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NEW JERSEY SUPREME COURT.

Action at Law.

Filed, January 22, 1932.

JENNIE MARCUS, wife of Hyman Marcus, and HYMAN MARCUS, individually,

Plaintiffs-Respondents,

vs.

ST. PAUL MERCURY INDEMNITY COMPANY, St. Paul, Minnesota, a body corporate,

Defendant-Appellant.

Notice of Appeal and Grounds.

To Siegendorf & Schwartz, Esqs., Attorneys for Plaintiffs-Respondents:

Sirs:

TAKE NOTICE, that the St. Paul Mercury Indemnity Company, defendant-appellant, appeals to the Court of Errors and Appeals, the Court of last resort in all cases in New Jersey, from the whole of the judgment entered in the above stated cause during the October Term, 1931, on the ground that the Supreme Court erred in giving judgment for the plaintiffs-respondents instead of the defendant-appellant.

Dated, January 14, 1932.

GREEN & GREEN,
Attorneys for Defendant-Appellant.

Backer:

Service of copy acknowledged this 15th day of January, 1932.

SIEGENDORF & SCHWARTZ,
Attorneys for Plaintiffs-Respondents.

CLIFTON DISTRICT COURT.

JENNIE MARCUS, wife of Hyman Marcus, and HYMAN MARCUS, individually,
Plaintiffs,

vs.

ST. PAUL MERCURY INDEMNITY COMPANY, ST. PAUL MINNESOTA, a body corporate,
Defendant.

Notice of Appeal, Filed Aug. 10, 1931.

To Siegendorf & Schwartz, Esqs., Attorneys for Plaintiffs:

PLEASE TAKE NOTICE, that the defendant, St. Paul Mercury Indemnity Company, St. Paul, Minnesota, a body corporation, hereby appeals to the New Jersey Supreme Court, from the judgment rendered by the District Court of the City of Clifton, in the above entitled action, on the 21st day of July, 1931.

Dated, July 27th, 1931.

GREEN & GREEN,
Attorneys for Defendant.

Backer:

Service of within and copy acknowledged this 28th day of July, 1931.

SIEGENDORF & SCHWARTZ,
Attorneys for Plaintiffs.

Specifications, Filed Sept. 11, 1931.

The following is a specification of the determinations or directions with respect to which appellant is dissatisfied in point of law:

1. The Court erred in admitting in evidence letter dated March 23rd, 1931, purporting to have been addressed to Messrs. Siegendorf & Schwartz by the Salvage Adjustment Corporation, without proof of the signature of Thomas Gallagher and proof of the authority of Thomas F. Gallagher and the Salvage Adjustment Corporation to act for the defendant.

2. The Court erred in admitting into evidence the conversation between the witness, Ephriam Schwartz and Thomas Gallagher without proof of the authority of Gallagher to act for the defendant.

3. The Court erred in admitting in evidence letter dated March 28th, 1931, purporting to have been written to Messrs. Siegendorf & Schwartz by the Salvage Adjustment Corporation without proof of Thomas Gallagher or his authority to act for the defendant.

4. The Court erred in admitting in evidence the conversation between the witness, Ephriam Schwartz and Lloyd Koch without proof of the authority of Koch to act for the defendant.

5. The Court erred in denying defendant's motion to non-suit on the ground that there was no proof of any consideration between the plaintiff and defendant.

Specifications.

6. The Court erred in denying defendant's motion to non-suit on the ground that there was no proof of any transaction with any person who was authorized to act for the defendant.

7. The Court erred in denying defendant's motion to direct a verdict in favor of the defendant, on the ground that there was no proof of any consideration between the plaintiff and the defendant.

8. The Court erred in denying defendant's motion to direct a verdict in favor of the defendant, on the ground that there was no proof of any transaction with any person who was authorized to act for the defenadnt.

Dated, September 10th, 1931.

GREEN & GREEN,
Attorneys for Defendant-Appellant.

Summons, Filed June 8, 1931.

City of Clifton
County of Passaic,

To Wit: The State of New Jersey. To Sergeant-at-Arms of the District Court or any Constable of said County:

SUMMON (L. S.) St. Paul Mercury Indemnity, St. Paul Minnesota, a body corporate.

To appear before the District Court of the City of Clifton, to be held at the District Court Room, Midtown Building, 296-300 Clifton Avenue, in the said City, on the 22nd day of June, A. D., 1931, at 9:30 o'clock in the forenoon, to answer unto Jennie Marcus, wife of Hymen Marcus, and Hymen Marcus, individually in an action on Contract Demand Two hundred and seventy-five ($275.00) Dollars. Hereof fail not.

WITNESS: Joseph A. Furrey, Esquire, Judge of said Court of Clifton aforesaid, the 8th day of June, in the year of our Lord, One Thousand Nine Hundred and thirty-one.

J. M. McALLISTER,
Clerk.

State of Demand, Filed June 8, 1931.

Plaintiffs complaining of the defendant say that:

1. On or about the 12th day of May, 1931, and for a long time prior thereto, the defendant, St. Paul Mercury Indemnity Company, St. Paul, Minnesota, was a foreign corporation lawfully authorized to transact business in the State of New Jersey.

2. During the course of said business, said company issued, for a valuable consideration a contract of insurance to Lay Fish Market Co., Inc., indemnifying and covering the said corporation for liability in the maintainance of certain premises known and described as 24 Peck Slip in the City of New York, and State of New York.

3. Said contract of insurance protected Lay Fish Market Co., Inc., from liability for injuries sustained by any person, and said policy among other things provided that: the assured was to surrender the sole and complete control and management of its defenses, in the event that an action was instituted against it.

4. On or about the 21st day of January, 1931, the plaintiff, Jennie Marcus was injured as the result of an accident on the premises afore described.

5. On or about the 17th day of March, 1931, said plaintiffs, Jennie Marcus and Hyman Marcus, through their attorneys, notified the Lay Fish Market Co., Inc., that an action would be insti-

tuted to recover damages as a result of the injuries sustained, and said notification was acknowledged by the Salvage Adjustment Corp., duly authorized agents and servants of the said corporation for and in behalf of said Lay Fish Market Co., Inc., pursuant to the terms of the said contract aforementioned.

6. On the said date, May 12th, 1931, the defendant corporation did by its duly authorized agent and servant, the Salvage Adjustment Corp., enter into a contract of settlement with plaintiffs, through their attorneys, in the sum of Two hundred and seventy-five ($275.00) dollars, for which plaintiffs agreed to execute a release of the aforementioned cause of action.

7. Subsequently thereto, said plaintiffs did execute the necessary papers aforementioned, and did deliver same to the defendant herein, but said defendant has wilfully and unlawfully refused to honor said contract of settlement and has returned and refused to accept said papers and make said payment as stipulated, although plaintiffs are, were, and always have been ready and willing to perform their part of the contract.

WHEREFORE, plaintiff has sustained damages in the sum of Two hundred and seventy-five ($275.00) dollars.

JUDGMENT will therefore be claimed in the sum of Two hundred and seventy-five ($275.00) Dollars, together with interest and costs of this suit.

SIEGENDORF & SCHWARTZ,
Attorneys for Plaintiffs.

Testimony.

CLIFTON DISTRICT COURT.

JENNIE MARCUS, wife of Hymen Marcus, and HYMEN MARCUS, individually,
Plaintiffs,

vs.

ST. PAUL MERCURY INDEMNITY COMPANY, ST. PAUL, MINNESOTA, a body corporate,
Defendant.

Clifton, New Jersey,
June 30, 1931.

Before—HON. PETER N. PERRETTI, *Judge.*

APPEARANCES:

SIEGENDORF & SCHWARTZ, Esqs., Attorneys for Plaintiffs, by Nathan Siegendorf, Esq., of counsel.

GREEN & GREEN, Esqs., Attornys for Defendant, by Harold Farkas, Esq., of counsel.

EPHRAIM F. SCHWARTZ, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Siegendorf:

Q. Mr. Schwartz, you are a practicing attorney of the State of New Jersey? A. I am.

Q. And you have been for how many years? A. Approximately four years, going on four years now.

Q. Connected with what firm? A. Siegendorf & Schwartz.

Q. In that regard, Mr. Schwartz, were you ever retained by a Mrs. Jennie Marcus and Hymen Marcus to represent them in a cause of action? A. I was.

Q. What kind of an action was that? A. An action to recover damages for personal injuries which she had sustained while on the premises of the Lay Fish Market at 24 Peck Slip, New York City.

Q. Subsequent to your retainer, Mr. Schwartz, state what were your negotiations in the matter? A. I addressed a letter to the Lay Fish Company advising them of our retainer and informing them that unless we heard from them with reference to an amicable adjustment of the matter within the space of time which we specified in our letter, we would be compelled to follow our client's instructions to sue the Lay Fish Company for the damages she sustained by her injuries.

