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*Notice of Appeal.*

**Notice of Appeal.**  
(Filed Jan. 22, 1917.)

## Essex County Circuit Court.

10

RUDOLPH GROSS,

*Plaintiff,*

*vs.*

COMMERCIAL CASUALTY INSUR-  
ANCE COMPANY of Newark,  
New Jersey.

*Action at  
Law.*

*Notice of  
Appeal.*

Sir:

20

TAKE NOTICE that the defendant appeals from the whole of the judgment entered in this cause, and each and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes in the State of New Jersey.

WM. E. HOLMWOOD,  
*Attorney and of Counsel  
for Defendant-Appellant.*

Dated, November 22, 1916.

30

To JACOB L. NEWMAN, Esq.,  
*Attorney for Plaintiff-Respondent.*

40

*Grounds of Appeal.***Grounds of Appeal.**

(Filed Jan. 27, 1917.)

**New Jersey Court of Errors and Appeals**

10

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 RUDOLPH GROSS,  
*Plaintiff-Respondent,*
*vs.*
 COMMERCIAL CASUALTY INSUR-  
 ANCE COMPANY,  
*Defendant-Appellant.*


---

*On Appeal  
 from Essex  
 Circuit Court.*
*Grounds of  
 Appeal.*

20

To

 JACOB L. NEWMAN, ESQ.,  
*Attorney for Plaintiff.*

Sir:

TAKE NOTICE, that the following are the grounds to be urged by the appellant, on the appeal taken in this cause, on the 22d day of January, 1917:

30

1. Because the learned trial judge denied the motion made by defendant's attorney to strike out the following testimony of the plaintiff:

“Q. What did you do there? A. Accept different shipments before they went on the boat. First I had to go to the different freight offices of the steamship company to make my arrangements for the forwarding of the goods, and made contracts.”

40

2. Because the learned trial judge denied the motion made by defendant's attorney upon the close of the plaintiff's case, for a judgment of

*Grounds of Appeal.*

non-suit because of the breach of the warranties set up in the amended answer.

3. Because the learned trial court denied the motion made by defendant's attorney for the direction of a verdict in favor of the defendant.

4. Because the learned trial court denied the motion made by defendant's attorney to direct the jury, that in the event of a finding in favor of the plaintiff upon the question of breach of warranty, that their verdict be limited to the period of total disability from January 4th, 1915, to January 20th, 1915, at \$25.00 per week, and for partial disability from January 20th, 1915, to March 7th, 1915, at \$18.75 per week or a total of \$202.00. 10

5. Because the learned trial judge charged the jury as follows: 20

"Gentlemen, it is the duty of the Court to construe the contract, to tell you what, in law, the contract means. You are the judges of the facts; but this is a legal proposition, of which the Court is the judge. It often occurs, in most cases it is true, that the precise words which the trial court is called upon to construe, have never been construed by any appellate court, and these precise words in this contract, 'totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation,' do not appear to have been construed by the appellate courts of the State of New Jersey. The Court's attention has been called to no case in the State of New Jersey by which these words have been construed by the appellate courts of this state; but these precise words have been construed by the courts of other states, and some of these courts have construed 30 40

*Grounds of Appeal.*

10 it one way, which would prevent recovery by the plaintiff in this case, and some have construed these precise words the other way, which permitted recovery under circumstances somewhat similar to those which appear in this case, and since the rule of law applicable to policies of insurance is that they shall receive liberal construction in favor of the insured I am inclined to adopt the rule which is liberal toward the insured rather than otherwise, and I shall adopt the language of the trial court quoted in the report of the case of *Young vs. Travellers' Insurance Company*, reported in 80 Maine, 244, adapting it to this case.

20 "I have already called to your attention the representation made by the plaintiff as to his occupation, that is, that it was office duties and travelling. Now, then, using these words, instead of the words used in this case, I charge you that this is the law applicable to this case. 'The reasonable construction which must be put upon the language here used is that it must have meant that, if the plaintiff was so disabled as to be incapable of doing any and every kind of business pertaining to his occupation, as office man and travelling,' then he would be wholly disabled from the prosecution of every kind of business

30 pertaining to such occupation, and entitled to the stipulated compensation. Otherwise, if he was not so disabled he would not be entitled; and therefore, gentlemen, I instruct you as a matter of law that the meaning of the language here used is, not that he must be so disabled, as to prevent him from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his occupation,' as in the office and travelling, 'but that he must be so disabled

40 as to prevent him from doing any and

*Grounds of Appeal.*

every kind of business pertaining to his occupation. There may be a difference between being able to perform any part of his business, and any and every kind of business pertaining to his occupation.' And that is the law, gentlemen, which I have read from this Maine case, and which is applicable to this case." 10

6. Because the learned trial judge charged the jury as follows:

"Gentlemen, while it is true that a false representation as to physical conditions in a policy of this kind would vitiate the policy, make the policy void, and that the plaintiff would be unable to recover under the policy, yet, if the person insured has omitted to mention some temporary or slight ailment, if the ailment is temporary or slight, then he is not prevented from recovery. 20  
And the same, as to the fact whether or not he had consulted a physician, the rule being that a full statement as to whether the applicant had consulted or been attended to by a physician is material to the risk, and will defeat a recovery, especially where it is warranted to be true, as it is in this case. But even where the answers are made warranties, substantial truth is all that is required, in analogy with the rule as to temporary or slight ailment, which I have just mentioned, and it is held that medical consultation 30  
or attendance for merely slight or temporary indisposition need not be disclosed, the insured being entitled to a liberal construction, as I have already stated, of the language of application."

WM. E. HOLMWOOD,  
*Attorney for and of*  
*Counsel with Defendant.*

*Summons.*

**Summons.**

(Filed April 3, 1916.)

THE STATE OF NEW JERSEY to COM-  
(L. S.) Mercial Casualty Insurance Company  
of Newark, New Jersey.

10 YOU ARE SUMMONED to answer the annexed  
complaint of RUDOLPH GROSS, in an action at law  
in the Essex County Circuit Court. And take  
notice that unless you file your answer to said  
complaint with the Clerk of the said Essex  
County Circuit Court, at Newark, within twenty  
days after the service upon you of this writ, and  
the annexed complaint, the plaintiff may proceed  
in the suit, and judgment may be entered against  
you.

20 WITNESS, FREDERIC ADAMS, Esq., Judge of the  
said Circuit Court, at Newark, this first day of  
April, nineteen hundred and sixteen.

JOSEPH McDONOUGH,  
*Clerk.*

JACOB L. NEWMAN,  
*Attorney.*

(See notice endorsed on complaint.)

30

40

*Complaint.*

**Complaint.**

ESSEX COUNTY CIRCUIT COURT.

RUDOLPH GROSS,

*Plaintiff,*

*vs.*

COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK,  
NEW JERSEY,

*Defendant.*

*Action at  
Law.*

*Complaint.*

10

The plaintiff, Rudolph Gross, residing at Nos. 640-642 High Street, in the City of Newark, County of Essex and State of New Jersey, says:

First: That on the fourth day of January, nineteen hundred and eleven, the defendant was and still is a corporation duly incorporated under the laws of the State of New Jersey, with power to insure people against disability or death resulting from illness or bodily injuries.

20

Second: That on the first day of October, nineteen hundred and eleven, the defendant delivered to the plaintiff a certain policy of insurance in writing, and agreed, in consideration of the premiums provided for in said policy of insurance, and the renewals thereof, to insure the plaintiff against disability or death resulting from accident, illness or bodily injuries, a copy of which policy of insurance is hereto annexed and made part hereof, and is hereby expressly referred to.

30

And the said plaintiff in accordance with the terms of said policy of insurance, and the renewals thereof, paid to the said defendant the premiums therein provided for, and became and was entitled to all the benefits provided under

40

*Complaint.*

the terms of said policy of insurance and the renewals thereof.

Third: That said policy of insurance contained, among other things, the following clause:

10 "H. If the assured shall, by reason of any disease or illness, contracted during the term of this insurance and not herein accepted, be totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, and necessarily confined in the house, the same amount per week as is provided in Clause B. 1, viz., the sum of Twenty-five dollars per week, for total disability, will be paid to the assured; and if, immediately following such a period of total disability and confinement in the house, he shall be disabled and  
20 wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, but is not necessarily confined in the house, three-fourths of said amount per week will be paid to the assured, but no payment will be made for disability in excess of fifty-two consecutive weeks' duration."

30 Fourth: That on or about the first day of October, nineteen hundred and twelve, and annually thereafter, up to and including the first of October, nineteen hundred and fifteen, the defendant renewed said policy of insurance by executing and delivering to the said plaintiff renewal receipts continuing in full force and effect the terms and conditions of said policy of insurance in writing, provided the said plaintiff should pay the premiums provided for in said renewal receipts; and the said plaintiff did pay to the said defendant the premiums therein provided for, and became and was entitled to the benefits  
40 of the terms of said policy of insurance, in

*Complaint.*

accordance with the terms of said renewal receipts, said policy of insurance continuing in full force and effect up to and including the first day of October, nineteen hundred and fifteen as aforesaid.

Fifth: That on or about the twenty-ninth day of December, nineteen hundred and fourteen, the plaintiff became affected with an ailment known as Phlebitis, of which ailment the said defendant had due and timely notice, and was, by reason thereof, continuously confined to his house from the fourth day of January, nineteen hundred and fifteen, until the twentieth day of January, nineteen hundred and fifteen, and was unable to attend to any business or occupation. 10

Sixth: That, as a direct and sole consequence of said illness, the plaintiff was disabled for a period of 268 days from the twenty-first day of January, nineteen hundred and fifteen, until the fifteenth day of October, nineteen hundred and fifteen, during which time he was not confined to the house but was totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation. 20

Seventh: That on or about the first day of March, nineteen hundred and fifteen, and the seventh day of December, nineteen hundred and fifteen, the plaintiff furnished the defendant with health proofs of loss required by the terms of said policy of insurance, which loss amounted to Sixty dollars and seventy-five cents (\$60.75) for total disability, and Seven hundred and seventeen dollars and seventy-five cents (\$717.75) for partial disability, in all making a total of Seven hundred and seventy-eight dollars and fifty cents (\$778.50), and duly performed all the conditions of the said policy on his part. 30 40

*Complaint.*

Eighth: That the defendant has not paid said sum of Seven hundred and seventy-eight dollars and fifty cents (\$778.50), and has always refused to pay the plaintiff the same.

10 Plaintiff demands, as damages, the sum of Seven hundred and seventy-eight dollars and fifty cents (\$778.50) with interest from the seventh day of December, nineteen hundred and fifteen.

JACOB L. NEWMAN,  
*Plaintiff's Attorney.*

20 Judgment will be claimed for the sum of Seven hundred and seventy-eight dollars and fifty cents (\$778.50) with interest thereon from the seventh day of December, nineteen hundred and fifteen, together with costs.

JACOB L. NEWMAN,  
*Plaintiff's Attorney.*

Attached hereto is true copy of policy Exhibit P. 1, to which exhibit reference is made.

NOTICE to the within named defendant:

30 In case the within writ of summons and complaint are served upon you personally then take notice that if you intend to make a defense to this action, you must file an Affidavit of Merits within ten days from the date of service thereof upon you, and must file your answer within twenty days from the date of such service, and in default thereof, judgment will be entered against you. Lawful service upon a corporation is deemed personal service for the purpose of this notice.

JACOB L. NEWMAN,  
*Plaintiff's Attorney.*

*Answer.***Answer.**

(Filed April 20, 1916.)

## ESSEX COUNTY CIRCUIT COURT.

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 RUDOLPH GROSS,
*Plaintiff,**vs.*
 COMMERCIAL CASUALTY INSUR-  
 ANCE COMPANY OF NEWARK,  
 NEW JERSEY.
*Defendant.*
 Defendant.  
 Action at  
 Law.
*Answer.*

10

The answer of the defendant, Commercial Cas-  
 ualty Insurance Company, a corporation, lo-  
 cated at No. 31 Clinton Street, Newark, New  
 Jersey, to the complaint filed herein, respectfully  
 shows:

20

1. The defendant admits the allegations con-  
 tained in paragraph one of said complaint.

2. Defendant admits the allegations contained  
 in paragraph two of said complaint, except the  
 allegation that a copy of said contract referred  
 to is attached to and made a part of said com-  
 plaint.

3. Defendant admits the allegations contained  
 in paragraphs three, four and five of said com-  
 plaint.

30

4. Defendant, further answering, denies  
 the allegations of paragraphs six and seven of  
 said complaint.

5. Defendant admits the allegations contained  
 in paragraph eight of said complaint.

40

*Answer.*

DEFENSES.

In addition to the matters referred to above, defendant will urge the following defenses:

10 1. That the plaintiff failed to give to the defendant written notice of the commencement of said alleged disability by disease, as early as was reasonably possible, in accordance with the provisions of the policy of insurance held by him.

2. That the defendant did not contract with the plaintiff in the manner and form alleged.

WILLIAM E. HOLMWOOD,  
*Attorney for Defendant.*

20

30

40

*Reply.***Reply.**

(Filed May 3, 1916.)

## ESSEX COUNTY CIRCUIT COURT.

RUDOLPH GROSS,

*Plaintiff,**vs.*COMMERCIAL CASUALTY INSUR-  
ANCE COMPANY OF NEWARK,  
NEW JERSEY,*Defendant.**Action at  
Law.**Reply.*

10

The plaintiff, Rudolph Gross, replying to the defense of the defendant, says:

1. The plaintiff denies that he failed to give the defendant written notice of the commencement of said alleged disability by disease, as early as was reasonably possible, in accordance with the provisions of the policy of insurance held by him.

20

2. The plaintiff denies that the defendant did not contract with the plaintiff in the manner and form alleged.

JACOB L. NEWMAN,

*Attorney of Plaintiff.*

30

40

*Amendment to Answer.*

**Amendment to Answer.**

(Filed January 26, 1917.)

ESSEX COUNTY CIRCUIT COURT.

10	RUDOLPH GROSS,  vs.  COMMERCIAL CASUALTY INSUR- ANCE COMPANY OF NEWARK, NEW JERSEY,	Plaintiff,     Defendant.	}     }	<i>Action at Law.</i>     <i>Amendment to Answer.</i>
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20 The answer filed by the defendant herein is hereby amended by adding thereto the following paragraphs as paragraphs three, four and five of defenses.

3. That on the first day of October, 1914, the plaintiff renewed said policy of Insurance for the term of one year, and re-affirmed the warranties contained in said policy, and in particular warranty No. 16, as follows:

“I have not been disabled nor have I received medical or surgical attention during the past five years, except as follows:

30 In 1911 for Eczema lasting four months.”

Whereas the fact is said plaintiff was under the care of a physician prior to the date of such renewal and in the year 1914, and that plaintiff's claim is invalidated because of such breach of warranty.

4. That upon the date of the renewal of said policy referred to in the preceding paragraph the plaintiff also re-affirmed warranty No. 15 in said policy as follows:

40 “15. My habits of life are correct and tem-

*Amendment to Answer.*

perate, my hearing and vision is not impaired; I am in sound condition mentally and physically, except as herein stated:

No exceptions.”

Whereas the plaintiff was suffering at the time of said renewal and prior thereto from a disease known as Phlebitis, and prior to that time had consulted a physician as to his physical condition, and that plaintiff's claim is invalidated because of such breach of warranty. 10

5. That at the time of the renewal of said policy of Insurance as referred to herein, the plaintiff agreed with the defendant that said policy should be renewed for a period from October 1, 1914, to October 1, 1915, as follows:

“Provided the statements in the schedule of warranties in the original contract are true at this date and that nothing exists at the date hereof to render the hazard of the risk greater than or different than that shown by such schedule.” 20

That prior to and at the time of such renewal, the hazard of said risk was greater than or different than that shown by such schedule in that said plaintiff was not in sound health, and in that he was under the care of a physician, and that he was suffering from a disease known as Phlebitis, and that plaintiff's claim is invalidated because of his failure to comply with said agreement. 30

WILLIAM E. HOLMWOOD,  
*Attorney for Defendant.*

It is stipulated that the plaintiff's attorney entered a general denial by way of reply to the amended answer.

*Rudolph Gross, direct.*

ESSEX CIRCUIT COURT.

10	<p>RUDOLPH GROSS, <i>vs.</i> COMMERCIAL CASUALTY INSUR- ANCE COMPANY.</p>	}
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Transcript of shorthand notes of testimony, and so forth, taken in above stated cause, upon the trial thereof, at the Court House, Newark, N. J., on Wednesday, November 15, 1916.

Before Honorable Nelson Y. Dungan, Judge, and a jury.

Jacob L. Newman for plaintiff.

W. E. Holmwood for defendant.

20 Mr. Newman opens for plaintiff.

Mr. Holmwood opens for defendant.

*The Court.* You may submit your contract to Mr. Holmwood. From the opening, there appears to be nothing denied except the sixth and seventh paragraph of the complaint, so all of the rest of them may be taken as admitted.

30 *Mr. Newman.* If your Honor will permit me I will offer them one by one.

RUDOLPH GROSS, plaintiff, sworn in his own behalf.

*Direct examination* by Mr. Newman.

O. Mr. Gross, you are the plaintiff in this case, are you? A Yes.

Q What is your full name? A Rudolph Gross.

40 Q Where do you live? A I live 640 High street.

*Rudolph Gross, direct.*

Q Are you employed with anybody? A J. Lichtman & Sons.

Q Leather manufacturers? A Yes.

Q Their place of business is where? A 241 Frelinghuysen avenue.

Q You have been so employed for how long a period? A Eight or nine years. 10

Q In 1911 were you employed by them? A Yes.

Q And in what capacity? A Travelling man.

Q In the month of October, 1911, was a policy of insurance procured by you from the Commercial Casualty Insurance Company, of Newark, New Jersey? A Yes.

Q I show you policy dated eleventh of October, 1911, and ask you if that is the policy you refer to? A Yes. 20

*Mr. Newman.* I offer it in evidence.

Marked Ex. P. 1.

Q Did you subsequently renew that policy?

*The Court.* That is admitted.

*Mr. Newman.* Shall I offer these renewals?

*Mr. Holmwood.* I suggest that you offer the last one; that will be enough. 30

*Mr. Newman.* We can stipulate this on the record. From October 1, 1912, to October 1, 1913, and then from October 1, 1913, to October 1, 1915; then from October 1, 1914, to October 1, 1915. I offer them.

*Mr. Holmwood.* I will consent to them if you will consent to admit the stubs.

*Mr. Newman.* I have no objection. You can offer them on your case. I do not want 40

*Rudolph Gross, direct.*

to admit anything now; I don't know anything about it on my case.

*Mr. Holmwood.* I object to the offer, then, unless they are properly proven, unless Mr. Newman will admit that on my case he will admit the stubs.

10 *The Court.* The Court cannot give effect to any such reservation as that.

*Mr. Newman.* If it is a stub of the check and you can prove it, I will not object to it when it comes to your case.

Said papers marked Ex. P. 2, Ex. P. 3 and Ex. P. 4.

Q. Have you paid the premiums on these renewals right along? A Yes.

20 Q While this policy was in force and effect were you taken sick? A Yes, I was.

Q About when? A About the end of December, 1914.

Q After you were taken sick did you see a physician? A Yes, I did.

Q When did you see a physician? A The beginning of January. January 4th.

Q And as a result of this sickness for how long a time were you confined to the house? A For over two weeks.

30 Q From January 4 to January 20th? A Yes.

Q Who was your physician? A Dr. Wallhauser.

Q And after being confined to the house for this period did you still suffer from this sickness? A Yes, I did.

Q First, tell us what was the nature and character of this illness? A The first of all was intense pain and inflammation of the veins.

40 Q Inflammation of the veins of what? A On both feet, and pustulation.

*Rudolph Gross, direct.*

Q That means pus gathered there, does it?

A Yes, on top of my foot, on top of my toes and between the toes, there were open sores.

Q Running? A Running.

Q For how long a period did that continue to give you pain and discomfort, and were the sores running? A Until about the fall of 1915.

10

Q As a result of that condition were you treated by the doctor? A Yes, I was.

Q On and off? A Yes.

Q Now, up to the fall of 1915, were you prevented from doing your normal work in your employment? A Yes, I was.

Q Will you state for the benefit of the Court and jury just what your work consisted of? A I went on the road.

Q You went on the road? A Yes.

20

Q To where? To what places? A To New York, to Boston, to Philadelphia and different other places that I had to go to.

Q And what character of work did you do there in those places? A I had to sell and to buy.

Q Just a minute. Selling and buying what? A Merchandise.

Q What kind of merchandise? A Leather.

Q What else did you have to do? A Hides.

30

Q Besides selling and buying, what did you do? A I had to go to the different docks in New York.

Q Docks? A Yes.

Q What do you mean by docks? Steamship docks? A Steamship docks.

Q What did you do there? A Accept different shipments before they went on the boat. First, I had to go to the different freight offices of the steamship company to make my arrange-

40

*Rudolph Gross, direct.*

ments for the forwarding of the goods, and make contracts.

10 *Mr. Holmwood.* I had no means of knowing what the witness was going to say about that, and I move to strike it out. There is nothing to indicate in his complaint to this defendant that his duties were other than office duties and travelling. If his duties were those of shipping clerk I don't think that testimony can be introduced to show disability.

*The Court.* The motion will be denied.

Q You stated that you went to various docks and examined the shipments? A Yes.

20 Q What else did you do? A I went to different steamship companies to make contracts for freight, to see the different people personally, because it was always important to see them personally; you could hardly do it over the 'phone or by letter, in order to get quicker results.

Q You mean, to see them with regard to the steamer, and so forth? A Yes, and to get room on the steamer and to fix rates, and so forth.

Q Did you have any work in connection with that that necessitated you doing any office work?

30 A Well, sometimes I had, yes.

Q Now, tell us in what way. A I called the people up on the 'phone; I eventually dictated a letter concerning that business.

Q Did your office work relate to the work that you had to do in the different cities? A Yes, sir.

Q Relating to your travelling? A Yes.

40 Q Now, from the fourth of January up to the fifteenth of October were you able to travel and do the office work that was necessary in con-

*Rudolph Gross, direct.*

nection with your travelling? A I was not able.

Q Were you wholly prevented from doing that work? A Absolutely.

Q And what prevented you from doing that work? A The pain and my general condition.

Q And what was your general condition in addition to your pain, sir? A I was awful weak. 10

Q And in what way would your weakness manifest itself? A I moved around very hard; I walked with pain, and I would go down—I was run down altogether.

Q Did you wear any shoes during this time? A No.

Q Could you wear shoes? A No.

Q Why not? A I couldn't put them on my feet. 20

Q Were your feet swollen or what? A Yes, they were swollen.

Q Over what period did this extend, that you were unable to wear shoes? A Most of the time.

Q From what time to what time? A From January.

Q To what period? A To about the 4th.

Q From the 4th of January? A Yes.

Q To what time? A To October. 30

Q Of what year? A 1915.

Q Then this condition existed over practically the entire period that you claim you were disabled, is that right? A Yes, with the exception of probably a month or so that I had a big shoe made.

Q You had a special shoe made? A Oh, yes, always.

Q Now, did you at any time go to your office?

A Yes. 40

*Rudolph Gross, direct.*

Q How would you get there? A I would ride down with the automobile.

Q How would you come away from there?

A By automobile.

10 Q Could you do the regular work pertaining to your office and pertaining to your position while you were in the office, during the period, January 21, 1915, to October 15, 1915? A No.

Q Did you do any work at all? A No, I did not.

Q When you went down there how did you move around? A Pardon me, I said I did not. I occasionally dictated a letter, or I occasionally would be asked about something which I answered.

Q I mean, did you do your regular work?

A No, I did not.

20 Q How did you get around this place? A I walked, but I walked very hard, because I had two big slippers on.

Q Did you use anything when you walked?

A No.

Q Did you feel anything when you walked?

A Yes, it was an awful hardship.

Q Was this condition a painful one, Mr. Gross? A Very painful.

30 Q Did Dr. Wallhauser at any time treat you, from January to October, on and off? A Yes, he did, with the exception of the time that he was away from the city, and he then put me in the hands of his assistant.

Q Mr. Gross, on the 2d of February, 1915, did you sign and mail this proof of loss to the casualty company? Is that your signature (showing paper to witness)? A Yes, that is my signature.

*Rudolph Gross, direct.*

*Mr. Newman.* I offer in evidence proof of loss, and I will call it to the attention of the jury.

*The Court.* It will be admitted.

Marked Exhibit P. 5.

Mr. Newman reads Exhibit P. 5 to the jury. 10

Q Now, did you make another claim on the 7th of December, 1915 (shows paper to witness)?

A Yes.

Q Is this the claim? A Yes.

Q And is that your signature at the bottom of it? A Yes.

*Mr. Newman.* I offer it.

Marked Exhibit P. 6.

Mr. Newman reads Exhibit P. 6 to the jury. 20

*The Court.* Is that the date from which you claim indemnity, October 15th?

*Mr. Newman.* October 15th, yes, sir.

Q Mr. Gross, on February 27, 1915, did you write that letter to the company? A Yes, sir.

Q Is that your signature (showing paper to witness)? A Yes, sir.

*Mr. Newman.* I offer that in evidence. 30

Marked Exhibit P. 7.

Mr. Newman reads Exhibit P. 7 to the jury.

Q I show you a letter and ask you whether you received that letter from the casualty company in reply to your communication? A Yes.

*Mr. Newman.* I offer that in evidence.

Marked Exhibit P. 8.

*Rudolph Gross, cross.*

Q After that letter was received you sent in your first proof of loss, which I showed you?

A Yes.

10 *Mr. Newman.* Here is another letter which I offer in evidence, by consent, dated March 4, 1915, to the Commercial Casualty Company.

Marked Exhibit P. 9.

*Mr. Newman.* Here is a letter from the Commercial Casualty Company, dated March 5th, in reply to that, and I desire to offer that in evidence.

Marked Exhibit P. 10.

*The Court.* These dates do not quite correspond.

20 *Mr. Newman.* This letter will explain that. March 5th, 1916. That (indicating) is dated March 1st, and he might have made an affidavit in February.

*Mr. Newman* reads Exhibit P. 10 to the jury.

*Cross examination* by Mr. Holmwood.

30 Q Mr. Gross, you are the secretary of J. Lichtman & Sons, aren't you? A Yes, sir.

Q They are a corporation? A Yes, sir.

Q You kept minutes of the Board of Directors? A I took them down at the meeting, made the notes.

Q And you did the ordinary duties of a secretary for the corporation, didn't you? A I have no other duties as secretary.

Q Nothing but to keep the minutes? Didn't you keep any other record? A No.

40 Q Did you have anything to do with the books of account? A No.

*Rudolph Gross, cross.*

Q How long have you been secretary? A Since the incorporation.

Q When was that? A I think 1912.

Q And as secretary you signed contracts and affixed the corporate seal, didn't you? A No—probably I did.

Q You did sign contracts for the company, didn't you? A With whom? 10

Q You had to sign contracts for the company, as secretary? A Very seldom.

Q But you have done it? A I might.

Q Have you signed any contracts from March 7, 1915, to October 15, 1915? A I don't remember.

Q Would you say that you did not? A I wouldn't.

Q You wouldn't say that you did not sign any? A I wouldn't say that I did; I wouldn't say that I did not. 20

Q From March 7th, how often were you at the office? A I came down very often.

Q Every day? A Some weeks every day.

Q Isn't it a matter of fact that from March 7th up to the 1st of July you were there every day? A Not every day.

Q Every day except Sunday? A And some other days I had not been down there. 30

Q When you were away on those other days you had business elsewhere? A What?

Q When you were away on other days you had business elsewhere? A I had been home, I guess.

Q But you might have had some business away from the office on those days? A No.

*Mr. Newman.* Which days?

*Mr. Holmwood.* March 7th to July, 1915. 40

*Rudolph Gross, cross.*

Q You have an office right next to Mr. Lichtman, the president of the company, haven't you?

A We have three offices.

Q One is for— A Mr. A. Lichtman.

Q One is your office? A No, in my office is the bookkeeper and typewriter.

10 Q In your office you have a bookkeeper and typewriter? A Yes, the typewriter is in my office.

Q Who has the other office? A The first office is the general office.

Q Then comes your office? A No. When you come in first you come in one office, and that is a large office, and on the right side you go in Mr. Lichtman's office, and on the left side you go into the office where I have my desk.

20 Q Where is the general office? A The first one when you go in.

Q Then you are on the left and Mr. Lichtman is on the right? A Yes.

Q Where is the shop, with reference to the office? A In the opposite direction.

Q Part of the same building? A Oh, yes.

Q How do you go to the shop from your office? A Through a door.

Q Do you ever go into the shop? You go into the shop, don't you, to inspect the work?

30 A I go through the shop, yes.

Q How often? A I didn't count it, but many times.

Q Do you give out any work to the men in the shop? A Yes, sir.

Q Do you supervise their operations? A No, sir.

Q Do you keep the time of the men in the shop? A No, sir.

Q Had you anything to do with the shop?

40 A Not with the outside; not with the manufacturing.

*Rudolph Gross, cross.*

Q Then, why do you go through the shop many times? A Why, it interested me to see it; I like to see how the leather is coming out.

Q How long have you been in this business? A Since I have been under fourteen years; twenty years, now.

Q And there is no interest for you except your general interest, to walk through the shop? A Absolutely. 10

Q You say you did some travelling prior to the time you were laid up first? A Yes.

Q Where did you go? A New York, Philadelphia, Boston.

Q On pleasure or business purposes? A For business.

Q How long were those trips? How long were you away from the office? A Sometimes half a day; sometimes two or three days. 20

Q About how many days a month would you average away from the office? A Oh, about four or five days a week; sometimes only three days a week; sometimes every day.

Q Sometimes you would be there all the week, wouldn't you? A No.

Q Never was there all the week, from Monday until Friday? A No.

Q Usually, would you go to New York? A New York. 30

Q Have you a branch in New York? A No.

Q Have you a selling agent in New York? A No, I took that over.

Q You are the selling agent in New York? A Yes.

Q Have you an office in New York? A No.

Q When you were at the office did you do anything in the way of the supervision of the office work? A No. 40

*Rudolph Gross, cross.*

Q Who took care of the accounts, sending out accounts? A The bookkeeper.

Q Did you supervise his work? A No.

Q Never supervised his work; never looked to see what he was doing? A Well, I looked it over.

10 Q What? A Well, I might have looked over it, yes.

Q You looked over the ledger, occasionally, to see if the accounts had been sent out and see if there was some unpaid accounts? A I might look to see if the account has been paid, yes, that is interesting for a salesman.

