recalls signing the paper. The question is objectionable.

Mr. Kalisch: Question withdrawn.

10 Q. Before signing this statement, will you tell us what, if anything, Mr. Miller said to you and after he had written down on this paper any statement? A. That is all I know that we had signed the report and I don't remember such writing material as I see here.

Q. Did he shove it under your face and make you sign or just what did he do?

Mr. Turner: I object.

20 The Court: Objection sustained.

Q. Don't you remember under what circumstances you signed, whether anything was said by him? A. I remember he laid a piece of paper down and asks is it correct, and he asks my father and he said it was a matter in your behalf, and the company would take care of you and everything will be all right.

30 CROSS EXAMINATION BY MR. TURNER:

Q. You swear to that now, although at the last hearing you swore you had never seen Mr. Miller and you never did sign this statement? A. Very true.

40 Q. Now, when was your recollection refreshed as to these particular words which you quote Mr. Miller as having said to you? When did you first learn that he had said those words to you?

Moe Rosenberg. Called in Rebuttal. Cross.

Mr. Kalisch: I object to the question. It is too full and requires two separate answers.

The Court: Objection sustained. Strike out the second question.

Q. (Question repeated by stenographer as follows:) Now, when was your recollection refreshed as to these particular words which you quote Mr. Miller as having said to you? A. When I did see my signature. 10

Q. And that is just this minute when you just looked at the signature now, and up until now you had believed you never saw Mr. Miller until he came to court? A. The more I see my signature my mind has been refreshed I seen Mr. Miller.

Q. When you saw your signature, it refreshed you as to your conversation? A. Exactly. 20

Q. It has not been refreshed outside of the court in any other way? A. No.

Q. Now, you do recall he came to your place and you do recall signing this statement? A. Exactly.

Q. Was anything else said before you signed this statement outside of what you have told us now? A. Not that I can properly recall. I can't say; I don't remember very well.

Q. (By the Court) Did your father sign at the same time you did? A. I don't remember, but I will say this much: I was present at the time my father was. 30

Q. (By the Court) When your father signed, was the body of the writing appearing before your signature and his on the paper, if you remember it? A. I don't remember. I don't think so.

Nathan Rosenberg. Called in Rebuttal. Direct.

NATHAN ROSENBERG, recalled in rebuttal on behalf of plaintiff.

DIRECT EXAMINATION BY MR. KALISCH:

Q. Again referring to D-1, I ask you, Mr. Rosenberg, whether that is your signature? A. Yes, sir.

10 Q. I want to know whether, when you put your signature to this piece of paper, this writing between your own name and your son's name above it was there?

Mr. Turner: I object as leading.

The Court: There is nothing leading in that.

A. I don't remember.

20 Q. What do you mean you don't remember whether it was there or not? A. Yes.

Q. Do you know what the word "version" means?

A. No, sir.

Q. Did you read any statement between your name and your son's name before you put your name to it?

Mr. Turner: I object. That question has already been answered and now it is put in different form.

30

The Court: I will allow the question.

Q. (Question repeated by stenographer.) A. Yes.

Q. Did you read that writing between your son's signature and your own if it was there? A. If the writing was there?

Q. If it was there, did you read it? A. No.

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Nathan Rosenberg. Called in Rebuttal. Cross.

Q. And you don't remember whether it was there or not, is that right? A. Yes.

CROSS EXAMINATION BY MR. TURNER:

Q. You usually know what you sign your name to? A. I know the insurance was for my protection and he would take care of me. 10

Q. You never read anything you sign? A. I do so.

Q. Don't you always read what you sign? A. When a stranger comes in I pay attention, but he told me he was from the insurance company.

Q. You never saw him before, did you? Did you ever see Miller before that day? A. No, sir.

Q. When you were last here at this trial, you swore you had never seen him? A. I said I did see him. 20

Q. You say now you did see him? A. Yes.

Q. And that is the first and only time you ever saw him? A. At that time.

Q. You never saw him before that time? A. No, sir.

Q. And yet you did not read what you signed? A. The beginning is in my own handwriting, and I signed. He said, "Fill in your name, address, and that's all." 30

Mr. Kalisch: I object on the ground this is not cross examination of any rebuttal testimony.

The Court: I will allow it.

Q. At that time, although you had never seen Miller before, you did not read what you signed? A. I tell you again, I did read the beginning. He 40

Harry Unger. Called in Rebuttal. Direct.

said simply your name and address and that's all that is necessary.

The Court: On this report, not the other report. Did you read this statement?

The Witness: No, I can't read it even now.

10 Q. Were you there while Mr. Miller was talking to your son? A. Yes.

Q. You heard the conversation between them, didn't you? A. Well, he was talking to me first.

Q. He was talking to you, too? A. Yes.

HARRY UNGER, sworn on behalf of plaintiff.

20 DIRECT EXAMINATION BY MR. KALISCH:

Q. Mr. Unger, you are a practicing attorney of this state and have been so for how long? A. About twelve to thirteen years.

Q. You are in the general practice of law? A. I am.

Q. What is the custom among attorneys for making their charges for services in court?

30 Mr. Turner: I object to "custom" as being incompetent.

Mr. Kalisch: Question withdrawn.

Q. Mr. Unger, is a charge, in your opinion and in your experience, of twenty-five dollars for drawing an answer, two hundred dollars, which included two days' waiting and one day's trial, and one hundred dollars for twelve hours taken in the in-

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Harry Unger. Called in Rebuttal. Direct.

vestigation of a tort claim involving a ten thousand dollars damage claim, reasonable?

Mr. Turner: I object to that as not a correct recital of the services performed.

The Court: That is my recollection of what he testified to. I don't remember whether it was ten or twelve hours, he said. 10

Mr. Kalisch: Twelve hours.

Mr. Turner: Two days' waiting and counsel said he was in his office.

The Court: The testimony was he had set aside all of these two days and did not take care of any other business.

Q. I will make that correction to the statement. He made no engagement during those two days and was back and forth during the hours that court was in session during those two days. 20

Mr. Turner: My objection is his practice in making no engagement for the two days is not warranted by the fact involved in this case.

The Court: It is a hypothetical question based on what Mr. Estrin testified was done by him. Whether or not that is a proper method of charge. Whether or not he is not entitled to such charges, based on his testimony. 30

Q. May I add one more point, that Mr. Estrin succeeded in obtaining a non-suit for his client. A. My opinion is that it is reasonable.

Mr. Turner: No cross examination.

Mr. Kalisch: That is the plaintiff's case.

The Court: I would like to recall Mr. Miller. 40

*Albert A. Miller. Recalled. Direct.
Renewal of Motion for Non-Suit.*

ALBERT A. MILLER, recalled:

EXAMINATION BY THE COURT:

10 Q. Do you recognize any of the handwriting on this report, Mr. Miller? A. Do you mean by comparisons?

Q. By your knowledge? A. Why, I couldn't tell whose writing it is.

Q. Do you know in whose writing the words "abrasions of the arms" and "in the City Hospital"? A. No, I do not.

The Court: That is all.

20 Mr. Turner: I move for a judgment in favor of the defendant on the same grounds as mentioned for a non-suit, and on the further ground that the state of demand filed in this case alleges that on or about November 10, 1922, and while the above policy was in force (referring to the policy here) and while such Ford sedan was being operated by Moe Rosenberg, agent of Nathan Rosenberg, his son, under the terms of the policy the accident occurred, by reason of which it was alleged one, et cetera; and that
30 in paragraph four of the same state of demand it says suit was instituted on behalf of Joseph Kobich, who was and still is one of the officer of the plaintiff company, to recover damages from this plaintiff resulting from the accident hereinbefore referred to, which accident was instituted, and so forth.

The Court: I will permit an amendment to conform to the evidence.

40

Mr. Kalisch: I move to amend. We tried the case upon the policy as it existed.

The Court: What is the policy?

Mr. Kalisch: It insures Nathan Rosenberg.

The Court: No, it insures the Royal Tire Exchange, a corporation.

Mr. Kalisch: Well, I say they have waived the point that Nathan Rosenberg is not in there under that policy, and the policy, as I understand, not only insures the Royal Tire Exchange, but it insures others that legally operated that automobile.

10

The Court: True, it insures the company. Is it your contention under this policy that Mr. Rosenberg, riding in this car, is not insured?

Mr. Turner: He personally is not insured. It is the Royal Tire Exchange, but not Mr. Rosenberg. If Nathan Rosenberg were driving the car or the Royal Tire Exchange really was sued, then we would have to pay it.

20

The Court: It indemnifies those using that automobile or anyone legally using it. The question is whether or not Nathan Rosenberg would be liable for Moe Rosenberg. Was there a specification of defenses filed in this matter?

Mr. Kalisch: No, there was not.

Mr. Turner: There was no demand filed.