Q. Is this a copy of the letter, Mr. Schwartz (indicating)? A. Yes.

Mr. Siegendorf: I offer this letter in evidence.

(The paper referred to was marked Exhibit P-1.)

Q. Subsequent to the sending off of this letter, Mr. Schwartz, did you receive a reply? A. I did receive a reply from the St. Paul Mercury Indemnity Company asking me to communicate with them.

Mr. Farkas: I object to testimony if the letter is here.

Mr. Siegendorf: I will introduce the letter, if your Honor please.

The Witness: That is the letter I received from the St. Paul Mercury Indemnity Company (indicating).

Mr. Siegendorf: Of course, if your Honor please, this notation here (indicating) has nothing to do with the letter. This was put on through some error in the back.

The Court: For the purpose of the record, what are the words?

Mr. Siegendorf: For the purpose of the record, the words "$500 submitted" on the face of the letter, and the markings on the back of the letter have no materiality.

The Court: And they are no part of the exhibit.

Mr. Farkas: If the Court please, I would like to make an objection to the introduction of this letter unless there be some proof of the signature on the letter and the authority of the person who wrote the letter, and his connection with the St. Paul Mercury Indemnity Company.

Mr. Siegendorf: If your Honor please, in answer to that objection, may I say that the letter is prima facie evidence of the series of negotiations going on between the defendant corporation and our office and that the entire series of letters is admissible.

The Court: I will allow it and grant you an exception.

Mr. Siegendorf: I will read the letter

before it is marked. This letter reads as follows:

"St. Paul Mercury Indemnity Company
of St. Paul, Minnesota."

Then on the left hand side in small type

"Salvage Adjustment Corporation, adjusters, 80 Maiden Lane, New York."

"Messrs. Siegendorf & Schwartz,
688 Main Street,
Passaic, New Jersey."

This letter is dated March 23, 1931, "re Assured, Lay Fish Co., Inc."

"Date of accident 1/21/31.
File No. LIA-SM 519.

Dear Sir:

Lay Fish Co. have turned over to us for attention your letter dated March 17, 1931, concerning the above-entitled matter. If you will get in touch with the writer at John 5105 the case will be discussed with you.

Yours very truly,

SALVAGE ADJUSTMENT CORPORATION,
T. F. GALLAGHER,
Casualty Department.
THOMAS F. GALLAGHER."

I offer the letter in evidence.

(The paper referred to was marked Exhibit P-2.)

By Mr. Siegendorf:

Q. Mr. Schwartz, subsequent to that letter did you receive, or did you have any communication with the office of the Salvage Adjustment Company? A. I did. I spoke on the telephone.

Mr. Farkas: I object to that answer as not being responsive.

Q. Just answer yes or no. A. I did.

Q. With whom was it that you spoke? A. Mr. Thomas F. Gallagher.

Q. Did you subsequently meet Mr. Gallagher? A. I did.

Q. Were you able to connect up that voice with the voice that you spoke with on the telephone? A. Yes, they were the same voices.

Q. You met him personally where? A. At the office of the Salvage Adjustment Corporation, at 116 John Street, New York City.

Q. Now, Mr. Schwartz, what was the nature of your conversation on the telephone?

Mr. Farkas: I object to that, if your Honor please, unless it first be established who Mr. Gallagher is, what his connection with either one or the other corporations is, and the nature and extent of his authority.

Mr. Siegendorf: I withdraw the question.

Q. Who is Mr. Gallagher? A. Mr. Gallagher is the agent of the Salvage Adjustment Corporation.

Mr. Farkas: I object to that answer and ask that it be stricken out.

Mr. Siegendorf: May I say at this time, your Honor, in view of the fact that this letter has already been introduced in evidence, it is now a matter of record that Thomas F. Gallagher whose name appears on that letter is a member of the Casualty Department of the Salvage Adjustment Corporation?

Mr. Farkas: The mere statement by witnesses on the stand that this man is the agent of the corporation, or the mere fact that he happened to sign a letter which appears to be on its letterhead, which has printed on the top "Salvage Adjustment Corporation" is no proof in law or in any other manner that this person is a representative of the corporation or is authorized to negotiate settlements, or authorized to do anything with respect to the corporation.

The Court: I will allow it and allow you an exception.

Mr. Farkas: I would like to press it, your Honor, because my entire case hangs to a large degree on it, and I am going to cite the cases to your Honor. (Citing cases.)

(Discussion off the record.)

The Court: I will allow it and allow you an exception.

Q. Now, Mr. Schwartz, the nature of that conversation that you say you had with Mr. Gallagher was what?

Mr. Farkas: I object to that if the Court please, upon the same grounds. There

is no proof establishing the connection of Mr. Gallagher with this defendant, no proof of his authority nor any proof that anything he may have done was binding.

Mr. Siegendorf: This letter has already been introduced into evidence.

The Court: Of course, I appreciate that the burden is on the plaintiff to establish the relationship and also the authority of this individual to effect a settlement. If he can establish that, he has sustained the burden. I will allow that and grant an exception.

Q. Will you, Mr. Schwartz, tell us what the nature of that conversation was after you received that letter dated March 23rd? A. I spoke to Mr. Gallagher on the telephone, and pursuant to his request in the letter addressed to me, and he asked me what figures I had in mind in settlement of this case, and I told him that we could not discuss settlement, that I would prefer not to discuss settlement in this case until he had had a physical examination of our client, and he said he thought it might be necessary to have a physical examination. He said that if we would send the copy to him of the medical report from our physician, that he would examine the report and let me know.

Mr. Farkas: May I note an exception to all this conversation?

The Court: Yes, I will grant you an exception.

Q. Subsequent to that conversation, did you or did you not forward the Salvage Adjustment

Corporation, or rather the St. Paul Mercury Indemnity Company, through its agent, the Salvage Adjustment Corporation——

Mr. Farkas: I object to the form of the question. The use of the word "agents" is unjustified and a conclusion on the part of counsel.

Mr. Siegendorf: I believe your Honor has already advised counsel that he has an objection to that line of questioning.

Mr. Farkas: As I understand it, your Honor has not yet passed upon the question whether the Salvage Adjustment Corporation or anyone else was the agent of this defendant. I understand that your Honor has received it for further proof.

The Court: The proof of the power of this man to negotiate settlements. The fact that he is agent is not sufficient in my mind to settle the case. He might be any kind of an agent of an insurance company. The burden is on the plaintiff.

Mr. Farkas: There has been nothing in the case so far making this man an agent of any kind. The stationery says nothing about his being an agent.

Mr. Siegendorf: That is a matter for your Honor to decide.

The Court: I will overrule the objection and grant you an exception to my ruling.

Q. As part of that telephone request, Mr. Schwartz, did you forward that statement? A. I did. I sent the copy of the statement to the St. Paul at its office with the Salvage Adjustment Corporation.

Q. Is this a copy of that medical statement, Mr. Schwartz? A. This is the original, and a copy was sent to the Salvage Adjustment Corporation on March 26, 1931.

Mr. Farkas: I object to the offer of it in evidence on the ground that it is immaterial, incompetent and has no relation to the facts in the case.

The Court: I sustain the objection.

Q. Pursuant to that arrangement, Mr. Schwartz, did you get a further reply from the St. Paul Mercury Indemnity Company? A. I did. I received another letter from them asking me to get in touch with the St. Paul Mercury Indemnity Company at its office with the Salvage Adjustment Corporation.

Mr. Farkas: I object to that as not responsive and ask that it be stricken out.

The Court: If the letter is going in evidence, then I will strike it out.

Q. Is this the letter, Mr. Schwartz (indicating)? A. This is the letter, with the exception of the notation in my handwriting of the telephone number of the company on the face of the letter.

Mr. Farkas: I make the same objection to this letter on the ground that there is no proof as to who Thomas F. Gallagher is.

The Court: I will allow it and grant you an exception.

Mr. Siegendorf: I offer the letter.

(The paper referred to was marked Exhibit P-3.)

Q. Did you follow the instructions in that letter and communicate with Mr. Gallagher of the Salvage Adjustment Corporation? A. I did.

Q. And what was the result of that communication?

Mr. Farkas: I object to that as calling for a conclusion. I don't know what the answer is going to be.

Mr. Siegendorf: If your Honor please, that is in the nature of conversation and I say that it is admissible.

Q. What was the nature of the conversation? A. I spoke to Mr. Gallagher and Mr. Gallagher requested the physical examination.

Mr. Farkas: I would like to note my exception again to the conversation with Mr. Gallagher.