Q And after you found an account was unpaid would you direct the bookkeeper to send out a statement? A I might say, "Why, isn't the account paid? You better see that it comes in."  
20

Q Did you ever go into the receiving department and see if the material came in? A No.

Q You never went to the shop for that purpose? A No.

Q Did you ever supervise the manufactured article before it went out from the factory? A I would like to see an article before it goes to the customer.  
30

Q You did attend to that part of the work? A I did.

Q You did, up until what time? A Until I was laid up.

Q You couldn't see the stuff after you were laid up? A Not while I was laid up I couldn't.

Q But you were at the office? A What?

Q You were at the office from March 7th on, weren't you? A Oh, yes.

Q Well, why couldn't you see it and inspect  
40

*Rudolph Gross, cross.*

it? A I didn't feel like going out at all times into the factory and looking at the stuff.

Q But sometimes you could, couldn't you, if you had the opportunity? A No.

Q You never inspected the work from March 7th to October 15th? A I looked at it, yes.

Q And if you found it was defective and needed touching up you would call the workmen's attention to it? A No. 10

Q What you did look at you found was all right? A I don't remember. I looked at it. When I seen it I felt satisfied, then, it is going all right.

Q How did you notify your shipping clerk as to the quantity of the order and how he had to send it? A At what time?

Q Do you personally see that the proper quantity of your goods is shipped? A No. 20

Q So the only personal part you take in the shipment is to inspect it and find out if the goods are all right at times? A Sometimes I do.

Q Isn't it a fact, Mr. Gross, that from March 7th to July 1st, up to the time you went to the shore in the summer— A I don't know whether it was July 1st—

Q Wait until I get through my question. Isn't it a fact that from March 7th to July 1, 1915, you performed most of the office duties? A It is not a fact. 30

Q Isn't it a fact that you told Mr. Lane, or some other gentleman at the office of the company, that during that time, from March 7th to July 1, 1915, you performed most of your office duties? A It is not a fact, no.

Q When did you go to the shore? A About July, I guess.

Q You took a vacation there all summer, did 40

*Rudolph Gross, cross.*

you? A I took a vacation all the time; I had to have a vacation.

Q You were there all summer? A No; a few weeks.

Q I show you a letter dated March 31st, addressed to the Commercial Casualty Company, signed "R. Gross," and ask if that is your signature? A Yes.

*Mr. Holmwood.* I ask that it be marked for identification.

Marked D. 1 for identification.

Q Now, I show you a policy, and call your attention to your application blank, on the back of the policy, which is made a part of this policy, and call your attention to this provision. You are asked to state your residence and you stated it 53 Baldwin street, at that time? A I did, yes.

Q "My occupation is office duties, and the duties of my occupation are fully described as follows: Office duties and travelling only. I understand that risks are classified according to occupation, and that my occupation above described is classified select." You recall that, don't you? A I really don't know what it means.

Q You will recall giving the classification of your occupation, in this application, as office duties? A I mentioned to the agent what I am doing. It was not my broker; it was the company's broker.

Q In your application here you are listed as "Office duties"? A Yes.

Q You received this policy? A Yes.

Q Did you read this policy when you got it? A I really don't know.

*Rudolph Gross, cross.*

Q You had this policy for four years? A Yes.

Q You know on your renewal blank you are classified as "Office duties"? A I don't know; I didn't say that.

Q What did you mean by "Office duties" in this classification when you made your application? A I mentioned to the agent of the company— 10

Q I am not asking you what you meant; I am asking you what office duties you performed?

A Those in consequence of my travelling.

Q You have a desk in the office? A Oh, yes.

Q Did you do any other office duties except those made necessary by travelling? A No. I might have signed a check occasionally.

Q Signed checks? A Yes.

Q As secretary of the company? A Yes. 20

Q And signing minutes as secretary of the company? A Yes.

Q Signing contracts as secretary of the company? A The contracts Mr. Lichtman usually signed himself.

Q Where they required a formal signing with the corporate seal, didn't you sign as secretary of the company? A There were no contracts signed with the corporate seal.

Q You wouldn't say, during that time, from March 7, 1915, to October, 1915, you didn't sign any contract, would you? A No, I wouldn't say. 30

Q You did some work in the office that was not made necessary by the travelling? A No.

Q You kept minutes. That was not made necessary by travelling? A I kept the minutes—I signed them.

Q So you did other duties not made necessary by travelling business? A I had to sign checks. 40

*Rudolph Gross, cross.*

*Mr. Newman.* I object.

*Mr. Holmwood.* Question withdrawn.

10 Q On February 23d you wrote this letter which is marked P. 7 in which you say: "I was laid up at home for several days and since then have been brought down to the office and back again in an automobile, but have been unable to go out on the road, which is my occupation"? Now, during that time how long would you remain at the office, when you were brought down by automobile? A Well, at that time I just passed by and went in; might have stayed there a half an hour, or an hour, and went away.

Q Were you ever there the entire day from January 4th to January 20th? A From January 4th to January 20th I was home.

20 Q You say in your letter that you were laid up for several days? A Yes.

Q And by several days you meant that period from January 4th to January 20th? A Yes.

Q Now, after January 20th how did you go to the office? A With an automobile.

Q Always went with the automobile? A Yes.

Q Up to the 7th of March? A Yes, and after that date.

30 Q Who drove the automobile? A Who drove it?

Q Yes. A The chauffeur.

Q How long would you remain at the office on those days after January 20th?

*Mr. Newman.* I object. The testimony is clear that between January 4th and January 20th he didn't go to the office at all. It is a misleading statement.

40 *The Court.* The question, I think, relates to the time after January 20th.

*Rudolph Gross, cross.*

A After I had come down to the office I stayed there for about an hour, sometimes, half an hour, sometimes; I came there in the morning for half an hour or an hour, and sometimes in the afternoon also.

Q That was after January 20th? A Yes.

Q I call your attention to your letter of March 31st, which you have identified. 10

*Mr. Newman.* It is not in evidence, now.

*Mr. Holmwood.* I think I can examine upon it now.

*Mr. Newman.* No.

Q You say in this letter of March 31, 1915, that you were not at your office every day up to the 7th of March, and that from that time on—you say—"as told your investigator I have been coming down to the office nearly every day, if weather permits and remain here a part of the day instead of staying at home. It was then that I would occasionally dictate a letter—which, however, is not my duty; my occupation is that of a salesman and I cannot perform any part of my duty pertaining to this occupation." Is that correct? A If it is there, surely. 20

Q So you did dictate some letters during that period while you were at the office? A I did.

Q You have not been able to attend to any of your salesmanship duties since the previous December? A No, sir. 30

Q Now, do you recall the subject upon which you dictated letters on any one of those occasions? A They were pertaining to my previous affairs.

Q What previous affairs? A There might have been an occasional letter to the steamship company, or a letter to one of my customers.

Q About what? A I don't remember about 40

*Rudolph Gross, cross.*

what it was. If I did it, it certainly was a considerable strain on my side.

Q I don't get that. A If I dictated a letter it was with a considerable strain on my side.

Q How many letters did you dictate during the period March 7th to July 1st? A I couldn't say; I didn't count them; very few.

10 Q Did you dictate several letters a day? A Oh, no—occasionally.

Q Do you mean occasionally you would dictate several letters at a time? A Oh, no; occasionally one.

Q Have you your letter-books showing correspondence? Do you keep carbon copies? A We keep a copy-book.

Q You keep a carbon letter or letter-book record? A A copy-book—no carbon.

20 Q Are all letters impressed in the copy-book? A I think so, surely.

Q Have you the copy-book here? A No.

Q You don't recall, then, the particular subjects about which you dictated letters? A Not today; I did about two years ago.

30 Q You had not attended to any of your salesmanship duties since the previous December. What business was it that required your performing office duties? A One of my former parties that I took care of might have written a letter, and I was asked by Mr. Lichtman about the opinion, what to do. I would have given my opinion because I knew my own portion, what I might have done.

Q Mr. Lichtman, the president of this company, is your father-in-law? A No; the president of the company is Mr. A. Lichtman; he is my brother-in-law.

40 Q You consulted with one another about the affairs of the company? A Oh, yes.

*Rudolph Gross, cross.*

Q Both the manufacturing end and the selling end? A I don't know much about the manufacture.

Q What did Mr. Julius Lichtman do there?  
A Julius Lichtman is vice-president.

Q What does he do? A He is taking care of the tanning part. 10

Q In the shop? A In the shop.

Q Does he have anything to do with the salesmanship end? A No.

Q What is Abraham Lichtman? A Abraham Lichtman is president.

Q Does he have anything to do with the salesmanship end? A Oh, yes.

Q He has quite a great deal to do with the salesmanship end? A Yes.

Q Does he go upon the road himself? A Certainly. 20

Q How long was he away upon the road?

*Mr. Newman.* I object. We are going very far afield, your Honor.

*The Court.* Yes. The objection will be sustained.

Q Isn't it a fact that Mr. Abraham Lichtman attends to the salesmanship end exclusively?

A No.

Q Isn't it a fact that while he is away upon the road that you look after the office? A Not exactly. 30

Q You never look after the office when he is away upon the road? A No.

Q Who looks after the office end while he is away upon the road?

*Mr. Newman.* I object.

*The Court.* Objection overruled.

Q Answer the question. A There is nothing to be looked over. 40

*Rudolph Gross, cross.*

Q It looks after itself? A Suppose letters come in; they wait until he comes back, and then he answers them.

Q But you do transact some of the business of the concern while he is away, don't you?

A If I am well; if I am in the office; that is, if I am down, and well, and able to do it, I do it, surely.

Q You have done it before you were sick?

A Oh, yes.

Q Was Mr. Abraham Lichtman away during the summer and spring of 1915? A I don't recollect.

Q You don't recall it? A No.

Q You recall during the time you were at the office, when you were sick? A I don't like to think back to the time.

20 Q What? A I don't recollect now, no.

Q Will you tell us what you did for several hours when you got to the office on those days?

A I sat down. I read, mostly.

Q What? The mail? A The mail that came in I was so interested in.

Q The mail addressed to the firm or the mail addressed to you? A The mail addressed to both. I was still interested to read the mail.

30 I went out in the factory, walked through, and then I went back home.

Q What was your purpose in going through the factory? A Just going around. All I went, sometimes, for, I went around, and sometimes I felt better if I sat down.

Q In order to fix the dates a little more clearly, I understand that up to March 7th you didn't spend very much time in the office? A No.

40 Q After March 7th you were there nearly every day? A Yes, nearly.

*Rudolph Gross, cross.*

Q That is, from March 7th up until the time you went to the seashore? A Up until March 15th.

Q Didn't you go down to Allenhurst for the summer? A Yes.

Q You left for there about the 1st of July? A I don't exactly remember; it was probably the end of July. 10

Q It was in the month of July, would you say? A It was probably the end of July.

Q After you went to Allenhurst did you come up to the office occasionally? A I did.

Q About how often? A Probably once a week.

Q About once a week? A Yes; and at the same time I went to Dr. Coffey for treatment. Then, I was in the city, and I couldn't omit to go down to the office. 20

Q Would you average about once a week during the time you were down at the shore until you returned, at the office, during the summer? A I couldn't say.

Q Do you think it would be more than that? A Well, probably I came down once or more a week.

Q Sometimes twice a week? A Not to the office; I meant to the city.

Q Well, you came up to the office, you say—you would stop at the office? A Yes. 30

Q What would you do at the office? A Just come in and say, "How do you do."

Q Would you read the mail? A I would take a letter and read it, yes.

Q You would read any mail that had accumulated there during your absence? A No.

Q Who was attending to your mail while you were away? A Mr. Lichtman was always attending to the mail in general. 40

*Rudolph Gross, cross.*

Q You were staying with him at the seashore, weren't you, at his house? A Yes.

Q Would he bring your mail down to you, or the company's mail? A No.

10 Q Would he discuss the company's affairs with you? A I surely would talk with him every night, what is going on at the time.

Q You kept in touch with the business through him? A I couldn't say kept in touch. I kept in touch with the affairs of the company, yes.

Q And if any matters had arisen that he wanted to consult with you about he could consult with you in the evening, couldn't he? A Yes.

20 Q When did you come back from the shore, Mr. Gross? A I think it was in the beginning of September.

Q After you returned from the shore would you go to the office occasionally? A Yes.

Q Every day? A Nearly every day.

Q Up to the 15th of October? A Yes.

30 Q What would you do in those days? A The same things; first to come and open the mail, read the mail, and then I laid down for an hour or two, because I had to; then I treated my foot. I merely went down to the office in order to spend my time, instead of at home. I couldn't stay at home all the time.

Q Then you signed some checks? A Yes, my hand—

40 Q And took care of the minutes? A Took care of the minutes. That is only once a year. Then I had to attend the meeting of the company, and at that time I took down all the minutes, or I remembered in my head, and after the meeting is over I dictated to the typewriter, and she put it on the typewriter machine and

*Rudolph Gross, cross.*

put them in the book; then after a time I get it before me for a signature and I attach my signature. That is once a year.

Q I beg your pardon? A Only once a year.

Q When was that? A That is in March.

Q What time in March? A I think our meetings were the 15th of March. 10

Q Did you attend the meeting in March, 1915? A I was there.

Q Did you take care of the minutes? A I heard what was going on, yes.

Q And you dictated the minutes, and signed them? A I surely did.

Q You say that you negotiated with firms in New York and Philadelphia about buying and selling? A Yes.

Q Did you make contracts for the Lichtman Company? A No. 20

Q You didn't make contracts? A No.

Q If you purchase some goods do you sign a contract for them, or does the contract go to Mr. Lichtman? A Well, the contract goes to the firm.

Q Do you have to approve those contracts? A No.

Q You had nothing further to do with them after you signed an order? A Well, I come home and I say, "I bought thus and thus" or, "I sold thus and thus," and it is taken down, and if it comes in a bill comes in for it. 30

Q When you come in do you make a book record of it or does the bookkeeper? A No; I just tell Mr. Lichtman, or I tell the bookkeeper. I have got to report what I have done.

Q If this case lasts over until tomorrow will you bring your letter-book of Lichtman & Company, showing the correspondence from March 40

*Henry J. F. Wallhauser, direct.*

7th to October 15th? A Yes, if Mr. Lichtman permits me to do it.

Q You are the secretary of the company? It is in your charge, isn't it? A No.

*Mr. Newman.* There will be no difficulty about it. We will produce it.

10 Q Do you know Mr. Wright?

*Mr. Holmwood.* Will you stand up, Mr. Wright?

[A man in the audience arises.]

A I think I remember that face.

Q Did he call at your place of business to see you regarding this claim? A Yes.

Q Didn't you tell Mr. Wright that after March 7, 1915, you were at your office every day attending to most of your duties? A I  
20 did not.

*Re-direct examination by Mr. Newman.*

Q Is this the letter you got from the Commercial Casualty Company on March 26th (Showing letter to witness)? A Yes.

Q You replied to that letter on March 31st, the letter that has been shown you? A I did, yes.

30 *Mr. Newman.* I ask that this be marked for identification.

Marked P. 11 for identification.

HENRY J. F. WALLHAUSER, sworn in behalf of plaintiff.

*Direct examination by Mr. Newman.*

Q Dr. Wallhauser, you are a practicing physician in the City of Newark? A I am.

40 Q How long have you been practicing medicine? A About twenty-six years.

*Henry J. F. Wallhauser, direct.*

Q Do you know Rudolph Gross, the gentleman who just left the witness stand? A Yes, sir.

Q Did you, in January, 1915, treat him? A I did.

Q Do you remember when your treatment started in? A Some time early in January. 10

Q What was he suffering from? A He had inflammation in both feet.

Q What is the disease called? A Well, it is a very rare form of trouble; I don't believe I have seen anything like it in twenty-five years; it really is not classified as any particular disease; it is a very rare form of inflammation and I couldn't classify it; I have been seeing a lot of these things, too. It is a very rare disease. There are some conditions similar to it that we have, but there was a nodular infection about the superficial veins. After a time it would ulcerate and break down. It was very painful. We tried various soothing applications without much effect, until we began a course of injections. 20

Q You did inject for it? A Yes.

Q I notice you have termed the disease on the certificate that was sent to the company as phlebitis? A Yes. 30

Q That is the name for it? A That is the name I gave it.

Q What is the nature or character of it? How did it show on the feet? A There was a swelling, an edema, an infection, nodular swellings and ulcerations, and loss of tissue.

Q Was there pus there? A Ulcerations are almost always accompanied by pus.

Q How long did you treat this man, Doctor? A I treated him until I went away on vacation, 40

*Henry J. F. Wallhauser, direct.*

and then I put him in charge of my associate, Dr. Coffey, while I was away

Q When did you go on your vacation? A I went away about July and came back somewhere about the 1st of October.

10 Q Did you treat him also in October? A I think I saw him in October. I am not certain about that.

Q Was his condition such as to prevent him from doing ordinary normal things that he had to attend to there? A He was in considerable pain, and couldn't walk very well. He could navigate in a way, but it was very painful.

Q I show you a paper marked Exhibit P. 5 and ask you whether that is your signature to it? A It is.

20 Q I show you a paper marked Exhibit P. 6 and ask you if that is your signature? A Yes.

*Mr. Newman.* These papers have been offered in evidence.

(Mr. Newman reads Exhibit P. 5 and Exhibit P. 6 to the jury.)

30 Q Doctor, then it is your opinion that from January 4, 1915, to October, 1915, he was prevented by the condition of this disease from attending to the normal duties pertaining to his position?

*Mr. Holmwood.* I object.

*The Court.* Objection sustained.

40 Q Doctor, from your knowledge and experience, and from your examination of the patient, and your various consultations and attention to him, would you say whether the condition of his disease and character of the same would prevent him from transacting his normal business, and if so, from what period to what period?

*Henry J. F. Wallhauser, cross.*

*Mr. Holmwood.* I object.

*The Court.* What is your objection?

*Mr. Holmwood.* I think it is immaterial whether the man was disabled. The question of fact is what he did. Furthermore, the evidence in the case shows that this disease, and the resulting disability, can only be proved by what is known as subjective symptoms, the man's testimony, himself. 10

*The Court.* The question may be answered.

A Why, I should say that he was disabled from doing work that he specified here in the way of going about, and so on.

Q From what time? A From the time that I started to treat him in January, until October, when I saw him. 20

*Cross examination by Mr. Holmwood.*

Q Now, Doctor, did you hear Mr. Gross testify here this afternoon? A I did, some of it. I was drowsy over there awhile.

Q Did you hear him testify to certain parts of office duties that he performed during that period? A Yes.

Q Then he was not disabled, so far as performing those duties were concerned, was he? A No. 30

Q Then he was not what you call totally disabled? A Well, I should say no, if he could come down to the office. I was only answering with regard to his general work; that is, as a salesman, going about.

Q So that your opinion as to whether he could attend to his usual duties referred to his duties as a salesman, a travelling man? A That is right. 40

*Henry J. F. Wallhauser, re-direct.*

Q Not his office duties?

*Mr. Newman.* Going about, the Doctor said.

Q During the time you treated him did you call at his home or his office to see him? A He came to me.

10 Q Did you ever attend to him at his home? A No, sir.

Q How would he come to you, walk, or in an automobile? A That I don't know; I never go outside of the rear office; I wouldn't know that. I suppose that he came some way in a conveyance, I am not certain, though, because he was in great pain always.

Q I beg your pardon? A He was generally in great distress in his troubles.

20 Q You didn't attend him after the 1st of March? A I attended him until about the beginning of July, when I went away.

Q After his return from the seashore you did not attend him? A I saw him in October.

Q What time in October? A Early in October, when I got back.

Q Was it after he resumed his regular duties, so far as you know? A I don't know about that; we didn't go into that; I don't know.

30 *Re-direct examination by Mr. Newman.*

Q Doctor, you don't go out and attend patients at all, do you? A Not as a rule, except in a consultation once in awhile. I do, out of town.

Q You are somewhat of a specialist, are you not, in these skin diseases? A Yes.

Q This was in line with your particular kind of work? A Yes.

40

*Henry J. F. Wallhauser, re-cross.*

*Re-cross examination by Mr. Holmwood.*

Q Is eczema a symptom of phlebitis? A Not necessarily.

Q Did you ever attend Mr. Gross for phlebitis before December, 1914? A Yes.

Q When? A About a year before that.

Q Prior to that time? A I don't remember about that; I have treated him off and on for quite a while. 10

Q Can you fix the date of that treatment a year previous? A The year previous? No.

*Mr. Newman.* I object. How is that material?

*The Court.* I don't know, unless it carries with it a representation, by his renewal, that he did not have that disease, and was in good condition. 20

*Mr. Newman.* If he treated him the year previous it would not indicate anything except that he made no claim for it.

*The Court.* I do not notice anything in the answer to the effect that he made any false representation at the time that he made the renewal.

[After further argument.] Do you mean to say that you are not obliged to set up as a defense the portion of the contract which you say that they have broken? 30

*Mr. Holmwood.* I don't believe that it has to be specially pleaded. We have alleged that they have broken the contract in the manner and form alleged.

*The Court.* If that is your idea I will sustain the objection.

Defendant's counsel prays an exception and the same is allowed. 40

*Henry J. F. Wallhauser, re-cross.*

Q Did you tell Mr. Gross the nature of his disease at the time of that previous treatment?

*Mr. Newman.* I object.

*The Court.* That seems to be on the same line; but upon reflection I recall that it was brought out on direct examination that he had treated him the year before for a similar trouble, which opens cross examination. I am inclined to think that if counsel wishes to ask the question which was previously overruled I will reverse my previous ruling. That had escaped me for the moment.

A With regard to the nature of the ailment, I don't believe I could have told him, because I didn't know myself.

20 Q Did you originate this expression yourself?

A I did, sir.

Q Have you never heard it before? A Certainly, I have heard it in connection with other conditions.

Q Will you give us the dates you attended Mr. Gross for phlebitis, prior to December, 1914?

*Mr. Newman.* I object.

30 A I think I could if I could get down to the office, or something like that; I might be able to, but I am not sure at that.

Q You say it was about a year previous?

A About a year.

Q Can you place the month? Can you tell approximately what time of year? A I cannot at this time, sir, no.

Q Would you say it was prior to the 1st of October, 1914? A I have not the slightest idea with regard to the time of the year at all, sir.

40 Q Whether you examined him in December?

*Henry J. F. Wallhauser, re-cross.*

A It might be any time of the year; I have not any idea of the date in my mind, or the time.

Q You say you first attended him for this last trouble in December, 1914? A In the early part of January.

Q You say that about a year before that you attended him for the same trouble? A Yes. 10

Q Would you say that it was at least six months after that? A I should say so, yes, I would agree to that.

*Mr. Holmwood.* I ask your Honor for leave to amend the answer.

*The Court.* Motion is made to amend the answer by setting up fraudulent representations. The motion is made now, so if you wish to bring in witnesses here tomorrow you cannot allege surprise. 20

*Mr. Newman.* I do not think he ought to be permitted to amend, now, after the case has gone to trial and the answers are in. We are prepared to try it on the pleadings, and I think we ought to be confined to that. Now, at the eleventh hour, we are confronted with a new situation.

*The Court.* You may prepare your amendment and I will determine in the morning. 30

ADJOURNED to Thursday, November 16, 1916, at ten o'clock, A. M.

*Motion to Amend Answer.*

## SECOND DAY.

Thursday, November 16, 1916.

Met pursuant to adjournment.

Present, counsel as before stated.

10 *Mr. Holmwood.* Will your Honor hear the motion at this time for amending the answer?

*The Court.* Yes.

*Mr. Holmwood.* I have prepared an amendment by adding the paragraphs 3, 4 and 5, as follows (reading):

“The answer filed by the defendant herein is hereby amended by adding thereto the following paragraphs as paragraphs three, four and five of defenses.

20 “3. That on the first day of October, 1914, the plaintiff renewed said policy of insurance for the term of one year, and reaffirmed the warranties contained in said policy, and in particular warranty No. 16, as follows: ‘I have not been disabled nor have I received medical or surgical attention during the past five years, except as follows: In 1911 for eczema lasting four months.’ Whereas the fact is that said plaintiff was

30 under the care of a physician prior to the date of such renewal and in the year 1914, and that plaintiff’s claim is invalidated because of such breach of warranty.

“4. That upon the date of the renewal of said policy referred to in the preceding paragraph the plaintiff also reaffirmed warranty No. 15 in said policy as follows:

40 ‘15. My habits of life are correct and temperate, my hearing and vision is not impaired; I am in sound condition mentally

*Motion to Amend Answer.*

and physically, except as herein stated. No exceptions.'

"Whereas the plaintiff was suffering at the time of said renewal and prior thereto from a disease known as phlebitis, and prior to that time had consulted a physician as to his physical condition, and that plaintiff's claim is invalidated because of such breach of warranty. 10

"5. That at the time of the renewal of said policy of insurance as referred to herein, the plaintiff agreed with the defendant that said policy should be renewed for a period from October 1, 1914, to October 1, 1915, as follows: 'Provided the statements in the schedule of warranties in the original contract are true at this date and that nothing exists at the date hereof to render the hazard of the risk greater than or different than that shown by such schedule.' That prior to and at the time of such renewal, the hazard of said risk was greater than or different from that shown by such schedule in that said plaintiff was not in sound health, and in that he was under the care of a physician, and in that he was suffering from a disease known as phlebitis, and that plaintiff's claim is invalidated because of his failure to comply with said agreement." 20 30

*Mr. Newman.* My main point in this thing is this: First, the answer sets forth that the defense is a true one. My second point is that there are no misrepresentations (after argument). But if you Honor feels that in the interests of justice it ought 40

*Abraham Lichtman, direct.*

to be amended I am not going to oppose it. I am here to try the case.

*The Court.* It is not a surprise to you?

*Mr. Newman.* No.

*The Court.* The amendment will be allowed.

10

*Mr. Newman.* Of course, it must be understood that no other defenses will be interposed.

ABRAHAM LICHTMAN, sworn in behalf of plaintiff.

*Direct examination by Mr. Newman.*

Q What connection have you with A. Lichtman & Son? A President of the company.

20

Q Is Mr. Gross employed with your company?

A Yes, sir.

Q He has been employed for how long? A About nine years.

Q From January, 1915, to October, 1915, was he in the employ of your company? A Yes, sir.

Q In what capacity? A Secretary of the company.

Q What was his work? What was his employment? A It was very broad.

30

Q State what it was, in a general way. A Taking delivery of merchandise, secretary, in general, of the corporation.

Q What did he do with reference to travelling, if anything?

*Mr. Holmwood.* I object to that as leading.

*The Court.* Objection sustained.

Q. Tell us all that he did. A We have in our line of business—

40

*Abraham Lichtman, direct.*

Q Don't tell us what you have in your line of business. A That is the only way I can explain it.

*The Court.* Then I am afraid you cannot explain it, Mr. Lichtman.

Q Can't you mention what he did? A We have delivery of hides to be taken and shipped out; they are shipped at various points, which was one of his main things to do. Further, more than that, there were various things to be attended to for the corporation, which necessitated him going to various places to do it, to complete. 10

Q What things were they. A The taking up of hides.

Q (*By the Court.*) What is that? A The taking up or delivery of hides. 20

Q To you or for you? A For us, say, mostly at Boston and vicinity.

Q What would he do in order to make delivery? A Examine the goods.

Q Where? A At Salem, or Peabody, or Woburn.

Q Did he have anything else to do with reference to the hides, as to the freightage. A Yes, sir; booked freight and saw that we received carload lots, and saw that no goods were shipped at less than carload rates, to enable us to receive the benefit of carload rates. 30

Q In the pursuit of those duties was he called any place else besides Boston? A Oh, yes.

Q Where were those places? A Philadelphia, Wilmington, New York City.

Q From January to October, 1915, was he in a condition to perform those duties? A No, sir.

Q What was his condition during that year, 40

*Abraham Lichtman, cross.*

from January to October, 1915? A Very sick condition.

Q Did you observe as to his walking during that time? A I certainly did.

Q What was your observation as to that? A Practically unable to walk.

10 Q Would you say that during that period he was continuously in the office, intermittently in the office? A He was there at various times.

Q But regularly or irregularly? A Irregularly, very much so.

Q During that period, when he did come to the office, would he stay the full length of office hours or only part of the office hours? A Sometimes he was there, I think, all day.

Q Most of the times when was he there? A At his own convenience.

20 Q When he came how did he come? A By my automobile.

Q When he went home did he go home the same way? A The same way.

Q And did this condition continue during that entire period, from January to October? A I have not got the time made out thoroughly in my mind; I should think so, yes, sir.

Q That is your best recollection, you mean? A Yes, sir.

30 Q Did you tell us in what way you were connected with J. Lichtman & Son? A I am president of the company.

Q Are you connected with the Commercial Casualty Company? A I am a stockholder of the company.

*Cross examination by Mr. Holmwood.*

40 Q About how often would you receive car-loads of hides, Mr. Lichtman? A Practically every day.

*Abraham Lichtman, cross.*

Q How large were your shipments? A From three to four a day.

Q Cars? A Carloads, a day.

Q Are these hides imported? A Some of them.

Q What seaports do they arrive at? A Various, all of them.

10

Q Before discharging the cargo would it be necessary to make an inspection? A Before discharging the carloads?

Q Yes. A We couldn't very well do that.

Q Well, when could you make an inspection?

A After the cargoes were disposed of—discharged.

Q After the cargo is discharged isn't this delivered to you? A No, sir.

Q Where and when would you accept delivery? A The steamship company's general delivery dock.

20

Q Where would you accept delivery? A At their dock.

Q After it has been discharged on the dock? A Yes.

Q And it was necessary to go to these various places and inspect cargoes? A Whenever we thought so; yes.

Q That is what Mr. Gross went for? A Yes.

30

Q And you would go yourself? A I examined some lots.

Q And did Mr. Julius Lichtman go sometimes? A No, sir.

Q Mr. Gross had some other duties in the office, also, did he not? A He did.

Q What were they? A He signed checks; almost every check that goes out he signed.

Q Is he a stockholder in your company? A No, sir.

40

*Abraham Lichtman, cross.*

Q His signature is necessary before a check can be sent out? A Countersigned by the secretary.

10 Q What other duties did he have in the office? A Well, he would look over the various bills of freight and various insurance certificates to see that they were properly filled out and properly endorsed, and take care of drafts as they came in.

Q Had he general charge of the finances there? A Yes.

Q And banking? A No, sir.

Q He didn't take care of that? A No, sir.

Q How about the bookkeeping? A Taken care of by the bookkeeper.

Q He took care of that? A No, sir; he was not the bookkeeper.

20 Q Did he supervise that? A No, sir.

Q What do you mean, then? He took care of the finances, I understood you to say? A No, you did not.

Q You didn't say that? A No, sir.

Q If you did say that you were mistaken? A Absolutely.