30

Mr. Kalisch: I maintain we are entitled to proceed with our action as it was brought, but if you find the defendant is not entitled to a judgment, but merely a non-suit on the ground that the proper party plaintiff does not appear, then I will ask for a non-suit.

The Court: Nathan Rosenberg was sued in the upper courts for an alleged accident. If the Royal Tire Exchange were not a corpora-

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tion and properly insured in its true entity, then I would say that under the nature of this policy where Nathan Rosenberg is sued as the operator of this car, that this company was liable under the terms of this agreement to indemnify, whoever I might determine was the real assured as between the parties. That is not the situation we find ourselves in. The fact is, the Royal Tire Exchange was a business trade name only, but we have the policy issued to a corporation and we find there is no corporation. Now, I say that the agreement was made between the Maryland Casualty Company and the Royal Tire Exchange, Inc. If there was such a contract, then those lawfully operating that car legally have a right to indemnity under the terms of the policy. There isn't any such contract. The Royal Tire Exchange, Inc., does not exist and is not the party here at all, unless you show that the error is a mutual error and the defendant company has accepted the premiums and benefits thereof. That, of course, is a material fact, if their application will show other than what the policy shows. I think that the company will be denied the right to crawl from under this policy on account of the misnaming of the assured, unless it appear that such contract arose through fraudulent representations of the assured.

Mr. Kalisch: As I take it, the application was made and they have written a policy mentioning the Royal Tire Exchange, a corporation, when it should be Nathan Rosenberg, trading as the Royal Tire Exchange. I therefore ask the Court to keep the case open, re-open the case for the purpose of introducing further testimony,

The Court: I will reopen the case to this extent. There is no question in my mind as to the apparent intention between the Royal Tire Exchange and this company. The car is identified, the business appears and the nature of the business of the assured is expressed and apparently purports to be a contract indemnifying a certain party as to a certain automobile. There seems to be a misnaming of the assured. Unless it appears that the misnaming is the result of fraud on the part of the assured, I will hold that the intended contract between the parties was at that time to indemnify the owner of that car, whatever the true description of that owner may be, and that this action may prevail. 10

Mr. Turner: I object, and pray an exception to your Honor's ruling.

The Court: I say, unless fraud be established; unless it be shown that the misnaming of the assured was the result of fraud on the part of the assured or its agent, I will hold the true contract between the parties was the contract indemnifying—the other terms being out of the way—the real Royal Tire Exchange. 20

Mr. Turner: We are not going to prove fraud.

The Court: I will deny your motion on that ground. 30

Mr. Turner: I pray an exception.

The Court: Under such circumstances, it would appear that the Royal Tire Exchange is the trade name of Rosenberg, and that Nathan Rosenberg is the owner of that car; that he was sued as such, and that the car was operated by one in his employ, and that the suit against him was one of the suits within the 40

anticipation of this policy. That disposes of that.

Mr. Turner: I pray an exception.

10 The Court: I will find as a fact that there was an accident on the night of November 10, 1922. I find as a fact that there was no report of this accident until December, the date of the letter the attorney testified purporting to represent the injured sent to the assured plain-
tiff here. I find as a matter of fact there was a report of this accident by the assured to the company, December 9th or 10th. If the letter was the 9th, the probabilities are it was the 10th. I will find as a fact, that upon the receipt of that letter by the assured, the company was notified of the accident. I will find as a fact that upon the receipt of the summons and the complaint in the action of Kobich
20 versus Rosenberg, the summons and complaint was promptly and duly turned over by the assured or his representative to the defendant here, and that they received due notice, proper notice, and timely notice of the suit.

30 With those findings of fact, I think that the negotiations between the insurance company and the insured or his representative, the nature of their negotiations, the letter of April 4, 1923, and the investigation by the representative of the company, the report of his investigation to the company, all tend to show waiver on the part of the company of the failure to give due notice of the accident and that the fact that notice of the accident was not given immediately as the policy requires, does not vitiate the policy, because of that waiver.

40 Another question arises; whether or not even if the question of notice of the accident be ignored, notice of the suit is a separate source of

obligation between the parties. That question may arise. I have some doubt as to that question whether or not that term as to that policy was not a separate agreement from the other. That is even though notice, had not been given, in time, of the accident, whether or not the subsequent notice of the suit does not permit the assured to recover. Counsel fees or costs incurred through the suit. I do not think it necessary under the circumstances to pass upon that question. Finding that the company has waived its requirement of timely notice of accident by its conduct, the company then continues liable under the terms of the policy. If that be the case, they were to supply or furnish to the assured proper counsel and whatever may be necessary in the conduct of its case so far as the court costs and counsel fees are concerned.

10

20

Then, I find as a fact they refused to furnish counsel. The assured, justified in seeking his own salvation, sought counsel, and retained him.

I find three hundred and fifty dollars is a reasonable fee, especially when I realize the suit was started for ten thousand dollars and counsel was successful in defeating that suit.

I will enter judgment for the plaintiff and against the defendant in the sum of three hundred and fifty dollars.

30

Mr. Turner: I pray an exception.

40

I, LOUIS R. FREUND, Judge of the Second District Court of the City of Newark, do hereby certify that the foregoing is a transcript of the evidence given upon the trial of the case of Nathan Rosenberg, trading as Royal Tire Exchange, v. Maryland Casualty Company of Baltimore, a corporation, on April 1st, 1925, as certified by William E. Davenport, the stenographer appointed to report such evidence stenographically.

10

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 16th day of April, 1925.

LOUIS R. FREUND.

I, WILLIAM E. DAVENPORT, a stenographer duly appointed to report stenographically the evidence given before the Second District Court of Newark in the case of Nathan Rosenberg, trading as Royal Tire Exchange, v. Maryland Casualty Company of Baltimore, a corporation, do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 1st day of April, 1925, before Hon. Louis R. Freund, Judge of the Second District Court, in said matter.

20

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 16th day of April, 1925.

30

WM. E. DAVENPORT.

Exhibit P-1.**Automobile Policy**

**MARYLAND CASUALTY COMPANY
OF BALTIMORE**

Herein Called the Company

DOES HEREBY AGREE with the Assured named and described as such in the General Agreements hereto attached and forming a part hereof, as follows: 10

I. To insure said named Assured, in accordance with the provisions of said General Agreements, as respects the Automobiles owned or operated within the confines of the United States and Canada by the named Assured and listed in said General Agreements.

II. The insurance provided by this Policy is so extended as to be available, in the same manner and under the same conditions as it is available to the named Assured, to any person or persons while riding in or legally operating any of the Automobiles described in the General Agreements, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the named Assured, or, if the named Assured is an individual, with the permission of an adult member of the named Assured's household other than a chauffeur or a domestic servant; provided further, insurance payable hereunder shall be applied first to the protection of the named Assured, and the remainder, if any, to the protection of other persons entitled to insurance under the provisions and conditions of this Clause, as the named Assured shall in writing direct. 20
30
40

10 III. In addition to the limit set forth in the General Agreements, the Company will, at its own cost, (court costs and all interest accruing after entry of judgment being considered a part thereof regardless of the limit of liability set forth in the General Agreements), investigate all accidents covered hereunder, and defend all suits thereon, even if groundless, of which notices are given to it as hereinafter required, unless the Company shall elect to settle the claim or suit.

20 IV. The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries or death sustained or loss occasioned within the provisions of the Policy; and the prepayment of any judgment that may be recovered against the Assured upon any claim covered by the policy is not a condition precedent to any right of action against the Company upon the Policy, but the Company is bound to the extent of its liability under the Policy to pay and satisfy any such judgment and to protect the Assured against the levy of any execution issued upon the same: and an action may be maintained upon any such judgment by the injured person, his or her heirs or personal representatives, as the case may be, to enforce the liability of the Company as in
30 the Policy set forth and limited.

No. O. L. 148847

SUBJECT TO THE GENERAL AGREEMENTS, AS AFORESAID, AND TO THE FOLLOWING CONDITIONS:

The unqualified term "Assured" wherever used in this Policy shall include in each instance any other person, firm or corporation entitled to insurance under the provisions and conditions of Insuring Clause II hereof, but the qualified term "named Assured" shall apply only to the Assured named and described as such in the General Agreements. 10

Immediate written notice of any accident and like notice of any suit resulting therefrom, with every summons or other process, must be forwarded to the Home Office of the Company, or to its authorized representative.

Unless specifically endorsed hereon, this Policy does not cover any obligations assumed by or imposed upon the Assured by any Workmen's Compensation law, agreement or plan. 20

This Policy does not cover accidents to any employee or employees of the Assured engaged in the use, operation or maintenance of any said Automobile or Automobiles.