The Court: Yes.

Mr. Farkas: All the conversations.

The Court: Yes, I will allow you an exception.

A. (Continuing) I called the office of the Salvage Adjustment Corporation at the telephone number which was given to me on the stationery of the St. Paul Mercury Indemnity Corporation of St. Paul, and Mr. Gallagher requested a physical examination of our client, Mrs. Marcus without any court order.

Q. And as a result of this did you arrange for this examination? A. I did.

Q. And do you recall who the doctor was? A. Dr. Levy, of Passaic, examined Mrs. Marcus.

Q. Subsequent to that time did you have any further communication with Mr. Gallagher? A. I did.

Q. As a result of the conversations, what happened? A. A conference was arranged after a conversation with Mr. Gallagher in the New York office of the St. Paul Mercury Indemnity Company at the Salvage Adjustment Corporation address, Mr. Gallagher requesting me to come to New York City to discuss settlement of this case.

Q. And did you go to New York to settle this case? A. I did.

Q. And did you meet Mr. Gallagher? A. I did.

Q. Will you tell us the nature of your transaction with Mr. Gallagher while up in the office of the St. Paul Mercury Indemnity Company at the offices of the Salvage Adjustment Corporation in New York City?

Mr. Farkas: I object.

A. I came to the offices of the Salvage Adjustment Corporation at the address given by the Salvage Adjustment Corporation and spoke to Mr. Gallagher, and first I asked for the man and I spoke to him, and we discussed settlement of the case, and he said—he showed me the statements of his witnesses, and he said that in his opinion from these statements there was no liability, and that he would not make us any offer. Subsequently in discussing the case he said, "Mr. Koch is here. Let us take it up with him."

Q. Who is Mr. Koch? A. Mr. Koch was introduced to me by Mr. Gallagher as the head

man in charge of the office. I spoke to Mr. Koch. We discussed the case and then he asked me what figure I had in mind to settle this case, and I told him.

Mr. Farkas: May I have the same objection throughout to any testimony as to conversations with Mr. Koch on the ground that there is no evidence to connect Mr. Koch with the defendant in this case in any manner to show his authority or his right to make settlement?

The Court: Yes, the exception will be noted.

A. (Continuing) And I saw Mr. Koch in the office of the Salvage Adjustment Corporation and he told me that when we could get together on a figure the case would be settled. I finally offered to settle the case for $300. He said, "Shave this off a little bit and the case is settled." I did. I offered to settle the case for $275. He said, "Settle it." He said, "Send me a release."

Q. Subsequent to that time did you send him the release? A. I did.

Q. Is this that release (indicating) acknowledged by yourself and signed and executed by the parties? A. This is the release that we forwarded to the company with the signatures torn off so we could not arouse any suspicion in our client's mind.

Mr. Farkas: I object to the offer of the release on the ground that it is self-serving, not binding on the defendant in any manner.

Mr. Siegendorf: I offer the release in

this particular case to show the state of the affairs going on throughout the entire time.

The Court: I will allow it and give you an exception.

(The paper referred to was marked Exhibit P-4.)

Q. Did you in turn, Mr. Schwartz, receive a draft for the same? A. I never did.

Q. What was the final outcome? A. I never received any money in settlement of the case. They returned the release, which they had requested, in their envelope to me.

Q. Did they at any time give you any reason for their refusal to pay this claim? A. No.

Mr. Farkas: I object to that and ask that it be stricken out. I do not see how that is material.

The Court: Strike it out. The fact of the matter is you did not get it. What difference does it make what the reason was?

Q. Did either Mr. Gallagher or Mr. Koch at any time while you were at their offices or at any time during the course of your conversations or communications with them tell you or advise you that any settlement that they made with you would first have to be taken up with the home office of the St. Paul Mercury Indemnity Company?

Mr. Farkas: I object to that on the ground that it is leading.

Mr. Siegendorf: I will reframe the question.

Q. Were you informed or advised by Mr. Gallagher or Mr. Koch that it was necessary for them to first confirm this offer of settlement made with you? A. No.

Mr. Farkas: I object to that, if your Honor please, on the same ground, on the ground that it is leading, and on the ground that it is incompetent.

The Court: The objection is based on the ground that it is a leading question. Undoubtedly it is. Cannot you frame the question so that it will not be leading?

Q. Did Mr. Koch or Mr. Gallagher advise you that they would have to take this matter up with anyone else before the matter would be settled? A. No.

Mr. Farkas: That is the same question. I ask that the answer be stricken out.

Q. Did Mr. Koch ever say anything to you——

Mr. Farkas: I object to that.

Mr. Siegendorf: Just a minute. Let me finish my question.

Q. Did Mr. Koch ever say anything to you, or did Mr. Gallagher ever say anything to you with respect to communicating with anyone else before a final settlement of this case? A. No.

Mr. Farkas: I object to that and I ask that the answer be stricken out on the

ground that the question is leading, and on the ground that the settlement of an alleged claim made out of court as to its alleged agency is not binding upon the defendant.

The Court: I will allow the question if it is not leading.

(Discussion off the record.)

The Court: I still maintain it is a leading question.

Q. When you arrived at the figure of $275, Mr. Schwartz, together with Mr. Koch, was it understood that this was a final settlement?

Mr. Farkas: I object to that on the ground that this question is even more leading than the first question, and on the second ground that any declaration made— I withdraw the second one.

Mr. Siegendorf: It is not a declaration made on Mr. Koch's part.

Mr. Farkas: I am withdrawing the second part of my objection.

Mr. Siegendorf: Then the objection is sustained?

The Court: Yes. You have to put the question so it does not suggest the answer.

Mr. Siegendorf: In order to frame my question——

The Court: He is an intelligent witness, and I am sure he knows what you want.

Q. Subsequent to the time that you made this final arrangement, Mr. Schwartz, together with Mr. Koch——

The Court: What was said, if anything.

Q. (Continuing.) What was said, if anything? A. He asked me to send the release to him and——

Mr. Farkas: I just want to note my objection.

The Court: I will allow it and give you an exception.

A. (Continuing.) He didn't say anything with reference to taking this matter up for approval with the home office.

Mr. Farkas: I ask that the last part of the answer be stricken out as not responsive.

The Court: Only the person propounding the question can object to it as being irresponsive.

Mr. Siegendorf: The answer stands?

Mr. Farkas: I never understood that.

The Court: It is only you who can object to the answer when it is not responsive to your question.

Mr. Farkas: No cross examination.

I would like at this time to make a motion for a non-suit.

The Court: I don't know whether they have rested. Have you rested?

Mr. Siegendorf: Yes.

Mr. Farkas: (Continuing.) Upon the following grounds:

First, this is an alleged contract between the plaintiff here, Jennie Marcus, and the St. Paul Mercury Indemnity Company. There is no evidence whatsoever to connect the St. Paul Mercury Indemnity

Company with this transaction. There is no evidence of a consideration moving from Jennie Marcus to the St. Paul Mercury Indemnity Company, which is the foundation of the contract.

Secondly, my motion is upon the ground that there is no proof of any contract with the St. Paul Mercury Indemnity Company. There is no proof of any transaction with any person connected with the St. Paul Mercury Indemnity Company, and there is no proof of any authority on the part of any person who has been mentioned in the negotiations here to transact business for the St. Paul Mercury Indemnity Company in any way, and certainly no authority on the part of any person who has been mentioned here to settle this matter.

With relation to the first point, I merely want to make this additional remark: The St. Paul Mercury Indemnity Company is allegedly or impliedly, or whatever you might say, in this case by virtue of some connection with the Lay Fish Company. There is absolutely no proof before your Honor to show what that connection is or to show what particular purpose the St. Paul Mercury Indemnity Company would have in negotiating with this plaintiff or this plaintiff's attorney.

I press very strongly my first point, that there is no privity of contract whatsoever.

(Argument on motion.)

The Court: I will deny the motion and grant you an exception.

DEFENDANT'S CASE.

HARRY HYMAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Farkas:

Q. Mr. Hyman, are you an agent of the St. Paul Mercury Indemnity Company? A. No, sir.

Q. What is your connection with the St. Paul Mercury Indemnity Company? A. None.

The Court: Who is this gentleman?

Mr. Farkas: Mr. Harry Hyman.

Mr. Siegendorf: He has no connection whatever with the St. Paul Mercury Indemnity Company, is that the question?

Mr. Farkas: The question was, "What is your connection with the St. Paul Mercury Indemnity Company?"

The Witness: As I understood the question, I thought it meant a direct connection. There is an indirect connection.

Q. What is your connection with the St. Paul Mercury Indemnity Company? A. I am the president of the Salvage Adjustment Corporation. The Salvage Adjustment Corporation has some relations with the St. Paul Mercury Indemnity Company.