Q (*By the Court.*) I understood you to say that, and I understood you also that he countersigned all checks? A Yes.

30 Q That did refer to Mr. Gross? A Well, yes, sir. He took no charge of the finances and banking, and so forth.

Q And he did countersign all checks? A Yes.

Q How was that, during the period of his illness? A The checks were sent to his house for signature and sent to Mrs. Lichtman for her signature. There were two signatures necessary to be on every check and they had to be counter-

40 signed.

*Abraham Lichtman, cross.*

Q By either Mr. Gross or Mrs. Lichtman?

A Yes, sir.

Q (*By Mr. Holmwood.*) And if he was away for a day or two? A Then they were counter-signed by Mrs. Lichtman.

Q During the summer of 1915 Mr. Gross was away at the seashore? A Yes, sir. 10

Q He stayed with you? A Invited to my house.

Q You would discuss matters of business whenever you got down there? A Whenever I saw fit I did.

Q Did you commute to the office every day? A I did.

Q How many times a week did Mr. Gross commute to the office? A I didn't keep any specific account; I couldn't tell you.

Q Would you say that he was absent an entire week during that period? A I think so. 20

Q When? A I haven't any specific dates.

Q Would you say that he was absent any more than an entire week without calling at the office? A No, sir.

Q You would say that as a matter of fact, hardly a week went by but that Mr. Gross would come there at least once or twice? A I wish to correct that statement. I think he was away one time at least two weeks. 30

Q Did you take a vacation some time? A I have not had a vacation in three years.

Q Did Mr. Gross ever have a vacation? A Whenever he felt like taking it, he took it.

Q Was he away during that summer, that you recall? A I think at one time, for two weeks, yes, sir.

Q That was the longest period of time he was away from the office at one time? A Away from our employ, yes sir. 40

*Abraham Lichtman, cross.*

Q During the balance of the summer would he commute once a day, or once or twice a week?

A I couldn't say. I should say, probably, he would go once, stay away a day, and then come in.

10 Q He would go out with you? A I don't think so. There was no specific time set. He would probably go in on a later train, or he might go in on an earlier train.

Q How did he go to the train? A In a machine.

Q What? A My automobile.

Q When he arrived in Newark how did he go to the factory? A The same way.

Q The same automobile? A No; we have two automobiles.

20 Q Who drove him to the train? A The chauffeur.

Q You had another chauffeur in Newark? A No, I had a car down to the shore I drove myself.

Q Then you were with him every time he came up? A No, sir; I did not.

Q Who drove him when you didn't go with him? A My father's chauffeur.

30 Q What other duties did he have there with reference to being secretary of the corporation? A His duties were very general; I should think he would make himself useful with anything he could find useful to do.

Q You looked upon him as general manager, didn't you? A I looked upon him to do anything he could do.

Q He had an office right across from you? A Yes.

Q A private office? A No private office, no, sir.

40 Q Semi-private? A Yes, sir.

*Abraham Lichtman, re-direct.*

Q That is, it is separated from the general office isn't it, the same as yours is? A Yes.

Q His duties are very general, you say? A Yes.

Q Can you tell us any of them besides those you have mentioned? A I think I have outlined them pretty thoroughly. 10

Q Did he have any duties with reference to inspecting the operations of the workmen? A No duties, no, sir.

Q Did he ever take any part in that work? A I think he did.

Q Did he take any part in that work during the time he was not able to travel, during the time he stayed in the office? A I wouldn't care to say.

Q Would you say he did not. A He had no reason to. 20

Q Why not? A Because he is not a practical tanner and does not know anything about the factory.

Q In arranging contracts for freight rates and so forth, with the railroad companies, he would arrange them in his office, wouldn't he, over the telephone? A Sometimes over the telephone.

*Re-direct examination by Mr. Newman.* 30

Q Did the major part of his office duties relate to the work that he did in connection with his travelling?

*Mr. Holmwood.* I object.

*The Court.* That is rather leading.

Q Can you state what the major part of his office duties related to? A They all actually had a bearing on what he had done outside.

Q Now, was he able to make, during the 40

*Abraham Lichtman, re-cross.*

period, from January, 1915, to October, 1915, trips to the various points which you have indicated were necessary in the performance of his duties, doing work which it was customary for him to do? A Absolutely not.

*Re-cross examination by Mr. Holmwood.*

10

Q When you say that all of his duties related to transactions that occurred outside, you don't mean that, do you? A How is that?

*Mr. Newman.* I object. He didn't say that. (Former answer read, as follows: "They all actually had a bearing on what he had done outside.")

Q You don't mean that, do you? A Well, the office duties he had—if he was in New York, making a contract with the French line—

20

Q Answer the question. A Yes, I would that.

Q Did the signing of checks have a bearing on what he did outside? A Yes.

Q All checks he signed? A No.

Q Nor taking care of the minutes of the corporation? Did that have a bearing on what he did outside? A No.

Q Nor did telephoning to arrange for freight rates have a bearing on what he did outside in every case? A Yes.

30

Q Is he the only salesman you had. A The only one.

Q The only one you had? A Besides myself.

Q Some of those shipments he telephoned about might have been orders you placed, isn't that so? A I would confirm them myself.

*Wilma Alexovits, direct.*

WILMA ALEXOVITS, sworn in behalf of plaintiff.

*Direct examination* by Mr. Newman.

Q Miss Alexovits, what is your full name, please? A Wilma Alexovits.

Q Do you work for J. Lichtman & Sons? A 10  
Yes.

Q How long have you worked for them? A  
Seven years.

Q Were you in their employ from January to October, 1915? A Yes.

Q Are you still in their employ? A Yes.

Q You know Mr. Gross, of course? A Yes.

Q Do you know what his duties were in connection with the business there? A I believe I do; yes, sir.

Q Will you please tell us in a general way 20  
what his duties were?

*Mr. Holmwood.* I object.

Q Well, tell what he did during that period there. A He was our outside man; he took care of the work outside; that is, he took up shipments, made arrangements for freight; took care of documents. He had to make trips with reference to his work, with reference to taking stock up, or holding it, or selling it, or whatever the case happened to be. 30

Q Now, from January, 1915, to October, 1915, what was his physical condition? A He was ill.

Q Was it observable? A Oh, yes.

Q In what way? A To begin with he couldn't walk—well, of course, he could walk, but he couldn't walk very well. It was very evident that he felt pain whenever he walked.

Q Did he show any signs of weakness besides his inability to walk without pain? 40

*Wilma Alexovits, direct.*

*Mr. Holmwood.* I object. What does she know about the pain?

*The Court.* The question may be answered.

10 Q Was there any other sign of any physical weakness or condition except the evident signs that you noticed, that he had considerable pain when he walked? A Sometimes, during that period when he was down to the office, he would fall asleep.

Q So, during the period, beginning in January, 1915, and ending about October, 1915, was he, during that period, unable to make trips to the various points, and do the work which you have described he usually did, in connection with the business? A No, he did not.

20 Q Did he do any office work? A No; only that pertaining to his outside work.

Q Only that pertaining to his outside work? Was he unable to do that office work during the period, January, 1915, to October, 1915, which pertained to his outside work? A I should say no, because he didn't go out.

Q During that period, January, 1915, to October, 1915, was his attendance at the office regular or irregular? A Irregular.

30 Q When he did attend did he attend for the usual period or less than the usual period? A No, he didn't attend regularly.

Q He didn't attend regularly? Well, I mean the period. Was that longer, was it the usual period or was it less than the usual period? A Well, I think, so far as I can recollect, that he was in a shorter period, during that time.

40 Q And when he was in the office was he in physical condition to do his regular work during that period? A No.

*Wilma Alexovits, direct.*

Q When you state that his office work related to his outside work would you mind explaining that a little more in detail to the jury? A Whenever he does any outside work he comes back and gives me a letter concerning that work; he gives me instructions regarding it.

Q What did that apply to? What was that outside work that this correspondence applied to? A If he made any deliveries of any hides for bookings it was with reference to the confirmation of the freight; he always had to make confirmation. 10

Q Did he also make sales and purchases? A Yes.

Q And the correspondence would relate to the sales and purchases that he made? A Yes, sir; surely.

Q Do you know, when he was regularly performing his duties, before January, to what points or destinations he made those trips? A Why, yes, he would go to New York very frequently, and to Boston, Wilmington and Philadelphia. 20

Q You say he went very frequently to New York? A Yes.

Q And did that apply also to those other places, or not quite so frequently? A Not quite as frequently as to New York. 30

Q Can you give us any idea how frequently he would average on his trips to New York? A That was nearly every day.

Q When he didn't go nearly every day to New York, if he would go to Boston or Philadelphia, how many trips would he make to those places? A I couldn't say how many trips he made, but if he went to those places he would sometimes stay over a day or two. 40

*Wilma Alexovits, cross.*

Q Would he be apt to go there once a month, or twice a month? What would be your opinion as to those other places? A I really couldn't say.

10 Q So that during the period from January, 1915, to October, 1915, he didn't make those trips to the various points that you have mentioned, to do the work which it was customary for him to do?

*Mr. Holmwood.* I object.

*The Court.* Objection sustained.

*Cross examination by Mr. Holmwood.*

Q Now, there are occasions when orders come to the office unsolicited, aren't there? A I believe they do, yes, surely.

20 Q In the mail? A Yes.

Q And who would reply to those orders, and accept them? A Mr. Lichtman.

Q And if Mr. Lichtman was away who would reply to those letters and accept them? A If he was away that would usually be left until he came back.

30 Q Mr. Gross had an office straight across from Mr. Lichtman, didn't he? A I had my office there, too; I have my typewriter desk in Mr. Gross's office.

Q You did his work exclusively? A I do all the office work; I am bookkeeper and stenographer.

40 *Mr. Newman.* I have here, in accordance with my promise, the letter-book of J. Lichtman & Sons, from April to October, but I do not think we ought to go into all the letters here, as they relate to different private matters of this concern, of which Mr. Gross is an employee. I simply want to live up to my promise. I have had a reference

*Wilma Alexovits, cross.*

looked up as to how many letters Mr. Gross wrote during that period. If counsel wants to go into that, all right; but I don't think he ought to read the correspondence.

*Mr. Holmwood.* How is it marked?

*The Court.* Perhaps you had better ask the witness how they are marked. 10

*Witness.* They are marked "Secretary."  
Mr. Gross is secretary of our concern.

Q I call your attention to a letter dated May 4, 1915, to C. G. Flacks & Son? A It is dictated by Mr. R. J. Lichtman.

Q It is signed by Mr. Gross? A Yes, that is his signature.

Q It is declining to accept an offer—

*Mr. Newman.* I object to what it is. Does your Honor think that is material, to go into each letter? 20

*The Court.* I think it is quite material. It is correspondence in which Mr. Gross took part, and I think that is the crux of this case.

*Mr. Holmwood.* (After argument.) I will not offer to introduce the letters if the witness will be allowed to tell whether or not they pertain to Mr. Gross's travelling business or whether they pertain to office duties. 30

*The Court.* That leads to the objection does it not?

*Mr. Newman.* Yes; I have no objection.  
A This letter in question was signed by Mr. Gross and was dictated by Mr. A. Lichtman.

Q Mr. Gross signed it? A Yes.

Q It is declining to accept a price offered in payment of a certain stock of the Lichtman Company? A Yes. 40

*Wilma Alexovits, cross.*

Q I mean by stock, leathers? (Witness pauses.)

Q (*By the Court.*) Is that so? A Why, yes, that is the letter.

Q (*By Mr. Holmwood.*) Now, show us the next letter.

10 Q (*By the Court.*) Did you take a memorandum of the letters? A No, I did not; but I have the dictation marks on the letter. It is right here (indicating) "A. L., W. A."

Q (*By Mr. Holmwood.*) Here is a letter dictated by Mr. Gross, dated May 4th, the same day, to Downing's express, with reference to a shipment. Do you know whether or not that order was placed by Mr. Gross, or was placed by Mr. Lichtman, for which those goods were shipped?

20 A I suppose it is placed by Mr. Gross since he is writing it.

Q Mr. Gross had been confirmed from the previous December, and this is May 4th. Have you any recollection when this order was placed?

A No, I have not.

Q Then, if he placed that order it was placed prior to the time he was taken sick, in December, or at least it was placed in the office? A

30 I wouldn't say that he placed the order; I would say that I don't know who placed the order.

Q I show you a letter dated May 4th, the same date, to the Ladew Jones Company, signed by J. Lichtman & Sons, by R. Gross. A Dictated by Mr. A. Lichtman.

Q Mr. Gross signed the letter on the fourth of May? A Yes.

Q That letter relates to— A An offer we made to the Ladew Jones Company.

Q For some of your merchandise? A Yes.

*Wilma Alexovits, cross.*

Q Will you tell us how many letters, on May 4th, were signed by Mr. Gross? A I have not looked it over.

Q Well, here is one, two, three, four letters, is that right, on May 4th. A Yes.

Q And the last letter was to the Columbia Leather Company, acknowledging receipt of a letter from them? A That is also dictated by Mr. Lichtman, signed by Mr. Gross. 10

Q Requesting a settlement of the account, is that right? A Yes.

Q On May 6th there is a letter, signed by Mr. Gross and dictated by Mr. Gross, is that right? A Yes.

Q To T. F. Boyle & Company, announcing a shipment of some leather. Do you know who placed that order? A No, I don't recollect who placed that order. 20

Q T. F. Boyle & Company, of Boston, Massachusetts? A Yes.

Q On May 8th, a letter to the National State Bank, signed by Mr. Gross? A Yes.

Q Placing with them two drafts with bills of lading attached, for collection? A Yes.

Q Was that dictated by Mr. Gross? A Evidently.

Q (*By the Court.*) How is that? A Yes. 30

Q (*By Mr. Holmwood.*) Do you know where the other letters are? A May 13th?

Q Letter to Downing's Express, New York City, enclosing bills of lading consigned to J. L. & S., Havre. Do you know who placed that order? A No, I couldn't say that.

Q That is France, isn't it? A Yes.

Q That was placed through the mail, wasn't it? A Yes, sir, that was placed by mail or by cable.

Q Who was that letter dictated by? A Signed by Mr. Gross. 40

*Wilma Alexovits, cross.*

Q. Letter of May 18th, dictated by Mr. Gross, to the inspection department of the Ocean Accident Company, with relation to the Department of Labor to alter an elevator in the building? A Yes.

10 Q. (*By Mr. Newman.*) Are all those letters signed as secretary? A Yes.

*By Mr. Holmwood.*

Q. May 22d, confirming order given by 'phone, dictated by Rudolph Gross? A Signed by Mr. Gross.

20 Q. Letter sent to Mr. James Coughlan, Brooklyn, May 24th, enclosing invoice, for correction, to Bellinger Brothers & Lane, of Newark, signed by Mr. Gross, dictated by Mr. Gross, is that correct? A Yes.

Q. The same date, New Jersey Leather Company, checking up car of bales, "Shipped us on the 18th. We find shrinkage." A Dictated by Mr. A. Lichtman, signed by Mr. Gross.

Q. May 24th, same date, Automobile Leather Company, calling attention to the notice in the item, that was overlooked, dictated by Mr. Gross and signed by Mr. Gross, is that correct? A Yes.

30 Q. Next? A May 29th.

Q. New Jersey Leather Company, dictated by Mr. Gross, signed by Mr. Gross? A Yes.

Q. Complaint of a shortage in a load of splits of three per cent., is that right? A Yes.

Q. What is the date of that? A June 3d.

Q. New Jersey Leather Company, dictated by Mr. Gross, signed by Mr. Gross? A Yes.

Q. Complaint of the condition of a carload of splits? A Yes.

40 Q. What is the next one?

*Wilma Alexovits, cross.*

*Mr. Newman.* Cannot we shorten this, if your Honor please?

Q Letter dated June 4th, Wilmington Leather Company, dictated by Mr. Lichtman and signed by Mr. Gross? A Yes.

Q Letter inquiring as to certain price at which goods should be filled? A Yes. 10

Q Now, on June 5th, letter to Downing's express, dictated by Mr. Gross, signed by Mr. Gross? A Yes.

Q Enclosing bill of lading, 70 bales of rough splits, leather marked for foreign order for foreign shipment? A Yes.

Q Was that order received by mail? A No, these are all received by cable at the office? A Yes.

Q (*By the Court.*) Did you go through that book? A Today? No. 20

Q Last evening, to determine the number of letters written by Mr. Gross? A No, I have not.

Q (*By Mr. Holmwood.*) We have a letter of June 16th.

*The Court.* Nothing between June 5th and June 16th?

A That must be a mistake; June 25th, that must be—11th, that is right. 30

Q There was no correspondence from June 11th— A June 5th, this was.

Q June 5th to June 16th, to be answered? A Yes, there are.

Q From June 11th to June 16th there was no correspondence in the book, was there? A No, I guess not.

Q Then we have a letter, June 16th, dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q Confirming telephone conversation, to Gilbert W. Taylor, by which you agreed to coverage 40

*Wilma Alexovits, cross.*

for war risks, in the following cases, with reference to contracts of insurance? A Yes.

Q Letter of June 16th, to Chubb & Sons, New York City, with reference to coverage, dictated by Mr. Gross and signed by Mr. Gross,—with reference to coverage on the steamship “Westward Ho.”? A Yes, sir.

10 Q Letter dated June 21st, to W. B. Vernon, enclosing freight bills for carload of coal, containing an overcharge, dictated by Mr. Gross and signed by Mr. Gross, is that correct? A Yes.

Q June 24th, National State Bank, enclosing draft and bills of lading to be credited to the account of J. Lichtman & Sons, dictated by Mr. Gross and signed by Mr. Gross, is that correct? A Yes.

20 Q The same day, another letter to the same bank, enclosing drafts for collection, dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q Who is this dictated by (indicating)? A This was written by myself.

Q Wasn't it dictated to you? A No.

Q You always put the initials, don't you, if they are dictated to you by anyone? A Yes, I do; that is my signature there.

Q That is your signature? A Yes.

30 Q What is the date of that? A That must be July 6th.

Q National State Bank, enclosing bills of lading—

Q (*By the Court.*) Was that between June 24th and July 6th? A Yes.

Q (*By Mr. Holmwood.*) To the National State Bank, dictated by whom? A This letter I wrote, and Mr. Gross evidently signed it.

40 Q July 10th, similar letter to the State Bank, enclosing draft for collection. That is correct, is it? A Yes.

*Wilma Alexovits, cross.*

Q July 16th? A J. H. Penniman & Company, Boston, notifying us, "That you have several tons of skivings as sampled by you," dictated by Mr. Gross and signed by Mr. Gross, is that correct? A Yes.

Q July 22, 1915, to Wilmington Leather Company signed by Mr. Gross enclosing a statement of account and postscript in Mr. Gross's handwriting, stating that the cash account is enclosed in the statement? A Yes. 10

Q Letter of July 23d, to Herran P. Brian, and M. Bintz, Lond Geneau, signed by Mr. Gross. Do you know to what that letter relates? A No, I don't read German; it was a German letter.

Q Letter to the same firm in France, dated July 23d, signed by Mr. Gross. A Signed by Mr. Gross.

Q (*By the Court.*) Dictated by him? A I don't take the German letters. 20

Q (*By Mr. Holmwood.*) Letter of July 30th, letter to Downing's express, dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q Enclosing bill of lading, and giving instructions in connection with that bill of lading? A Yes.

Q Now, referring to that, that shipment is to a foreign firm, is it? A Yes. 30

Q Do you know how that order was placed? A By cable.

Q Do you copy in this book records of cablegrams? A Some of the letters have cablegrams attached.

Q Do you remember taking any dictation from Mr. Gross of cablegrams around this time? A No; I get cablegrams myself.

Q Were they always answered by cable? A Yes.

Q Do you remember taking any dictation 40

*Wilma Alexovits, cross.*

to answer these cablegrams from Mr. Gross? A No.

Q Would you say you didn't? A I think not.

Q But if they were dictated in German, you wouldn't take them? A No, I don't take German.

10 Q Letter of August 2d, Economy Star Company, Jefferson City, Missouri, dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q Replying to a letter from them requesting sample, and sending sample of merchandise? A Yes.

Q Sending sample of upholstery trimmings? A Yes.

Q That is right, is it? A Yes.

20 Q This is a letter of August 6th, National State Bank, dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q Concerning a difference of account between the company and the State Bank, with reference to foreign credits and foreign exchange, and making a complaint with reference thereto? A This matter referred to in this letter was a matter which took place three or four years ago.

30 Q Do you know who went over this account and got these figures to make this complaint to the bank? A These were Mr. Gross's figures, I believe, at the time.

Q Letter of August 6th, to Brian and Bintz, Lond Geneau, France, signed by Mr. Gross? A Yes.

Q Is that signed by Mr. Gross? A It must be, yes, this is Mr. Gross's signature.

40 Q Letter dated August 7th, to the Wilmington Leather Company, dictated by Mr. Lichtman and signed by Mr. Gross. (No response.)

*Wilma Alexovits, cross.*

Q (*By Mr. Newman.*) Is that correct? A Yes.

Q (*By Mr. Holmwood.*) With reference to shipment of gun metal sides? A Yes.

Q Is that correct? A Yes.

Q Letter of August 18th, there being only six pages of letters in the book between August 7th and August 18th, is that correct? A Yes. 10

Q On August 18th there is a letter, signed by Mr. Gross, to the Rasey Tanning Company, Ashtabula, Ohio, notifying them that you are returning, by Lehigh Valley, twenty-six russet splits, and asking credit therefore, signed by Mr. Gross. Do you know who that was dictated by? A No; I don't think it was dictated to me; because I have not my initials on it.

Q Do you have a substitute there while you are on vacation? A Yes. 20

Q A letter dated August 13th, to the same concern—

*The Court.* The last one was the 18th.

*Mr. Holmwood.* That may be the 13th. I may have misread the last one—August 12th.

*The Court.* All right; now the 13th.

Q —to the same concern, enclosing two letters, one from the Montreal Leather Company and the other from someone else, in reply to a request for a sample of splits, is that right, enclosing two letters with reference to a sample of splits, signed by Mr. Gross—is that correct? A Yes. 30

Q The same date, to the State Department, Washington, D. C., latter signed by Mr. Gross, complaining about a shipment which had been requisitioned at Antwerp by the German gov- 40

*Wilma Alexovits, cross.*

ernment, and asking this government to take action thereon? A Yes.

Q August 17th, letter to Weigand & Doerzbacher, city, enclosing credit memorandum for allowance and calling attention to the open balance, signed by Mr. Gross? A That is right.

10 Q August 17th, on the same page we have two letters signed by R. Gross—one, A. R. Clark Company, Toronto, Ontario, and one to the Wilmington Leather Company, the one to Clark & Company replying to a night lettergram stating that they have mailed bills of lading and customs invoices, is that correct? A Yes.

Q The one to the Wilmington Leather Company referring to "the writer's conversation with you over the 'phone, with reference to bills of lading." Is that correct? A Yes.

20 Q On August 18th, letter to Malcomb Inglis & Company, Northampton, England, signed by R. Gross, confirming cable with reference to B. S. splits and stating that they have no reason to reduce the price, is that right? A Yes.

Q Letter of August 25th, to M. Strauss & Sons, Newark, dictated by Mr. Gross, and signed by Mr. Gross? A Yes.

30 Q Referring to the conversation had with Mr. Strauss, with reference to sample pieces contained in lots of wet heads, is that correct? A Yes.

Q Requesting credit memorandum, is that correct? A Yes.

Q Universal Stamp Works, dated the same day, referring to conversation had over the 'phone and asking him to make up a stencil, is that correct? A Yes.

Q Signed Mr. Gross? A Signed by Mr. Gross.

*Wilma Alexovits, cross.*

Q Letter dated August 31st, there being only three letters intervening in the book between the previous date, is that right? A Yes.

Q To Mr. Louis V. Aronson, Newark, with reference to commission on a sale to be allowed Mr. Aronson, is that correct? A Yes.

Q Dictated by Mr. Gross and signed by Mr. Gross? A Yes. 10

Q Letter dated August 31st to Mr. S. Brooks Clark, Fifth Avenue, New York City, requesting a quotation on two million five hundred thousand washers, giving description. Is that signed by Mr. Gross? A Yes.

Q What is the date of this? A September 1st.

Q Letter dated September 1st, Montreal Carriage & Leather, Limited, Montreal, Quebec, dictated by Mr. Lichtman and signed by Mr. Gross? A Yes. 20

Q Stating that you cannot do better than the price quoted, is that right? A Yes.

Q Then, if Mr. Lichtman dictated that letter, do you know who quoted the price to Montreal Leather Company? A Mr. Lichtman did.

Q Letter dated the same date, to E. H. McCormack & Sons, Newark, calling attention to overdue accounts, dictated by Mr. Gross and signed by Mr. Gross, is that right? A Yes. 30

Q Letter dated September 4, to J. Fuller, care of Pennsylvania Railroad, enclosing a bill of lading for shipment on steamship Lord Ern, is that right, dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q September 7th, to the National State Bank, with reference to re-presentation of a draft that had not been honored. Is that correct? A Yes. 40

*Wilma Alexovits, cross.*

Q Dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q On September 7th a letter to the same bank, enclosing draft for collection, is that correct? A Yes.

10 Q Letter of September 7th, Avery Chemical Company, Boston, acknowledging receipt of sample of lactic acid and ordering ten barrels of the same, is that right? A Yes.

Q Signed by Mr. Gross? A Yes.

Q September 7th, letter to M. D. Hess, of Feist & Feist, enclosing bill received from physician for services rendered to one of the employees of J. Lichtman & Son, is that right? A Yes.

Q Dictated by Mr. Gross and signed by Mr. Gross? A Yes.

20 Q To P. Brian and Bintz, September 7th, with eight stricken over it—September 8, 1915; Herran P. Brian and M. Bintz, Lond Geneau, signed by Mr. Gross? A Yes.

Q Enclosing, in said letter, an account, part of which is written in the handwriting of Mr. Gross—figures and dates? A Yes, dates.

30 Q Letter dated September 6, 1915—we will say to another such firm, it is a long name and I think we can dispense with it, signed by Mr. Gross. Where is it addressed to? A Regensburg, Germany.

Q Signed by Mr. Gross? A Yes.

Q Letter to Johan Weiss Mandel, Vienna, signed by Mr. Gross? A Yes.

Q (*By the Court.*) What is the date of that? A September 6th.

40 Q (*By Mr. Holmwood.*) Letter dated September 10th, to the National State Bank, signed by Mr. Gross, enclosing drafts to be credited to the account, and letter dated September 13th, to

*Wilma Alexovits, cross.*

Downing's foreign express, enclosing three bills of lading for foreign shipments? A Yes.

Q Signed by Mr. Gross and dictated by Mr. Gross? A Yes.

Q September 13th, letter to Wilmington Leather Company, acknowledging receipt of the letter of the 11th and enclosing check in the settlement of the account, is that correct? A Yes. 10

Q Dictated by Mr. Gross and signed by Mr. Gross? A Signed by Mr. Gross.

Q Letter to—what is this one? A Herran P. Brian, and M. Bintz, Lond Geneau.

Q (*By the Court.*) What is the date? A December 14, 1915.

Q Signed by Mr. Gross? A Yes.

Q September 15th, letter to Columbia Leather Company, Boston, acknowledging receipt of statement of sales? A Yes. 20

Q And complaining that no check accompany the statement, is that correct? A Yes.

Q Dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q Letter dated December 16th, to Mr. Gilbert Taylor, New York City, confirming telephone conversation authorizing him to close the war risk for insurance for foreign shipment, dictated by Mr. Gross and signed by Mr. Gross? A Yes. 30

Q September 17th, letter to International Arms & Fuse Company, Fifth Avenue, New York, dictated by Mr. Gross and signed by Mr. Gross, giving them a quotation on two million seven hundred thousand, six ounce grain leather washers, is that correct? A Yes.

Q Letter dated September 20th, to the Department of State, Washington, D. C., dictated by Mr. Gross and signed by Mr. Gross, referring 40

*Wilma Alexovits, cross.*

to previous letter of August 13th, and acknowledging receipt of all blanks in which to fill out his claim against the German government? A Yes; that is in reference to a matter that happened some time ago, too, before the war.

10 Q (*By the Court.*) Before the war? A Yes, in 1913.

Q Goods requisitioned by the German government before the war? A No; they were goods that were requisitioned after the war started, but they were sent before the war.

Q (*By Mr. Holmwood.*) Here is one dated September 21st, Avery Chemical Company, Boston, dictated by Mr. Gross and signed by Mr. Gross, in reference to order for lactic acid, is that right? A Yes, sir.

20 Q Do you know what that was used for? A No; I couldn't say.

Q Used in the manufacturing plant, was it? A It is used outside in the factories some place; I don't know what it was used for.

Q Letter dated September 24th, to the National State Bank, enclosing draft signed by Mr. Gross? A Yes.

30 Q Letter dated September 25th, to the H. G. Vogel Company, New York City, replying to favor of the 24th, with reference to "conversation had with our engineer, Mr. Cline," is that right? A Yes.

Q With reference to fixing up pump. Was that pump used in the factory? A I don't remember that.

Q Dictated by Mr. Gross and signed by Mr. Gross? A Yes.

40 Q Letter dated September 25th, to W. L. Ingle, Limited, Leeds, England, dictated by Mr. Gross and signed by Mr. Gross, acknowledging receipt of a letter of the 9th? A Yes.

*Wilma Alexovits, cross.*

Q Stating that they will try and get an allowance for something which is not at port for them? A Yes.

Q Letter dated September 25th, to the Rasey Tanning Company, Ashtabula, Ohio, signed by Mr. Gross? A Yes.

Q Stating "We have just looked over your shipments of buffings of the 31st instant, to September 10th—very sorry they were not right? A Yes. 10

Q Next, September 25th, Samuel Barrows & Company, London, England, dictated and signed by Mr. Gross, replying to favor of the 9th, and also favor of even date, and also favor of even date to Blanchard Brothers, and also stating they had no greenhead splits. Is that right? A Yes. 20

Q Eastern Steamship Corporation, September 25, 1915, dictated by Mr. Gross and signed by Mr. Gross, replying to their favor of the 23d. Is that correct? A Yes.

Q Complaining about the action of truckmen breaking a cask? A Yes.

Q Letter to Pauling & Ayre, Boston, Massachusetts, same date, September 25th, replying to their favor of the 24th, stating, "We are putting through sample of grain centers." Dictated by Mr. Gross and initialed by Mr. Gross? A. Yes. 30

Q Letter of October 4, 1915, to Mr. Berthold Hahn, N. Y. C., stating that the Wilmington Leather Company had shipped to him an order of calf skins, and asking Mr. Hahn to advise whether he had made sale of the same. Is Mr. Hahn a salesman in New York, or selling agent or selling agency? A Why, I think in this case it was a shipment that we made to them, and 40

*Wilma Alexovits, cross.*

they either returned it or sold part of it and returned the rest.