This Policy does not cover while the said Automobile or Automobiles are (a) being used for or in any race or speed contest, or (b) being operated by any person under the age limit fixed by law, or under the age of sixteen (16) years in any event, or (c) being used for towing or propelling any trailer or any vehicle used as a trailer, or (d) being used for rental or livery purposes or for the carrying of passengers for a consideration. 30

The Company is not responsible for any settlements made or any expenses incurred by the Assured, unless such settlements or expenditures are first specifically authorized in writing by the Com- 40

pany, except that the Assured may provide at the time of the accident, at the expense of the Company, such immediate surgical relief as is imperative.

In case of payment of loss and/or expense under this Policy the Company shall be subrogated to all rights of the Assured to the extent of such payment, and the Assured shall execute all papers required and shall cooperate with the Company to secure the Company its rights.

10

If the named Assured carries any other insurance covering concurrently a claim covered by this Policy, he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of valid and collectible concurrent insurance. If any other person, firm, or corporation insured hereunder by the provisions of Insuring Clause II is covered by valid insure against a claim otherwise covered by this Policy, no insurance under this Policy shall be applicable to such claim.

20

This Policy may be cancelled by the Company at any time by written notice to the named Assured stating when thereafter the cancellation shall be effective. It may be cancelled by the named Assured by a like notice to the Company. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata, when determined. If cancelled by the named Assured, the Company shall be entitled to the earned premium calculated at short rates, in accordance with the table printed on the back of this Policy. The check of the Company, or that of its agent or representative, mailed to the address of the named Assured as given in the General Agreements shall be sufficient tender of return premium.

30

No assignment or change of interest under this Policy shall bind the Company unless there shall be endorsed hereon the acceptance of the assignee

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and the consent of the Company signed by the President, a Vice-President, a Secretary or an Assistant Secretary of the Company.

An agent has no authority to change this Policy, or to waive any of its provisions, nor shall notice to any agent or knowledge of his or any other person be held to effect a waiver or change this contract or any part of it. No change whatever in this Policy, and no waiver of its provisions, shall be valid unless an endorsement is added hereto, signed by the President, a Vice-President, Secretary or an Assistant Secretary of the Company, expressing such change or waiver. In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed an agent of the Company. 10

IN WITNESS WHEREOF, the MARYLAND CASUALTY COMPANY has caused this Policy to be signed by its President and Secretary at Baltimore, Maryland but the same shall not be binding upon the Company unless countersigned by an authorized Agent of the Company. 20

F. HIGHLANDS BURNS,
President.

JNO A. HARTMAN,
Secretary.

Countersigned at Newark, N. J., this 14th day of November, 1921. 30

SCHLESINGER HELLER AGENCY,
J. B. Heller,
Authorized Agent,
Secretary.

MARYLAND CASUALTY COMPANY
BALTIMORE

Liability

Property Damage

General Agreements

(Valid only as attached to and forming a part of
the hereinafter mentioned automobile Policy)

Item I—Name Assured

10

Name of Assured—Royal Tire Exchange Corporation.

Address of Assured—#282 Halsey Street, Newark, New Jersey.

Item II—Policy Term

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The Assured's Business or Profession is Auto Tires and Accessories.

The Policy term shall be from 12.01 A. M. November 12, 1921, to 12.01 A. M., November 12, 1922.

Item III—Schedule

The Automobiles covered hereby, the premium charges thereon, and other data in regard thereto are as follows:

30

Schedule

No. of Autos—1.

Description Trade Name, Number, Year and Motive Power—Ford Sedan 1921, Model # 5379716 Gas.

Manufacturers List Price, Including Cost of Special Bodies, Winter Tops, Etc. Also Load Capacity If a Commercial Car—\$660.

40

Use to Which Vehicle is to be put—Pleasure and business calls, excluding commercial delivery.

Premium—\$28.50.

Property damage premium—\$10.00.

Total Premium—\$38.50.

(a) Trade or business in which Automobiles covered hereby are used—Pleasure and business calls.

(b) The Automobiles covered hereby are and will be principally maintained and garage in the city or town of Newark, N. J.

(c) That Automobiles covered hereby are and will be principally used in the city or town (and its vicinity) of Newark, N. J. 10

(d) The number of chauffeurs employed to operate the private passenger cars covered hereby is None.

(e) The risk was insured during the past year in New.

(f) No Automobile covered hereby is or will be used for towing or propelling any trailer or any vehicle used as a trailer. 20

(g) No Automobile covered hereby is or will be rented to others or used to carry passengers for a consideration express or implied.

(h) No Company has heretofore cancelled any automobile policy of the Assured, or refused to issue automobile insurance to the Assured.

(All exceptions to statements "f", "g", and "h", above are to be noted. If none, so state).

Exceptions—No exceptions. 30

The Insurance granted by the Policy and these General Agreements is as follows:

Item IV—Liability

(A) Against loss from liability imposed by law upon the Assured for damages on account of bodily injuries including death resulting therefrom, accidentally suffered or alleged to have been suffered 40

10 by any person or persons, caused by any Automobile owned or operated by the Assured, as described in the Schedule hereof, and for the purposes named therein, or by the loading or unloading of merchandise carried on any such Automobile provided for the transportation of such merchandise and so specified in the Schedule, within the confines of the United States and Canada, provided such bodily injuries or death are suffered as the result of accident occurring within the term of the Policy as in Item II hereof set out.

The Company's limit of liability on account of one person so injured or killed shall be Five Thousand Dollars (\$5000), and subject to the same limit for each person the Company's total liability on account of any one accident so injuring or killing more than one person shall be Ten Thousand Dollars (\$10000).

20

Property Damage

30 (B) Against loss from the liability imposed by law upon the assured for damage (including damage necessarily resulting from loss of use) to property of every description (property of the Assured and property of others while in charge of the Assured or of the Assured's employees excepted) resulting from any accident occurring within the Policy term aforesaid, directly caused by or due to the ownership, maintenance or use of any Automobile included in the Schedule hereof.

The Company's liability for such property damage shall in no event exceed the sum of One Thousand Dollars (\$1000) on account of any one accident.

Attached to and forming a part of Automobile Policy No. O. L. 148847 issued by the Maryland

40

Casualty Company of Baltimore to the Assured
named and described as such as in Item I hereof.

MARYLAND CASUALTY COMPANY.

By F. Highlands Burns,
President.

Not valid until countersigned by a General Agent
or Resident Manager of the Company.

10

No. L. P. 104366

Lia Form No. 377

Edition April 1920

Schlesinger Heller Agency.

General Agent

Resident Manager.

(On Back:)

20

Savitz-Denbigh Co.

Automobile Policy

No. O. L. 148847

MARYLAND CASUALTY COMPANY

(Seal)

Issued to

Royal Tire Exchange

Newark, N. J.

Premium \$38.50

30

Expires November 12, 1922

PLEASE READ YOUR POLICY

Carefully note Condition requiring Immediate
Notice of Every Accident and of Every Suit.

40

Exhibit P-2.

MICHEL ESTRIN
 Suite 609 Niagara Bldg.,
 185 Market St.,
 Newark, N. J.

March 4th, 1925.

10 Nathan Rosenberg, Prop.,
 Royal Tire Exchange,

For Services rendered in the case of Joseph Kobich
 vs. Nathan Rosenberg.

| | |
|--|---------|
| For drawing Answer | \$25.00 |
| Incidental expenses | 25.00 |
| For appearances in Court for trial of case | 200.00 |
| For investigation | 100.00 |
| | <hr/> |
| | 350.00 |

30

40

Exhibit P-3.

MARYLAND CASUALTY COMPANY
 Newark Claim Division
 Room 312 Essex Building
 Newark, N. J.

April 4, 1923.

23-25-1097 C Auto 10
 Royal Tire Exchange
 Joseph Koblich

Attorney Michael Estrin,
 185 Market St.,
 Newark, N. J.

Dear Sir:

I am returning herewith summons and complaint 20
 against Mr. Rosenberg which you left in this office
 the other day during my absence.

I note that a suit has been brought for \$10,000
 and remember that at the beginning, Mr. Rosen-
 berg stated that the case did not amount to any-
 think and that the man was not injured; however,
 I take from the reading of the complaint that it
 does amount to something and will at least require
 someone to put in an answer.

I regret very much that Mr. Silverman took such 30
 steps as this and would bring suit for \$10,000 in
 a case which you state could be settled for \$100,
 and as informed you over the telephone, I am not
 pleased with Mr. Silverman's taking this action
 and am of the opinion that the whole matter is
 nothing else by a big bluff, as you are located in
 the same office with Mr. Silverman, and it appears
 as though someone is trying to make a goat out of
 the writer. 40

Under the existing circumstances I will still continue to disclaim liability and as Mr. Silverman has taken this action, I will not consent to make any offer of settlement whatever.