Q. Have you any connection with loss adjustments on behalf of the St. Paul Mercury Indemnity Company? A. Yes, sir. I have.

Q. What is your connection with loss adjustments on behalf of the St. Paul Mercury Indemnity Company?

Mr. Sigendorf: Before this witness continues any further, if I may anticipate what his answer is going to be,—after all, I believe that is my right,—if the purpose of this witness is to go into the question of authority, my objection is this: that this witness is estopped for two reasons, one, which I will give here and cite a case for, and the other is that he himself was not a party to the transactions here, he not knowing what had gone on.

The Court: Don't argue the point unless you know what point he is going to raise. What is the question?

Mr. Farkas: "What is your connection with loss adjustments on behalf of the St. Paul Mercury Company?"

The Court: I will allow the question.

A. My answer is that I approve settlements for the St. Paul Mercury Indemnity Company and personally sign all the drafts.

Q. Is there anybody else connected with you, either directly or indirectly, or connected with the Salvage Adjustment Corporation, who has authority to approve loss payments on behalf of the St. Paul Mercury Indemnity Company?

Mr. Siegendorf: I object to the question. (Citing cases.)

Mr. Farkas: These cases go upon the assumption that the person acting was an agent and had some authority. There has been no proof here that the person who acted had any authority.

The Court: That seems to be the crux of the case. I will allow the question and grant an exception.

Q. (Last question read.) A. The vice-president of the Salvage Adjustment Corporation has the authority to make settlements, and I have.

Q. Who is the vice-president of the Salvage Adjustment Corporation? A. J. L. Razionzen.

Q. Do you know Mr. T. F. Gallagher? A. I do.

Q. And Mr. Koch? A. Yes.

Q. He was connected with the Salvage Adjustment Corporation? A. Yes.

Q. Have they authority to make a settlement on behalf of the St. Paul Mercury Indemnity Company?

Mr. Siegendorf: I object. That brings it within the direct line of my previous objection, and I press it at this time.

The Court: I will allow it and grant an exception.

A. They have not.

Cross examination by Mr. Siegendorf:

Q. Mr. Hyman, both Mr. Koch and Mr. Gallagher are in your employ? A. Yes, sir.

Q. And you say that you, as the president, I believe— A. (Interposing) Yes, sir.

Q. (Continuing)—of the Salvage Adjustment Corporation have authority to settle? A. Yes, sir.

Q. As well as the vice-president? A. Yes, sir.

Q. Now these letters which were introduced into evidence are letters signed by the Salvage Adjustment Corporation? A. May I see these letters?

Q. Certainly; here they are (handing letters to witness). A. They are letters, and they are signed—one letter is signed by Mr. Gallagher with

the title of Claims Examiner, and the other letter is signed by Mr. Gallagher on a form on which is printed "Salvage Adjustment Corporation," and the printing underneath that is "Casualty Department."

Q. On the letter, on the top of it, is "St. Paul Mercury Indemnity Company"? A. Yes, sir.

Q. You are authorized to use that? A. We are.

Q. Is it necessary, whenever Mr. Gallagher receives a letter, a claim letter such as ours is in this case—is it necessary that he first take up the matter with you before he commences any negotiations? A. No, sir.

Q. He communicates directly with the attorney? A. He does.

Q. He did it in this case? A. Yes.

Q. And subsequent to that, he arranges for a physical examination? A. He does.

Q. And does he have to communicate with you before arranging with this physical examination? A. No, he does not.

Q. And he may arrange for an appointment to take these different matters up at your office? A. You mean with respect to the medical? You say "different matters".

Q. With respect to the discussion of the case? A. Yes, he has the authority to do that.

Q. He has the authority to discuss the case? A. Yes.

Q. Has he the authority to submit a figure in settlement? A. To submit a figure to whom?

Q. To an attorney. By that I mean, of course, if the attorney——

Mr. Siegendorf: I withdraw my question.

Q. You understand the question, Mr. Hyman? A. I am afraid I do not.

Q. At any time, and under any circumstances, have either one of these two gentlemen authority to submit any kind of a figure in the way of settlement to an attorney or to an attorney or claimant? A. Their authority with respect to the discussion of figures—which I think is what you mean?

Q. Yes. A. (Continuing)—is always subject to my personal approval, and to that extent they are authorized to discuss it with visiting attorneys.

Q. But they may submit figures and later, as a matter of course, in your business, they must be approved by you? A. That is true with this correction, that by your expression as to submission of figures my understanding is that they are authorized to discuss with the attorneys their idea of the value of the case.

Q. And to submit a figure? A. By submitting a figure I do not want you to consider that as definitely binding us.

Q. That is not the question. That is one thing that the Court will decide, Mr. Hyman. The thing is, I am only delving into the course of business which you pursue there. My understanding is during the course of your business when the attorney or claimant involved appear at your office, they have the authority— A. (Interposing) To discuss figures.

Q. To discuss figures? A. They have.

Re-direct examination by Mr. Farkas:

Q. When you say that they have the authority to discuss figures, do you mean they have the

authority to make a settlement? A. They have not.

Q. Just what do you mean? A. I tried to make that clear.

Q. Just repeat that. A. They have authority to discuss figures, but they have no authority to effect a settlement without my authority. I personally pass on every case.

Q. When you say that they have authority to discuss figures, do you mean that they may talk about figures if they desire? A. They may talk about the case. If it is a question of liability they may discuss with the attorney the value of the case. It is always coupled with the distinct statement that it must be approved by the company. They never hold out to any visiting attorney that they have the authority to settle a case.

Mr. Siegendorf: I object to what their holding out is.

The Court: Strike it out.

Re-cross examination by Mr. Siegendorf:

Q. This arrangement was made between both yourself and your agents in so far as every settlement made must be made subject to your approval? A. I don't know what you mean by agents. My employees?

Q. Employees—is that right? A. No, I believe that every visiting attorney knows the arrangement in the office.

Q. Do you advise every attorney that comes into your office to that effect? A. Mr. Koch and Mr. Gallagher in their discussions always advise these attorneys that any meeting of the minds to the

extent of figures must be approved by an officer of the company.

Q. They always do that? A. Yes.

Q. You know that of a certainty? A. I know that of a certainty.

EPHRAIM F. SCHWARTZ, recalled as a witness on behalf of the plaintiffs, in rebuttal, further testified as follows:

Direct examination by Mr. Siegendorf:

Q. Were you advised at any time during your course of negotiations with Mr. Koch or Mr. Gallagher that every settlement had to be made with the approval of Mr. Hyman? A. No, sir, at no time.

Mr. Siegendorf: That is all.

Mr. Farkas: No questions.

I would like to make a motion for a direction of verdict at this time on the ground that there is no proof of any consideration between the plaintiff here and the defendant;

Upon the further ground that there is no proof of any authority on the part of the persons with whom there have been some alleged transactions to bind the St. Paul Mercury Indemnity Company, either express or implied, or because of some apparent holding out. The cases cited have all gone upon the assumption that there was an agency of some sort, there was a limited agency, and there has been some holding out or some secret instructions between the parties. Here is a case that is absolutely devoid of any testimony to connect up

Koch or Gallagher with the defendant here. There is no proof that they had any agency of any kind or had authority of any kind to negotiate this settlement. There is no proof that they ever had made a settlement of any kind, even with authority, as far as the facts in this case are concerned, that would be a binding contract between the St. Paul Mercury Indemnity Company and this plaintiff who had an alleged claim against the Lay Fish Company any more than if I had agreed to give them $275 because they had a claim against your Honor, we will say.

(Argument on motion.)

The Court: You gentlemen no doubt have some memoranda?

Mr. Siegendorf: Yes, sir.

Mr. Farkas: Yes, sir.

The Court: I would like each of you to submit a memorandum. Without serving one another, just serve one on me.

I, H. Richard Woebse, a stenographer duly appointed to report stenographically the evidence given before the Clifton District Court, in the case of Jennie Marcus, wife of Hyman Marcus, and Hymen Marcus, individually, plaintiffs vs. St. Paul Mercury Indemnity Company, St. Paul, Minnesota, a body corporate, defendant, do hereby certify that the foregoing is a true and correct transcript of the evidence given on the 30th day of June, 1930, before Hon. Peter N. Perretti, acting judge of the Clifton District Court, in the said matter.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 31st day of July, 1931.

H. RICHARD WOEBSE.

Certificate of Trial Judge.