Q Dictated by Mr. Gross and signed by Mr. Gross? A Yes.

10 Q October 4th, letter dictated by Mr. Gross to Weiss & Klau Company, New York City, dictated by Mr. Gross and signed by Mr. Gross, stating that "We have a lot of deep buffs such as you inquired for. You had better stop here at an early date and examine them." A Yes.

Q National Motor Vehicle Company, Indianapolis, October 4th, dictated by Mr. Gross and signed by Mr. Gross, asking them to send by parcel post a sample of scrap, to give a quotation on same, is that correct? A Yes.

Q (*By the Court.*) What are buffs? Thin slips? A Yes.

20 Q (*By Mr. Holmwood.*) Letter of October 7, 1915, to Downing's foreign express, shipping a bale of rough leather. Is that for Salonica? A Yes.

Q Signed Mr. Gross and dictated by Mr. Gross? A Yes.

30 Q Letter of October 11th, to Thayer Fose Company, Boston, dictated by Mr. Gross and signed by Mr. Gross, expressing surprise that they have made a shipment of pickled splits. Is that right? A Yes.

Q Letter of October 14th, Rasey Tanning Company, Ohio, dictated by Mr. Gross and signed by Mr. Gross? A Yes.

Q Advising them of the condition of splits which were to be shipped to them by the American Leather Manufacturing Company. Is that correct? A They were to be shipped to the American Leather Manufacturing Company.

40 Q Letter of October 14th, to the same concern, dictated by Mr. Gross and signed by Mr.

*Wilma Alexovits, re-direct—re-cross.*

Gross, asking him to see that all further shipments to Lichtman & Company are wrapped in paper, is that correct? A Yes.

*Mr. Holmwood.* Now, I will ask you, after you are through on the stand, to look through the letters from March 7th to May 4th, where we started on this, and tell us how many letters were written in that time. We won't go over them individually. We started to go over these letters from May 4th, I believe. 10

*By the Court.*

Q Do you keep more than one letter-book running at the same time? A No; just one.

Q You use a single book until that is filled and then you commence another one? A No: just one book. When that is finished we use another. 20

*Re-direct examination by Mr. Newman.*

Q You stated all letters were signed by Mr. Gross in his official capacity as secretary, did you? A Yes.

Q You have no knowledge as to whether these letters that have been gone over laboriously were signed at his office or his home, have you? A No; that I couldn't say. 30

Q When a letter indicated it was dictated by Mr. Gross does that indicate that he dictated it every word, or would it also embrace a situation in which he would say, "You can answer this letter," and give you the substance of the answer? A Yes; I answered many letters that way.

*Re-cross examination by Mr. Holmwood.*

Q Letters which he dictated you marked "Dictated," didn't you? A No, not necessarily. Sometimes he would tell me to answer 40

*Wilma Alexovits, re-cross.*

a letter and I would mark it dictated, and give it to him to sign it.

Q There was some letters that were not marked dictated in the beginning? A Yes; these were probably letters while I was away.

10 Q Were the letters which he dictated, dictated in his office? A Not always, no.

Q Where does he dictate them? A Over the telephone, sometimes, in his home.

Q The majority of them he dictated at his office, didn't he? A I don't really know how many.

Q He signed them in his office, didn't he? A No; when he was not in the office they were sent up to the house for him to sign there.

20 Q Did you take them over the 'phone? A Why, yes, when he was in that way we always did it; when he was not able to come to the office we sent it up to him.

Q But he did come to the office and dictate some letters during that period? A Yes; he came in occasionally.

Q Well, as a matter of fact, wasn't he there nearly every day until he went to the seashore? A No, I think not.

30 Q Did you hear his testimony here? A Yes, I heard it.

Q If he said he was there, that would be so, wouldn't it?

*Mr. Newman.* I object.

*The Court.* Objection sustained.

*Mr. Holmwood.* I will withdraw the question.

40 Q Did you say you took dictation from anyone else? A Well, I took it from Mr. Lichtman.

*Anna Strack, direct.*

Q Except Mr. Gross and Mr. Lichtman? A That is all.

Q When Mr. Lichtman dictated a letter his initials would appear at the bottom? A Usually, yes.

Q And the only occasions when letters were dictated by Mr. Gross were where I called out "dictated by Mr. Lichtman," is that so? A Yes. 10

PLAINTIFF RESTS.

*Mr. Holmwood.* If the Court please, I move for a non-suit in this case upon the ground that the testimony of the plaintiff and the plaintiff's physician, appearing in the evidence, in the plaintiff's case, shows that there has been a breach of warranty, the warranties, as appearing on the back of the application and on the back of the policy, being made part of the contract. 20

*The Court.* (After argument.) The motion to non-suit will be denied and an exception will be noted.

Exception noted as ground of appeal.

ANNA STRACK, sworn in behalf of defendant. 30

*Direct examination* by Mr. Holmwood.

Q Mrs. Strack, where do you live? A 53 Baldwin Street.

Q Did Mr. Rudolph Gross board with you at one time. A No, sir; he was my tenant.

Q Do you remember during what years he was your tenant? A Well, we built the house about six years ago and he lived with us about three and a half years. 40

*Anna Strack, direct.*

Q Did you live in the same house with him?

A Yes, sir.

Q Did you see him every day during that period? A Most every day.

Q Where did you see him? A Going back and forth to his work.

10 Q Would he come home to lunch? A Yes.

*Mr. Newman.* Does your Honor think this is material? 1913?

*The Court.* There is a defense interposed of a breach of warranty for failure to disclose physical conditions. Is that what it is to meet, Mr. Holmwood?

20 *Mr. Holmwood.* Yes, and it is also introduced for the purpose of showing that if he was a traveller his travelling duties did not carry him away from his office; that he came home to lunch.

Q How often would he come home to lunch?

A I imagine he came home every day.

*Mr. Newman.* I object.

*The Court.* Strike it out.

Q Would you see him come home to lunch?

A Yes, I would see him.

30 Q You couldn't say it was every day? A Well, no, I didn't see him every day.

Q Would you say it was nearly every day?

A Yes.

Q Do you know anything as to his physical condition during that time, his health? A I know at that time he was suffering with his feet; he was doctoring with Dr. Wallhauser.

Q When was that? Before he left you? A Yes.

Q When did he leave your house as a tenant?

40 A About two and a half years ago, I guess.

*Anna Strack, cross.*

Q How do you know he had trouble with his feet? A His wife told me so.

*Mr. Newman.* I ask that that be stricken out.

*The Court.* It will be stricken out.

*Mr. Holmwood.* I consent that it be stricken out. 10

Q Did you notice anything? A Yes.

*Mr. Newman.* I object to leading the witness.

*The Court.* Objection overruled.

Q What did you notice? A Why, that he walked as though he had trouble with his feet.

Q Did any physicians call at his house to see him that you know of? A No.

*Cross examination* by Mr. Newman. 20

Q When did he live with you, now? When was he your tenant? A Well, about six years ago.

Q That would be in about 1910? A No; I don't know; we built the house six years ago and Mr. Gross was our first tenant, and he lived with us about three years and a half.

Q That would be from 1910 to the middle of 1914, would it? Three and a half years? Is that what you mean? A Yes. 30

Q Was it 1913 or 1914 when he quit as a tenant, or don't you know? A He has left us about two years and a half, I think.

Q Two years and a half ago you think he left? A Yes.

Q That is your best memory on it? A Yes.

Q You weren't particularly interested in Mr. Gross, were you? A No.

Q You were simply the landlady of this place? A Yes. 40

*Anna Strack, re-direct—re-cross.*

Q And he rented rooms from you? A Yes.

Q You weren't home every day for lunch during those three and a half years, were you?

A Yes.

Q Every day? A Almost.

Q I didn't ask "almost." I asked every day.

10 Don't you ever go out of town? A No.

Q Never had lunch outside of your own home? A No.

Q You want the jury to understand that? A Yes.

Q Every day, at lunch, were you waiting at the window, watching to see whether Mr. Gross came home—every day? A No.

Q Of course not. So you don't know that he came home every day? A No.

20 Q Isn't it a fact that he might have been in Boston or Philadelphia and you not know it, or New York? A Yes.

Q You didn't follow him around to see where he was going? A No.

Q You took no personal interest in him at all? A No.

Q The only relations between you were landlord and tenant? A Yes, that is all.

*Re-direct examination by Mr. Holmwood.*

30 Q Your knowledge does not go to every day; you are only speaking of his usual habits? A That is all.

*Re-cross examination by Mr. Newman.*

Q You were subpoenaed here? A Yes.

Q How did you come to be subpoenaed? A After Mr. Gross moved away from my house there was a gentleman called on me and asked me whether Mr. Gross lived there. I said no, he used to live there.

40

*Charles S. Wright, direct.*

Q You needn't tell the whole conversation.

A I thought you wanted to know.

Q Someone came there. Did he say where he was from? A No, he did not.

Q Do you see the gentleman in court? A I think it was that gentleman there (indicating).

Q Will you point him out? A There (indicating). 10

Q That is the detective here? A Yes.

*Mr. Newman.* Will you stand up, please? (A man in the audience arises.)

*Mr. Newman.* What is your name?

*Voice.* Mr. Wright.

CHARLES S. WRIGHT, sworn in behalf of defendant.

*Direct examination by Mr. Holmwood.* 20

Q Mr. Wright, you are connected with the Commercial Casualty Company, the defendant in this case? A Yes, sir.

Q In what capacity? A As investigator of claims, and adjuster.

Q How long have you been connected with such company? A Approximately two years and a half.

Q Do you recall going to the place of business of Mr. Gross to see him with reference to this claim? A Yes. 30

Q Do you recall when you first visited him there? A On March 23, 1915.

Q Did you see him? A Yes, sir.

Q Where did you see him? A In the office.

Q What was he doing when you saw him?

A He wasn't doing anything when I saw him, except talking with me, that is the only thing he did. 40

*Charles S. Wright, direct.*

Q Did he say anything to you with reference to his claim? A His claim?

Q Yes. A Yes, we talked over his claim.

Q Will you tell us what that conversation was? A Well, I merely was pointing out the fact to him, in the first place, we talked over  
 10 the length of time he was totally disabled; that is, not able to leave the house. We talked over the total disability, when he could not leave the house, and then he told me when he could leave the house what he could do, and so forth. I merely explained the conditions of his policy, that when he could resume part of his duties his indemnity ceased with the company, according to his policy contract.

Q What did he say? A He claimed his duties were on the road and that he should  
 20 receive full indemnity.

Q Did he say anything as to whether or not he was attending to any of his duties? A Well, he told me he was attending to his office duties.

Q Do you remember the exact language that he used in telling you that? A I don't know as I do remember the exact words he used.

Q Did he say for how long—  
 30

*Mr. Newman.* I object to the form of the question. He can tell the conversation, but I do not think that his attention should be drawn specifically, by leading questions, to every detail. The proper rule is that the witness should state the entire conversation, and then if his memory is exhausted he can call his attention to specific matters.

Q Tell us the entire conversation, omitting  
 40 what you have already told us. Was there any-

*Charles S. Wright, direct.*

thing further said? A I am unable to repeat the exact conversation.

Q Not words, the substance of it? A The substance was that I explained the conditions of his policy.

Q What did he say? A He didn't say anything, only he didn't agree with me. He claimed he should have full indemnity when he could not go outside on the road, but merely attend to his office duties. 10

Q During what time? A The total was from January 4th until January 20th, I think, and from January 20th to March 7th, or 4th, he was not confined to the house. He claimed he could not do anything to speak of. But after March 7th—

Q Before you go further, did he say what he did, if anything, between January 20th and March 7th? A Yes; he dictated an occasional letter, and so forth; something very slight, but after March 7th he was able to resume nearly all of his office duties. 20

Q Did he use those words, "nearly all of his office duties"? A He could attend to nearly all of his office duties. I don't know as those were his exact words; that is the substance of it.

Q Did he make any statement to you as to the time he was at the office, after March 7th? A After March 7th nearly every day. 30

Q Did he say that? A Yes.

Q Is there anything else that you can recall in that conversation? A No, I don't know as there is.

Q Now, you saw him again at a later date, didn't you, Mr. Wright? A April 11th.

Q Where? A At the office, with Mr. Lichtman. 40

*Charles S. Wright, cross.*

Q What was he doing on that occasion? A When I went there he was not in the office, and I made inquiries for him, and somebody—I have forgotten who—went in a door—which I supposed led to the factory—and in a few minutes Mr. Gross came in.

10 Q How was he dressed? A In working clothes, as if he was doing some kind of work.

Q Did he walk in? A Yes.

Q You had another talk, on that occasion, with him? A Yes.

Q Tell us what occurred that time? A Similar to the other talk, regarding the conditions of his policy.

Q Did you have any further conversation? A Not since April 11th.

20 Q At this conversation of April 11th did he say anything to you as to whether or not he was able to attend to his ordinary duties? A Well, his ordinary office duties. He told me, at that time, he couldn't go on the road, but he could attend to his office duties inside.

*Cross examination by Mr. Newman.*

Q How long have you been with the Casualty Company, sir? A About two years and a half.

30 Q Prior to that where were you working? A I was working with another casualty company in New York City.

Q What was the name of it? A The Equitable Accident Company.

Q As investigator also? A As manager of the New York office.

Q Your first interview with him was on March 23, 1915? A Yes.

40 Q And your next interview was April 11, 1915? A Yes.

*Charles S. Wright, cross.*

Q Those were the only two interviews you had there? A That is all.

Q At both of those interviews you gave him what was your opinion of the construction of these policies, didn't you? A Yes.

Q He told you what his idea was about it, isn't that so? A Yes.

10

Q When you said that after March 7, 1915, he said he was there daily—nearly every day—is that what you said? A Yes.

Q He told you that he dictated an occasional letter? A That was before March 7th, he dictated an occasional letter.

Q But that is what he told you on that day, didn't he? A On what day?

Q On the interview of March 23, 1915. Did he not state to you that he dictated an occasional letter? Wasn't that what you said? A He said between January 2d and March 7th he dictated an occasional letter.

20

Q At the interview of April 11, 1915, did he say anything to you with reference to dictating letters? A There wasn't so much talk, at that time, with regard to that. Of course that was understood between us at the other time, that he could do his office work.

Q Did he say that he did all of his office work or only part of his office work? A I don't recall whether he said all of it or parts of it; he was attending to the principal parts of it.

30

Q Just a general statement. Isn't it a fact that on your visit of March 23d, and also on your visit of April, that Mr. Gross was then wearing a large slipper? A Not to my knowledge.

Q You say not to your knowledge. You ought to know. Did you see it? Won't you

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*Charles S. Wright, cross.*

say whether you saw it or didn't see it? A I don't remember seeing it.

*By Juror No. 6.*

Q You say you are an investigator for the Casualty Company? A That is part of my duties, yes, sir.

10 Q You went down to interview Mr. Gross in connection with this? A In connection with this claim, yes, sir.

Q In answer to this counsel, then, you said you didn't remember his exact answer. You went down there for the purpose of interviewing him on this subject, and then you want the jury to understand that you don't remember his exact answer? A To what question?

20 Q To the question, what the conversation was. You said you didn't remember the exact—  
A Not exactly, word for word.

Q You went down for that purpose, to interview him? You were an investigator? A Yes.

Q Don't you think that it was your duty? A Not exactly; the substance of it.

*By Mr. Holmwood.*

30 Q You don't remember the particular words that you used, do you? A Not particular, word for word.

Q Nor the particular words that Mr. Gross used? A Not the exact, particular words.

Q How long did the conversation last, Mr. Wright? A I should judge between half and three-quarters of an hour.

*By Juror No. 6.*

40 Q But you went down for that one purpose, to find out all you could for the interests of

*Ralph Lane, direct.*

your company? A Not to find out all I could; to talk over the matter with Mr. Gross.

Q (*By Mr. Holmwood.*) You tried to adjust it, didn't you? A Not exactly; I went to find out how he was getting along and now he had been, to find out about the case in general; what duties he could perform and what he could not; that was all. 10

RALPH LANE, sworn in behalf of defendant.

*Direct examination by Mr. Holmwood.*

Q Mr. Lane, what is your position with the defendant company? A Why, I have charge of the accident, claim and health department.

Q Did you ever see Mr. Rudolph Gross, in this case, with reference to this claim? A Yes.

Q Where did you see him? A At our office. 20

Q He called there? A Yes.

Q Do you remember the date? A Well, the first time he called was the latter part of September, 1915. I don't remember the day.

Q Who was with him? A I believe he called alone, the first time; I am not sure about that, though.

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

Q Please tell us what was said in that conversation. A We discussed the question as to whether he was totally disabled during the period he claimed and he stated that he had been totally disabled, so far as travelling was concerned, that travelling was his sole occupation, and on that basis he claimed total disability up to that day except that he did say that he performed part of his office duties. 30

Q From what date? A From March 7th. 40

*Ralph Lane, direct.*

Q Did you call his attention to his classification, in his application, as office duties? A Yes.

10 Q What did he say about that? A Well, he claimed, I believe, that it was improperly written, that the agent misunderstood it or something of that sort, that he was really a travelling man only.

Q Did he deny that office duties was part of his work? A Yes, he denied that.

Q But he did say that he was attending to office work, after March 7th? A Yes, part of his work.

Q Did he say anything as to what part? A Well, he said that he dictated an occasional letter, he did only occasional office duties.

20 Q Did you have another conversation with him after that? A Yes; he called on or about November 17th, and at that time we had an interview in Mr. Mitchell's office. Mr. Mitchell was the vice-president. At that time he also admitted, from March 7th to July 1st, he was able to do most of his office duties.

Q March 7th to July 1st? A Yes.

30 Q Did he have any one with him on that occasion, when he talked with you? A Yes, he had three or four people with him, an attorney, and I believe some insurance agent.

Q Mr. Newman here? A No; I believe some other attorney.

Q You say that he admitted that he was attending to some of his office duties—from what dates, again? A After March 7th.

Q Do you recall his exact language? A Well, he said most of his office duties he was attending to.

40 Q Did he qualify that in any way with reference to travelling? A No; he denied at all times that he was able to travel.

*Ralph Lane, cross.*

Q I mean, did he qualify the fact that he was attending to most of his duties by saying that he was attending to most of his office duties but couldn't travel? Is that a fact? A Yes.

*Mr. Newman.* I object.

*The Court.* It is improper to repeat his testimony. 10

Q Do you recall anything else that was said at that time by Mr. Gross? A He said he suffered a relapse about July 1st, and some time after that he went away on the advice of his physician, and he stayed away, I believe, until September. After that he came to his office only occasionally, once a week or so, at which time he would also call at the office of his physician, and that at the time he made those calls at his office he did occasional work— 20  
dictated letters.

Q You were unable to adjust the matter, were you, on that occasion? A Yes, we were not able to.

*Cross examination by Mr. Newman.*

Q You don't mean that he told you that he didn't do any office work at all, do you? A No; he told me that he did part of his office work. 30

Q Didn't he say to you on the first interview that his office work was mostly in connection with his travelling? A Yes; he did say that it was incidental to his selling.

Q He also stated to you that in July he had had a relapse? A Yes.

Q And told you that that prevented him from doing most of his office work from July to October? A He said so at the first time he called at the office, yes. 40

*Rudolph Gross, direct.*

Q At the second interview that you have detailed Mr. Hess was present, do you recall that? A Yes.

DEFENDANT RESTS.

10 *Mr. Holmwood.* I offer letter marked D. 1 for identification in evidence.

*The Court.* It will be admitted.

Marked Exhibit D. 1.

*Mr. Holmwood.* I offer stub of the last renewal voucher, being stub No. 1806, in evidence.

Marked Exhibit D. 2.

20 *Mr. Newman.* I offer letter dated March 26, 1915, marked P. 11 for identification in evidence.

Marked Exhibit P. 11.

RUDOLPH GROSS, plaintiff, recalled in his own behalf, in rebuttal.

*Direct examination by Mr. Newman.*

Q On the 8th of September, 1914, were you in sound condition, mentally and physically, so far as you knew? A Yes, sir.

30 Q It is a fact, is it, Mr. Gross, that about six months or a year prior to the last renewal you did call upon Dr. Wallhauser, didn't you? A Yes, I did.

Q Did you have anything the matter with you? A Yes.

Q What was the matter with you? A I got so easily tired in my feet I went down there to consult, because he once treated me before, about a few years ago.

40 Q And that is the time you mentioned in

*Rudolph Gross, cross.*

this? A That is so. I went down there and he looked me over. He didn't say anything. He said, "You go home and take a little more care, and take a little rest, and rub your feet with alcohol."

Q He didn't tell you anything was the matter with you? A No.

10

Q And you had no trouble after that until this last illness? A Yes.

Q And when you said you had been to Dr. Wallhauser, as you did, you referred to the statement you made in the warranty that in 1911 you had been treated for eczema for four months, is that right? A Yes, sir.

Q And was that about the same period that you were living at this lady's house? A Yes.

*Cross examination by Mr. Holmwood.*

20

Q How many times did you call on Dr. Wallhauser? A Prior to September 8, 1914?

*Mr. Newman.* At the time of this last renewal.

A I don't think I called at Dr. Wallhauser's.

Q Only this once you tell about? A Yes, and in 1911.

Q Did he prescribe for you this first time?

A He told me to rub my feet with alcohol.

30

Q Were your feet swollen? A Not exactly, no.

Q Were the veins swollen? A No.

Q What seems to be the trouble with them?

A I felt tired so easily.

Q You thought it was of sufficient importance to see a doctor about the condition? A I usually do, because I need my feet quite a bit, and the least trouble I have I go to a doctor rather sooner than later.

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PLAINTIFF RESTS.

*Motion to direct Verdict.*

10            *Mr. Holmwood.* If your Honor please, I  
 move for the direction of a verdict upon  
 the ground of breach of warranty, and I  
 renew my motion upon the ground that the  
 plaintiff, if entitled to recover at all, is  
 only entitled to recover the sum of two  
 hundred and two dollars and some cents,  
 at \$25 a week, and from January 20th to  
 March 7th, at \$18.75 a week, at which time  
 he resumed part of his duties, or most of  
 his duties, by the uncontradicted testimony  
 in the case, and I ask that if your Honor  
 feels that the defendant is wrong as to the  
 first contention, that if there is a verdict  
 in this case, it should be restricted to the  
 period mentioned therein, by a motion to  
 direct a verdict or by the charge of the  
 20            Court.

*The Court.* The motion will be denied.  
 Defendant's counsel prays an exception  
 to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Holmwood sums up for defendant.

Mr. Newman sums up for plaintiff.

Recess from one to two o'clock.

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*Charge to Jury.*

AFTER RECESS.

**Charge to Jury.**

The Court charges the jury as follows:

DUNGAN, J.

Gentlemen. This suit is brought upon a policy of insurance issued by the defendant, the Commercial Casualty Company, of Newark, in favor of the plaintiff, Rudolph Gross, insuring him against accident and illness for the term of the policy, which is one year from the date of its issue, which was on the 11th day of October, 1911, and which was renewed from year to year until the 11th day of October, 1914, and at that time renewed for a year from October 11, 1914, to October 11, 1915. We are not concerned with that part of the policy which relates to accidents, because no recovery is sought under that head. The only portion of the policy with which we are concerned is that which indemnifies the plaintiff against illness. That is paragraph H of the policy, and is as follows: "If the assured shall, by reason of any disease or illness, contracted during the term of this insurance, and not herein excepted, be totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, and necessarily confined in the house, the same amount per week as is provided in Clause B, when for total disability, will be paid to the assured." That is, \$25 a week. "And if, immediately following such a period of total disability and confinement in the house"—and this is the important part to which I desire to call your attention—"he would be totally dis-

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*Charge to Jury.*

abled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, but is not necessarily confined in the house, three-quarters of said amount per week will be paid to the assured; but no payment will be made for disability in excess of fifty-two consecutive weeks' duration." With that you are not concerned because there is no claim for fifty-two consecutive weeks; the term is less than that. Three-quarters of \$25 will be \$18.75 per week.

It is admitted by the defendant, the Commercial Casualty Company, that the plaintiff is entitled to recover full indemnity from January 4th to January 20, 1915, and three-quarters indemnity from January 20th to March 7, 1915, at the rate of \$18.75 a week, provided he is not prevented from recovering at all by reason of what they claim to be a false representation or warranty, not in the original policy, but in the last renewal; and this I will presently mention. This amount, according to the admission of the defendant itself, is \$202.67.

But it is insisted that the plaintiff is not entitled to recovery after that date because it appears without dispute in this case that he was able to perform some portion of his accustomed duties after March 7th and up to October 15th, the limit of time for which he claims indemnity under this policy.

He represented, in his application for this insurance, that his occupation was fully described as being office duties and travelling only and upon the stand, in this case, he has testified that his work consisted in examining, in New York, Boston, Wilmington, Philadelphia and other places, goods purchased on behalf of the firm, or the corporation of Julius Lichtman,

*Charge to Jury.*

by which he was employed and of which he appears to have been a member. This, according to the testimony of one of the witnesses, he was required to do almost every day. I am not sure whether he testified to it himself or whether it was the stenographer and book-keeper; but she says that he was in New York 10  
four or five days a week, frequently. She does not testify to the frequency with which he went to Boston, Philadelphia, Wilmington and other places, but he says that he frequently was obliged to go to those places and examine hides consigned to the corporation, of which he was a part, and leather, which was sold and consigned by the corporation, of which he was a part, and that this work necessitated his traveling and using his feet. He says that during 20  
this period he was absolutely unable to attend to that portion of his work, and in this he is corroborated by Dr. Wallhauser, who attended him, and he says that that constituted the bulk of his work. He was the secretary of the corporation and he says that he also did office work; but he says that the bulk of that work which he did in his office was in connection with that part of the work which required him to travel. He admits that he was in the office 30  
frequently, and except for a vacation which he took in the summer of 1915 and from which he returned in the early part of September, he says that he was at the office almost every day; that he preferred to do that rather than to stay around the home, and Mr. Lichtman says that some days he was there almost all day.

Mr. Gross says that he generally went to his office, occasionally dictated a letter, would lie down part of the time, sometimes go out in the shop, and look around, where he says his duties 40

*Charge to Jury.*

10 did not call him, but which he was minded to do because of his interest in the work and interest in the concern; that he remained there for half an hour or an hour, and would return home; and that his trips to the Lichtman factory and from the Lichtman factory were in an automobile, being unable to travel on foot. That was corroborated by Mr. Abraham Lichtman, who says that he used his automobile during that period.

20 It appears, however, from the testimony of the bookkeeper and stenographer, that during that period covered by the letter-book which was here produced, which was from May 4th to October 14th, he had signed about eighty letters. Some of them had been dictated by Mr. Abraham Lichtman, the president of the corporation, but many of them had been dictated as well as signed by him, and related to the business of the corporation. There cannot be any question about that, that these letters related to the business of the corporation. Some of them were addressed to the National State Bank, sending drafts for collection, and sending bills of lading for goods purchased; complaining of the character of goods received, and I think many of these letters entered generally into the business of the corporation of which he was a part.

30 But eighty letters may sound like quite a large number until we consider over what period they ran. Now, from May 4th to October 14th is one hundred and sixty-three days, so that although there were eighty letters it means only a letter about every other day, on an average, including Sunday, and of course we may assume that at least one day in the week the  
40 factory was not operated and the place was

*Charge to Jury.*

not open; so that the average was a little more than that, perhaps.

Mr. Wright, who was an investigator of the company, says that he had a conversation on March 23d with the plaintiff, in which the plaintiff then told him that he was attending to his office duties, and Mr. Lane, who is in charge of a branch of the defendant's business, says that the plaintiff told him that from March 7th to July 1st he was able to do most of his office duties. 10

Gentlemen, it is the duty of the Court to construe the contract, to tell you what, in law, the contract means. You are the judges of the facts; but this is a legal proposition, of which the Court is the judge. It often occurs, in most cases it is true, that the precise words which the trial court is called upon to construe, have never been construed by any appellate court, and these precise words in this contract, "totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation" do not appear to have been construed by the appellate courts of the State of New Jersey. The Court's attention has been called to no case in the State of New Jersey by which these words have been construed by the appellate courts of this state; but these precise words have been construed by the courts of other states, and some of these courts have construed it one way, which would prevent recovery by the plaintiff in this case, and some have construed these precise words the other way, which permitted recovery under circumstances somewhat similar to those which appear in this case, and since the rule of law applicable to policies of insurance is that they shall receive a liberal construction in favor of 20 30 40

*Charge to Jury.*

the insured I am inclined to adopt the rule which is liberal toward the insured rather than otherwise, and I shall adopt the language of the trial court quoted in the report of the case of *Young v. Travellers' Insurance Company*, reported in 80 Maine, 224, adopting it to this case.

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I have already called to your attention the representation made by the plaintiff as to his occupation, that is, that it was office duties and travelling. Now, then, using these words, instead of the words used in this case, I charge you that this is the law applicable to this case. "The reasonable construction which must be put upon the language here used is that it must have meant that, if the plaintiff was so disabled as to be incapable of doing any and every kind of business pertaining to his occupation," as office man and travelling, "then he would be wholly disabled from the prosecution of every kind of business pertaining to such occupation," and entitled to the stipulated compensation. Otherwise, if he was not so disabled he would not be entitled; and therefore, gentlemen, I instruct you as a matter of law that the meaning of the language here used is, not that he must be so disabled, as to prevent him from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his occupation," as in the office and travelling, "but that he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. There may be a difference between being able to perform any part of his business, and any and every kind of business pertaining to his occupation." And that is the law, gentlemen, which I have read

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*Charge to Jury.*

from this Maine case, and which is applicable to this case.

But even though the plaintiff was prevented from performing any and every part of his occupation and would otherwise be entitled to recover, the defendant claims that he is prevented from recovering by reason of a false representation made in the last renewal, which has reference to a representation made in his application for insurance, in which he says, "I have not been disabled, nor have I received medical or surgical attention during the past five years, except as follows: In 1911, for eczema, lasting four months." In his renewal receipt, which he received from the company and by which he was bound, this policy is renewed upon the proviso that "the statements in the schedule and all the original warranties are true at this date"; so that he represented that same thing, that is, that he had not been disabled, nor had or received medical or surgical attention during the five years. That was his representation when this policy was renewed on the 11th day of October, 1914, and he also says about that, "Nothing exists at the date hereof to render the hazard of the risk greater than or different than that shown by such schedule."