Yours very truly,

S. B. TUCKER,
Manager.

10 Registered
SBT:EMS

Exhibit D-1.
(For Identification.)

LETTER TO HOME OFFICE.

20 I, Moe Rosenberg, age 19, residing at 49 Seymour Ave., Newark, N. J., make the following statement:
I am employed by my father as salesman. He trades as the Royal Tire Exchange, 282 Halsey Street, Newark, N. J. On the night of November 10, 1922, at 6 p. m. I was bound west on Clinton Ave., Newark, N. J., bound home. I was driving my father's Ford sedan, Maker's #5379716. I was accompanied by my father, Nathan Rosenberg. I
30 was running between ten to twelve miles per hour as I approached the safety isle which is located opposite Wright Street on Clinton Ave. I slowed down on nearing same and was running about eight miles per hour passing along side of same. I had gotten half way apast the safety isle and I was about two feet from safety isle when a man ran off the sidewalk from my right directly in front of me. He was not more than three feet ahead of me. He
40 was running for a trolley car, which was pulling

in along safety isle. I applied my brakes but was unable to stop until after my right front fender struck the man on the left side. The man was picked up alongside my right front wheel. He complained that his arm hurt. The Officer who was doing traffic duty came over and had me take the man to the City Hospital. After examination the man went home. I was placed under arrest for not having my license with me and held under \$25. bail for hearing on Thursday, November 16, 1922, when I was given a suspended sentence. I have been a licensed driver one year and two months. My present license number is 15512 C 1923, 39198 (1922). I was unable to get any witnesses on account of the officer ordering the man to the hospital. 10

(Signed) MOE ROSENBERG.

I, Nathan Rosenberg, of 49 Seymour Ave., Newark, N. J., was present at the time my son, Moe Rosenberg, made the above statement, and I wish to state that I was accompanying him at the time of the said mentioned accident and that my version is the same as outlined by him. 20

(Signed) NATHAN ROSENBERG.

Witness:

A. A. MILLER
1/11/23 at
282 Halsey St.,
Newark, N. J. 30

Exhibit D-2.

(For Identification.)

Notice: Accidents which involve personal injuries, no matter how slight, should be reported by telephone to—

10 MARYLAND CASUALTY COMPANY
Newark Claim Division
Room 312 Essex Bldg., Newark, N. J.

Confirm by this written report.

Notice—This form must be filled out in every particular.

20 REPORT OF AUTOMOBILE ACCIDENT

1. Name of Owner—Royal Tire Exchange Policy No. 148847.
2. Address—282 Halsey St. City—Newark. State—N. J.
3. Date of Accident—November 10th.
4. Hour—7 P. M.
- 30 5. Name of person in charge of machine—Moe Rosenberg.
6. Age—
- 6½. Address of person in charge of machine—49 Seymour Ave.
7. Manufacturer's number of vehicle—5379716.
8. Engine number—585096.
9. Name of Manufacturer—Ford (Sedan).
10. License number—33639.
- 40 11. Was operator licensed?—Yes.

12. For how long had he operated an automobile?—One year.
13. In what direction was the vehicle going?—Clinton Ave.
14. Rate of speed?—
15. Were you engaged in public or private competition or record run or run against time?—
16. What side of street?—Right.
17. Were you blowing a horn or sounding a gong at the time?—Yes. 10
18. Were all your lights lit?—Yes.
19. (a) If a collision, in what direction was other vehicle going?—
- (b) What side of street?—
- (c) Rate of speed?—
- (Stamp) (Received Jan 12, 1923 A.F.C.)
- (d) Who was operator of other vehicle?—
- (Name and Address)
- (e) License number of other vehicle?— 20
20. Who is to blame for the collision?—Kobich.
21. Name of person injured—Joseph Kobich.
22. Married or single—
23. Address—
24. Nature of injuries—Abrasions of the arm.
25. Where taken after the accident?—To City Hospital.
26. Was doctor called? If so, who?—None.
27. Address— 30
28. What was extent of damage to property other than your own?—
29. Owner's name—
30. Address—
31. To what extent was damage done to your property?—
32. Cause of accident—Ran into car when crossing to safety isle at Clinton Ave.
33. Names and addresses of witnesses. (This is very important)—Nathan Rosenberg. 40
- (Stamp) Received Jan. 18, 1923 H.A.D.
- (Over—Very Important)

(On Back)

34. Where did accident occur?—At Clinton & Somerset St. City—Newark. State—N. J.
(Give name of Street Boundary below)

35. Describe in detail—

Signed NATHAN ROSENBERG.

10

Address

Date Jan. 8th. 1923.

Exhibit D-3.

(For Identification.)

Dec. 9, 1922.

20 Mr. Nathan Rosenberg,
49 Seymour Ave.,
Newark, N. J.

Dear Sir:

I desire to inform you that I represent Joseph Kobich, of this City, who on Nov. 10th, 1922, in the vicinity of Clinton Ave. & Somerset St., Newark, N. J., was struck by your automobile.

30 My client, as a result of this accident, has sustained severe personal injuries, and under these circumstances, I would appreciate greatly, should you turn this matter over to your insurance carrier, if insured, or to call at this office, in view to making an amicable adjustment of this matter.

Very truly yours,

(Signed) JACOB W. SILVERMAN.

40 JWS*S.

Judgment Record.

68127

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

vs.

MARYLAND CASUALTY Co., of Balti-
more, a Corporation,
Defendant.

10

| | |
|----------------|-------|
| Summons | 2.10 |
| Listing fee | 1.50 |
| Attorney's fee | 17.50 |

| | | |
|-------------|-------|-----------|
| Total Costs | 21.10 | 20 |
|-------------|-------|-----------|

KALISCH & KALISCH, Plaintiff's Attorneys.
FRANK G. TURNER, Defendant's Attorney.

A summons in the above stated cause was issued on the seventeenth day of March, 1925, returnable on the twenty-fifth day of March, 1925, wherein the plaintiff demands of the defendant the sum of Three hundred fifty Dollars.

30

The plaintiff filed a state of demand March 17th, 1925.

The summons was served and returned as follows:

"The President or other head Officer not being found, I served the within summons March 20th, 1925, on Mr. Tucker, he being in charge of the office of Maryland Casualty Co., Inc.,

40

Judgment Record.

the within named defendant, by reading it to him and giving him a copy thereof.

WILLIAM J. GILCHRIST, Constable."

March 25, 1925, this cause was adjourned until April 6th.

10 April 6, 1925, the plaintiff and defendant appeared and this cause was tried and determined at this time:

Moe Rosenberg, Nathan Rosenberg and Michael Estrin were sworn in behalf of the plaintiff, and the plaintiff offered in evidence a policy of insurance, a bill and a letter. Albert G. Miller, Charles T. Savitz, Stewart B. Tucker and Nathan Rosenberg were sworn in behalf of the defendant. Nathan Rosenberg and Harry Unger were sworn in rebuttal. The evidence being closed, the court rendered judgment in favor of the plaintiff and against the defendant in the sum of Three hundred fifty dollars damages and costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of Three hundred fifty Dollars damages with costs.

20 April 18 defendant filed notice of appeal and bond.

30

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Certificate.

SECOND DISTRICT COURT OF THE CITY OF
NEWARK.

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

vs.

MARYLAND CASUALTY Co., of Balti-
more, a Corporation,
Defendant.

10

On Contract.

I, James E. Garrigan, Clerk of the Second Dis-
trict Court of the City of Newark, do hereby cer-
tify that the transcript hereto attached is a true
transcript of the record and proceedings had in the
Second District Court of the City of Newark, in
the above entitled cause as it appears on page 68127
in Docket 73 of said Court.

20

JAMES E. GARRIGAN,
Clerk.

30

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NEW JERSEY SUPREME COURT.

| | | |
|----|--|------------------------|
| | NATHAN ROSENBERG, trading as ROYAL TIRE EXCHANGE, Plaintiff, | } Notice of Appeal. |
| | vs. | |
| 10 | MARYLAND CASUALTY Co., of Balti- more, a Corporation, Defendant. | |

To Kalisch & Kalisch, Attorneys of Plaintiff.

TAKE NOTICE, that the defendant hereby appeals
to the New Jersey Court of Errors and Appeals from
all of the judgment entered herein by the New Jersey
Supreme Court affirming the judgment of the Second
20 District Court of Newark.

Yours respectfully,

FRANK G. TURNER,
Attorney of Defendant-Appellant.

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NEW JERSEY COURT OF ERRORS AND
APPEALS.

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

vs.

MARYLAND CASUALTY Co., of Balti-
more, a Corporation,
Defendant.

Grounds
of Appeal. 10

To the Plaintiff:

TAKE NOTICE, that the following are the grounds
of appeal from the judgment of the New Jersey
Supreme Court. 20

1. The Supreme Court erroneously affirmed the
court below wherein it refused to nonsuit the plaintiff
on the ground that no notice as required by the policy
was given by the plaintiff to the defendant.