I, Peter N. Perretti, acting judge of the Clifton District Court, do hereby certify that the foregoing is a transcript of the evidence given upon the trial in the case of Jennie Marcus, wife of Hymen Marcus, and Hymen Marcus, individually, plaintiffs vs. St. Paul Mercury Indemnity Company, St. Paul, Minnesota, a body corporate, defendant, on June 30, 1931, as certified to by H. Richard Woebse, the stenographer appointed to report such evidence stenographically.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 5th day of August, 1931.

PETER N. PERRETTI.

Exhibit P-1.

SIEGENDORF & SCHWARTZ
688 Main Avenue
Passaic, N. J.

March 17th, 1931

Lay Fish Co., Inc.
24 Peck Street
New York City

Gentlemen:

We have been retained by Mrs. Minnie Marcus of Passaic, to institute suit against you in order to recover damages as the result of injuries which she sustained while purchasing merchandise in your market on Wednesday, January 21st, 1931.

Before instituting suit we are communicating with you, so that you may, if you desire, have an opportunity to adjust this claim amicably.

If you are insured, please inform your insurance company so that they can then take the matter up with us.

Very truly yours,

SIEGENDORF & SCHWARTZ
By Ephraim F. Schwartz

EFS:LS

Exhibit P-2.

SAINT PAUL MERCURY INDEMNITY COMPANY OF SAINT PAUL
Saint Paul, Minnesota

SALVAGE ADJUSTMENT CORPORATION
Adjusters
30 Maiden Lane
New York

March 23rd, 1931

Messrs. Siegendorf & Schwartz
688 Main Street
Passaic, N. J.

Re: Assured: Lay Fish Co. Inc.
Date of accident: 1/21/31
File Number: LIA SM 519

Dear Sir:

Lay Fish Co. Inc. have turned over to us for attention, your letter dated March 17th, 1931 concerning the above titled matter.

If you will get in touch with the writer at John 5105 the case will be discussed with you.

Yours truly,

SALVAGE ADJUSTMENT CORPORATION
Casualty Department.
THOMAS F. GALLAGHER

TFG:SS

Exhibit P-3.

SALVAGE ADJUSTMENT CORP.
116 John Street
New York, N. Y.

March 28th, 1931

Siegendorf & Schwartz
688 Main Avenue
Pasaic, N. J.

Re: LIA.SM-519
Lay Fish Co.
Mrs. Minnie Marcus
1/21/31

Dear Sirs:

We have your letter of the 26th instant, and if you will kindly communicate with the writer at John 5105, the matter will be discussed with you.

Very truly yours,

THOMAS F. GALLAGHER
Claims Examiner

TFG:SS

Exhibit P-4.

To all to whom these Presents shall come or may concern, Greeting:

KNOW YE, That we, Jennie Marcus, and Hyman Marcus for and in consideration of the sum of Two hundred and seventy-five ($275.00) dollars lawful money of the United States of America,

Exhibit P-4.

to them in hand paid by THE LAY FISH CO., INC. have remised, released and forever discharged, and by these Presents, do for their heirs, executors and administrators, remise, release and forever discharge the said THE LAY FISH CO., INC. its successors and assigns, of and from all and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever, in law or in equity, which against it they ever had, now have or which they, their heirs, executors or administrators, hereafter can, shall, or may have, for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the day of the date of these Presents, and more particularly arising out of and from any and all claims as a result of personal injuries suffered by Jennie Marcus on the premises of the Lay Fish Co., Inc., on January 21st, 1931.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 13th day of May in the year of our Lord One Thousand Nine Hundred and thirty-one.

JENNIE MARCUS (L. S.)
HYMAN MARCUS (L. S.)

Signed, Sealed and Delivered
in the Presence of

EPHRAIM F. SCHWARTZ

Exhibit P-4.

State of New Jersey,
County of Passaic—ss.:

BE IT REMEMBERED, That on this 13th day of May, in the year of Our Lord One Thousand Nine Hundred and thirty-one, before me, the subscriber, An attorney-at-law of New Jersey personally appeared Jennie Marcus and Hyman Marcus who, I am satisfied, are the releasors mentioned in the within Indenture, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed.

EPHRAIM F. SCHWARTZ
An Attorney-at-law of New Jersey

Clerk's Transcript.

DISTRICT COURT

OF THE CITY OF CLIFTON, N. J.

No. 8/19;

JENNIE MARCUS, wife of Hyman Marcus, and HYMEN MARCUS, individually,
Plaintiffs,

—VS—

ST. PAUL MERCURY INDEMNITY COMPANY, St. Paul, Minnesota, a body corporate,
Defendant.

SIEGENDORF & SCHWARTZ, Plaintiffs' attorneys.

GREEN & GREEN, Defendant's Attorneys.

Costs	$13.75
Sum. and copy	2.00
	$15.75
Trial Fee	$

A summons was tested June 8th, 1931 returnable June 22nd, at 10 o'clock in the forenoon. The Sgt-at-Arms returned the summons as follows, viz: I served within summons on June , 1931, on defendant, by delivering a copy thereof to Frank L. Smith, Commissioner of Banking and Insurance of the State of New Jersey.

.....
Sergeant-at-Arms.

Plaintiffs' demand was filed June 10th, 1931. This case was called for trial on June 22nd, 1931, at 10 o'clock in the forenoon, adjournment was taken upon application of defendant until June 29th, 1931, at 10 o'clock in the forenoon, and further adjournment was taken until June 30th, 1931, at 10 o'clock in the forenoon.

June 30th, 1931, the plaintiff appearing and the defendant appearing the trial of the cause was proceeded with as follows:

H. Richard Woebse, Stenographer, Sworn.

On the part of the plaintiff. Ephraim F. Schwartz, was sworn.

On the part of the defendant. Harry Hyman, was sworn.

The Court reserved decision, and on July 21st, 1931, entered a judgment in favor of the plaintiff and against the defendant, in the sum of Two Hundred Seventy Five Dollars ($275.00).

WHEREUPON, It is on this 21st day of July, 1931, by this Court considered and adjudged that said Jennie Marcus, wife of Hyman Marcus, and Hyman Marcus, individually, recover against St. Paul Mercury Indemnity Company, St. Paul, Minnesota, a body corporate, the sum of Two Hundred Seventy Five Dollars ($275.00).

Notice of Appeal filed August 10th, 1931.

Bond of Appeal filed August 10th, 1931.

I, James McAllister, Clerk of the District Court of the City of Clifton, do certify that the above is a true copy of the records in the above mentioned cause, given under the seal of this Court this 10th day of August, 1931.

JAS. McALLISTER
Clerk.

(Seal)

Opinion of Supreme Court.

NEW JERSEY SUPREME COURT.

No. 426

OCTOBER TERM, 1931.

JENNIE MARCUS, wife of Hyman Marcus, and HYMAN MARCUS, individually,
Plaintiffs-Respondents,

vs.

ST. PAUL MERCURY INDEMNITY COMPANY, St. Paul, Minnesota, a body corporate,
Defendant-Appellant.

Submitted, October , 1931. Decided, 1931.

On appeal from the District Court of the City of Clifton sitting without a jury.

For defendant-appellant, GREEN & GREEN (Harold Farkas, of counsel).

For plaintiffs-respondents, SIEGENDORF & SCHWARTZ.

Before—JUSTICES CAMPBELL, LLOYD and BODINE:

PER CURIAM: The appeal brings up a judgment in favor of the plaintiffs.

Mrs. Marcus, claimed personal injuries by reason of a fall on premises of the Lay Fish Market at 24 Peck Slip, New York City. She and her husband consulted a firm of attorneys with a view of having a suit for damages instituted. The

attorneys brought the matter to the attention of the Lay Fish Market by letter dated March 17, 1931, and in reply thereto received a letter under date of March 23, 1931, purporting to be from the Salvage Adjustment Corporation, adjuster for the St. Paul Mercury Indemnity Company, the defendant in this case, requesting them to discuss the matter with Mr. Gallagher of the casualty department with a view to settlement. Negotiations were commenced and there was a visit to Gallagher and a Mr. Koch, who occupied offices in the suite of offices used by the defendant Indemnity Company and the Salvage Adjustment Corporation. The upshot of the negotiations was that these individuals agreed to settle the case for $275.00 upon the plaintiffs executing a release. The release was executed and the agreement of settlement was then repudiated resulting in the present action.

It is contended that the agreement of settlement was without consideration and that there was no proof either of the agency of the Salvage Adjustment Corporation or of Gallagher or Koch, to negotiate a settlement for the St. Paul Mercury Indemnity Company, and further that the letters addressed to the plaintiffs' attorneys were not properly received in evidence.