It appears from the testimony of Dr. Wallhauser that about a year, or at least six months, before the time of his illness, before January 4th, he had treated him, or had been consulted by him, for trouble with his feet; that he had diagnosed the case at that time as being phlebitis, which is the same disease for which he is now seeking to recover. But Dr. Wallhauser, you may recollect, did not state the duration of that illness at that time, if it be an illness, nor how serious it was.

*Charge to Jury.*

10 Mrs. Strack says that the plaintiff lived in her house, as her tenant, and that during the time he lived there, commencing about six years ago, and the tenancy ending about two and a half years ago he had some trouble with his feet; that is, she says he walked as if he had some trouble with his feet; but it is admitted that in 1911—and she does not say just what time that was—which would include the period of six years, while he resided in that house he didn't have eczema; and it appears from his examination, on rebuttal, that that trouble was with his feet. The plaintiff, however, says that the consultation and treatment with Dr. Wallhauser at that time consisted of just one single consultation; that he went to Dr. Wallhauser's office because he got tired on his feet; 20 and that Dr. Wallhauser said to him to "Take a little more rest and rub your feet with alcohol"; and that that was all that was done; that he came home and took that advice, and that was all that took place.

30 Gentlemen, while it is true that a false representation as to physical conditions in a policy of this kind would vitiate the policy, make the policy void, and that the plaintiff would be unable to recover under the policy, yet, if the person insured has omitted to mention some temporary or slight ailment, if the ailment is temporary or slight, then he is not prevented from recovery. And the same, as to the fact whether or not he had consulted a physician, the rule being that a full statement as to whether the applicant has consulted or been attended to by a physician is material to the risk, and will defeat a recovery, especially where it is warranted to be true, as it is in this case. 40 But even where the answers are made warran-

*Charge to Jury.*

ties, substantial truth is all that is required, in analogy with the rule as to temporary or slight ailment, which I have just mentioned, and it is held that medical consultation or attendance for merely slight or temporary indisposition need not be disclosed, the insured being entitled to a liberal construction, as I have already stated, of the language of the application. 10

So, gentlemen, if you find that the illness of the previous year, the year before the renewal of this policy, in October, 1914, for which the plaintiff consulted Dr. Wallhauser, was of a temporary or slight character, then he will not be barred from his right to recover on that account. However, if it be of so serious a character, as I have mentioned, as to permanently affect his health, and to make him a less desirable risk for the insurance company at the time he made this representation, then it is such a representation as will bar a recovery in this case, and it is for you to say, under the evidence in this case, which it is. 20

The burden of proof, in the first place, is upon the plaintiff to establish his case. Therefore, gentlemen, if you find by the greater weight of the evidence in the case that the plaintiff was, by reason of any disease or illness contracted during the term of this insurance, totally disabled, and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, up to the 15th day of October, 1915, you will award to him compensation under this policy, which will be total disability from the 4th day of January, to January 20th, \$60.75, and three-quarters disability from that date up to October 15th, \$717.75, amounting, altogether, to \$778.50, 40

*Exception to Charge.*

and to that you may add interest from December 7th, 1915, amounting to \$44.85, making \$822.35, unless you shall find it to be established in this case that there was a false representation of the character I have mentioned, which will prevent him from recovering, in which event he cannot recover anything.

10

But if you should find that he is not entitled to recover for the full period of the claim, because he was not totally disabled and totally prevented from attending to any and every kind of business pertaining to his occupation, then you will award him compensation for such period as he was so prevented, at the rate I have indicated, \$25, up to January 20th, and at \$18.75, for the rest of the period, together with interest from December 7, 1915, to this date at the rate of six per cent.

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## THE JURY RETIRES.

*Mr. Holmwood.* I desire to except to that portion of the charge in which your Honor spoke with reference to the Maine case, and the rule laid down there as to the interpretation of the language of the contract.

Exception noted as ground of appeal.

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*Mr. Holmwood.* And I also pray an exception to that portion of the charge in which your Honor spoke with reference to the rule with regard to the breach of the warranty and as to whether it was the substantial truth that was given in the application, stating that if a minor misrepresentation was made that would not vitiate the policy.

Exception noted as ground of appeal.

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*Exhibit P. 1.***Exhibits.**

## EXHIBIT P. 1.

(Form 2-A, Feb., 1910.)

COMMERCIAL CASUALTY INSURANCE  
COMPANY

OF NEWARK, NEW JERSEY.

(Herein called the Company.)

COMMERCIAL ACCUMULATIVE DISABILITY POLICY.

Principal sum, first year, \$5,000.00.

Increasing to \$7,500.00.

10

IN CONSIDERATION of the premium herein provided, and of the statements in the Warranties endorsed herein, which statements the assured makes by accepting this policy, and warrants to be true, the Company

20

## DOES HEREBY INSURE

the person named and described in said Warranties for the term herein provided, against disability or death resulting directly and independently of all other causes from bodily injuries effected solely through accidental means, suicide (sane or insane) not included, as follows:

## SINGLE INDEMNITIES.

30

A. If such injuries alone, immediately, continuously and wholly prevent the Assured from performing any and every duty pertaining to his occupation, and during the period of such disability and within four (4) years from the date of accident, result in any one of the losses described below, the Company will pay the sum specified opposite such loss and in addition will pay weekly indemnity for the period of such

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*Exhibit P. 1.*

disability from the date of accident to the date of death or other specified loss at the rate per week provided in Clause B, or, if such injuries alone result within ninety days from date of accident in any one of the losses described below, without there being continuous total disability, the Company will pay the sum specified opposite such loss.

10

## Loss of

- Life .....The Principal Sum.  
 Both Hands by removal at or above the wrists .....The Principal Sum.  
 Both Feet by removal at or above the ankles .....The Principal Sum.  
 One Hand at or above the wrist and One Foot at or above the ankle (by removal) .....The Principal Sum.  
 20 Entire Sight of Both Eyes, if irrecoverably lost .....The Principal Sum.  
 Either Hand by removal at or above the wrist .....One-half of Principal Sum.  
 Either Foot by removal at or above the ankle .....One-half of Principal Sum.  
 Entire Sight of One Eye, if irrecoverably lost .....One-half of Principal Sum.
- 30 The Principal Sum payable for loss of life will be paid to the Beneficiary named in the Warranties endorsed herein, if living; otherwise to the executors, administrators or assigns of the Assured. All other indemnities payable under this Clause A will be paid to the Assured.

## SINGLE WEEKLY INDEMNITY.

## TOTAL DISABILITY.

40 B. 1. If such injuries do not result in any of the losses provided for in Clause A, but alone

*Exhibit P. 1.*

immediately, continuously and wholly prevent him from performing any and every duty pertaining to his occupation, the sum of Twenty-five Dollars per week will be paid to the Assured, as hereinafter provided, but not for more than four years.

10

## PARTIAL DISABILITY.

2. If such injuries shall not totally disable the Assured, but shall immediately or immediately following a period of total disability, continuously and wholly prevent him from performing fully work essential to the duties of his occupation, one-half of the amount provided for total disability will be paid to the Assured, but not for more than thirty consecutive weeks, nor will payment be made for more than four years for total and partial disability combined.

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## ELECTIVE INDEMNITIES.

C. If the Assured shall sustain injury by means as aforesaid, which injury is named in the Schedule of Injuries hereinafter contained, he may elect to receive the amount of indemnity specified opposite such injury in lieu of all other indemnity except under Clause F, provided he signifies his choice to the Company within ten days from the date of occurrence of said injury. In no event will more than one of the amounts payable as an elective indemnity be paid for injury or injuries sustained in any one accident.

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## DOUBLE INDEMNITIES.

D. The amounts payable under Clauses A, B and C shall be doubled, if the bodily injury is sustained by the Assured—(1) while on a public

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*Exhibit P. 1.*

conveyance (including the platform, steps, or running-board thereof) provided by a common carrier for passenger service; (2) while in a passenger elevator (excluding elevators in mines); (3) in consequence of the burning of a building while the Assured is therein; (4) in consequence of a stroke of lightning; (5) in consequence of the collapse of the outer walls of a building while the Assured is therein.

SUNSTROKE, FREEZING, HYDROPHOBIA, ASPHYXIATION, BLOOD POISONING.

E. Any one of the following, namely—sunstroke, freezing, hydrophobia, asphyxiation, blood poisoning—suffered through accidental means (excluding suicide, sane or insane, or any attempt thereat, sane or insane), shall be deemed a bodily injury within the meaning of this policy.

SURGEONS' FEES.

F. If a bodily injury or an illness, for which indemnity is payable under this policy, is suffered by the Assured, and if on account of said bodily injury or illness, and within ninety days from the date of the accident or inception of illness, the Assured undergoes a surgical operation named in the Schedule of Operations set forth herein, the Company will pay the Assured, in addition to the indemnity payable for said bodily injury or illness, the sum set opposite such operation in said schedule; provided that not more than one of the said amounts so named shall be payable for one illness or for bodily injuries resulting from one accident. If bodily injuries do not result in disability, but do require surgical treatment by a surgeon within ninety

*Exhibit P. 1.*

days from date of accident, the Company will pay the amount actually expended for such treatment, but not exceeding the amount named in Clause B. 1, for one week of total disability.

## ACCUMULATIONS.

G. If all premiums are paid annually, the original Principal Sum herein provided will be increased ten per cent. in the second and each subsequent year for five consecutive years, until such increases amount to fifty per cent. of the original Principal Sum, and thereafter, so long as this policy is maintained in force by annual premium payments the amount insured shall be the original Principal Sum plus the accumulations. 10

If premiums are paid otherwise than annually, the original Principal Sum herein provided will be increased five per cent. in the second and each subsequent year for ten consecutive years, until such increases amount to fifty per cent. of the original Principal Sum, and thereafter, so long as this policy is maintained in force the amount insured shall be the original Principal Sum plus the accumulations. 20

## ILLNESS.

H. If the Assured shall by reason of any disease or illness, contracted during the term of this insurance and not herein excepted, be totally disabled, and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, and necessarily confined in the house, the same amount per week as is provided in Clause B. 1, for total disability will be paid to the Assured; 30 40

*Exhibit P. 1.*

and if, immediately following such a period of total disability and confinement in the house he shall be totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, but is not necessarily confined in the house, 10 three-fourths of said amount per week will be paid to the Assured, but no payment will be made for disability in excess of fifty-two consecutive weeks' duration.

## BLINDNESS AND PARALYSIS.

I. If the Assured has, as the result of disease contracted during the term of this policy and not hereinafter excepted, entirely and irrecoverably lost the sight of both eyes, or permanently and entirely lost the use of both hands 20 or both feet, or of one hand and one foot, and if also he has been for one year and will thereafter and during his life by reason thereof, be permanently disabled from engaging in any work or occupation for wages or profit, the Company will pay to him upon satisfactory proof a sum sufficient to increase the indemnity theretofore paid for the disease which shall have 30 caused such disability to an amount equal to one-half the original Principal Sum, the payment of which will end this policy.

## IDENTIFICATION.

J. If the Assured, by reason of injury or illness, shall be physically unable to communicate with friends, the Company, upon receipt of a telegram or other message giving the number of this policy, will immediately transmit to his 40 relatives or friends any information respecting

*Exhibit P. 1.*

him and will defray the expense necessary to put the Assured in the care of friends, but not exceeding the sum of One Hundred Dollars.

## WEEKLY INDEMNITY PAYMENTS.

K. Claims for weekly indemnity of less than eight weeks' duration will be paid upon presentation of satisfactory affirmative proof of total or partial disability as herein defined; claims of longer duration will be paid at the expiration of eight weeks from date of accident or inception of illness and at intervals of eight weeks thereafter, such affirmative proof of disability and of its continuance to be furnished before each payment, final proof in all cases to be furnished in accordance with Paragraph I, General Provisions. 10

20

## INSURANCE OF BENEFICIARY.

L. If the Beneficiary first named in the Warranties endorsed herein is not the Assured or an Assured Beneficiary under any other accident or disability policy issued by this Company, and is over eighteen and under sixty years of age, then this policy shall also insure the person so named against bodily injuries effected solely through accidental means, suicide (sane or insane) not included, and received (1) while on a public conveyance (including the platform, steps, or running-board thereof) provided by a common carrier for passenger service; (2) while in a passenger elevator (excluding elevators in mines); (3) in consequence of the burning of a building while the Beneficiary is therein; (4) in consequence of a stroke of lightning; (5) in consequence of the collapse of the outer walls of a building while the Beneficiary is therein, 30

40

*Exhibit P. 1.*

which injuries alone result within ninety days from date of accident in any one of the losses described below, in the sum specified opposite such loss.

## Loss of

- 10 Life .....The Original Principal Sum.  
 Both Hands by removal at or above the wrists .....The Original Principal Sum.  
 Both Feet by removal at or above the ankles .....The Original Principal Sum.  
 One Hand at or above the wrist and One Foot at or above the ankle (by removal) .....The Original Principal Sum.  
 Entire Sight of Both Eyes, if irrecoverably lost.....The Original Principal Sum.  
 20 Either Hand by removal at or above the wrist, One-half of Original Principal Sum.  
 Either Foot by removal at or above the ankle, One-half of Original Principal Sum.  
 Entire Sight of One Eye, if irrecoverably lost...One-half of Original Principal Sum.

- 30 If the Beneficiary shall sustain injury under conditions as aforesaid and such injury is named in the Schedule of Injuries herein contained, the sum set opposite said injury in the column headed Beneficiary will be paid to the said Beneficiary, but not more than one amount will be payable for injuries to the Beneficiary resulting from any one accident.

The original Principal Sum payable for loss of life will be paid to the Assured. All other indemnities payable under this Clause will be paid to the Beneficiary.

*Exhibit P. 1.*

## SURGEONS' FEES FOR BENEFICIARY.

M. If a bodily injury for which indemnity is payable under Clause L is received by the Beneficiary therein designated, and if on account of the said bodily injury and within ninety days from the date of the accident, the said Beneficiary undergoes a surgical operation named in the Schedule of Operations set forth herein, the Company will pay said Beneficiary, in addition to the indemnity granted by Clause L, one-half the sum set opposite such operation in the said schedule; provided that not more than one of the said amounts so named shall be payable under this Clause for bodily injuries resulting from one accident. 10

## GENERAL PROVISIONS. 20

I. Written notice as early as may be reasonably possible must be given to the Company at Newark, New Jersey, of any accident and injury or commencement of disability by disease, for which claim can be made, with full particulars thereof and full name and address of the Assured. Affirmative proof must be given to the Company at its Home Office, in Newark, New Jersey, within three months from the date of death, dismemberment, or loss of sight, or termination of continuous disability from injury or illness. Preliminary proof of permanent disability, blindness or paralysis, by disease must be furnished to the Company within one year, and final proof thereof within two years from the commencement of the disease which caused disability. No legal proceedings for a recovery hereunder shall be brought within ninety days after receipt of proof at the office of the Com- 30 40

*Exhibit P. 1.*

pany in Newark, New Jersey, nor after one year from the date provided herein for the filing of proofs, nor after one year from the termination of one year of total disability from blindness or paralysis. If any limitation contained herein is at variance with a statute of the State in  
10 which this policy is issued, the said limitation shall be considered to be amended to agree with the minimum period of limitation provided by such statute.

II. No claim against this Company under Accident policies or accident part of Disability policies shall be valid in excess of Ten Thousand Dollars, or Fifty Dollars per week for weekly indemnity, except as such sums shall be increased under the provisions of Clauses D, F, G, L  
20 and M.

III. No claim against this Company under Health or health part of Disability policies shall be valid in excess of Fifty Dollars per week for weekly indemnity.

IV. If the Assured carries insurance in this or other companies or associations, or both, making an aggregate single weekly indemnity in excess of his average weekly earnings, this Company shall be liable for only such proportion  
30 of insurance for any of the indemnities, other than for loss of life, as said average weekly earnings shall bear to the aggregate of the single weekly indemnity of the entire insurance so carried.

V. The Company may cancel this policy by written notice mailed to the Assured's residence address as given in the Warranties, or served upon the Assured by a representative of the Company with a check of the Company or of its  
40 duly authorized agent, for the unearned part,

*Exhibit P. 1.*

if any, of the premium. The Assured may likewise cancel by surrender of the policy and the latest renewal receipt, if any, to the Company or its duly authorized agent, the unearned portion of the premium actually paid therefor, less customary short rates for the time in force, being thereupon payable on demand. 10

VI. This insurance does not cover disability resulting from any disease or illness contracted while engaged in military or naval service in time of war; nor any disease or illness for which the Assured is not regularly treated by a licensed physician; nor any disease or illness contracted nor disability sustained outside the limits of the United States, Canada or Europe, nor in any part of Alaska or the British Possessions in America north of the sixtieth degree of north latitude, nor in any territory of the United States acquired since 1897; nor any disease or illness contracted within fifteen days from noon of the day this policy is dated, but, in lieu thereof, the insurance under Clauses H and I herein shall remain in force for fifteen days after the expiration of the accident insurance herein provided. 20

VII. Persons under eighteen or over sixty years of age are not covered by this policy either as Assured or Beneficiary. Women between ages eighteen and sixty are insured only when named as Beneficiary, and then only under the conditions especially designated herein for the insurance of the Beneficiary. 30

VIII. The consent of the Beneficiary shall not be requisite to a surrender or assignment of this policy, nor to a change of beneficiary hereunder. A duplicate original of any assign- 40

*Exhibit P. 1.*

ment must be filed at the Home Office of the Company in Newark, New Jersey. The Company shall not be responsible for the validity of any assignment. Any claim hereunder shall be subject to proof of insurable interest.

10 IX. The Company shall have the right and opportunity to examine the body of the Assured or Beneficiary, when and so often as it requires in case of injury or illness and also have the right and opportunity to make autopsy in event of death.

X. When liability is created under the provisions of Clauses A or I herein, or in event of the death of the Assured from natural causes, all insurance hereunder shall thereupon immediately cease.

20 XI. If the Assured is injured, or disabled by illness, after having changed his occupation to one rated by this Company in a more hazardous class than the premium paid for this policy covers, or while temporarily engaged in an occupation so rated, the Company's liability will be only such proportion of the Principal Sum or other indemnity as the premium paid by him will purchase at the rate fixed by this Company for such more hazardous occupation.

30 XII. Any breach of warranty in the Warranties endorsed herein, or a failure to comply with any of the requirements contained herein, will invalidate all claims under this policy.

XIII. An agent has no authority to change this policy or to waive any of its terms, nor shall notice to an agent or to any other person or knowledge of an agent or of any other person be held to effect a waiver or change in this contract or any part of it. No change whatever

*Exhibit P. 1.*

in this policy and no waiver of its conditions 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.

SCHEDULE OF INJURIES. ASSURED AND BENEFICIARY. 10

Elective Indemnities.—Clauses C and L.

The amounts stated in the following Schedule of Injuries are payable under this policy if the Company's liability for single weekly indemnity for total disability is Fifty Dollars per week, proportionate amounts being payable if said liability is for a larger or smaller amount.

	Assured		Beneficiary	20
	Single indemnities Clause C	Double indemnities Clause D	Special indemnities Clause L	
FOR LOSS BY REMOVAL, within ninety days after injury:				
one or more Fingers (at least one entire phalanx)...	\$300.00	\$600.00	\$150.00	
Of one or more entire Toes..	400.00	800.00	200.00	
FOR COMPLETE HERNIA				
Caused solely and directly by accidental injury.....	140.00	280.00	70.00	30
FOR COMPLETE DISLOCATION, viz:				
Of the Shoulder or Elbow....	200.00	400.00	100.00	
Of the Wrist .....	250.00	500.00	125.00	
Of two or more Fingers.....	100.00	200.00	50.00	
Of the Hip .....	600.00	1,200.00	300.00	
Of the Knee or Ankle.....	300.00	600.00	150.00	
Of two or more bones of Foot (not toes) .....	300.00	600.00	150.00	
Of two or more Toes.....	100.00	200.00	50.00	

*Exhibit P. 1.*

	Assured		Beneficiary	
	Single	Double	Special	
	indem- nities Clause C	indem- nities Clause D	indem- nities Clause L	
FOR THE COMPLETE FRACTURE OF BONES, viz:				
	Of the Skull, both tables.....	\$650.00	\$1,300.00	\$325.00
10	Of the Lower Jaw.....	150.00	300.00	75.00
	Of the Collar Bone.....	300.00	600.00	150.00
	Of the Pelvis.....	500.00	1,000.00	250.00
	Of the Thigh .....	600.00	1,200.00	300.00
	Of the Leg or Knee Cap.....	400.00	800.00	200.00
	Of the Arm between Elbow and Shoulder .....	600.00	1,200.00	300.00
	Of the Forearm between the Wrist and Elbow.....	300.00	600.00	150.00
	Of two or more Ribs.....	200.00	400.00	100.00
	Of two or more bones of the Foot (not toes).....	250.00	500.00	125.00
	Of two or more bones of the Hand (not fingers).....	250.00	500.00	125.00
20	Of two or more Toes.....	200.00	400.00	100.00
	Of two or more Fingers.....	200.00	400.00	100.00

## SCHEDULE OF OPERATIONS. ASSURED.

Amounts Payable in Addition to Indemnities to Assured.—Clause F.

30 The amounts stated in the following Schedule of Operations are payable under this policy if the Company's liability for single weekly indemnity for total disability is Fifty Dollars per week, proportionate amounts being payable if said liability is for a larger or smaller amount.

APPENDICITIS (See Laparotomy)

ANEURISM (tumor of artery)—Ligation..\$100.00

AMPUTATION OF

	Foot, Hand or Forearm.....	50.00
	Leg or Arm.....	100.00
	Thigh .....	200.00
	Thumb, Finger or Fingers.....	20.00
40	Toe or Toes.....	20.00

*Exhibit P. 1.*

ABCESS OR BOIL—Incision.....	\$ 10.00	
BONE—Removal of diseased portion of bone .....	50.00	
Curetting only .....	30.00	
BRONCHOTOMY, Thyrotomy, Laryngotomy, Laryngotracheotomy or Tracheotomy	100.00	
CARBUNCLE—Incision and Treatment.....	10.00	10
DISLOCATIONS, Reduction of		
Shoulder, Elbow, Hip, Knee or Ankle..	50.00	
Two or more bones in body of Hand or Foot (not thumb, finger or toe).....	30.00	
Wrist or Lower Jaw.....	30.00	
Thumb, Finger or Fingers.....	20.00	
Toe or Toes.....	20.00	
EXCISION OF		
Shoulder, Hip or Knee Joint.....	200.00	
Elbow, Wrist or Ankle Joint.....	100.00	20
EYE, EAR, NOSE OF THROAT—Any cutting operation .....	20.00	
FELON—Incision .....	10.00	
FRACTURES, Reduction of		
Nose, Lower Jaw, Collar Bone, Shoul- der Blade or Forearm (one or both bones) .....	50.00	
Breast Bone, Coccyx, two or more bones in body of Hand or Foot (not thumb, finger or toe).....	30.00	30
Upper Arm .....	70.00	
Rib or Ribs, Thumb, Finger or Fingers, Toe or Toes.....	20.00	
Any of the bones of the Pelvis.....	100.00	
Thigh .....	150.00	
Knee Cap or Leg Bones (one or both)	100.00	
GANGLION (cystic tumor of tendon sheath) —Incision and Curetting.....	30.00	
GUNSHOT WOUNDS—Treatment not neces- sitating Amputation or Laparotomy	50.00	40

*Exhibit P. 1.*

	HYDROCELLE—Tapping—Incision or Excision of Sac.....	\$ 50.00
	INGROWING TOE NAIL—Removal.....	20.00
	INTESTINAL OBSTRUCTION (see Laparotomy)	
	KIDNEY—Fixation or Removal.....	200.00
10	LAPAROTOMY (Opening of the abdominal cavity for an operation on any organ contained therein, or for Traumatic Peritonitis, or Exploratory Incision).....	200.00
	LITHOTOMY (operation for removal of stone in bladder) any cutting.....	200.00
	MASTOIDITIS—Operation for .....	100.00
	OESOPHOGOTOMY for stricture or other cause .....	200.00
	PARACENTESIS—Tapping of Abdomen, Chest, or Bladder.....	50.00
20	Ear Drum .....	30.00
	PERITONITIS (See Laparotomy)	
	RECTUM, Operation for	
	Hemorrhoids—Excision or Ligation....	50.00
	Prolapsed .....	50.00
	Fistula in Ano—Incision.....	50.00
	Polypus—Extirpation .....	50.00
	Malignant Stricture—Excision or Colostomy .....	200.00
30	SKULL TREPHINING, for fracture of both tables .....	200.00
	SYNOVITIS (inflammation of the lining membrane of a joint), Incision.....	50.00
	TETANUS—Injection of anti-tetanic serum into frontal lobe of brain.....	200.00
	TUMORS—Extirpation from any part of the body—	
	Benign .....	30.00
	Malignant .....	100.00
40	VARICOSE VEINS—Ligation or Excision...	50.00

*Exhibit P. 1.*

VARICOCELE — Acupressure — Ligation or Excision .....	\$ 50.00
WOUNDS OF SCALP or other parts—Suturing .....	10.00

SCHEDULE OF OPERATIONS. BENEFICIARY.	
Amounts Payable in Addition to Indemnities to Beneficiary provided by Clause L.— See Clause M.	10

The amounts stated in the following Schedule of Operations are payable under this policy if the Company's liability for single weekly indemnity for total disability of the Assured is Fifty Dollars per week, proportionate amounts being payable if said liability is for a larger or smaller amount.

AMPUTATION OF		20
Thigh .....	\$100.00	
Leg or Arm .....	50.00	
Foot, Hand or Forearm.....	25.00	
Thumb, Finger or Fingers.....	10.00	
Toe or Toes .....	10.00	
DISLOCATIONS, Reduction of		
Shoulder, Elbow, Hip, Knee or Ankle..	25.00	
Wrist or Lower Jaw.....	15.00	
Two or more bones in body of Hand or Foot (not thumb, finger or toe).....	15.00	30
Thumb and Finger or Fingers.....	10.00	
Two or more Toes.....	10.00	
FRACTURES, Reduction of		
Thigh .....	75.00	
Any of the bones of the Pelvis.....	50.00	
Knee Cap or Leg Bones (one or both)	50.00	
Arm between Elbow and Shoulder....	35.00	
Lower Jaw, Collar Bone or Forearm (one or both bones).....	25.00	40

*Exhibit P. 1.*

	Two or more bones in body of Hand or	
	Foot (not thumb, finger or toe).....	15.00
	Two or more Ribs.....	10.00
	Thumb and Finger, two or more Fin-	
	gers, two or more Toes.....	10.00
10	SKULL TREPHINING, for fracture of both	
	tables .....	100.00

IN WITNESS WHEREOF, the COMMERCIAL CASUALTY INSURANCE COMPANY, of NEWARK, NEW JERSEY, has caused these presents to be signed by its President and Secretary, but the same shall not be binding upon the Company unless countersigned by the duly commissioned agent.

C. W. FEIGENSPAN,  
*President.*

20 H. C. MITCHELL,  
*Secretary.*

Countersigned at Newark, New Jersey, this 11th day of October, 1911.

THOS. A. KANE,  
*Mgr. City Dept.*

30 This endorsement No. 2647 attached to and forms a part of this policy.

T. A. KANE.

*Exhibit P. 1.*

## ENDORSEMENT No. 2647.

It is hereby understood and agreed that that part of the last three lines of Clause A, which reads: “\* \* \* if such injuries alone result within ninety days from date of accident in any one of the losses described below, without there being continuous total disability, the Company will pay the sum specified opposite such loss,” is entirely eliminated and the following is substituted in lieu thereof. “\* \* \* if such injuries alone result within one hundred days from date of accident in any one of the losses described below, without there being continuous total disability, the Company will pay the sum specified opposite such loss.” 10

Clause B, Paragraph 1 is entirely eliminated and the following is substituted in lieu thereof: “\* \* \* if such injuries do not result in any of the losses provided for in Clause A, but alone, immediately, continuously and wholly prevent him from performing any and every duty pertaining to his occupation, the sum of Twenty-five Dollars (\$25.00), per week, will be paid to the Assured as hereinafter provided, so long as he shall suffer such disability.” 20

That part of Clause B-2, reading: “\* \* \* nor will payment be made for more than four years for total and partial disability combined,” is entirely eliminated. 30

It is further understood and agreed that if the Assured shall, by reason of bodily injury from the date of accident of immediately following a period of total disability, as defined in Clause B-1, be confined within an incorporated hospital and be rendered continuously unable to transact each and every part of his business duties, the Company will pay, in addition 40

*Exhibit P. 1.*

to the weekly indemnity provided in Clause B-1, provided no claim is made under Clause F, one-half of the amount provided in Clause B-1, for the period of such disability and hospital confinement not exceeding ten consecutive weeks.

- 10 Attached to and forming a part of Policy No. D-1051, dated October 1st, 1911, issued by the Commercial Casualty Insurance Company, of Newark, New Jersey, to Rudolph Gross.  
Newark, New Jersey, October 11th, 1911.

H. C. MITCHELL

T. A. K.

*Secretary.*

## WARRANTIES.

Mr. RUDOLPH GROSS.

- 20 1. My age is 32. 2. My weight is 135. 3. My height is 5 ft. 6 in. 4. Color, white.  
5. My residence is No. 53 Baldwin street, (City or Town) Newark, County of Essex, State of New Jersey.  
6. My occupation is Office duties, and the duties of my occupation are fully described as follow: Office duties and traveling only.  
7. I understand that risks are classified according to occupation, and that my occupation  
30 above described is classified Select.  
8. (Name of firm or corporation) I am with J. Lichtman & Son, whose business is that of Leather Manufacturers. Located at 241 Frelinghuysen avenue, City of Newark, State of New Jersey.  
9. Policy to be payable, in case of death under its provision, to (Name) Tina Gross, (Address) No. 53 Baldwin street, Newark, New Jersey.  
40 Relationship to me of Beneficiary is that of wife.

*Exhibit P. 1.*

10. My average weekly earnings exceed the weekly indemnity for general accidents or for sickness under all insurance carried by me, including that herein applied for.

11. I have no accident or health insurance, and have made no application for accident, health or life insurance upon which I have not been notified of the action thereon, except as herein stated: 10

Policy in Standard Accident Insurance Company, \$1,250.00.

12. No application made by me for accident, health or life insurance has ever been declined, and no accident or health policy issued to me has ever been canceled or renewal refused by this or any other company or association, except as herein stated: No exceptions. 20

13. I have never received or been refused indemnity for any injury or sickness, except as herein stated: No exceptions.

14. I have not in contemplation any special journey nor any hazardous undertaking, not required by my occupation as above described, except as herein stated: No exceptions.