2. The Supreme Court erroneously affirmed the
court below wherein it refused to nonsuit the plaintiff
on the ground that there was no proof that the auto-
mobile involved in the accident was the automobile
mentioned in the policy. 30

3. The Supreme Court erroneously affirmed the
Court below wherein it refused to nonsuit the plaintiff
on the ground that the plaintiff had not complied with
the terms of the policy.

4. The Supreme Court erroneously affirmed the
Court below wherein it refused to nonsuit the plaintiff
on the ground that there could be no recovery on the
policy. 40

5. The Supreme Court erroneously affirmed the Court below wherein it refused to nonsuit the plaintiff on the ground that the proofs were that he had not paid the attorney whose fees he sought to recover from the defendant.

10 6. The Supreme Court erroneously affirmed the Court below wherein it refused to give judgment for defendant on the same grounds as the motion for nonsuit.

7. The Supreme Court erroneously affirmed the Court below wherein it refused to give judgment for the defendant on the ground that the policy insured the Royal Tire Exchange, a corporation and did not insure the plaintiff.

20 8. The Supreme Court erroneously affirmed the Court below wherein it erroneously held:

“There seems to be a misnaming of the assured. Unless it appears that the misnaming is the result of fraud on the part of the assured, I will hold that the intended contract between the parties was at that time to indemnify the owner of that car, whatever the true description of that owner may be and that this action may prevail.”

30 9. The Supreme Court erroneously affirmed the Court below wherein it erroneously held:

“I say unless fraud be established: unless it be shown that the misnaming of the assured was the result of fraud on the part of the assured or its agent, I will hold the true contract between the parties was the contract indemnifying—the other terms being out of the way—the real Royal Tire Exchange.”

40 10. The Supreme Court erroneously affirmed the Court below wherein it erroneously held:

“Under such circumstances, it would appear that the Royal Tire Exchange is the trade name of Rosenberg and that Nathan Rosenberg is the owner of that car; that he was sued as such, and that the car was operated by one in his employ, and that the suit against him was one of the suits within the anticipation of this policy. That disposes of that.”

10

11. The Supreme Court erroneously affirmed the Court below wherein it erroneously held:

“With those findings of fact, I think that the negotiations between the insurance company and the insured or his representative, the nature of their negotiations, the letter of April 4, 1923, and the investigation by the representative of the company, the report of his investigation to the company, all tend to show waiver on the part of the company of the failure to give due notice of the accident and that the fact that notice of the accident was not given immediately as the policy requires, does not vitiate the policy, because of that waiver.”

20

12. The Supreme Court erroneously affirmed the Court below wherein it erroneously held:

“Finding that the company has waived its requirements of timely notice of accident by its conduct the company then continues liable under the terms of the policy. If that be the case, they were to supply or furnish by the assured, proper counsel and whatever may be necessary in the conduct of its case, so far as the court costs and counsel fees are concerned.”

30

13. The Supreme Court erroneously affirmed the Court below wherein it erroneously held:

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“Then I find as a fact they refused to furnish counsel. The assured, justified in seeking his own salvation, sought counsel, and retained him.”

14. The Supreme Court erroneously affirmed the Court below wherein it erroneously gave judgment in favor of the plaintiff and against the defendant for Three Hundred and Fifty Dollars.

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FRANK G. TURNER,
Attorney of Defendant-Appellant.

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409 May Term, 1925.

NEW JERSEY SUPREME COURT.

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff-Appellee,

vs.

MARYLAND CASUALTY CO.,
Defendant-Appellant.

10

Appeal from Second District Court of Newark.

Argued May Term, 1925. Decided October Term, 1925.

KALISCH & KALISCH, for Plaintiff-Appellee.

FRANK G. TURNER, for Defendant-Appellant.

20

Argued before Parker, Minturn and Black, JJ.

P R CURIAM :

This action was tried in the Second District Court of Newark, without a jury, and judgment was rendered for the plaintiff for \$350. The action was brought on an insurance policy, issued to "Royal Tire Exchange Corporation." By the terms of the policy the defendant insurance company contracted to defend, at its own expense, suits brought against the assured, for accidents arising from the operation of its described automobile. One Joseph Kobich brought an action against Nathan Rosenberg (the plaintiff herein) to recover damages for personal injuries, alleged to have been caused by Rosenberg's car, while occupied by him, and driven by his son, the action resulted in a non-suit. The defendant company refused after notice, to defend that action thus making it necessary for the plaintiff herein to

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40

incur expenses in its defence ; to recover for which this present action is brought against the insurance company.

The first point is that the Trial Judge had no power to reform the policy. The contract or policy stated that it was entered into with "the assured named and described as such in the general agree-
 10 ments hereto attached and forming part hereof." In the said agreements attached to the policy the name of the assured was given as "Royal Tire Exchange Corporation." The back of the policy (front cover as folded) bore the notation "Issued to Royal Tire Exchange." The Court merely construed the policy as insuring the "Royal Tire Exchange,"
 20 which was the trade name under which the plaintiff was doing business. It is a settled rule of evidence that it may be shown alunde, by parol evidence, that a fictitious or trade name in the contract was meant to indicate a certain person. Such proof only identifies one of the parties to the contract and makes no change in any term, condition or obligation of the contract, and is comprehended by that rule of evidence which allows the fact of a latent ambiguity to be explained by parol testimony. *Sergent vs. Adams*, 3 Cr (Mass.), 72; *Axford vs. Meeks*, 59 N. J. L., 502.

30 The practical interpretation of the policy by the defendant's agents, therefore, in the correspondence and dealings between the parties, coincided with the construction thus adopted by the Court.

The second contention is that immediate notice of the accident was not given, and point three is that the Court erred in finding a waiver of timely notice of the accident. This contention is based upon the following provision in the policy : "No change what-
 40 ever in this policy, and no waiver of its provisions shall be valid unless an endorsement is added hereto,

signed by the President, a Vice-President, Secretary or Assistant Secretary of the company, expressing such change or waiver."

Such a provision has been held not to apply to conditions to be performed after the loss has occurred, such as service of notice of the loss. *Bohles vs. Insurance Co.*, 83 N. J. L., 246.

If an insurance company, after receiving an insufficient notice of loss, examine the claim and refuse to pay it exclusively on other reasons, this is a waiver to objections to the notice. 10

Schenck vs. Mercer Ins. Co., 24 L. 447.

Francis vs. Ins. Co., 25 L. 78.

The claim manager denied liability on the ground of collusion or fraud, suspicion of which was in a large part engendered by the fact that the attorney representing the injured suitor (Joseph Kubich) and the attorney representing the assured (Nathan Rosenberg), had offices in the same suite of rooms. 20

It is settled that one who as a claim manager, is entrusted by the insurer with authority to adjust the loss presumes authority also to waive notice of proofs of loss.

Snyder vs. Dwelling House Co., 59 N. J. L., 544.

The next contention is that the Court erred in refusing a non-suit. This contention is based on a provision of the policy, viz: "The company is not responsible for any settlements made or expenses incurred by assured, unless * * (such are) * * * first specifically authorized in writing by the company * * *". 30

This provision can only apply where both parties were proceeding under and in accordance with the terms of the policy. The defendant's refusal to 40

defend the action against the plaintiff was in direct violation of the terms of the policy, and of necessity, compelled the plaintiff to protect his interest.

The next point is that the Court erred in not granting a nonsuit because there was no proof that the car involved in the accident was the car insured, nor was there any proof to establish the ownership of
10 the car.

The plaintiff's evidence was that he bought the car and that it was by him insured; that it was in his possession at the time of the accident, and that he owned but one car. This was positive proof of ownership.

In *Norris vs. Ins. Co.*, 127 Atl. 763, it was held that possession alone of the car is prima facie evidence of ownership. Upon all the contentions presented the
20 judgment will be affirmed.

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NEW JERSEY SUPREME COURT.

| | | | |
|--|---|---|----|
| NATHAN ROSENBERG, trading as ROYAL TIRE EXCHANGE, Plaintiff-Appellee, vs. MARYLAND CASUALTY CO., Defendant-Appellant. | } | On Appeal Rule of Affirmance Remittitur. | 10 |
|--|---|---|----|

The above matter was heard by us at the May Term, 1925, Frank G. Turner appearing for the appellant and Kalisch & Kalisch, appearing for the appellee, and the Court having considered the argument and briefs of counsel, it is, therefore, on this sixth day of November, 1925,

20

ORDERED, that the judgment in all things be affirmed with costs and that the record be remitted to the Court below to be proceeded with in accordance with this judgment and the practice of said Court.