The defendant called Harry Hyman, the president of the Salvage Adjustment Corporation, who testified that the company adjusted losses for the defendant Indemnity Company, but that the only persons having authority to approve settlements were the president and vice-president of the Salvage Adjustment Corporation; that although Koch and Gallagher were both employed by the Salvage

Adjustment Corporation, they had no authority to make settlements. It further appeared that the letters received in evidence were written in due course of business by Gallagher, and that the letterhead bearing the name of the St. Paul Mercury Indemnity Company was used with the approval of that company. It also appeared that both Koch and Gallagher had authority to discuss settlements but were instructed to state that their action must be approved before it became final.

It seems to us apparent that the defendant was not prejudiced by the receipt of the letters in evidence, in view of the testimony offered in its behalf. It would also seem from the testimony introduced that the court was justified in finding that the contract of settlement was predicated upon a good and valid consideration. There was no denial of the defendant's liability and the only proof offered was indicative of the limited authority reposed in the employees of the Salvage Adjustment Corporation.

Conceding that possibly the letters were improperly received in evidence at the time they were offered, it seems to us that the testimony on behalf of the defendant confirmed the action of the trial judge and established the plaintiffs' right of recovery. It was a fair inference from all the testimony that Gallagher and Koch were clothed with apparent authority to settle the matter. Since there was proof to support the findings of the trial judge, those findings cannot be disturbed on appeal.

The judgment will be affirmed with costs.

New Jersey Court of Errors and Appeals

JENNIE MARCUS, wife of Hyman Marcus, and HYMAN MARCUS, individually, Plaintiff-Respondents, vs. ST. PAUL MERCURY INDEMNITY COMPANY, St. Paul, Minnesota, a body corporate, Defendant-Appellant.	Action at Law On Appeal from the New Jersey Supreme Court.

BRIEF OF DEFENDANT-APPELLANT.

Statement.

This is an appeal by the defendant from a judgment rendered by the Supreme Court in favor of the plaintiff and against the defendant, affirming a judgment entered in favor of the plaintiff and against the defendant in the District Court of the City of Clifton, in an action to recover the sum of $275.00 on an alleged settlement agreement made with the plaintiffs by the defendant.

Facts.

The facts underlying the appeal are briefly as follows:

Plaintiffs claiming to have an action for negligence in the maintenance of premises at 24 Peck Slip, New York City, against the Lay Fish Com-

pany, Inc., addressed a letter to it, through their attorneys. They allege that they received a letter on the stationery of the St. Paul Mercury Indemnity Company, purporting to have been signed by one Thomas F. Gallagher, requesting them to communicate with him and attempted to prove certain negotiations had with the said Thomas F. Gallagher and one Lloyd Koch, personally and by telephone, relating to an agreement to settle their alleged claim. The aforesaid negotiations culminated, according to their contention in a settlement of the alleged claim for the sum of $275.00, which settlement, they say the defendant failed to live up to. Upon these state of facts they brought suit in the District Court of the City of Clifton against the defendant.

The plaintiffs allege in their state of demand (Case, pp. 5-6) that the St. Paul Mercury Indemnity Company was a foreign corporation authorized to transact business in the State of New Jersey, that during the course of its business it issued, for a valuable consideration, a contract of insurance to the Lay Fish Company, Inc., indemnifying and covering the said corporation for liability in the maintenance of certain premises known and described at 24 Peck Slip, in New York City, and that said policy protected the Lay Fish Company, Inc., from liability for injuries sustained by any person, and said policy, among other things, provided that the assured was to surrender the sole and complete control and management of its defenses in the event that an action was instituted against it. These allegations are not supported by any of the proofs offered at the trial.

Defendant objected to the admission in evidence of letters alleged to have been written by the said Thomas F. Gallagher (Case, p. 10 and p. 15) and

conversations had with him and Lloyd Koch, on the ground that the plaintiffs had failed to show that the said Gallagher and Koch were the authorized agents of the defendant for the purpose of the alleged transaction, and further objected to the introduction of letters written or alleged to have been written by Gallagher, on the ground that there was no proof of the signature of the said Gallagher.

On the part of the defendant, it is shown by the witness, Harry Hyman (Case, p. 24, &c.), that the said Gallagher and Koch were not authorized to negotiate the settlement of $275.00 on its behalf.

Defendant made a motion at the end of the plaintiff's case for a non-suit, on the ground that there was no proof that the alleged transactions were had with a duly authorized representative of the defendant, and on the further ground that there was no proof of any consideration for the alleged agreement between the plaintiffs and the defendant, which motions were denied (Case, pp. 22-23).

At the end of the defendant's case, motions for directed verdict were made upon the same grounds, which were in turn denied (Case, pp. 30-31). It is respectfully submitted that the Supreme Court erred in giving judgment for the plaintiff-respondents instead of the defendant-appellant.

LAW.

POINT ONE.

The court erred in admitting into evidence letters purporting to bear the signature of Thomas F. Gallagher, dated March 23, 1931 and March 28, 1931.

The Court received into evidence Exhibits P-2 and P-3 (Case, pp. 10 and 15, l. 30), which were letters bearing the name of the St. Paul Mercury Indemnity Company and the Salvage Adjustment Corporation, and purporting to have been signed by one Thomas F. Gallagher. These letters were received into evidence without proof of the signature which said letters bore or of the identity of the sender or his connection with the defendant. Both letters were introduced over the objection of the defendant and exceptions were allowed.

It seems to be a well settled rule of evidence that documents of this nature must be properly identified before being received into evidence and it is contended that the admission of the said letters was harmful error. 4 Wigmore on Evidence states the rule to be in paragraph 2130:

> "The general principle has been enforced that a writing purporting to be of certain authorship cannot go to the jury as genuine merely on the strength of the purport; there must be some evidence of the genuineness (or execution) of it."

This rule is relaxed in a situation where a letter is received by due course of mail, *purporting*

to come in answer from the person to whom a prior letter has been sent. 4 Wigmore on Evidence, p. 581, Par. 2153; *Leunis Company* v. *Singer,* 102 N. J. L. 68. But in the case at bar it does not appear that the letter offered into evidence was in response to a letter addressed to the person replying. On the contrary, the original letter was addressed to the Lay Fish Company, Inc., and the reply purported to come from Thomas F. Gallagher on the stationery of the St. Paul Mercury Indemnity Company, and secondly, there is no evidence as to whether the response arrived in due course of mail.

The Courts have been reluctant to extend the application of this rule beyond the circumstances above outlined. In the case of *Charles H. Scholes Company* v. *Oppenheim,* 136 N. Y. Supp. 37, the Court refused to extend the rule as to reply letters to a letter following an oral communication. The Court said:

> "There is no doubt but that, where a letter is received by due course of mail, purporting to be in answer from the person to whom a prior letter has been sent, the reply letter is admissible in evidence. In such cases the Courts have held that the circumstances present prima facie proof of the genuineness of the letter. No case has, however, been cited to us and I know of no authority in this state, that this rule should be extended to cases where the letter follows an oral communication. The only argument for extending the rule under such circumstances is that where an oral communication is made to a sole person, and a communication is received purporting to come from that person, and the contents show knowledge of the matter communicated, it is a fair inference that the

> letter is written by the person to whom alone the oral communication was made. *Nevertheless, the Courts seem unwilling to accept this inference, at least in any case where actual proof of handwriting may be had.*" (Italics ours.)

And in the annotation in 9 A. L. R. at p. 992, (bottom of page), it is stated:

> "And the fact that a letter is in reply to a prior one mailed by the recipient does not necessarily bring it within the exception to the general rule, *at least where the same is signed by another than the sendee of the original.* For example in Butler v. Price (1874), 115 Mass. 578, where the reply was signed by the wife of the man to whom the original had been sent, it was held that such fact did not create a prima facie case of genuineness or authority. And see Thayer v. Schley, 1910, 137 App. Div. 166; 121 N. Y. Supp. 1064." (Italics ours.)

It is respectfully submitted that the letters in the case at bar are not within the limited exception to the rule requiring the authentication of signatures on documents before the same are received in evidence and that therefore the Court erred in admitting into evidence letters allegedly written by Thomas F. Gallagher and purporting to be on the stationery of the St. Paul Mercury Indemnity Company.

By means of these letters it was attempted to show that Thomas F. Gallagher was the agent of the St. Paul Mercury Indemnity Company for the purpose of conducting negotiation involved in this suit.

The case of *Dean* v. *The American Glue Company,* 86 N. E. 890 (Mass.), involved a suit turn-

ing on the question of agency. In the course of its opinion, the Court said:

> "The averment in the first count of the declaration that he acted as the agent of the defendant is wholly unsupported by any evidence, for the letter claimed to have been written by him on paper bearing the defendant's letter-head, unless connected with the company was not evidence which would support a finding that he was acting for it. It is familiar law that unless some proof of agency is offered, the mere declaration of one who assumes to be an agent cannot be admitted to bind his alleged principal. A foundation must first be laid and from whom he procured the letter-head is not shown."