15. My habits of life are correct and temperate; my hearing and vision is not impaired; I am in sound condition mentally and physically; except as herein stated: No exceptions. 30

16. I have not been disabled nor have I received medical or surgical attention during the past five years, except as follows:

In 1911, for Exzema, lasting four months.

(State year) (State disability) (State duration)

In..... for..... lasting.....

In..... for..... lasting.....

In..... for..... lasting.....

In..... for..... lasting..... 40

*Exhibit P. 1.*

17. My last serious illness was (State disease) none (Give date), and lasted (Give duration of illness).

10 a. The Beneficiary carries no other accident insurance in this Company, except as herein stated: No exceptions.

b. The Beneficiary is in sound condition mentally and physically; and hearing or vision is not impaired, except as herein stated: No exceptions.

The policy period shall be Twelve months, beginning on the First day of October, 1911, at noon, and ending on the First day of October, 1912, at noon, standard time.

20 The Premium for the policy period is Sixty (\$60.00) Dollars.

## OFFICERS.

C. W. FEIGENSPAN, President.  
 DAVID O. WATKINS, Vice-President.  
 WILLIAM J. GARDNER,  
 Vice-President and Gen. Manager.  
 GEORGE W. JAGLE, Secretary-Treasurer.  
 ROBERT H. McCARTER, General Counsel.

30

## DIRECTORS.

C. W. FEIGENSPAN, President C. Feigenspan  
 Brewing Co.; director Union National Bank,  
 Newark, N. J.

DAVID O. WATKINS, attorney and counselor at law;  
 former Banking and Insurance Commissioner  
 of New Jersey.

WILLIAM J. GARDNER, Vice-President and Gen-  
 eral Manager Commercial Casualty Insurance  
 Co.

40

*Exhibit P. 1.*

- EDWARD C. STOKES, Former Governor of New Jersey; President Mechanics National Bank, Trenton, N. J.
- WINTON C. GARRISON, Vice-President Federal Trust Company, Newark, N. J.
- JOSEPH W. CONGDON, Judge N. J. Court of Errors and Appeals; President Phoenix Silk Mills, Paterson; former President Silk Association of America. 10
- GEORGE J. ROBERTS, Vice-President Public Service Corporation, Newark, N. J.
- GEORGE W. JAGLE, President J. J. Hockenjos Co., Newark, N. J.
- JOHN F. CONROY, of E. S. Ward & Co., Leather Manufacturers, Newark, N. J.
- JOHN HOWE, Tax Commissioner, Newark, N. J.
- ABRAHAM ROTHSCHILD, Stengel & Rothschild, Leather Manufacturers, Newark, N. J. 20
- ROBERT H. McCARTER, former Attorney-General of New Jersey, Newark, N. J.

COMMERCIAL ACCUMULATIVE DISABILITY POLICY.

Policy No. D-1051.

COMMERCIAL CASUALTY INSURANCE COMPANY OF NEWARK, 30  
NEW JERSEY.

Issued to

RUDOLPH GROSS.

Do not fail to read your policy.  
Notify the Company at once if disabled.  
Agent.

*Exhibit P. 2.*

## EXHIBIT P. 2.

Premium \$60.00                      Renewal No. R. V. 1237

COMMERCIAL CASUALTY INSURANCE  
COMPANY

NEWARK, NEW JERSEY

10      Certificate continuing in force Policy No. D-1051

Show serial letter

Name of Assured, Rudolph Gross.

Commercial Casualty Insurance Company, in consideration of the premium of Sixty Dollars, hereby agrees to continue in force the above numbered Policy for Twelve months from October 1st, 1912, to October 1st, 1913, at 12 o'clock noon (standard time), provided the statements in the

20      schedule of Warranties in the original contract are true at this date and that nothing exists at the date hereof to render the hazard of the risk greater than or different than that shown by such Schedule.

Not valid unless countersigned by a duly authorized representative of the Company.

H. C. MITCHELL, Secretary.

30      Countersigned at Newark, New Jersey,  
this 22nd day of August, 1912.

THOS. A. KANE,  
Manager City Department.

*Exhibit P. 3.*

## EXHIBIT P. 3.

Premium \$60.00. Renewal No. R. V. 1547.

COMMERCIAL CASUALTY INSURANCE  
COMPANY

NEWARK, NEW JERSEY

10

Certificate continuing in force Policy No. D-1051.

Show Serial letter

Name of Assured, Rudolph Gross.

Commercial Casualty Insurance Company, in consideration of the premium of Sixty and 00/100 Dollars, hereby agrees to continue in force above numbered Policy for Twelve months from October 1st, 1913 to October 1st, 1914, at 12 o'clock noon (standard time), provided the statements in the schedule of Warranties in the original contract are true at this date and that nothing exists at the date hereof to render the hazard of the risk greater than or different than that shown by such Schedule.

20

Not valid unless countersigned by a duly authorized representative of the Company.

H. C. MITCHELL, Secretary.

30

Countersigned at Newark, New Jersey,  
this 28th day of August, 1914.

W. VAN WINKLE,  
Manager P. A. & H. Depts. Agent.

40

*Exhibit P. 4.*

## EXHIBIT P. 4.

Premium \$60.00.

Renewal No. R. V. 1806.

COMMERCIAL CASUALTY INSURANCE  
COMPANY

NEWARK, NEW JERSEY

10

Certificate continuing in force Policy No. D-1051.

Show serial letter

Name of Assured, Rudolph Gross.

20

Commercial Casualty Insurance Company, in consideration of the premium of Sixty and 00/100 Dollars, hereby agrees to continue in force the above numbered Policy for Twelve months from October 1st, 1914, to October 1st, 1915, at 12 o'clock noon (standard time), provided the statements in the schedule of Warranties in the original contract are true at this date and that nothing exists at the date hereof to render the hazard of the risk greater than or different than that shown by such Schedule.

Not valid unless countersigned by a duly authorized representative of the Company.

H. C. MITCHELL, Secretary.

30

Countersigned at Newark, New Jersey,  
this 8th day of September, 1914.  
Direct 53 Baldwin St., City.

W. VAN WINKLE,  
Mgr. P. A. & H. Dept.

*Exhibit P. 5.*

EXHIBIT P. 5.

PROOFS OF LOSS.

(Health)

COMMERCIAL CASUALTY INSURANCE  
COMPANY

10

OF NEWARK, NEW JERSEY

STATEMENT OF CLAIMANT

(Every question must be answered fully.)

My full name is Rudolph Gross, I am resident of Newark, County of Essex, State of New Jersey.

I am insured in the COMMERCIAL CASUALTY INSURANCE COMPANY of Newark, New Jersey, under Policy No. dated D-1051, October 11th, 1911, for a weekly indemnity of \$25.00 per week.

20

I was taken sick as hereinafter described, and for the purpose of claiming the indemnity to which I may be entitled by the terms and conditions of said policy, I answer the following questions:

1.—What is your age at the present time? 35 years.

30

2.—What was your occupation when taken sick? Traveling.

3.—By whom were you employed when taken sick? Give name and address. J. Lichtman & Son, 241 Frelinghuysen avenue, Newark, N. J.

4.—What was the nature of your sickness? Phlebitis, both feet.

5.—When and where did your sickness commence? About A. M. of December 29th, 1914, at home.

40

*Exhibit P. 5.*

6.—Did your sickness result from any injury?  
No.

7.—Did you have a physician or physicians?  
If so, give name and address? H. J. F. Wall-  
hauser, 47 New street, city.

10 8. When did you first consult a physician?  
January 4th, 1915.

*House Confinement*

9.—From what date and to what date were  
you **TOTALLY DISABLED AND NECES-  
SARILY CONFINED TO THE HOUSE?** From  
January 4th, 1915, to January 20th, 1915, a  
period of two weeks and three days.

*Non-Confinement but Totally Disabled*

20 10.—From what date and to what date were  
you **TOTALLY DISABLED**, but not necessarily  
confined to the house? From January 21st, 1915,  
to still disabled....191., a period of.....  
weeks and .....days.

11.—When did you first begin, after your sick-  
ness, to attend to **ANY PART** of your business  
or occupation?.....191 .

12.—What was your weekly salary or income,  
at the time you were taken sick, \$50.75 per week.

30 13.—Had you any other insurance against  
sickness at the time you were taken sick? If  
so, how much per week, and in what Companies  
or Associations? No.

14.—Have you ever made any claim on this  
Company or on any other Company or Associa-  
tion? If so, when, what company, and the  
amount? No.

(Signed), RUDOLPH GROSS, Claimant.

P. O. Address 123 Johnson avenue.

*Exhibit P. 5.*

Sworn to and subscribed before me at Newark, N. J., this second day of February, A. D. 1915.

(SEAL)

HERMAN SIMON,  
*Notary Public or Justice of the Peace.*

Form 102—Claim

10

### STATEMENT OF ATTENDING PHYSICIAN

In evidence of Claim of Rudolph Gross, of Newark, N. J.

1. When and where were you first consulted or called to attend this claimant for the disease described? At my office, on the 4th day of January, 1915, at 11 A. M.

2. What was the precise nature of the disease and its extent? Phlebitis, both feet. 20

3. What local and constitutional symptoms existed during disability? Inflammation with pustulation, intense pain.

4. Was the disease of so serious a nature as to wholly disable and prevent him from attending to ANY AND EVERY KIND OF DUTY pertaining to his occupation? Yes.

30

#### *House Confinement*

5. From what date and to what date do you consider him to have been TOTALLY DISABLED AND NECESSARILY CONFINED TO THE HOUSE? From Jan. 4th, 1915 to Jan. 20, 1915.

#### *Non-Confinement but Totally Disabled*

6. Do you consider him to have been TOTALLY DISABLED after the above period of

40

*Exhibit P. 6.*

house confinement? If so, for how long? Yes.  
 weeks and.....days.....

7. When did you last attend him for this illness? Mar. 1/15.

8. Did the disease to your knowledge result from any injury? Not to my knowledge.

10 9. What surgical operation, if any, was performed? None.

(Give date and character of operation)

10. Has the claimant ever been, or is he now suffering from any other constitutional or local disease, either hereditary or acquired? If so, to what extent has such disease contributed to lengthen the disability? No.

20 11. Has he any history of prior attacks of this illness for which indemnity is now claimed? If so, when? Yes. About a year ago.

H. J. WALLHAUSER,  
*Attending Physician.*  
 47 New St., Newark, N. J.  
 (Address in Full)

Dated Mar. 1, 1915.

## EXHIBIT P. 6.

## HEALTH PROOF OF LOSS

30

COMMERCIAL CASUALTY INSURANCE  
COMPANY

## NEWARK, NEW JERSEY

1. My full name is Rudolph Gross.
2. Age 36 years.
3. Weight 145 pounds.
4. My address is 640 High street, Newark, State of N. J.
- 40 5. My occupation is Traveling, Buying and Selling.

*Exhibit P. 6.*

6. I am the holder of Insurance Policy No. D-1051 issued by the COMMERCIAL CASUALTY INSURANCE COMPANY,, dated Oct. 11th, 1911, in the sum of \$25.00 Weekly Indemnity.
7. My weekly earnings from my stated occupations are \$50/75.
8. My illness dates from the 29th day of December, 1914. 10
9. The precise nature and extent of my illness was as follows: Phlebitis, both feet.
10. Give date you last suffered from similar illness? About January, 1914.
11. In direct and sole consequence of said illness I was absolutely CONFINED TO THE HOUSE for 17 days, from Jan. 4th, 1915, to Jan. 20th, 1915, and was unable to attend to any business or occupation, as stated in my Proof of Loss dated March, 1915. 20
12. In direct and sole consequence of said illness I was CONVALESCING for 268 days from January 21st, 1915, to October 15th, 1915, during which time I occasionally left the house, but was unable to attend to any portion of any duties of my occupation. Part of this time is covered by my proof of loss dated March, 1915.
13. I was PARTIALLY DISABLED for.....days, 30  
from.....191 ....., to .....191.....  
during which time I was unable to attend to the following portion of my duties:.....
14. The physician who attended me for said illness was Dr. H. J. Wallhauser, of 47 New street, Newark, N. J.
15. Are you insured against illness in any other Companies or Association? If so, for how much per week, and in what Companies or Association? State fully. None. 40

*Exhibit P. 6.*

16. Have you ever made claims on this Company before? No, except in proof of loss dated March, 1915.

17. Have you ever made any claims for either illness or accident on any other Companies or Association? State fully. No.

18. I have not been disabled nor required medical or surgical treatment for illness or accident during the past five years, except as follows:

Date	Name of Illness.	Number of Days
In 1911,	with Exzema,	lasting 4 months,
	result,	cured.

19. I agree that the furnishing of this blank, as well as its acceptance by the Company as proof, shall not be a waiver of any of the conditions of the Policy.

I have carefully read the foregoing statements, and warrant them and each of them to be full, complete and true.

(Signed),

RUDOLPH GROSS,  
Claimant.

Witness to Signature,  
D. MOODY DESE.

30 STATEMENT OF ATTENDING PHYSICIAN

1. How long have you been personally acquainted with the claimant? Three years.

2. How long have you been his physician? Three years.

3. What was the exact nature of the illness, its character and course? Phlebitis (both feet).

4. What symptoms led you to diagnose the illness as above described? Inflammation with pustulation, intense pain.

40

*Exhibit P. 6.*

5. How many times did you treat him in consequence of said illness? At varying intervals of a week or month.
6. Give dates when you visited him at his house .....191.....
7. Gives dates when he visited you at your office .....191..... 10
8. On what date was he first strictly confined to the house in consequence of said illness? Jan. 4, 1915.
9. On what date and for how long, was he first permitted to leave the house? Jan. 21, 1915.
10. On what date was he first able to attend to any of the duties of his occupation? Oct., 1915.
11. What surgical operation, if any, was performed? None. 20
12. His illness has been reported to the Board of Health as No.
13. Has the claimant ever been, or is he now suffering from any constitutional or local disease, or the effects of same, either hereditary or acquired? If so, state full particulars? No.
14. Has he ever suffered previously from any illness similar to that herein described? Yes.
15. Have you examined him for any other Company or Association for this illness? If so, state name and full particulars? No. 30
16. For what ailments or illness other than the one for which he is now making claim have you ever treated claimant? None.
17. State what you know of any other illness for which he has received medical or surgical treatment .....
18. I am a regular graduated physician, practicing in the City of Newark, State of New Jersey. 40

*Exhibit P. 6.*

Dated at Newark, N. J., this 7th day of Dec.,  
1915.

H. J. F. WALLHAUSER, M. D.  
47 New Street, Newark, N. J.  
(Address)

10

## STATEMENT OF EMPLOYER

1. How long have you been personally acquainted with claimant? Ten years.
2. How long has he been in your employ? Seven years.
3. In what capacity? Part of salesman only and latter same capacity and sect.
4. What were his duties at the time of the injury? Same.
- 20 5. On what date did he cease working because of the illness herein described? Beginning of Jan., 1915.
6. On what date did he resume work after said illness? About Oct. 15, 1915.
7. To the best of your knowledge and belief was the illness described herein alone responsible for his inability to perform his duties? Consider that it was.
- 30 8. What were his weekly earnings at the time of the illness described herein? About \$75.

Dated at Newark this 7th day of December,  
1915.

Signed.....A. LICHTMAN  
Official Position .....President  
Firm Name .....J. Lichtman & Son  
Address.241 Frelinghuysen Ave., Newark, N. J.

*Exhibit P. 7.*

EXHIBIT P. 7.

Largest Handlers of Rough Splits in the World  
Telephone Connections

Liber Widebrook and Private Codes Used

J. LICHTMAN & SON

10

TANNERS AND LEATHER MANUFACTURERS

Main Office and Tanneries	European Offices and Stores
Frelinghuysen Avenue,	9 Rue des Messageries
Concord Street, Sherman	PARIS, FRANCE
Avenue and Peddie Street	Cable Address, Peaulio, Paris
NEWARK, N. J., U. S. A.	131 Avenue du Moulin
Cable Address, "Lichtman	BRUSSELS, BELGIUM
Newark"	Cable Address, Edlow, Brussels

Newark, N. J., U. S. A., Feb. 23, 1915.

Commercial Casualty Insurance Co., of N. J.,

20

Newark, N. J.

Gentlemen:

RE. D.1051.

I would like to advise you that in the last week of December, 1914, my feet began to trouble me and on Jan. 3rd it was necessary for me to go to Dr. Wallhauser, 47 New St., City, for treatment. I was laid up at home for several days and since then have been brought down to the office and back again in an automobile, but have been unable to go out on the road, which is my occupation. I therefore put in my claim for disability and other compensation due me under my poiley and which I trust will have your prompt attention.

30

Yours very truly,

RUDOLPH GROSS.

40

*Exhibit P. 8.*

## EXHIBIT P. 8.

C. W. FEIGENSPAN,  
President.  
GEORGE W. JAGLE,  
Treasurer.

HARRY C. MITCHELL,  
Vice President & Gen'l Manager.  
THOMAS A. KANE,  
Secretary.

COMMERCIAL CASUALTY INSURANCE  
COMPANY

10

NEWARK, NEW JERSEY

Personal Accident & Health Depts.  
W. VAN WINKLE, Manager.

February 26th, 1915.

Mr. R. Gross,  
53 Baldwin Street,  
Newark, N. J.

20

RE: CLAIM No. 171—R. GROSS.

Dear Sir:

We have your favor of the 23rd inst. advising  
of your disability and are enclosing herewith  
a Proof of Loss to be completed and returned  
to this office.

Upon receipt of same this matter will have  
our immediate attention.

Yours very truly,

30

W. VAN WINKLE,  
Mgr. P. A. & H. Depts.

RL. . . .LEK

Enc.

\$250,000.00 Deposited with the Commissioner of  
Banking and Insurance of New Jersey for  
the Protection of Policyholders.

40

*Exhibit P. 9.*

## EXHIBIT P. 9.

Largest Handlers of Rough Splits in the World  
Telephone Connections

Lieber Widebrook and Private Codes Used

## J. LICHTMAN &amp; SON

10

## TANNERS AND LEATHER MANUFACTURERS

Main Office and Tanneries	European Offices and Stores
Frelinghuysen Avenue,	9 Rue des Messageries
Concord Street, Sherman	PARIS, FRANCE
Avenue and Peddie Street	Cable Address, Peaulio, Paris
NEWARK, N. J., U. S. A.	131 Avenue du Moulin
Cable Address, "Lichtman	BRUSSELS, BELGIUM
Newark"	Cable Address, Edlow, Brussels

Newark, N. J., U. S. A., March 4, 1915.

Commercial Casualty Insurance Co.,  
Newark, N. J.

20

Gentlemen:

RE. CLAIM No. 171.

I herewith return statement properly filled  
in.

Yours very truly,

RUDOLPH GROSS.

Per W. A.

30

*Exhibit P. 10.*

## EXHIBIT P. 10.

C. W. FEIGENSPAN,  
President.  
GEORGE W. JAGLE,  
Treasurer.

HARRY C. MITCHELL,  
Vice President & Gen'l Manager.  
THOMAS A. KANE,  
Secretary.

COMMERCIAL CASUALTY INSURANCE  
COMPANY

10

NEWARK, NEW JERSEY

Personal Accident & Health Depts.  
W. VAN WINKLE, Manager.

March 5th, 1915.

Mr. R. Gross,  
53 Baldwin Street,  
Newark, N. J.

RE:-CLAIM No. 171—R. GROSS.

20

Dear Sir:—

We are in receipt of your favor of the 4th  
inst. enclosing Proofs of Loss in your claim  
and we are sending another Proof of Loss to be  
completed upon your recovery and returned to  
this office.

Awaiting receipt of this Proof of Loss, we  
remain,

30

Yours very truly,

W. VAN WINKLE,  
Mgr. P. A. & H. Depts.

RL. . . .LEK

Enc.

\$250,000.00 Deposited with the Commissioner of  
Banking and Insurance of New Jersey for  
the Protection of the Policyholders.

40

*Exhibit P. 11.*

## EXHIBIT P. 11.

C. W. FEIGENSPAN,  
President.  
GEORGE W. JAGLE,  
Treasurer.

HARRY C. MITCHELL,  
Vice President & Gen'l Manager.  
THOMAS A. KANE,  
Secretary.

COMMERCIAL CASUALTY INSURANCE  
COMPANY

NEWARK, NEW JERSEY

10

Personal Accident & Health Depts.  
W. VAN WINKLE, Manager.

March 26th, 1915.

Mr. Rudolph Gross,  
53 Baldwin Street,  
Newark, N. J.

RE:—CLAIM NO. 171—R. GROSS.

Dear Sir:—

20

Our investigator who interviewed you recently, reports that he learned from you that you were totally disabled from January 4th to January 20th, during which time, however, you occasionally called at your Doctor's office for treatments. He further reports that from January 20th to March 7th, you had medical treatment about every two weeks, but were at your office almost every day attending to part of your duties. We understand, however, that you were unable to do any traveling. 30

We believe our investigator explained to you the terms of the policy, which provides full indemnity in case of sickness, during the period of house confinement, and three-fourths of the indemnity for non-confining disability, up to the time that you resume any part of your duties. It will be apparent to you, therefore, that under the terms of the policy, you would be entitled to 40

*Exhibit P. 11.*

only three-quarters indemnity for the period between January 4th and January 20th, and inasmuch as you resumed part of your duties after January 20th, no further indemnity would be due.

10 We are informed, however, that a settlement under such basis would not be satisfactory to you, and we are therefore going to ask that you write and advise us what indemnity you believe should be paid in your claim. We appreciate the fact that you are an old policy holder with this Company, and we want to make some adjustment that will be both fair and satisfactory.

Kindly let us hear from you.

Yours very truly,

W. VAN WINKLE,

20 RL. . . .LEK Mgr. P. A. & H. Depts.

\$250,000.00 Deposited with the Commissioner of Banking and Insurance of New Jersey for the Protection of the Policyholders

30

40

*Exhibit D. 1.*

EXHIBIT D. 1.

Largest Handlers of Rough Splits in the World  
Telephone Connections

Lieber Widebrook and Private Codes Used

J. LICHTMAN & SON

TANNERS AND LEATHER MANUFACTURERS

Main Office and Tanneries	European Offices and Stores
Frelinghuysen Avenue,	9 Rue des Messageries
Concord Street, Sherman	PARIS, FRANCE
Avenue and Peddie Street	Cable Address, Peaulio, Paris
NEWARK, N. J., U. S. A.	131 Avenue du Moulin
Cable Address, "Lichtman	BRUSSELS, BELGIUM
Newark"	Cable Address, Edlow, Brussels

10

Newark, N. J., U. S. A., March 31, 1915.

Commercial Casualty Insurance Co.,

Newark, N. J.

20

Gentlemen:

I am in receipt of your communication of the 26th and in reply would state that the position you take in my case is not in accordance with the information given to your investigator. In the first place, during the period from Jan. 4th to Jan. 20th, I was totally disabled and confined to the house and if I did call at Dr. Wallhauser's office for treatment, at which time I was taken down by automobile, it was for the reason that Dr. Wallhauser does not make any calls. I do not see how this can have any affect on my claim for full indemnity for this period. As to the period after Jan. 20th and to March 7th, I was not down to the office every day attending to a part of my duties, as you state, but was most of the time at home. I was taken out in the automobile and it was then that I would occasionally call at the office and remain there

30

40

*Exhibit D. 1.*

10 for a short time without doing any part of my duties. For this period I am entitled to three-quarter's of the indemnity and the same indemnity applies to the time after March 7th. As told your investigator, I have been coming down to the office nearly every day, if the weather permits, and remain here a part of the day instead of staying at home; it was then that I would occasionally dictate a letter—which, however, is not my duty; my occupation is that of a salesman and I cannot perform any part of my duty pertaining to this occupation and it may be a considerable length of time before I am in a position to resume my occupation.

20 I would appreciate a check from you for the first eight weeks due me, by return mail, in accordance with the terms of my letter.

Yours very truly,

R. GROSS.

R. G./W. A.

30

40

*Exhibit D. 2.*

## EXHIBIT D. 2.

Renewal Voucher

No. R. V. 1806

COMMERCIAL CASUALTY INSURANCE  
COMPANY

NEWARK, N. J.

10

Policy No. D-1051.

Name, Rudolph Gross.

Address, #53 Baldwin Street, Newark, N. J.

Occupation, Office duties.

Principal Sum for accident and health business  
only, \$5,000.00.

Weekly Indemnity, \$25.00.

Kind of Policy, Accumulative Disability.

Classification, Select.

Premium, \$60.00.

20

Date of Renewal, October 1st, 1914.

Expires, October 1st, 1915.

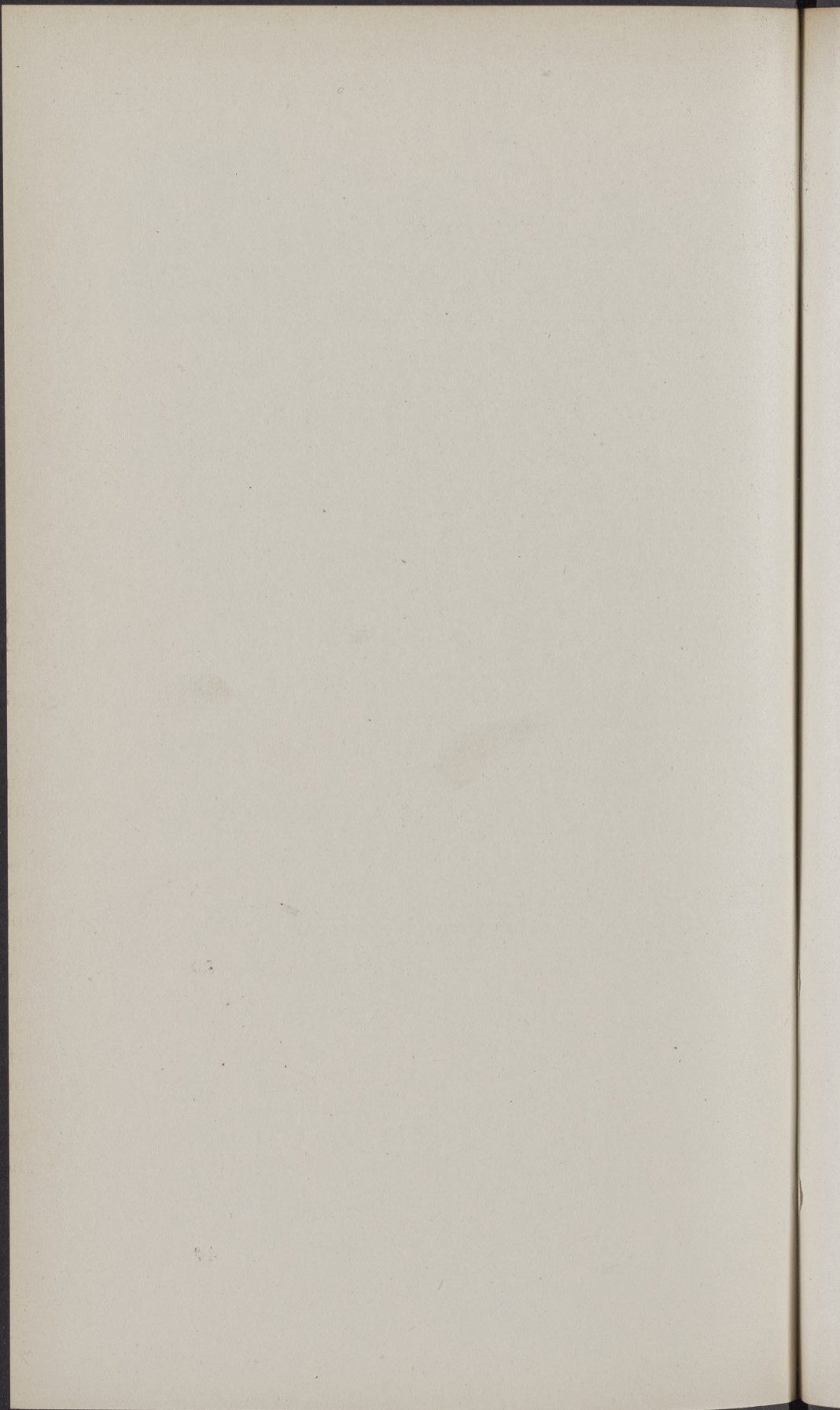
Agency of Newark Office.

JAMES A. GILL,  
Agent.Note.—This Voucher must be mailed to the  
Home Office on the date Renewal is issued.

T.

30

40



*Judgment.*

## ESSEX COUNTY CIRCUIT COURT.

26990,

10

RUDOLPH GROSS,

*Plaintiff,**vs.*

COMMERCIAL CASUALTY Co.,

*Defendant.*

20

*Action at  
Law.**On Verdict  
by a Jury.**Judgment  
entered**Nov. 16th,  
A. D. 1916.*Amount,  
\$822.3

Costs, 56.2

Total, \$878.6

Jacob L. Newman, attorney of plaintiff.

This action was tried before Nelson Y. Duran with a jury at the Essex County Circuit Court November 16th, 1916.

The cause having been heard and submitted to the jury, they return their verdict as follows

They find in favor of the plaintiff, Rudolph Gross, and assess the damage against the defendant Commercial Casualty Co. at the sum of eight hundred twenty-two dollars and thirty-five cents.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of eight hundred and twenty-two dollars and thirty-five cents and costs, which are taxed at the sum of fifty six dollars and twenty-eight cents, making in the

*Judgment.*

whole the sum of eight hundred seventy-eight  
dollars and sixty-three cents.

Judgment entered and signed November 16,  
1917.

WM. S. GUMMERE,

*Judge.* 10

Book 4, page 3.

20

30

40

## New Jersey Court of Errors and Appeals

RUDOLPH GROSS,  
*Plaintiff-Respondent,*

*vs.*

COMMERCIAL CASUALTY INSUR-  
ANCE COMPANY OF NEWARK,  
NEW JERSEY,  
*Defendant-Appellant.*

*Action at  
Law.*

### **Brief for Appellant.**

#### **Statement of Facts.**

This action was brought against the defendant to recover indemnity for an alleged disability under a policy of insurance. The case was tried in the Essex Circuit Court before Judge Dungan, and a jury, and a verdict was returned in favor of the plaintiff for Eight Hundred Twenty-two Dollars, Thirty-five Cents, (\$822.35), upon which verdict judgment was duly entered. This appeal is from that judgment.

The plaintiff, an employe and officer of A. Lichtman & Son, Tanners and Leather Manufacturers, was the holder of what is known as a Disability Policy in the defendant company. This policy provides for certain specified indemnity for disability arising by accident. It also provides in certain cases for indemnity for total disability when produced by disease or illness. Plaintiff's claim arises under the latter feature of the policy.