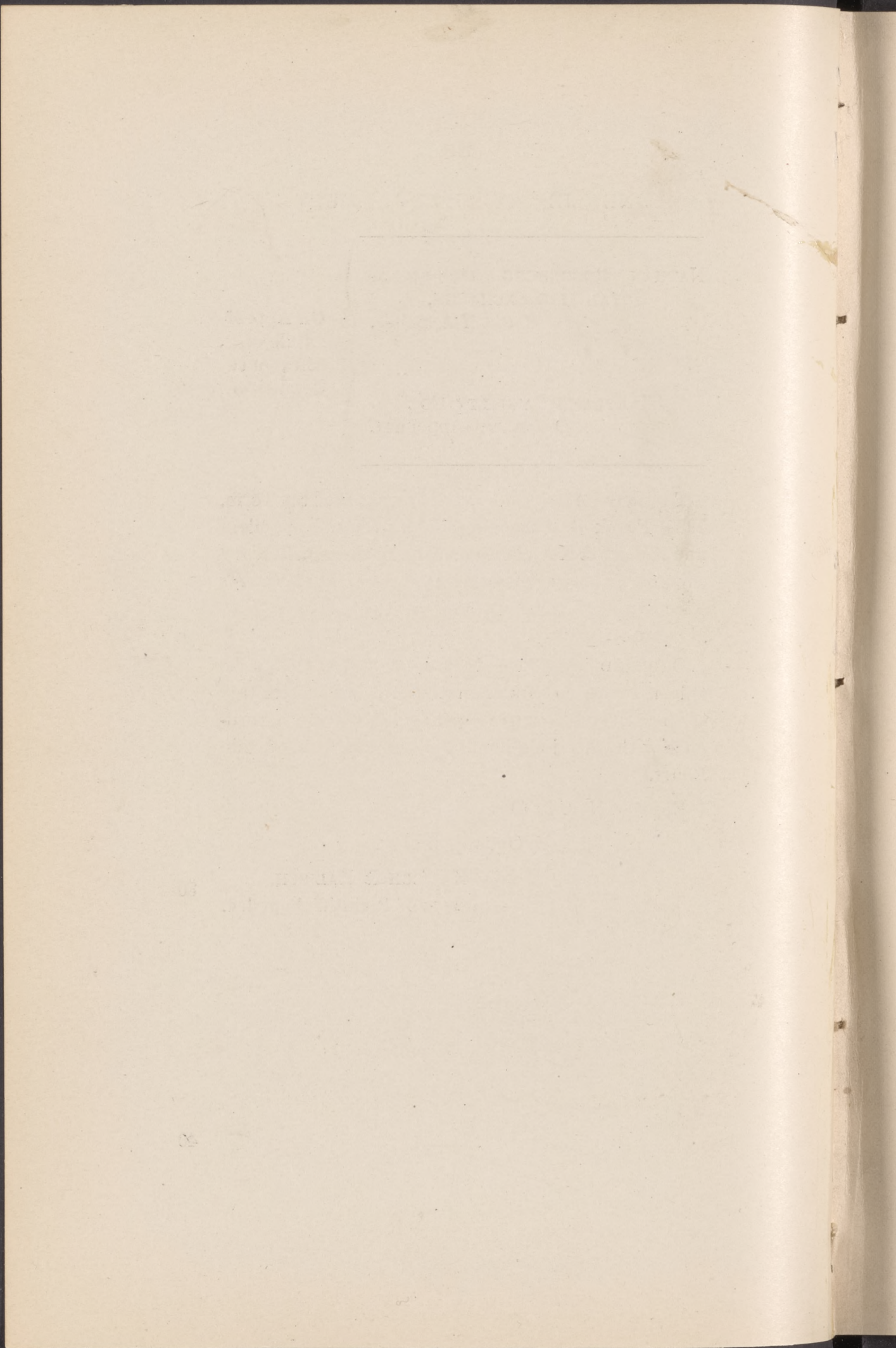
Entered Nov. 6, 1925.

On motion of

KALISCH & KALISCH,
 Attorneys of Plaintiff-Appellee.

30

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New Jersey Court of Errors and Appeals

NATHAN ROSENBERG, trading as
ROYAL TIRE EXCHANGE,
Plaintiff,

v.

MARYLAND CASUALTY Co., of Bal-
timore, A Corporation,
Defendant.

On Appeal
From
Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Plaintiff, an individual, sues to recover attorney's fees and legal expenses, for which he claims to have become indebted, but not paid, in a suit brought against him by one Joseph Kobich. Judgment was entered in his favor for \$350 and \$21.10 costs and defendant appeals.

He bases his suit on a policy of liability insurance issued to a corporation known as Royal Tire Exchange Corporation (Case, p. 92).

Plaintiff is not connected with Royal Tire Exchange Corporation and he exhibits no policy of insurance issued to himself.

On November 10, 1922, plaintiff was riding in an automobile on Clinton Avenue, Newark. This automobile collided with Joseph Kobich. See statement of plaintiff (Case, pp. 98-99).

On January 8, 1923, plaintiff reported this accident to defendant (Case, p. 100).

The Trial Court erroneously attempted to reform the policy of insurance in the following language (Case, p. 83):

“The Court: I will reopen the case to this extent. There is no question in my mind as to the apparent intention between the Royal Tire Exchange and this company. The car is identified, the business appears and the nature of the business of the assured is expressed and apparently purports to be a contract indemnifying a certain party as to a certain automobile. There seems to be a misnaming of the assured. Unless it appears that the misnaming is the result of fraud on the part of the assured, I will hold that the intended contract between the parties was at that time to indemnify the owner of that car, whatever the true description of that owner may be, and that this action may prevail.

“Mr. Turner: I object, and pray an exception to your Honor’s ruling.”

POINT I.

It was error for the Supreme Court to find that the District Court Judge had power to reform the policy.

By its own terms the policy provides it cannot be thus changed (Case, p. 91):

“No change whatever in this Policy, and no waiver of its provisions shall be valid unless an endorsement is added hereto, signed by the President, a Vice-President, Secretary or an Assistant Secretary of the Company, expressing such change or waiver.”

This was not a suit to reform the policy. The state of demand alleges that plaintiff is one of the officers of plaintiff company (Case, p. 4):

“4. Suit was instituted on behalf of Joseph Kobich against the said Nathan Rosenberg, who was and still is one of the officers of the plaintiff company, to recover damages from this plaintiff, resulting from the accident here-

inbefore referred to, which said action was instituted on or about March 24, 1923."

There was no contract of insurance between plaintiff and defendant.

It is the function of the Court to construe the contract, not to make a new one.

Capps v. National Union Fire, 149 N. E., 247.

POINT II.

If plaintiff had been a party to the contract of insurance he had violated its terms.

The contract with Royal Tire Exchange Corporation provides (Case, p. 89) :

"Immediate written notice of any accident and like notice of any suit resulting therefrom, with every summons or other process, must be forwarded to the Home Office of the Company, or to its authorized representative."

Immediate written notice of the accident was not given. This is fatal to any claim under the policy :

"The policy provides that the assured shall give immediate written notice. In *Everson v. General Fire & Life Assur. Co.*, 88 N. E., 658, the Supreme Court of Massachusetts holds that under the policy requiring that in case of accident written notice should be sent the insurer 'as soon as possible,' the words quoted are substantially equivalent to 'forthwith' or 'immediate' which in this connection mean that such notice shall be sent with reasonable promptness.

"In cases where there have been no unusual circumstances the Court has held that two days is within the meaning of the condition of immediate notice. *Peoria Marine & Fire v.*

Lewis, 18 Ill., 553, but in the case of Railway Passenger Assur. Co. v. Burwell, 44 Ind., 460, the Court holds that notice at the end of six days is not immediate notice."

See

Macchia v. Scottish Union, 3 N. J. A. R.,
707;
Billet v. Penna. Fire 3 N. J. A. R., 977.

POINT III.

The Trial Court erred in finding (Case, p. 85): "Finding that the company has waived its requirement of timely notice of accident by its conduct, the company then continues liable under the terms of the policy. If that be the case, they were to supply or furnish to the assured proper counsel and whatever may be necessary in the conduct of its case so far as the court costs and counsel fees are concerned."

The theory of the Court was that Mr. S. B. Tucker, claim manager, had waived the requirement of timely notice.

The requirement was "immediate written notice."

A claim department manager has no power to waive such term of the policy. See policy (Case, p. 91, lines 9 to 19).

He is neither President, Vice-President, Secretary nor Assistant Secretary.

See

Leo v. Interstate Chemical Co., 110 Atl.
Rep., 903;
Thomas v. Employers Liability Ins. Co.,
130 At., 322.

POINT IV.

“The Court refused to nonsuit the plaintiff on the ground that there could be no recovery on the policy.”