So that we see that aside from the fact that the letters were not evidential because of lack of proof of signature, it is equally true that they were not evidential because of the failure to lay a proper foundation for their introduction, by showing that the sender thereof was authorized so to do. The evidential value of the facts contained in the letters would be the same as a declaration made by an alleged agent orally and it has been held that such declarations are inadmissible to prove the agency. *Leonard* v. *Standard Acro Corporation,* 95 N. J. L. 229; *Standard Oil Company* v. *Linol Company,* 75 N. J. L. 294.

POINT TWO.

Plaintiffs have failed to establish their burden of proving that Gallagher and Koch were the duly authorized agents of the defendant.

The plaintiffs' entire proof, if any there be, rests upon the conversations and correspondence with Thomas F. Gallagher and Lloyd Koch.

In the nature of the present controversy, it is proper that before introducing into evidence transactions with an alleged agent, some proof should be offered to show the agency of the alleged agent and his principal. When this has been done in accordance with established rules, the Court may then receive evidence as to the transaction.

The plaintiff's have here attempted to go into transactions with the alleged agents of the defendant without in any manner showing the connection of the agents with the defendant and the nature and extent of their authority.

Testimony was received as to the transactions alleged have have been carried on with Gallagher (Case, p. 11, ll. 15-40; Case, p. 13, ll. 18-40; Case, pp. 14, 15, 16 and 17) over the objection of the defendant. This testimony is prefaced only by the bare statement of the witness Schwartz to the effect that Mr. Gallagher was the agent of the Salvage Adjustment Corporation (Case, p. 11, ll. 37-39). This answer was objected to and motion made to strike it out, which was denied and exception allowed. It is, of course, apparent that the answer is a conclusion of the witness not supported by fact or circumstance, and

it is urged that it was error to permit the answer to stand and likewise error to permit the witness to testify to transactions with Gallagher and Koch without laying a proper foundation.

It is a cardinal rule of agency that one dealing with an agent known to be such to him must take notice of the nature and extent of his authority, and is bound at his peril to notice the limitations upon the authority granted. The rule is so stated in Mechem on Agency, Second Edition, Vol. Sec. 742-743, and the burden of proving the extent of the authority of an alleged agent is upon the person alleging the fact. *Agricultural Insurance Company* v. *Fritz,* 61 N. J. L. 211; *Hall* v. *Passaic Water Company,* 83 N. J. L. 771; *Dispatch Printing Co.* v. *The National Bank of Commerce,* 109 Minn. 440, 124 N. W. 236, 50 L. R. A. N. S. 74; *Oxweld Acetylene Company* v. *Hughes,* 126 Md. 437, 95 Atl. 45, L. R. A. 1916-B 75, Ann. Cas. 1917-C 837; *Dean* v. *The Big Spring Company,* 138 Md. 388, 113 Atl. 891.

In 21 R. C. L., p. 858, it is stated as follows:

> "As against one who has assumed to act as the agent of another, the presumption is that he had authority to do the act in question, but a person who has availed himself of the act of an agent in order to charge the person must prove the authority under which the agent acted. In other words, he has cast upon him the burden of establishing the agent's authority to bind his principal by the contract in controversy. This can be done by showing recognition by the principal of other similar acts and transactions performed by the agent. As a general rule, an agent's authority to bind his principal may not be shown by the agent's acts or declarations."

And our Courts have held:

> "The declarations of an agent, though accompanying his acts, constitute no evidence of the extent of his authority." *Dowden* v. *Cryder,* 55 N. J. L. 329, at page 331; *Ryle* v. *Manchester Building & Loan Association,* 74 N. J. L. 840.

There can be no question but that the plaintiffs have failed to establish by direct evidence that either Gallagher or Koch were authorized by the defendant to act for it in the making of the alleged settlement. If they are to sustain their burden it must therefore be by proof of facts tending to show that the defendant *knowingly* permitted them to hold themselves out as its agents, or that the making of the alleged agreement was within the apparent scope of the authority of the alleged agents. The acts which will constitute a holding out must be those of the principal, and acts within the apparent scope of the authority of the agent are only established by means of a course of dealing. As we have pointed out, there is no testimony in the case with respect to the acts of the principal, there is no testimony that the alleged principal *knowingly* permitted Gallagher or Koch to hold themselves out as its agents for the purpose of making this agreement, there is no testimony that the plaintiffs or their representative ever before knew Gallagher or Koch or had any reason to assume that they were authorized by the defendant for the purpose herein alleged. The rule is stated in *Heckel* v. *Cranford Country Club,* 97 N. J. L. 538, at page 540:

> "A principal is bound by the acts of his agent within the authority he has actually given him, which includes not only the pre-

> cise act which he expressly authorizes him to do, but also whatever usually belongs to the doing of it or is necessary to its performance. Beyond that, he is liable for the acts of the agent within the appearance of authority which the principal himself *knowingly* permits the agent to assume, or which he holds the agent out to the public as possessing. For the acts of his agent, within the scope of the authority he holds the agent out as having or *knowingly* permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases would be to enable him to commit a fraud upon innocent persons. *In whichever way the liability of the principal is established it must flow from the act of the principal.*" (Italics ours.)

An agency of this kind is in the nature of an estoppel, and arises, as stated, for the purpose of preventing a fraud upon innocent parties. The reason is so stated in the leading case of *Law* v. *Stokes*, 32 N. J. L. 249, at page 252:

> "For the acts of the agent within the scope of authority he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such cases, would be to enable him to commit a fraud upon innocent persons."

See also 2 C. J., page 573.

It is manifest that the rule of estoppel does not apply to such a case as the present, because an estoppel is only brought into play where the person dealing with the alleged agent has chang-

ed his position on the faith of the apparent authority; 2 C. J. 464, paragraph 72.

In this case, there is no proof that the plaintiffs have changed their position in any manner. If they had a cause of action against the Lay Fish Company, at the time of entering into the negotiations, they still have it, and are at liberty to pursue it. There is further an utter lack of any proof that the defendant knowingly permitted Gallagher or Koch to exercise any authority which exceeded the express authority with which they were vested, or of any dealings between the plaintiffs and Gallagher or Koch prior to the present transaction which would have led the plaintiffs or their representatives to believe that Gallagher or Koch were vested with authority to make the alleged statement. There is further no suggestion of a fraud having been committed. It is respectfully submitted that the acts of Gallagher and Koch were not within the scope of their apparent authority.

A person dealing with a special agent is bound to ascertain the extent of his power. *Dowden* v. *Cryder,* 55 L. 329; *Black* v. *Shreve,* 13 N. J. Eq. 455; *National Iron Armor Company* v. *Bruner,* 19 N. J. Eq. 441, and such facts are not proven by the declaration of the agent although accompanying his acts. *Dowden* v. *Cryder,* supra; *Standard Oil Company* v. *Linol Company,* 75 N. J. L. 294.

And the English case of *Paul* v. *Leask,* 9 Jur. N. S. 829, points out that one dealing with a person assuming to act as the agent for another can always save himself loss or difficulty by applying to the alleged principal to learn whether the

agency does exist and to what extent, while the alleged principal has no such mode of protecting his interest.

A situation somewhat similar to the present existed in the case of *Agricultural Insurance Company* v. *Fritz,* 61 N. J. L. 211. Here the plaintiffs below brought suit upon an alleged oral contract of insurance alleged to have been made by one Chambers. The Court held, at page 216:

> "There is not a particle of evidence that Chambers had power to bind the plaintiff in error to a verbal insurance contract. It is disclosed in the fact that he was accustomed to solicit insurance for the plaintiff in error and in the fact that after his negotiations in the case of Fritz, a policy was issued in accordance with the conclusions reached between him and Mrs. Fitz that he had some connection with that company. * * * Proof of mere assumption of authority by him, without proof also of acquiescence by the company in the appearance he held out, or of ratification by it of his acts, in pursuance of the power assumed, with knowledge of the assumption which shall have misled the insured as to the true extent of the authority he possessed, will not establish the extent of the agent's power. Stringham v. St. Nicholas Insurance Co., 3 Keyes 280; Bush v. Westchester Fire Insurance Co., 63 N. Y. 531; Elw. Ev. Ag. 16, note."

In the present case the defendant does not deny that Gallagher and Koch were its agents for certain purposes, but it does deny and has proven that they had no authority to make the settlement upon which this suit is based.

Such was the situation in the case of *Hall* v.