This indemnity is provided for in section "H" of the policy, which will be found on page

111 of the State of Case, hereinafter quoted, and which forms the basis of the complaint filed in this cause. Under this clause, the plaintiff claims that he was totally disabled from January 4th, 1915, to October 15th, 1915, and that from January 4th to January 20th of said period, plaintiff was confined to his house. The policy provides for the payment of the sum of twenty-five dollars, (\$25.00) per week while the insured is totally disabled and confined to the house, and the payment of eighteen dollars seventy-five cents, (\$18.75) per week while the assured is *totally disabled*, but not necessarily confined to the house. *In addition to being totally disabled, the policy provides that assured be "wholly and continuously prevented from performing any and every kind of business pertaining to his occupation."*

The plaintiff was confined to his house, and did not attend to any of the duties of his occupation from January 4th, 1915, to January 20th, 1915. From January 20th, 1915, to March 7th, 1915, he was not necessarily confined to the house, but claims to have been unable to attend to any of his duties and claims that he did not do so. *From March 7th, 1915, to the balance of the period of his claimed disability, he attended his office and transacted part of the business of his employment.* That he did attend to part of his usual duties, is an admitted fact in this case and was so treated by the trial judge in his charge to the jury (page 98, lines 27-33).

The application for insurance is attached to and made part of the contract, and the statements made therein are by the express terms of the contract made warranties. The plaintiff states in his application, among other things, that his occupation was "office duties," and that

the duties of such occupation were "office duties and traveling." He further states, Warranty No. 16, Exhibit P. 1, page 127, as follows:

"16. I have not been disabled nor have I received medical or surgical attention during the past five years, except as follows:

"In 1911, for Eczema, lasting four months."

In Warranty No. 15, he states as follows:

"15. My habits of life are correct and temperate; my hearing and vision is not impaired; I am in sound condition mentally and physically; except as herein stated: No exceptions."

This policy of insurance was issued on the first day of October, 1911, for a period of one year, and was renewed from year to year up to October, 1914, when it was again renewed by renewal certificate (Exhibit P. 4, page 132), from October 1st, 1914, to October 1st, 1915. This renewal certificate provided that such renewal was granted provided the statements in the schedule of warranties in the original contract are true at the date of that renewal and that nothing exists at the date thereof to render the hazard of the risk greater than or different than that shown by such schedule.

### Questions.

At the trial, the defendant raised two contentions by way of defense to plaintiff's claim, which can be briefly summarized as follows:

I. That plaintiff's claim was invalidated because of the breach of warranties numbers fifteen and sixteen above set forth, and of the renewal thereof expressed in the renewal certificate, in that it appeared in plaintiff's case upon

the testimony of plaintiff's physician, Henry J. F. Wallhauser, that at a period of about a year prior to the last renewal, he had attended the plaintiff for phlebitis. (Page 45, lines 5-10.)

II. That if entitled to recover anything under the policy, the plaintiff was not entitled to recover indemnity after the 7th day of March, 1915, at which period as appears conclusively from the testimony in the case, and is an accepted fact therein, he resumed part of the duties of his employment.

The first contention is raised on this appeal by exceptions to the refusal of the trial judge to grant the motion made by defendant's attorney at the close of plaintiff's case, for a judgment of non-suit because of the breach of warranties (page 81, lines 14-29), and the refusal of the trial judge to direct a verdict in favor of the defendant upon the same ground (page 96, lines 1-25). The question is also raised by an exception to the charge of the trial judge to the jury (page 106, lines 30-40). These exceptions were all noted as Grounds of Appeal, and appear as paragraphs two, three and six of the Grounds of Appeal (page 2).

The second contention is raised on this appeal by the refusal of the trial court to direct a verdict in favor of the defendant, as to the claim of plaintiff for indemnity after the 7th day of March, 1915, and to which refusal, exception was duly taken, and noted as Ground of Appeal (page 96, lines 1-25), and upon exception duly taken and noted as Ground of Appeal to the charge of the trial court on this point (page 106, lines 24-30). These exceptions form the basis of paragraphs 4, 5 and 6 of the Grounds of Appeal (page 2).

**Argument.****Question I.**

## I.

THE LEARNED TRIAL JUDGE ERRED IN DECLINING TO DIRECT A JUDGMENT OF NON-SUIT IN FAVOR OF THE DEFENDANT, AT THE CLOSE OF THE PLAINTIFF'S CASE, AND IN FAILING TO DIRECT A VERDICT IN FAVOR OF THE DEFENDANT AT THE CLOSE OF THE ENTIRE CASE UPON THE GROUND OF BREACH OF WARRANTIES IN THE POLICY.

It is a well settled rule that a breach of warranty in a policy of insurance, no matter how trivial, or apparently immaterial such warranty may be, will vitiate the policy. The distinction between a warranty of this class and a mere representation which is not made a part of the contract, is clearly understood and needs no citation of authority. There is no question in this case but that the assured had been treated for phlebitis by Dr. Wallhauser prior to the last renewal, and that by reaffirming his original warranty as to treatment by a physician and as to his general condition, he was guilty of a breach of warranty such as barred his recovery in this case. The terms of the renewal certificate are so clear that there can be no question as to the binding force of the same. That the warranties contained in the application are of binding force, clearly appears from the wording of the contract of insurance, as follows:

"IN CONSIDERATION of the premium herein provided, and of the statements in the Warranties endorsed herein, which statements

the assured makes by accepting this policy, and warrants to be true, the company DOES HEREBY INSURE" (Exhibit P. 1, page 107).

In *Vivar v. Supreme Lodge of Knights of Pythias* (Supreme Court of New Jersey, June 9, 1890), 52 N. J. Law, 455, 20 Atl. Reporter, 36, Mr. Justice Dixon described a warranty as follows:

"Of themselves, statements in the application are mere representations, and they will not become conditions or warranties, unless the parties plainly evince an intention to make them such, either by so denominating them, or by declaring the validity of the contract to depend upon their literal truth. May Ins. §§ 158-165; Insurance Co. v. Day, 39 N. J. Law, 89."

This Court gave a definition of a warranty in the case of *Owens v. Metropolitan Life Insurance Co.* (Court of Errors and Appeals of New Jersey, June 17, 1907), 74 N. J. Law, 770; 67 Atl. Reporter, 25. Mr. Justice Pitney wrote the opinion of the Court and used the following language:

"With respect to the other statements in paragraphs 4, 5 and 6, respecting attendance and care of a physician and treatment in a hospital, these representations concerning matters of fact that were presumably within the knowledge of the applicant are to be treated as warranties, a breach of which would render the policy void. *Dimick v. Metropolitan Life Ins. Co.*, 67 N. J. Law, 367, 51 Atl. 692."

In that case, however, the proofs did not sustain the defendant's contention as to the alleged breach of warranty.

*Lippincott v. Supreme Council Royal Arcanum* (N. J. Court of Errors and Appeals, March 9, 1900), 64 N. J. L., 309, S. C. 45 Atl. Rep. 774, was a case in which among the statements certified by the plaintiff to the medical examiner, were the following: That he had never undergone any surgical operation; that he had never been afflicted with catarrh; that he was, at the time of making the statements, in sound health. The truthfulness of each of these several statements was warranted by Lippincott. In the opinion of the Court, Judge Gummere said:

“He must have known, when he declared that he had never suffered from catarrh, that this was untrue, for he was then being treated by his physician for that disease. He likewise must have known that he was making a false statement when he declared that he had never undergone a surgical operation. The unimpeached testimony in the case is conclusive upon this point, and a verdict for the plaintiff cannot be supported without disregarding it. This being so, it was the duty of the trial court to control the jury in its action, and direct a verdict for the defendant. *Baldwin v. Shannon*, 43 N. J. Law, 596; *Crue v. Caldwell*, 52 N. J. Law, 215, 19 Atl. 188; *Haines v. Trust Co.*, 56 N. J. Law, 312, 28 Atl. 796. The judgment under review should be reversed.”

Another case is the case of *Silcox v. Grand Fraternity* (Court of Errors and Appeals of New Jersey, June 20th, 1910), 79 N. J. L., 502, S. C. 76 Atl. Rep. 1018. Mr. Justice Garrison

in delivering the opinion of the Court, which reversed the judgment below, said:

“Among the questions and answers contained in Silcox’s application were the following:

“Question 18a. When and for what complaint did you last consult a physician; give full particulars? Fifteen years ago; inflammation of bowels.

“(b) Give the name and address of the physician whom you last consulted? Dr. Mosher, Griggstown, N. J.”

“These questions related to matters within the personal knowledge of the applicant whose answers were complete and unequivocal. That the applicant’s answers to these questions were untrue appears from the testimony of \* \* \*. The contract of warranty, the statements warrantied, and the untruth of such statements all therefore conclusively appeared.

“The rules of law applicable to such a state of facts are (1) that where a contract for life insurance makes the answers contained in a written or printed application warranties, and makes such warranties part of the contract, an untrue statement by way of answer, concerning a matter of fact that is within the personal knowledge of the applicant, constitutes a breach of warranty that will defeat a recovery by the beneficiary of such contract; and (2) \* \* \*”

It was held in *Brunjes v. Metropolitan Life Insurance Company*, 83 N. J. L., 296, S. C. 84 Atl. Rep. 1062 (Supreme Court of New Jersey, Nov. 11, 1912,) in opinion written by Mr. Chief Justice Gummere, that:

“An application for life insurance provided that, whenever nothing is written in a

paragraph, it is agreed that the declaration is true without exception. The fourth question asked for the name of the physician who last attended the applicant, the date of the attendance, and the complaint.

“This was answered with the words, ‘Dr. Coughlin, Jan. 1911, grippe, good results.’ The next question stated that the applicant had not been under the care of any physician within two years other than as stated in the previous question except, etc., with nothing written in the blank after the word ‘except.’ The physician designated testified that in the spring of 1910 deceased was treated irregularly for dyspepsia, and in October of that year presented symptoms of tuberculosis, for which he was treated during the winter, when he had an attack of grippe for which the physician also treated him. HELD that, in the absence of any evidence reflecting on the credibility of the physician, his evidence showed a breach of warranty as a matter of law.”

As the warranties in the case at bar relates to matters of fact, clearly within the knowledge of the plaintiff, the reaffirmance by him of the statements in the original warranties constitute a false warranty, and for the breach thereof, the defendant was entitled to a direction of verdict in its favor.

## II.

THE LEARNED TRIAL JUDGE ERRED IN CHARGING THE JURY THAT IF SUBSTANTIAL TRUTH WAS TOLD IN THE WARRANTIES, PLAINTIFF'S NEGLIGENCE TO STATE A TEMPORARY OR SLIGHT AILMENT WOULD NOT CONSTITUTE A BREACH OF WARRANTY.

On this point, the learned trial Court charged the jury as follows:

"Gentlemen, while it is true that a false representation as to physical conditions in a policy of this kind would vitiate the policy, make the policy void, and that the plaintiff would be unable to recover under the policy, yet, if the person insured has omitted to mention some temporary or slight ailment, if the ailment is temporary or slight, then he is not prevented from recovery. And the same, as to the fact whether or not he had consulted a physician, the rule being that a full statement as to whether the applicant had consulted or been attended to by a physician is material to the risk, and will defeat a recovery, especially where it is warranted to be true, as it is in this case. But even where the answers are made warranties, substantial truth is all that is required, in analogy with the rule as to temporary or slight ailment, which I have just mentioned, and it is held that medical consultation or attendance for merely slight or temporary indisposition need not be disclosed, the insured being entitled to a liberal construction, as I have already stated, of the language of application."

This charge is noted as the sixth ground of appeal, and exception was taken thereto (page 106, lines 30-40).

The learned trial Court was evidently treating the breach of warranty in this case as a mere misrepresentation. It can hardly be said in this case that the statement was a mere misrepresentation. It clearly was a warranty made so by the express terms of the contract, the truth of which was warranted therein and made part of the consideration for the same.

Even if the question of its immateriality should have been considered by the trial Court, surely as a matter of law the statement of an applicant for insurance as to whether or not he had been attended by a physician is distinctly relative to the risk involved. A breach of such a warranty as this, when clearly established by the evidence, is not, under any circumstances, a question for the jury, but should be passed upon by the trial Court as a matter of law. This, we believe, is firmly established by the decisions of this State which have been referred to above. Under these circumstances, the action of the trial Court in charging the jury as above set forth, was clearly erroneous, and for that reason the judgment entered should be reversed.

### Question II.

THE LEARNED TRIAL JUDGE ERRED IN DENYING DEFENDANT'S MOTION THAT THE JURY BE DIRECTED TO LIMIT PLAINTIFF'S RECOVERY UNDER THE CONTRACT TO \$202.00, AND IN CHARGING THE JURY IN ACCORDANCE WITH THE DOCTRINE LAID DOWN IN THE CASE OF *YOUNG V. TRAVELLERS' INSURANCE COMPANY*, REPORTED IN 80 Maine, 244.

A very important question in this case is as to whether or not under the health clause of this policy (Section H, Exhibit P. 1, p. 111), an as-

sured can recover indemnity for total disability while he is able to attend to part of his usual duties. We must observe a distinction in the use of the terms "total" and "partial" disability in connection with this matter, for a reading of the contract clearly demonstrates that there is no provision for recovery for partial disability under the health section of the policy.

Perhaps, as an aid to the construction of this section, it will be interesting to refer to the accident section of the policy where exactly the same language is used in the paragraph relating to total disability (see Section B, Exhibit P 1, page 108), and the subject of partial disability under the accident portion of the contract is covered by paragraph two of Section B, and it will be noted that this clause for partial disability uses different language than that used in the clause for total disability, the language of the clause for total disability being the same as that used under Section "H," which is the health section of the policy.

*There is no provision for partial disability under section "H," the only disability recognized being that the assured must be "totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation."* The only distinction raised in this section at all is as to whether or not such total disability was confining or non-confining. If the disability was such as to confine the assured to the house, he was entitled to the full indemnity of \$25.00 per week for the time stipulated, or for the time of such actual confinement. If he was not necessarily confined to the house, he was entitled to three-fourths of such indemnity for the time stipu-

lated, or for the period of such total non-confining disability. There is no basis for the use of the term "partial disability" in connection with this clause. The disability must be total, whether it is confining or non-confining.

It should be borne in mind that this clause does not cover the only indemnity granted in this policy, but is designed purely to compensate an assured when he is totally unable to attend to any and every part of the usual affairs of his business.

The plaintiff in this case in his application outlined his occupation as "office dutes" and stated that the duties of such occupation were "office duties and traveling." Although he claims he was unable to travel from March 7th to October 15th (except it does appear that he traveled to the seashore), he was able to and did attend to part of his office duties, commuting from the seashore to do so (page 37, lines 1-17).

The language of section "H" is clear and unequivocal, and the construction placed upon it by the trial Court following the Maine case of *Young v. Travellers' Insurance Company*, *supra*, is a strained construction. The words "totally disabled" surely do not apply to the condition of the plaintiff in this case, nor do the words "Wholly and continuously prevented from performing any and every kind of business pertaining to his occupation," give sanction to the action of the trial Court in permitting this question to go to the jury, and charging the jury as he did in reference thereto. The charge of the trial Court was as follows (Page 101, line 15; page 103, line 3):

"Gentlemen, it is the duty of the Court to construe the contract, to tell you what, in law, the contract means. You are the judges

of the facts; but this is a legal proposition, of which the Court is the judge. It often occurs, in most cases it is true, that the precise words which the trial Court is called upon to construe, have never been construed by any appellate court, and these precise words in this contract, "totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation," do not appear to have been construed by the appellate courts of the State of New Jersey. The Court's attention has been called to no case in the State of New Jersey by which these words have been construed by the appellate courts of this State; but these precise words have been construed by the courts of other states, and some of these courts have construed it one way, which would prevent recovery by the plaintiff in this case, and some have construed these precise words the other way, which permitted recovery under circumstances somewhat similar to those which appear in this case, and since the rule of law applicable to policies of insurance is that they shall receive liberal construction in favor of the insured, I am inclined to adopt the rule which is liberal toward the insured rather than otherwise, and I shall adopt the language of the trial Court quoted in the report of the case of *Young v. Travellers' Insurance Company*, reported in 80 Maine, 244, adapting it to this case.

"I have already called to your attention the representation made by the plaintiff as to his occupation, that is, that it was office duties and traveling. Now, then, using these

words, instead of the words used in this case, I charge you that this is the law applicable to this case. 'The reasonable construction which must be put upon the language here used is that it must have meant that, if the plaintiff was so disabled as to be incapable of doing any and every kind of business pertaining to his occupation, as office man and traveling,' then he would be wholly disabled from the prosecution of every kind of business pertaining to such occupation, and entitled to the stipulated compensation. Otherwise, if he was not so disabled, he would not be entitled; and therefore gentlemen, I instruct you as a matter of law that the meaning of the language here used is, not that he must be so disabled, as to prevent him from doing anything whatsoever pertaining to his occupation, or any part of his business pertaining to his occupation,' as in the office and traveling, 'but he must be so disabled as to prevent him from doing any and every kind of business pertaining to his occupation. There may be a difference between being able to perform any part of his business, and any and every kind of business pertaining to his occupation.' And that is the law, gentlemen, which I have read from the Maine case, and which is applicable to this case."

*The fact that the language of this clause is in the conjunctive and not in the disjunctive, is ignored by the trial judge.*

As the different conditions which can be made the basis of a claim for indemnity are set forth in the conjunctive, all of such conditions must

be present in order to permit a recovery. These conditions are:

1. The assured must be totally disabled.
2. He must be wholly and continuously prevented from performing any and every kind of business pertaining to his occupation.

If he is able to attend to any of the duties of his occupation, he is clearly not prevented from attending to every duty of his occupation, and therefore is not entitled to indemnity. To place any other construction upon the language of this clause is to do violence to the plain terms of the contract, and would be practically to create a new contract between the parties, permitting partial disability for ill health; when under the express terms of the contract, partial disability is only allowed in case of accident as specified in paragraph 2 of section "B" (page 109). The construction placed upon this by the trial Court reads into the clause the word "or," making an alternative, and eliminating the conjunctive "and." There can be no security in written contracts if the apt language used can be so distorted. The language of the policy in question has been in use by a number of companies for a considerable length of time, and the language of the total disability clause of the accident feature of the policy has been construed by other courts on a number of occasions.

In *Fuller on Acc. & Employer's Liability Ins.* (1913) p. 292-3:

"In some policies, the provision as to total disability declares that the assured must be disabled 'from prosecuting his usual employment,' or 'from prosecuting any and every kind of business pertaining to his occupation.' Under these conditions, natural-

ly, one who is unable to do any work pertaining to his occupation is totally disabled.”

In *U. S. Mutual Acc. Ass'n v. Milliard*, 43 Ill. App. 148 (1892), the assured, an attorney, received a severe injury to his hand. The Court said:

“That the injury to the hand was severe, and that the plaintiff suffered much pain is shown. Is such injury to the extent shown by this evidence within the terms of this policy? The clause of the policy is ‘That indemnity is to be paid for the loss of time resulting from bodily injuries which shall, independently of all other causes, immediately, wholly and continuously disable from the transaction of any and every kind of business pertaining to his profession as an attorney at law. Construing this contract as the parties made it, an injury that did not wholly and continuously disable assured from the transaction of any kind of business pertaining to his profession, is not within the terms of the policy.

“The undertaking of the defendant was not to indemnify against pain or inconvenience, but for loss of time when wholly disable from attending to his professional business, and it cannot be said that an injury to the plaintiff’s hand, and pain and discomfort resulting from the injury, wholly disable him from the prosecution of the duties of his profession. \* \* \*

“The second instruction given for the plaintiff was: ‘If it appears from the evidence that the plaintiff was not able to do all the substantial acts necessary to be done in the prosecution of his business on ac-

count of the injury he received, then he was wholly disabled within the meaning of the policy.' The instruction is broader than the terms of the policy would authorize. While inability to write would be exceedingly inconvenient to an attorney who had been engaged in practice for years, yet it would not be a total disability from attending to certain duties of his profession, and the instructions that if plaintiff could not do all substantial acts necessary to be done in the prosecution of his business, he was wholly disabled, is erroneous. The judgment is reversed."

*Knapp v. Preferred Acc. Assn.*, 53 N. Y. (Hun.) 1889, 84. Appeal dismissed 130 N. Y. 635.

Plaintiff was denied a recovery in this case upon the ground that a severe injury to his hand did not totally disable him from pursuing his occupation as a retired gentleman.

Justice Dwight said:

"The question is one which does not seem to admit of much discussion, but it would be easy to suggest many duties, and even pleasures, pertaining to the domestic, social and business relations of a retired gentleman, from which he would wholly be debarred by a disabled hand. He might still, it would seem, keep an eye upon his investments, collect and disburse or reinvest his income, attend the meetings of the boards of directors of which he was a member, superintend repairs and improvements to his property, and, generally, devote considerable attention to the care of himself, his family and his estate. That plaintiff was totally disabled and prevented from any

and every kind of business pertaining to the situation in life which he ascribes to himself seems not to be established by the evidence before us."

That total disability wholly preventing plaintiff from prosecuting his business is necessary for recovery was held in *Gracey v. Peoples Mutual Acc. Assn.*, 21 Pittsburgh Legal Jr., 25 (1890).

*Saveland v. The Fidelity & Casualty Co. of N. Y.*, 67 Wis. 174 (1886).

This case is similar to the case at bar. The plaintiff, a merchant grocer received an injury which confined him to his home for a week. At the end of that period "by means of great exertion, he was enabled to get to his buggy, and superintend a small part of his business, but was almost wholly disabled for the whole period of twenty-six weeks." The Court said:

"Here the plaintiff was only entitled to recover in case the injury was such as to 'wholly' disable and prevent him from the prosecution of 'any and every' kind of business pertaining to his occupation 'and then only, for such period of continuous *total* disability,' not exceeding the amount stipulated, nor 'the money value of his time during the period of continuous *total* disability, not exceeding twenty-six weeks. The ordinary object of a policy of insurance may be such as stated by the learned trial judge, but the manifest purpose of this policy was to obtain premiums by incurring as little risk as possible. But there was no law to prevent the parties from making their own contract. The plaintiff consented to and made this one. He cannot repudiate or

alter its conditions in the day of his calamity. The courts are powerless to make a new contract for him or to strike some words from the contract he made for himself, and insert others, and thus enlarge the risk, in order to meet the expectation of the plaintiff in obtaining the policy. This we should be compelled to do, in order to sanction the charge to the jury. The plaintiff's right to recover is necessarily restricted to the time he was wholly disabled and prevented 'from the prosecution of any and every kind of business pertaining to his occupation.'"

Judgment for plaintiff reversed.

The *Saveland* case (*supra*) was expressly approved in the later case of *Merrill v. Travellers' Ins. Co.* (1895) 91 Wis. 329, the Court using this language:

"The disability to transact any and every kind of business pertaining to the plaintiff's occupation must not only have been immediate, but total. Partial or limited disability will not suffice. The language of the policy is entirely free from doubt in this respect, and, if authority be needed on this point the case of *Saveland v. Fidelity & Casualty Co.*, 67 Wis. 174, where the policy in this point was identical with the provisions of the policy in question, is conclusive."

In *Ford v. U. S. Mutual Acc. Relief Co.* (1889) 148 Mass., 153, the plaintiff was classified as a leather cutter and merchant. It was held that in order to permit recovery, he must prove disability, as to both occupations.

In *McKinley v. Banker's Acc. Ins. Co.* (1898), 56 Iowa, 81, the policy read that indemnity would be paid for injuries "immediately, wholly and continuously disabling the 'plaintiff' from transacting any of the duties pertaining to his occupation as a merchant." Judgment was for eight weeks. It appeared that he had attended his store during the last four weeks, and attended to part of his duties. The Court said: "There is no evidence upon which to base a finding that the plaintiff was totally and continuously disabled for more than four weeks, and, under the terms of the contract, it is only for that period that he is entitled to recover."

In *Spicer v. Commercial Mutual Accident Co.*, 4 Pa. Dist. 271, under an accident policy, insuring "against personal bodily injuries, effected through external, violent and accidental means, which shall independently of all other causes, immediately, wholly and continuously disable him from transacting any and every kind of business pertaining to his occupation above stated, it was held that "There could be no recovery where the insured was able, during the whole period for which he claimed indemnity, to transact, and always did transact, some parts or some kinds of business pertaining to his occupation, and, to some extent, attended to all the duties of every kind connected with his business.

In the opinion McPherson, *J.* (March 20, 1895), says at page 276:

"All the cases, however (except 'the decision in Maine'), *Ycung v. Ins. Co.*, 80 Me., 244), 'which deal with the particular condition now in controversy, construe it as we feel bound to construe it, and hold it to

be a bar to recovery unless the disability is so complete as to prevent the insured from doing any part or kind of business pertaining to his occupation: *Lyon v. Assurance Co.*, 46 Iowa, 631; *Rhodes v. Ins. Co.*, 5 Lansing (N. Y.), 77; *Knapp v. Accident Association*, 24 N. J. St. Rep. 882; *Saveland v. Fidelity and Casualty Co.*, 67 Wis. 174; *Gracey v. Insur. Assn.*, 21 Pitts. L. J. (N. S.) 25."

See also *Lyon v. Ry. Passenger Assn. Co.*, 46 Iowa, 631.

*Smith v. Supreme Lodge of Order of Select Friends*, 61 Pac. 416.

*Baldwin v. Fraternal Ass. Assn.* 21 Misc. 124.

In *Bylow v. Union Casualty & Surety Co.*, 72 Vt. 325, it was held that one cannot be said to be wholly and continuously disabled from performing any and every kind of duty pertaining to his occupation within the meaning of an accident insurance policy, when one of his duties is "overseeing" and he continues in the same employment "superintending" the kind of work he had previously been engaged in; working nine-tenths of full time and receiving ninety per cent. of full pay.

Judgment below was reversed and judgment for the defendant for its costs granted.

See also *Rayburn v. Casualty Co.*, 141 N. C. 425.

*Commercial Travelers v. Barnes*, 72 Kansas, 293.

There is a line of authorities which place a so-called equitable construction upon the contract, and hold that if the assured is unable to

perform any *substantial* part of his usual duties, a recovery would be permitted.

These decisions have been placed upon the theory that unless some such interpretation were given to the contract, a recovery thereon would be difficult. In this connection, the Court must bear in mind that if an equitable construction is to be injected into the interpretation of a contract in a court of law, equity would also require the Court to consider the fact that the health clause of the policy is only a small part of the indemnity provided for under the various contingencies which are the subject of the risk, and for all of which the premium has been paid. These policies are comparatively inexpensive, and to afford protection to the extent that so-called equitable construction is sometimes carried by the courts would mean an adjustment of rates, not for the purpose of meeting the requirements of an inexpensive policy which is requested by the assured, and issued by the company, but to meet the requirements of a policy as the same is written by the courts, rather than the parties. Insurance is a contract between the parties the price of which is proportioned to the legal risk only. It can hardly be said that there is any prohibition in law against issuing an inexpensive form of insurance protection, as well as the more costly forms involving increased risk.

Cases which give the so-called equitable construction of the contract are the following:

*James v. Ins. Co.*, (Kan. 1905), 88 S. W. 125.

*Ind. Mutual Indemnity Co. v. Hawkins*, Ark. 127, S. W. 457 (1910).

*U. S. Cas. Co. v. Hanson*, 79 Pac. 176 (Col. 1904).

*Pac. Mutual Life Insurance Co. v. Branham*, 70 N. E. 174, 34 Ind. App. 243.

*It is respectfully submitted, however, that no matter what construction is placed upon the contract in the case at bar, the amount and extent of the business transacted by the plaintiff from the time he returned to his office on March 7th to the end of his claimed disability on October 15th, was such that it is clearly apparent that he performed a substantial part of his usual work during that period of the year.*

It is a firmly established and proven fact in this case that from March 7th, 1915, and continuing through the entire period during which he claims he was totally disabled, the plaintiff went to his office as usual and attended to part of his regular duties. This fact clearly appears in the evidence of the plaintiff himself and of his other witnesses. Plaintiff stated that this was so in the cross examination (Page 28, line 38). While at the factory he would go through the shop and inspect the work (Page 26, lines 28 to 30). He would look over the bookkeeper's accounts (page 28), and would examine the manufactured product before it left the factory (page 28, lines 26 to 30). As secretary of the company, he would keep the minutes of the corporation (page 24), sign contracts (page 25), and checks (page 31). That during this period he attended to a considerable amount of correspondence on various subjects relating to the general business of the corporation. This appears conclusively from his own testimony and particularly from the testimony of his stenographer, Miss Alexovits. Pursuant to the request of the defendant, the plaintiff produced a letter book, from which examination of Miss Alexovits was conducted, covering a period of

from May 4th, 1915, to October 14th, 1915. A synopsis of the subjects covered by these letters is in the testimony of Miss Alexovits (pages 63 to 81 inc.). These letters cover a great many subjects pertaining to the general business of the corporation, and entirely separable from the plaintiff's alleged occupation as salesman. There are letters declining and accepting orders; letters demanding settlements of accounts; letters announcing shipments of orders; letters placing drafts with banks for collection; letters with various insurance companies in reference to marine insurance; letters confirming orders received over the telephone by Mr. Gross; letters complaining as to the quality and quantity of material received; letters acknowledging orders received through the mail; letters requesting samples of merchandise; letters discussing differences of accounts with a bank, correspondence with the State Department in reference to a shipment requisition held at Antwerp by the German government; letter authorizing commission to broker on sale, letter requesting quotations on material; letters of complaint to shippers as to breakages. This correspondence consisted of about eighty letters and was a substantial part of the transactions of the firm during the period covered by it and was handled by Mr. Gross. This was shown by the fact that on one occasion, from June 5th to 16th, there was no correspondence in the book (page 67). In addition to this, we have Exhibit D 1, being plaintiff's letter under date of March 31st, 1915, in which he states that he had been going to the office nearly every day and would occasionally dictate a letter while there.

Therefore, on the testimony of the plaintiff himself, and of his own witnesses, disregarding

entirely the testimony of defendant's witnesses, Mrs. Strack, Ralph Lane and Charles S. Wright, it is clear that the plaintiff attended to a substantial portion of his usual duties and that he was able to travel back and forth from Newark to Allenhurst.

### Summary.

It is respectfully submitted, therefore, that the trial Court was in error in failing to grant defendant's motion for a non-suit at the close of the plaintiff's case, and in failing to direct a verdict for the defendant at the close of the entire case upon the ground of the breach of the warranty set forth in the original contract and reaffirmed by the renewal certificate, Exhibit P 4.

It is also urged that the learned trial Court erred in refusing to limit plaintiff's recovery to the sum of two hundred and two dollars (\$202.00), as requested on motion to direct a verdict, and erred in charging the jury in accordance with the decision in the case of *Young v. Travellers' Insurance Company*, 80 Maine 244.