Plaintiff has not paid the bill for attorney's fees (Case, p. 21, line 40).

The policy provides (Case, pp. 89-90):

“The Company is not responsible for any settlements made or any expenses incurred by the Assured, unless such settlements or expenditures are first specifically authorized in writing by the Company, except that the Assured may provide at the time of the accident, at the expense of the Company, such immediate surgical relief as is imperative.”

There could be no recovery by the plaintiff even if he held a similar policy issued to him.

POINT V.

“The Court refused to nonsuit the plaintiff on the ground that there was no proof that the automobile involved in the accident was the automobile mentioned in the policy.”

The policy covers Ford Sedan 1921 Model #5379716 of Royal Tire Exchange Corporation.

There was no proof that such automobile was involved in an accident with Joseph Kobich.

The burden was on plaintiff to bring himself within the terms of the policy. This was not done. If there had been a change of interest as to the automobile there would be no liability because the policy provides (Case, pp. 90-92):

“No assignment or change of interest under this Policy shall bind the Company unless

there shall be endorsed hereon the acceptance of the assignee and the consent of the Company signed by the President, a Vice-President, a Secretary or an Assistant Secretary of the Company."

This was a case where proof should have been offered to show the ownership of the car and no such ownership was established. *Security Credit v. Whiting Motor*, 118 At., 695.

POINT VI.

The Court erroneously held: "Under such circumstances, it would appear that the Royal Tire Exchange is the trade name of Rosenberg, and that Nathan Rosenberg is the owner of that car; that he was sued as such, and that the car was operated by one in his employ, and that the suit against him was one of the suits within the anticipation of this policy. That disposes of that."

This finding takes the claim outside of the policy. If Moe Rosenberg was employed by his father, that does not make him an employee of Royal Tire Exchange Corporation which is named as assured.

It is respectfully urged that the judgment of the Supreme Court should be reversed and set aside.

Frank G. Turner
FRANK G. TURNER,

Attorney and of Counsel with
Defendant-Appellant.

New Jersey Court of Errors and Appeals

NATHAN ROSENBERG, trading as
Royal Tire Exchange,
Plaintiff-Respondent,

vs.

MARYLAND CASUALTY CO. OF BAL-
TIMORE, a corporation,
Defendant-Appellant.

*On Appeal
from Su-
preme Court.*

BRIEF OF PLAINTIFF-RESPONDENT.

The plaintiff, an individual, trading as Royal Tire Exchange, sued to recover attorney's fees, cost of investigation and legal fees for which he became indebted because of a suit brought against him by one Joseph Kobich. Judgment was entered in his favor for \$350 and \$21 costs.

He bases his suit on a policy of insurance (Exhibit P. 1, pp. 87 to 95, inclusive) which policy provides among other things "the company will, at its own cost, investigate all accidents covered hereunder and defend all suits thereon, even if groundless, of which notices are given to it" (p. 88, ll. 1 to 11, inclusive).

A suit was brought against Nathan Rosenberg, by one Joseph Kobich, upon an accident covered under the said policy which policy was issued to Royal Tire Exchange (p. 95, ll. 25 to 30). The evidence in the case showed that "Royal Tire Exchange" was the trade name of Nathan Rosenberg (p. 13, ll. 39 and 40, and p. 98, l. 23). (The same appears on page 42, lines 10 to 16, inclusive.)

In a rider to the policy the name of the assured was erroneously inserted by the defendant-appellant as Royal Tire Exchange Corporation (p. 92, ll. 11 and 12) although the policy itself shows that the policy was *issued* to Royal Tire Exchange (p. 95, ll. 26 and 27).

The plaintiff-appellee gave notice of the accident and immediate notice of the suit to the defendant-appellant, but the defendant-appellant refused to defend the suit alleging in a letter (Exhibit P. 3, pp. 97-98) in substance, that the whole thing was a fraud. The plaintiff-appellee was thereupon compelled to have an investigation made and to defend the suit at his own expense. It was for such expense that the plaintiff-appellee brought suit.

Answer to Point 1 of the defendant-appellant's brief.

The District Court did not reform the policy.

The District Court construed the policy.

The District Court only altered the state of demand to conform to the evidence (p. 80, l. 38).

On page 95, the endorsement on Exhibit P. 1 shows that the policy was *issued* to the Royal Tire Exchange. The plaintiff-appellee had no reason to believe that the name of the assured was erroneously inserted in the rider to the policy (p. 92, ll. 11 and 12); the letter of the Maryland Casualty Co. (Exhibit P. 3, p. 97, l. 10) refers to the Royal Tire Exchange (Exhibit D. 1, p. 98, l. 23), identifies Nathan Rosenberg, as trading as the Royal Tire Exchange (Exhibit D. 2, p. 100, l. 20); refers to the Royal Tire Exchange as the owner of the Ford Sedan No. 5379716 and (p. 68, ll. 11 and 27) refer to the "assured"; and the

same lines and same pages refer to statements made by the "assured" which statements are Exhibit D. 1 (pp. 98 and 99); further on page 20, Nathan Rosenberg, the plaintiff-appellee identifies policy, Exhibit P. 1 (pp. 87 to 95) as the policy issued to him, also (p. 42, ll. 10 to 15) Miller, the adjuster of the defendant-appellant refers to the report of the automobile accident Exhibit D. 2 (pp. 100, 101 and top of 102) as relating to the plaintiff-appellee and also as relating to the Royal Tire Exchange.

These excerpts indicate clearly, that this plaintiff-appellee was considered by the defendant-appellant as the assured and that Nathan Rosenberg traded as the Royal Tire Exchange. And Mr. Turner, attorney for the defendant-appellant on page 22, stated that the policy showed the private number of his (referring to the plaintiff's) automobile. The colloquy on pages 25 and 26 between the Court and Mr. Turner, attorney for the defendant-appellant, *shows that the defendant-appellant only relied upon the question of the notice of the accident*, even upon his motion for non-suit no point was made that this plaintiff was not covered (p. 39, l. 39, bottom p. 40, and on p. 81, l. 18, and the lines following). Mr. Turner admits "that the Royal Tire Exchange was insured but not Nathan Rosenberg and that if Nathan Rosenberg were driving the car or the Royal Tire Exchange really was sued, then the insurance company would really have to pay." We agree in this respect with Mr. Turner and are of the opinion that the defendant-appellant must pay because if they insured the Royal Tire Exchange, then they insured Nathan Rosenberg, because Nathan Rosenberg was the Royal Tire Exchange.

With reference to the question of reforming the insurance policy, it appears there was not even an attempt to reform on the part of the Court. There was merely a misdescription of one of the parties to the policy and the Court was justified in identifying the parties to the agreement. The plaintiff-appellee was entitled to the benefit of the ambiguity because the insurance company was the fault of it.

The principal of *falsa demonstratio non nocet, cum de corpore constat*, applies, that is, if there is a false description of a party, so much of the description as is false is rejected and the instrument will take effect if a sufficient description remains to ascertain its application.

Greenleaf on Evidence, page 412, paragraph 301, Volume 1; *Wigmore on Evidence*, Volume 4, paragraph 2476; *Taylor on Evidence*, Volume 2—Part 1, paragraph 1218, are the authorities for the principal of *falsa demonstratio*, etc., and *Taylor on Evidence*, Volume 2, Part 1, paragraph 1218, states that if the description be partly correct and partly incorrect and the correct part be sufficient of itself to enable the Court to identify the subject intended, whilst the incorrect part is applicable to any such, parole evidence will be admissible and the instrument will be rendered operative by rejecting the erroneous statement.

The New Jersey cases of *Monmouth Park Association v. Wallis Iron Works*, 55 Law 132; *Sisson v. Donnelly*, 7 Vroom 432, are authorities to the effect that a court of law should read a written contract according to the obvious intentions of the parties, in spite of the clerical errors or omissions which can be corrected by perusing the whole instrument.

The case of *Vivar v. Supreme Lodge Knights of Pythias*, 52 Law 455, held that a false representation, that the beneficiary was the insured's wife did not warrant a cancellation of the policy because the designation of the beneficiary is deemed merely for identification purposes.