It seems clear that the undisputed facts in this case sustain the contention of the appellant upon both questions.

The testimony as to the breach of warranty is not contradicted, and there can be no doubt but that the assured was able to and did perform a substantial part of his usual duties during the time of his alleged total disability, and therefore was not entitled to recovery under the language of the policy, which is that he shall be "totally disabled and wholly and con-

tinuously prevented from performing any and every kind of business pertaining to his occupation."

Respectfully submitted,

WM. E. HOLMWOOD,  
EDWARD L. KATZENBACH,  
*Attorneys for and of Counsel  
with Defendant-Appellant.*

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## New Jersey Court of Errors and Appeals

RUDOLPH GROSS,

*Plaintiff and Respondent*

*vs.*

COMMERCIAL CASUALTY  
INSURANCE COMPANY  
OF NEWARK, NEW JER-  
SEY,

*Defendant and Appellant*

*On Appeal*

### Brief for Plaintiff-Respondent

The appeal in this suit brings up for review a judgment rendered against the defendant in favor of the plaintiff, in the Essex County Circuit Court on November 16th, 1916, before Hon. Nelson Y. Dunagan and a jury, for the sum of \$822.35 damages besides costs.

The suit was brought upon a policy of insurance covering health and accident, dated October 11th, 1911, and issued by the defendant company to the plaintiff (See Exhibit P—1) (State of Case—page 107). The original contract of insurance embraced in the aforesaid policy and covering the period from October 11th, 1911, to October 11th, 1912, was from year to year renewed and the renewals are evidenced by certain vouchers, No. R. V. 1237, running from October 1st, 1912, to October 1st, 1913 (See Exhibit P—2) (State of Case—page 130); renewal voucher 1547, running from October 1st, 1913, to October 1st, 1914 (See Exhibit P—3) (See State of Case—page 131); renewal voucher 1806, running from October

1st, 1914, to October 1st, 1915 (See Exhibit P—4) (See State of Case—page 132).

The contract covered by the aforesaid policy of insurance extended over a period commencing October 11th, 1911, and ending October 1st, 1915, and during which time the plaintiff paid the stipulated premiums of \$60 per annum, as required by the terms of the policy.

On or about the 29th day of December, 1914, and while the contract of insurance was in force, the plaintiff, Rudolph Gross, became afflicted with an ailment known as Phlebitis, of which ailment the defendant had due and timely notice. The nature of this illness is an inflammation of the veins of the limbs. This inflammation caused swelling of the feet and prevented him from moving about except with great pain and inconvenience. There was also pus on top of his feet, between the toes and on the soles. This condition continued with varying degrees of intensity from January 4th, 1915 to October 15th, 1915, and caused the feet to be very tender and the sores were so sensitive that the slightest covering on them caused pain and the plaintiff was unable to wear shoes or do any walking, and because of the pain that accompanied the trouble he lost considerable weight and suffered from weakness and, therefore, by reason of the aforesaid ailment, as the evidence clearly established, the plaintiff was continuously confined to the house from January 4th, 1915, until January 20th, 1915, and was unable to attend to any business or occupation.

Immediately after this period of total disability and confinement in the house and as a direct and sole consequence of said illness, known as Phlebitis, the plaintiff was totally disabled and prevented from transacting his usual and necessary occupation, but not confined to the house from January 21st, 1915,

to October 15th, 1915, and during this period he would occasionally go down town to his place of business by automobile, and it was then that he dictated and signed a few letters (consisting of eighty letters in a period of 163 days) and attended to some minor duties in connection with his occupation. His occupation was described in the policy of insurance (See Exhibit P—1) (See State of Case—page 107) as office duties and traveling only, but on account of his illness he was totally disabled and continuously prevented from performing his duties as a traveling salesman or as buyer of merchandise at the various seaports and was also prevented from doing the usual and necessary correspondence which was part of his occupation and was also prevented from traveling, which was necessary in performing the customary duties of his employment, during said period of disability. This period of disability when he was not actually confined in the house was from January 21st to October 15th, 1915, for which it is contended he was entitled to receive three-fourths of \$25.00, the indemnity provided for in the policy (covering a period commencing on the 21st day of January, 1915, and ending on the 15th day of October, 1915, in all, 268 days), after which time the plaintiff was able to resume his usual occupation and attend to the usual and customary duties of his employment.

That on the 1st day of March, 1915, and the 7th day of December, 1915, the plaintiff furnished the defendant company with health proofs of loss, required by the terms of the policy of insurance, which loss amounted to \$60.75 for the period of total confinement and \$717.50 for a period of total disability, but not actually confined in the house, making in all a total of \$778.50, with interest from the due date to the day of trial, which makes a total of \$822.35.

The defendant company refused to pay the plaintiff

iff the above compensation in accordance with the terms of the policy and a suit was thereupon instituted. The jury rendered a verdict for the plaintiff and assessed the damages at \$822.35 (including the interest and costs). The defendant admitted his liability to pay \$202.67, namely, full indemnity from January 4th to January 20th, 1915, and three-fourths indemnity from January 20th to March 7th, 1915, at the rate of \$18.75 a week, so that the only question in dispute was the period between March 7th, 1915 and October 15th, 1915. (See State of Case—page 96, line 8 to line 20).

The policy of insurance contains a clause, as follows: (See State of Case—page 111, line 31, to page 112, line 13).

“If the assured shall by reason of any disease or illness, contracted during the term of this insurance and not herein excepted, be totally disabled, and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, and necessarily confined to the house, the same amount per week as is provided in Clause B 1, for total disability will be paid to the assured; and if, immediately following such a period of total disability and confinement in the house, he shall be totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, but is not necessarily confined in the house, three-fourths of said amount per week will be paid to the assured, but no payment will be made for disability in excess of fifty-two consecutive weeks' duration.”

And the policy further contains a series of warranties made by the plaintiff at the time of entering into the contract of insurance, two of which warranties, namely, No. 6 and No. 16, which are material

to the issue, reading as follows: (See State of Case—page 126, line 25).

“My occupation is office duties, and the duties of my occupation are fully described as follows: Office duties and traveling only.”

(See State of Case—page 127, line 33.)

“I have not been disabled nor have I received medical or surgical attention during the past five years, except as follows: In 1911, for eczema, lasting four months.”

The renewal vouchers which form a part of this contract of insurance contain the following statement:

“Commercial Casualty Insurance Company, in consideration of the premium of sixty dollars, hereby agrees to continue in force the above-numbered policy for twelve months from October 1st, 1912, to October 1st, 1913, at 12 o'clock noon (Standard Time), provided the statements in the schedule of warranties in the original contract are true at this date and that nothing exists at the date hereof to render the hazard of the risk greater than or different than that shown by such schedule.”

The warranty No. 16 only became material to the issue, as hereinbefore stated, when the testimony was elicited (See State of Case—page 127, line 33), that the plaintiff, Rudolph Gross, sometime prior or subsequent to the last renewal, the date of which is very uncertain, called upon Dr. Wallhauser for a single treatment, complaining that he had pains in his limbs, no outward or visible signs of any eruption or trouble had occurred, and he claimed he was very tired and weak. Dr. Wallhauser suggested that he had better take a little rest, and upon the advice of Dr. Wallhauser he absented himself from the office for a short period, but claimed no indemnity for this occurrence.

Testimony of Rudolph Gross. (State of Case—page 94, line 28.)

Q. On the 8th of September, 1914, were you in sound condition, mentally and physically, so far as you knew? A. Yes, sir.

Q. It is a fact, is it, Mr. Gross, that about six months or a year prior to the last renewal you did call upon Dr. Wallhauser, didn't you? A. Yes, I did.

Q. Did you have anything the matter with you? A. Yes.

Q. What was the matter with you? A. I got so easily tired in my feet, I went down there to consult because he once treated me before, about a few years ago.

Q. And that is the time you mentioned in this? A. That is so. I went down there and he looked me over. He didn't say anything. He said, "You go home and take a little rest and rub your feet with alcohol."

Q. He didn't tell you anything was the matter with you? A. No.

Q. And you had no trouble after that until this last illness? A. Yes.

Q. And when you said you had been to Dr. Wallhauser as you did, you referred to the statement you made in the warranty, that in 1911 you had been treated for eczema for four months, is that right? A. Yes, sir.

Q. How many times did you call on Dr. Wallhauser? A. Prior to September 8, 1914?

Mr. Newman. At the time of this last renewal.

A. I don't think I called at Dr. Wallhauser's.

Q. Only this once you tell about? A. Yes, and in 1911.

Q. Did he prescribe for you this first time? A.

He told me to rub my feet with alcohol.

Q. Were your feet swollen? A. No.

Q. What seems to be the trouble with them? A. I felt tired so easily.

Q. You thought it was of sufficient importance to see a doctor about the condition? A. I usually do, because I need my feet quite a bit, and the least trouble I have I go to a doctor, rather sooner than later.

The verdict in this case was in strict accord with the facts as presented and the legal rules stated by the court, and should be upheld.

This case presented but two legal questions, one of which was interpolated in the case after all the pleadings had been filed and after the case was about to be presented to the jury, and the other was a question of the construction of the policy.

#### POINT I.

##### THERE WAS NO BREACH OF WARRANTY.

As to the first question, the defendant contended for the first time at the trial and not in its answer, that the policy of insurance was forfeited and made null and void by reason of the breach of the warranties and conditions therein contained and referred to in the renewal voucher No. 1806, covering the period from October 1st, 1914, to October 1st, 1915.

Examination of the renewal voucher shows that it contains two conditions precedent to the enforcement of the original contract of insurance; (1) That the statement in the schedule of warranties in the original contract are true at the date of the renewal voucher; (2) That nothing exists at the date when renewal voucher was issued to render the hazard of the risk **greater than or different than** that shown by such schedule.

There is nothing in the record of this case that

shows that condition No. 1 in the aforesaid renewal voucher was not performed or was not as represented. The condition expressly says that the warranties in the original contract must be true at this date. They were true at the date of the renewal voucher, as they were also true at the time the representations were made. There is no testimony in this case to show that for the five years preceding the date of the original policy of insurance, namely, October 1st, 1911, the plaintiff, Rudolph Gross, suffered from anything other than eczema, as mentioned in the warranties, lasting a period of four months.

Upon the issuing of the renewal voucher the assured does not reaffirm any of the warranties set up in the original policy of insurance as being true with respect to the five years preceding the date of the renewal voucher. This, in the very nature of it, cannot be so, for in 1911, Mr. Gross warranted that for five years preceding he received no medical or surgical attention except for eczema, and when the renewal voucher was issued in 1914, can it be said that Mr. Gross again warranted that for the past five years preceding 1914 he received no medical or surgical attention, except for eczema. This, of course, is absurd, and we do not think that a construction of this kind can be placed on the language in the renewal voucher. **The condition No. 1 in the renewal voucher simply reaffirms that the assured warrants and reiterates that all the statements and warranties he made in 1911 were true.** If the insurance company intended to have the assured make additional warranties each time a renewal voucher is issued to him it could easily have provided for this by attaching to the renewal voucher a new schedule of warranties to be executed each year by the assured.

Let us assume, however, for the purpose of this

argument that the clause in the original policy, namely, "I have not been disabled nor have I received medical or surgical attention during the past five years, except as follows," is to be construed as dating from the time the renewal voucher is issued, namely, that from the year 1909 to the year 1914, the assured did not receive any medical or surgical attention. From the testimony of Rudolph Gross, the plaintiff, it cannot be said that his visit to Dr. Wallhauser can be termed either medical or surgical attention. By the term medical attention we naturally mean treatment by a physician for sickness or disease accompanied by medical prescription. By surgical attention we ordinarily mean such functions and duties as are performed by surgeons skilled on the operating table. The treatment the plaintiff received from Dr. Wallhauser was in neither category. His visit was so unimportant that he did not think it necessary to disclose to the insurance company that he consulted Dr. Wallhauser, his family physician, with regard to an overworked and tired condition. And there was no duty upon him to inform the insurance company of such a visit. The occasion of the call was so trivial that it can hardly be called an ailment. Mr. Gross was run down from over-work. He experienced a languid and tired feeling and called upon his family physician. This is neither medical nor surgical attention and, therefore, it was not necessary for him to disclose the fact to the defendant.

In addition to this, it clearly appears from the testimony of Dr. Wallhauser that neither the doctor nor the plaintiff, Rudolph Gross, knew what the plaintiff's ailment was at the time he visited Dr. Wallhauser, some time before December, 1914.

Mr. Gross complained of a tired and languid feeling in his feet. Dr. Wallhauser examined him and was unable to ascertain what was the matter with

Mr. Gross, if there was anything really the matter with him.

On the re-cross examination of Dr. Wallhauser (See State of the Case—page 46, line 2) there appears the following question and answer:

Q. Did you tell Mr. Gross the nature of his disease at the time of that previous treatment? A. With regard to the nature of the ailment I don't believe I could have told him, because I didn't know myself.

How, then, could Mr. Gross have informed the defendant Insurance Company at the time he obtained the last renewal voucher, that he was suffering from a disease when neither he nor his physician knew what the disease was?

It is absurd to claim that in a situation of this kind where the assured makes a visit to his physician and neither he nor his physician is able to ascertain the nature of the ailment that by reason thereof the policy of insurance is forfeited and made null and void and all the premiums that have been paid by the assured and received by the defendant for a long number of years become forfeited and of no use and avail to the assured. This would be an extreme hardship and place an extremely narrow construction on a policy of insurance and adverse to the well-established doctrine and decisions in this State, that a liberal construction should be placed on all contracts of insurance.

At the time Mr. Gross obtained the last renewal voucher he did not disclose to the defendant that he had consulted a physician; he did not know what the ailment was, and even following the case of Lippincott vs. Supreme Council of New Jersey, Court of Errors and Appeals, March 9, 1900, 64 N. J. Law—309, which is cited by the defendant in his brief, we can not say that the plaintiff was guilty of a breach

of warranty. In that case Judge Gummere said:

**“He must have known when he declared that he had never** suffered from catarrh that this was untrue, as he was then being treated by his physician for that disease. He likewise must have known that he was making a false statement when he declared he had never gone under a surgical operation.”

But in our case it clearly shows that the plaintiff did not know at the time the renewal voucher was obtained for what ailment he had consulted a physician, and the proof is that it was not an ailment at all.

Dr. Wallhauser's advice was sought because the plaintiff felt tired in his feet. The warranty alleged to have been broken by the plaintiff in the case at bar relates to a matter of fact clearly not within the knowledge of the plaintiff, and the re-affirmance by him of the statements in the original warranty does not constitute a false warranty for the breach of which the policy of insurance should be forfeited.

As to the second condition in the renewal voucher we are confronted with the question whether or not the risk or hazard assumed by the company was greater in 1914 than it was in 1911. As to this there are two fundamental, undisputed facts:

First, in 1911, the risk assumed by the company was affected by the fact that shortly prior to the issuing of the original policy the plaintiff suffered for a period of four months with eczema, which fact was clearly stated in his original application and warranty, which is annexed to the policy, and second, that in 1914, when the renewal voucher was issued, he made a visit to Dr. Wallhauser.

Can it be said by any stretch of the imagination that if the assured made a single visit to Dr. Wallhauser some short time prior to the last renewal of

the said policy because he was languid and his limbs hurt him, for which the doctor gave him no prescription or remedy whatever, and for which difficulty the doctor suggested that he do not work quite so steadily and take it a little easier and bath his limbs, that the risk assumed after such a visit was larger? The plaintiff's failure to disclose the fact that he had called upon a physician for the reason hereinbefore stated cannot be said to have increased in any wise the hazard, for in truth and in fact the hazard was decidedly greater in 1911 because of his eczema than the risk in 1914, when his difficulty had disappeared entirely and when he had no medical or surgical treatment of any character excepting the single visit to Dr. Wallhauser. It may also be noted that no testimony of any prohibitive character or expert nature was introduced at the trial that could go to a jury to indicate that the risk was increased or the hazard made greater at the last renewal of the policy.

In the case of the Metropolitan Life Insurance Co. vs. McTague, 49 N. J. Law—page 587, Chancellor Magie in construing a similar clause in a policy of insurance said:

“Two representations in the revival application are alleged to have been false. The first was that which averred that John McTague had not, since the policy was issued, been ‘sick or afflicted with any disease.’ The District Court found as a fact that he had during that period had ‘a cold.’ The Common Pleas held that the statement of the application was not thereby shown to be untrue. In this I think there was no error. There was nothing in the mere fact found that required the inference that the insured life had been ‘afflicted by disease’ or even ‘sick.’ **These terms are not to be con-**

strued as importing an absolute freedom from any bodily ailment, but rather of freedom from such ailments as would ordinarily be called disease or sickness. Where a lapsed policy was renewed on condition that the insured was in good health, it was held that the phrase was not to be construed as meaning an absolute exemption from any physical ill; and as the policy had issued on an application showing the then state of health of the insured, it was further held that the condition was satisfied by the insured being in a state of health relatively like that represented in the original application. *Peacock vs. N. Y. Life Insurance Co.*, 20 N. Y., 293; *Cushman vs. U. S. Life Insurance Co.*, 70 N. Y., 77. Whether this view be approved or not, I am of the opinion that in the absence of proof that the cold referred to produced disease or sickness, the courts below rightly held that the falsity of the statement in question was not shown, nor do I think that the fact that the insured had been prescribed for by a physician necessarily required the inference that the cold produced either disease or sickness."

It is well settled that if the assured warrants that he is in a certain condition of health and subsequently warrants that he is in the same condition of health as at the time of the first warranty, and the facts disclose that between the first and second warranty the assured consulted a physician for a very unimportant and minor ailment the insurance policy is not by reason thereof forfeited.

The case of the *Metropolitan Life Insurance Company vs. McTague* (Supra) is a strong authority for the plaintiff's contention. There was positive representation, at the time the renewal voucher or revival voucher was issued that the assured had not

been sick or afflicted with any disease since the policy was issued. The proof, however, showed that the assured was ill with a cold. A technical and literal construction would immediately lead to the conclusion that the condition in the renewal application was violated. The court, however, did not place so narrow a construction upon the contract. It followed the well-established doctrine in this State that the courts are strongly averse to forfeitures of contracts of insurance and that a liberal and broad construction should be placed upon insurance contracts. It has long been the established law of this State that contracts of insurance should be construed liberally by the courts and most strongly against the insurer.

In the case of *Snyder vs. the Insurance Company*, 59 N. J. Law—page 544, Judge Depue said:

“It is a settled rule in the construction of contracts of insurance that policies of insurance will be liberally construed to uphold the contract, and conditions contained in them which create forfeitures will be construed most strongly against the insurer and will never be extended beyond the strict words of the policy.”

In *Stone’s Administrator against the U. S. Casualty Company*, 5 Vr. 371-375, Chief Justice Beasley said:

“A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted unless the terms of the endorsement will bear no other rational interpretation. If the terms used are imperfect, it is the fault of the defendants. It is their contract and the construction of it must be most strongly against them.”

In the case of *Graham et als. vs. The Security*

Mutual Life Insurance Company, 72 N. J. Law, 298, the court held that forfeitures are not favored in the law and courts are always prompt to seize hold of any circumstances to indicate an election to waive a forfeiture or an agreement to do so, on which the party has relief and acted.

In this case Judge Vroom said:

“It has long been a settled rule of law that the provisions of a contract that are to work a forfeiture are to be strictly construed. Forfeitures are never favored in the law and attention was called by counsel for defendants in error to the fact that the aversion of courts to the enforcing of forfeitures is emphasized in contracts for insurance for reasons usually existing peculiar to those contracts.”

It would, therefore, appear in accordance with the facts in the case and the legal principles herein set forth, that no conditions mentioned in the warranty were violated.

#### POINT II.

A LIBERAL CONSTRUCTION OF THE CLAUSE HEREINAFTER SET FORTH SHOULD PREVAIL AND THE DOCTRINE LAID DOWN IN THE CASE OF YOUNG vs. THE INSURANCE CO. SHOULD BE ADOPTED AS THE LAW OF THIS STATE.

The second legal question presented in this case is as to the construction of the following clause in the policy. (See State of Case—page 112, line 3.)

“And if immediately following such period of total disability and confinement in the house, he shall be totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation, but is not necessarily confined in the house, three-fourths of said amount per week will be paid to the assured, but no payment will

be made for disability in excess of fifty-two consecutive weeks' duration."

It is the contention of the plaintiff that unless he was able to do all the substantial acts necessary to be done in the prosecution of his business, he was totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation.

If the prosecution of his business required him to do several acts and perform several kinds of labor and he was unable to do and perform one only, he was as effectually disabled from performing his business as if he could do nothing required to be done. If in the prosecution of a business several necessary things are to be performed to accomplish the work engaged in and one is disabled from performing one or more of the necessary things, such disability would render him totally disabled from prosecuting such business. A construction of this kind upon such clauses in policies has been placed by the majority of the courts in this country.

In a leading case in this country, *Young vs. Travelers' Insurance Company*, reported in 80 Maine, page 244, the plaintiff was a billiard-saloon keeper. The clause in the policy read that if he was wholly disabled and prevented from the prosecution of any and every kind of business pertaining to the occupation in which he is insured, then on satisfactory proof of such injuries, he shall be paid \$25.00 per week for such a period of continual total disability. The contention between the parties was whether it was incumbent upon the plaintiff to prove that the injuries he sustained by the accident wholly disabled him from the doing of any and every kind of act necessary to be done in the prosecution of his business; or was it sufficient for him to prove that the injury he received from the accident prevented him

from performing any one material act necessary to be done in the prosecution of his business. The court held that he was totally disabled and wholly and continuously prevented from performing any and every kind of business pertaining to his occupation if he was prevented from doing any one substantial and material act necessary to be done in the prosecution of his business. In the case of *Young vs. Travelers' Insurance Co.* (Supra) the court said as follows:

“A contract of insurance is to receive a reasonable construction, so as to effectuate the purpose for which it was made. In cases of doubt it is to be liberally construed in favor of the insured, that in all proper cases he may receive the indemnity contracted for. At the same time legal effect should be given to all the language used, for the purpose of guarding the company against fraud and imposture. The object to be accomplished by this contract was indemnity to the plaintiff for loss of time from being wholly disabled from prosecuting his business by an injury received as specified in the policy. **He was not able to prosecute his business unless he was able to do all the substantial acts necessary to be done in its prosecution. If the prosecution of the business required him to do several acts and perform several kinds of labor and he was able to do and perform one only, he was effectually disabled from performing his business as if he could do nothing required to be done.**

\* \* \* \* ”

In the case of *Turner vs. Fidelity Casualty Company of New York*, 70 N. W., 898, the plaintiff was a money lender on bond and mortgage and kept books. He dislocated his right shoulder, and he testified that for ten weeks he did no business at all,

but had a man do it for him. Nevertheless he went down to his office every day for a short time, but did no business. The policy contained a clause which stated that if the assured was totally disabled and wholly prevented from prosecuting any and every kind of business pertaining to his occupation, he was entitled to recover certain indemnity, in accordance with the terms of the policy. The company refused to pay any insurance for disability and an action was brought. The court held that the plaintiff was totally disabled from attending and prosecuting any and every kind of business pertaining to his occupation, in spite of the fact that the plaintiff came down to his office every day. In the opinion the court said:

“I think that a fair interpretation of that clause is not that he must be so disabled as to prevent him from doing anything pertaining to the business, but that he must be wholly disabled so as to prevent him from doing any and every kind of business pertaining to his occupation; not that he might do some one thing with regard to it, but that he must be wholly disabled so as to prevent him from doing any and every kind of business pertaining to that occupation.”

In reaching this conclusion the court illustrated the theory applicable to the construction of this clause by reciting a hypothetical case, as follows:

A barber who was able to shave and cut hair with his right hand suffered a serious injury to that hand. Nevertheless he came down to his barber shop every day and he was able to lather the face, take and receive change and do several things of this kind with his left hand. The court held that in such a case the barber was totally disabled, within the accepted meaning of such a clause in a policy, from prose-

cuting any and every kind of business pertaining to his occupation. Because his right hand was disabled, with which he was able to carry on his business in the occupation of a barber, he ought to recover.

It is not to be doubted that if in the prosecution of a business several things are to be performed to accomplish the work engaged in and one is disabled from performing one or more of the necessary things, such disability would render him totally disabled from prosecuting such business. A distinction, however, is made between the prosecution of a business such as the barber or the money lender or the billiard-saloon keeper and one where the business is composed of several minor and unimportant branches and the prosecution of one is prevented by an injury to the assured, yet he is able to carry on the other branches of the business and the business as a whole is maintained. As an example of this second class, we may take the occupation of a retail merchant, embracing various departments or kinds of labor, such as keeping the books, making out accounts and selling to customers, waiting on customers, doing up their purchases in packages and handling and arranging goods in the store. If the injury disabled the insured merchant from transacting one or more of these branches of business, but left him able to transact the others, he would not be totally disabled within the meaning of the policy. The injury would not be regarded as a total disability, leaving the assured incapable of performing any and every kind of business pertaining to his occupation. In a case of this kind *Lobdell vs. Laboring Men's Mutual Aid Association of Chatfield, Minn.*, 71 N. W., 696, the court said:

"Inability to perform some kind of business pertaining to the occupation, would not consti-

tute total disability within the meaning of the policy.”

But a business as that of the retail merchant must be distinguished from the occupation and the business conducted by the barber, the saloon-keeper or the plaintiff, Rudolph Gross. In the case of the retail merchant, if he is so disabled as not to be able to do up the purchases in packages or arrange his goods in the store, this alone necessarily would not prevent him from conducting and prosecuting the business of retail merchant. He might be able to keep his accounts, sell to customers, wait on customers, etc. In a word, the business of the retail merchant would not be entirely suspended. He still could carry on such business, although he may not be able on account of his disability to carry on one minor element of it. But in our case the plaintiff's occupation was that of traveling and office duties in conjunction with his travels. On account of his disability he was wholly and continuously prevented from conducting his business and occupation of traveling. By occasionally going down to his office in an automobile and dictating a few letters he was not carrying on his business of traveling. A business of this kind, therefore, does not fall within the category of the retail merchant.

The cases cited by the defendant in his brief in support of the contention that one must be totally disabled from doing the slightest act pertaining to his business in order to recover under the policy fall within the class of cases similar to that of the retail merchant.

The case of the U. S. Mutual Acc. Ass'n. vs. Milliard, 43 Ill., App. 148, cited in the brief was a case where the assured, an attorney, received a severe injury to his hand; nevertheless he came down to his office and performed the usual duties that he

was accustomed to perform in the practice of his profession, although he was considerably inconvenienced by the injury to his hand. It is readily seen that an injury to the attorney's hand would not prevent him from carrying on or from doing every kind of business pertaining to his profession. Perhaps he could not write or make memoranda; nevertheless he could practice law. It is the same kind of a case as the retail merchant whose hand became disabled and he was unable to do up packages, yet he was capable of carrying on the business of the retail merchant. The case cited by the defendant is wholly within this case and is not an authority for his contention.

A similar case is cited by the defendant in *Knapp vs. Preferred Acc. Ass'n.*, 53 N. Y. (Hun.), where a retired gentleman suffered an injury to his hand. Without any doubt an injury to the retired gentleman's hand did not prevent him from doing any and every kind of business pertaining to his occupation as a retired gentleman. He still could make his investments, collect, disburse or reinvest his income, attend meetings of his Boards of Directors, superintendent repairs and improvements. He could carry on every and any kind of business pertaining to the situation in life which he ascribed to himself.

The case of *Saveland vs. The Fidelity and Casualty Co. of New York*, 67 Wis., 174, also cited by defendant, is a case where a merchant grocer received an injury which did not prevent him from superintending his business and carrying on his occupation as a merchant grocer, even though he was inconvenienced by his injury. This, too, was a case like the retail merchant and is no authority for the defendant's contention.

The case of *McKinley vs. Bankers' Acc. Insurance Co.*, 56 Iowa, 81, cited in defendant's brief, is also a

case that falls within the category of the retail merchant. Here was a merchant that received an injury yet he attended to his store and attended to his duties. He, perhaps, could not attend to every minor duty that he was accustomed to take care of before the injury, yet he was fully able to carry on the business of a merchant.

The case of *Spicer vs. Commercial Mutual Accident Co.*, 4 Pa. Dist., 271, also cited in the defendant's brief, was a case where the defendant to some extent attended to every kind of work connected with his business. This, too, is different than our case.

The same is true of the case of *Bylow vs. Union Casualty and Surety Co.*, 72 Vt., 325, also cited in the defendant's brief, where it appeared that one of the defendant's duties was overseeing, and yet after receiving his injury he continued in the same employment, superintending the kind of work he had previously been engaged in, working nine-tenths of full time and receiving 90 per cent. of full pay.

All the cases cited by the defendant are entirely different and can be very readily differentiated from such cases as the case at bar or the billiard-saloon keeper or the barber or the money lender. In each one of these cases the assured was not able to carry on his occupation or his business. The barber, whose business was to shave and cut hair, was unable to carry on his occupation by reason of his disability. Mr. Gross, the plaintiff, the greater part of whose duties was traveling and selling, was unable to carry on his business or occupation, as he was unable to travel and move about. He was wholly and continuously disabled from performing any and every kind of business pertaining to his occupation. The situa-

tion is entirely different from that of the attorney, who disabled his hand yet was able to practice law, or from the retired gentleman who disabled his hand and yet was able to continue the business of a retired gentleman, or from the merchant who suffered an injury yet he was able to carry on the business of a merchant.

In the case of *Gomes vs. U. S. Casualty Co.*, 88 S. W., 125, there was a provision in an accident policy that insured against total disability to perform any part of the duties of the assured, and it was held that such a policy cannot be construed literally, but means inability to perform substantially part of the business.

In *Lobdell vs. Laboring Men's Mutual Aid Association of Chatfield, Minn.*, 71 N. W., 696, it was held that the fact that an injury to an assured is not such as to prevent him from occasionally performing some slight act in connection with his business, does not prove that he is not totally disabled within the meaning of the policy.

A summary of the cases indicates that the weight of authority clearly upholds the view maintained by the trial judge in his charge to the jury, namely, that a broad and liberal construction should be placed upon the policy and that the language of the clause under consideration means that the plaintiff was so disabled as to be unable to attend to any and every business pertaining to his occupation as office man and traveling man; that he was wholly disabled from prosecuting all and every kind of business pertaining to such occupation and entitled to the stipulated compensation. It is, therefore, submitted that the verdict of the jury was in accordance with the facts and the law and the judgment of the Essex

County Circuit Court, and should be affirmed.

Respectfully submitted,

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with Plaintiff-Respondent.

March Term, 1917.