It is the contention of the plaintiff-appellee, that the naming of the assured is merely for identification purposes and that the real intent and purpose of the whole contract of insurance, is to cover the operation of the *automobile described in the policy* and to substantiate this contention, we refer to the automobile policy Exhibit P. 1 (p. 87, ll. 20 to 40), where the insurance provided by the policy, is available to any person or persons while riding in or legally operating any of the automobiles described in the general agreements provided, the operation of the automobile is with the consent of the named assured. Surely there was sufficient evidence in the case for the Court to determine who was the holder of the policy. Now with reference to reforming the agreement, the only necessity for going into a court of equity would be because parole evidence cannot be used to alter, vary or contradict the written terms of an agreement in a court of law and we will assume, for the sake of argument, and without admitting it, that parole evidence was used in this case to alter, vary or contradict the terms of the instrument in showing who the real party in interest was, the defendant-appellant raised no objection to the admission, such evidence showing who the real party in interest was. The parole evidence rule is merely a rule of evidence, (*Chetwood v. Britton*, 2 Equity 283), and being a rule of evidence, the defendant-appellant having raised no objections to the introduction of parole evidence, cannot in-

voke the rule before the Appellate Court. (22 *Corpus Juris*, page 1295, paragraph 1728) where we find authority that a party who is entitled to the benefit of the rule prohibiting the omission of parole evidence, waives the benefit by allowing such testimony to be received without objection and without any effort to have it stricken out and under such circumstances, he cannot, after the trial has closed, invoke the rule.

The case of *Kean v. Davis*, 21 Law 683, is authority for the rule that the Court in using parole evidence to ascertain who is the real party in interest to a contract, does not alter, vary or contradict the written terms of a contract.

The case of *Clinton v. Hope Insurance Company*, 45 New York Reports 454, holds that if the description used is imperfect so that it cannot be understood without explanation, extrinsic evidence may be resorted to ascertain the meaning of the contract and when thus ascertained, it will be held to apply to the interest intended to be covered.

Joyce on Insurance, Volume 1, page 544, paragraph 205, holds that where parties have, by certain acts of their own, placed a construction upon doubtful terms of a contract, such construction will be accepted by the Courts as against themselves. Surely there was nothing in the case to show that the defendant-appellant did not recognize the plaintiff-appellee was the assured, but the contrary is the fact. Dealings with the plaintiff's attorney, authorizing settlement, letter to plaintiff's attorney (Exhibit P. 3), and Court's finding of fact, establish this clearly.

The plaintiff-appellee was a party to the contract of insurance and if he had violated any of

the terms of the contract, there was a waiver by the company of any violation.

Answer to Point 2 of the defendant-appellant's brief.

The Court has found that there was a waiver of the timeliness of the notice of accident. The Courts of the State of New Jersey have held that conditions in policy with respect to notice of loss and preliminary proofs may be waived by parole, and if there is any evidence of a waiver, it becomes a jury question. From the evidence in the case, it had found there was a waiver of an accident. Mr. Tucker, who, as it appears on page 56, line 13, was the manager of the Newark claim division of the defendant-appellant, admitted on page 60, lines 1 to 15, that he authorized Mr. Estrin, attorney for the plaintiff-appellee, to negotiate a settlement; Mr. Tucker (p. 62, l. 36) states that he never told Mr. Estrin that he disclaimed liability; on page 57, lines 13 to 20 Mr. Tucker, ordered Miller, an investigator of the defendant-appellant, to make an investigation and received statement Exhibit D. 1 (p. 98). On page 60, line 33, Mr. Tucker admits writing letter P. 3 (pp. 97 and 98), which letter disclaimed liability on the grounds of fraud and because of the fact that Silverman brought suit on behalf of Kobich for \$10,000.

The case of *Carson v. Jersey City, &c.*, 43 Law, page 300; *Dwelling House Insurance Co. v. Snyder*, 59 Law, page 544, are the leading cases in New Jersey to the effect that a preliminary notice of proof of loss, etc., may be waived by parole, because the Courts have held that the provision in insurance policies with reference to waivers being in writing, apply to those condi-

tions and provisions in the policy which relate to the formation and continuance of the contract of insurance and do not therefore, apply to those conditions which are to be performed after the loss occurs.

The cases of *Basch v. Humboldt Fire Insurance Co.*, 35 Law, page 429; *Graham v. Security*, 73 Law 205; *Jones v. Mechanics Insurance Co.*, 36 Law 29; *State Insurance Co. v. Maackens*, 38 Law, p. 564; *Hibernia Mutual Fire Insurance Co. v. Meyer*, 39 Law 482, and *Ratwanski v. Scottish Union and National Insurance Company*, 126 Atlantic 657, are to the effect that where there is a disclaimer on a particular ground or grounds, all other grounds are waived and the Court was justified in believing that the letter P. 3 (pp. 97 and 98) stated the grounds of the disclaimer and that therefore, the question of immediate notice was waived. As a matter of fact the Court found that the negotiations between the insurance company, the investigation by the representative of the company, the reports of the investigation, the letter of April 4, 1923, (P. 3) all tend to show waiver on the part of the company of the failure to give due notice of the accident.

A long line of cases holds that this Court will not reverse a judgment which is based upon a conclusion of the District Court upon a mixed question of law and fact *Dordoni v. Hughes*, 85 Atlantic 353; *Burr v. Adams*, 71 Law 263, and numerous other cases.

Answer to Point 3 of the defendant-appellant's brief.

Is covered by the answer to Point 2.

Answer to Point 4 of the defendant-appellant's brief

It seems that the defendant-appellant has abandoned the idea that the plaintiff could not recover because he had not paid the attorney whose fees he sought to recover from the defendant-appellant because Point 4, which is the only point with reference to the question, seems to indicate that the defendant-appellant relies upon the clause in the policy (pp. 89 and 90) to the effect that the company is not responsible for settlement and expenses, etc., unless specifically authorized in writing by the company. If this is the ground upon which the defendant-appellant seeks to rely, a glance at the case of *Anderson Ireland & Co. v. Maryland Casualty Co.*, which case was decided by the Court of Appeals of Maryland, 90 Atlantic 780, is a complete answer. In this case, the very same clauses in the policy of defendant-appellant company were construed and decided upon and the Court held that the provision that the casualty company would not be responsible for the expenses incurred by the assured in the absence of such authorization, could only apply when *both* parties were proceeding in accordance with the terms of the agreement.

In the case at bar, as in the case just cited, the Maryland Casualty Co. refused to pay defendant on the ground that the assured and the party who claimed against the assured, were working together in that case and the Maryland Casualty Co. sent a letter to the assured stating that they would send a lawyer to be present and defend at the trial, but they reserved the right to withdraw the lawyer at any time during the progress of the trial. The Court held that under those circumstances, the assured had a right to have his own counsel represent him and in view of the fact

that the company, by its policy agreed to defend it "at its own costs," and reserved the right not to do so, the insurance company was liable because of a breach of its agreement. Such is the case at bar, and we might say it is identical and the reasoning in that case applies to this case.

Now if the defendant has not abandoned the point that "expenses incurred" means expenses paid, we submit that "expenses incurred" in the ordinary English language, means expenses for which a party becomes *legally liable*. The meaning of the word *expense* is commonly understood as well as the meaning of the word *incurred*. The word incurred in Webster is defined as meaning that one becomes liable and *Tuttle v. State Mutual, etc.*, 127 Atlantic 682, holds that the insurance company must pay for costs and counsel fees incurred.

Answer to Point 5 of the defendant-appellant's brief.

There was plenty of proof that the automobile involved in the accident was the automobile mentioned in the policy.

There was proof that the automobile involved in the accident was the automobile mentioned in the policy. On page 14, line 5, Moe Rosenberg identifies automobile involved in the accident as a Ford sedan which is the same automobile mentioned in policy Exhibit P. 1 and that of the plaintiff-appellee. On page 22, line 25, plaintiff-appellee stated that he had *only one car* at the time and that is the car for which he received a policy. Assuming that there was no evidence in the plaintiff's case to the effect that the automobile involved in the accident was the automobile mentioned in the policy, it was cured by Exhibit D. 1 and Exhibit D. 2 which shows conclusively

that the automobile involved in the accident was the automobile which was insured.

Answer to Point 6 of the defendant-appellant's brief.

The appellee wishes to call the attention of the Court to that clause of the insurance policy on page 88, lines 1 to 10, which reads as follows:

“In addition to the limit set forth in the General Agreements, the company will, at its own cost (court costs and all interest accruing after entry of judgment being considered a part thereof regardless of the limit of liability set forth in the general agreements), investigate all accidents covered hereunder, and defend all suits thereon, even if groundless, of which notices are given to it as hereinafter required, unless the company shall elect to settle the claim or suit.”

The Court will readily see that under this clause of the policy there was a distinct obligation to DEFEND all suits, etc., at its own cost, provided immediate notice of the *suit* be given. The Court on page 84, lines 17 to 26, of the State of the Case found that notice of the *suit* was given duly and promptly and as required under the policy.

We wish to call attention to the fact that the defendant-appellant in his brief avoids reference to New Jersey cases, and further the Supreme Court opinion in this case, is replete with New Jersey cases, each and every one clearly on the points involved herein.

We respectfully submit that the judgment under review be affirmed.

KALISCH & KALISCH,
Attorneys of Plaintiff-Appellee.

On the brief,
ISIDOR KALISCH.

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