Passaic Water Company, 83 N. J. L. 771, where the Court said, as follows:

> "The defendant did not deny that Ryle had authority to make ordinary contracts for the supply of water to users for general purposes. But it did deny, and prove by its directors that he had not authority to make the unusual contracts set out by the plaintiff to guarantee a supply for fire purposes at a certain pressure at all times and under all conditions and upon the terms claimed by the plaintiff. And it supplemented this proof by its contract book which did not contain any other contract of the kind. There was no evidence on the part of the plaintiff tending to disprove the testimony of the defendant on this point. The facts therefore as to the authority or lack of authority of the agent on the crucial question were undisputed and the question as to his authority was one of law for the court and the direction of a verdict was not erroneous."

So that relying upon the aforesaid case, it would seem that the Court should have found that the alleged agents of the defendants were not authorized to make a settlement on behalf of the defendant, particularly in view of the absolute lack of evidence on the plaintiff's part to establish the authorization and the clear denial of the defendant.

In the case of *Queen Insurance Company* v. *Young,* 5 So. 116 (Ala.), it was held that a special authority to an agent to adjust a particular loss or damage does not confer authority to bind the company by a promise to pay the same; and also in *Commonwealth Insurance Company* v.

Solomon, 119 Atl. 850 (Del.), it is held that the mere fixing of the amount of damages does not necessarily bind an insurer to pay such amount or prevent it from contesting liability, and this is the identical situation revealed in this case. Also in *Richards* v. *Continental Insurance Company,* 47 N. W. 350 (Mich.), an offer to compromise a loss for one-half of the amount due, by a general adjuster who has no authority to waive or alter any of the terms of policies, has been held not to be such an exercise of authority as will bind the company or constitute of itself a waiver of a company's right to defeat a policy for breach of condition.

It is respectfully contended that the plaintiffs have failed to carry the burden of establishing that the agreement upon which they sued was made by the defendant or its agent authorized for that purpose.

POINT THREE.

Plaintiffs have failed to establish a consideration for the alleged agreement between them and the defendant.

Under this heading, we will take up Specifications 5 and 7.

Plaintiffs in their state of demand allege that the defendant issued a policy of liability insurance to the Lay Fish Company, Inc., protecting them from liability for injuries sustained by any person and base their right to an action against the defendant upon this policy of insurance. An examination of the testimony will show that they

have utterly failed to prove the existence of any such policy and that there is nothing in the testimony to show any consideration to the defendant for the making of the alleged settlement. The plaintiffs' proof begins with a letter addressed to the Lay Fish Company, Inc., and then goes into conversations and transactions with Gallagher and Koch, whom they allege to be the agents of the defendant. No mention is made in any point of the testimony of any consideration moving from the plaintiffs to the defendant to induce them to pay the plaintiffs the sum of $275. This is unquestionably a part of the plaintiff's case and is a necessary element of the proof. In its absence, the Court is not justified in assuming that the policy of insurance existed or that the plaintiff agreed to release its cause of action against the Lay Fish Company, Inc., in consideration of the payment by the defendant of $275. The Court is bound by the evidence which appears before it, and since there is no presumption which arises by operation of law in a matter of this kind, the plaintiffs should fail unless they establish affirmatively that there was consideration.

Where a written contract is not such as on its face imports a consideration, the party relying on it as a basis of recovery must establish the consideration. 13 C. J. 759. The same rule would seem to apply to an oral contract.

At the close of the plaintiffs' case a motion was made to non-suit on this very ground which motion was denied and exception allowed, and the situation remaining in this respect the same at the close of the defendant's case, a motion to direct a verdict was made on the same ground, which was denied and exception allowed.

It is respectfully contended that the trial Court erred in both, its refusal to non-suit and its refusal to direct a verdict.

Conclusion.

Defendant-Appellant therefore respectfully submits that the Supreme Court erred in finding for the plaintiffs and against the defendant and that for the reasons hereinabove set forth the judgment of the Supreme Court should be reversed; and the Trial Court should be directed to find in favor of defendant and against the plaintiffs.

Respectfully submitted,

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New Jersey Court of Errors and Appeals

JENNIE MARCUS, wife of HYMAN MARCUS, and HYMAN MARCUS, individually, Plaintiffs-Respondents, vs. ST. PAUL MERCURY INDEMNITY COMPANY, St. Paul, Minnesota, a body corporate, Defendant-Appellant.	Action at Law. On Appeal from the New Jersey Supreme Court.

BRIEF OF PLAINTIFFS-RESPONDENTS.

Statement of Facts.

This is an appeal from a judgment of the New Jersey Supreme Court affirming a judgment of the Clifton District Court. The opinion of the Supreme Court (State of Case, p. 40), can be found in 10 N. J. Misc., 44, 157 Atl. 546.

Suit was instituted in this case to recover the sum of Two Hundred Seventy-five ($275.00) Dollars, the amount that a claim for injuries was settled for with the defendants who refused to pay, after they had entered into the contract of settlement (State of Case, p. 18, ll. 20-30). The plaintiff's testimony shows that the plaintiff's attorneys were retained to institute suit in order to recover damages as the result of personal injuries sustained by the plaintiff, Jennie Marcus on January 21st, 1931, while on the premises of

the Lay Fish Market Company (State of Case, p. 8, ll. 10-13).

A letter was sent by the plaintiffs' attorneys dated March 17th, 1931 to the Lay Fish Market Company informing them that suit would be instituted unless an amicable adjustment was arranged (Exhibit P-1).

On March 23rd, 1931, plaintiffs' attorneys received a reply from the defendant informing them that their letter dated March 17th, 1931, which was set to the Lay Fish Market Co. had been turned over to it for their attention, and advising plaintiffs' attorneys to communicate with them to discuss the case. This letter was offered in evidence. Exhibit P-2. A telephone request was made by the defendant through the Salvage Adjustment Corp. requesting a copy of the medical statement of injuries and costs of treatment (State of Case, p. 13, ll. 19-33).

On March 27th, 1931 the medical statement and bill were sent to the defendant (State of Case, p. 14, ll. 37-41).

On March 28th, 1931 the defendants wrote another letter acknowledging the receipt of the medical statement and bill and requesting the plaintiffs' attorneys to communicate with them once more in order to discuss the case (Exhibit P-3).

A request was made by the defendant for a physical examination of the plaintiff, Jennie Marcus, and she was examined by Dr. Levy for the defendant-company on Saturday, April 25th, 1931 (State of Case, p. 16, l. 20 through p. 17, l. 5).

Telephone conversations were subsequently interchanged by Mr. T. F. Gallagher of the Salvage Adjustment Corp. and Mr. Schwartz of the

law firm of Siegendorf & Schwartz ending with the request that Mr. Schwartz attend a conference of the Salvage Adjustment Corp. to discuss a settlement (State of Case, p. 17, ll. 10-20). A conference was arranged for May 12th, 1931. Plaintiffs' attorney called at the offices of the Salvage Adjustment Corp., representing the defendant, and spoke to Mr. Gallagher after asking for him (State of Case, p. 17, ll. 20-32). Settlement of the case was discussed (State of Case, p. 17, l. 33). Mr. Gallagher showed the plaintiffs' attorney the defendant's statements concerning the claim against the Fulton Fish Market (State of Case, p. 17, ll. 34 and 35). Mr. Gallagher then introduced the plaintiffs' attorney to Mr. Koch who was at the office of the Salvage Adjustment Corp., and was asked what figure he had in mind to settle the case (State of Case, p. 17, l. 40 through p. 18, l. 20). Messrs. Gallagher and Koch then entered into a contract of settlement in the sum of $275.00.

When the defendants failed to live up to their agreement, suit was instituted, based upon the contract of settlement and this case was tried on June 30th, 1931, resulting in a judgment in favor of the plaintiffs which judgment was subsequently affirmed by the New Jersey Supreme Court. We respectfully submit that the Supreme Court properly affirmed the judgment of the District Court.

POINT ONE.

The Court properly admitted into evidence letters from the defendant company dated March 23, 1931, and March 28, 1931.

Counsel for the appellant argues that these letters should not have been admitted into evidence without proof of the signature of the sender.

The letters sent by the plaintiff's attorneys and the replys of the defendant company were properly admitted into evidence.

McCrath on "New Jersey Trial Evidence", page 229, section 256, states the controlling principle of law as follows:

> "*When a letter is received in due course of mail, apparently in response to a letter sent by the receiver it is presumed to be the letter of the person or corporation whose name is signed to it, and is admissible without proof of the defendant's handwriting. Thus a letter written entirely on the typewriter and signed "Singer Bros." on the typewriter, was admitted upon proof that it came in sequence to a letter written by the plaintiff and although the typewritten letter did not mention plaintiff's letter.* Citing *Leunis* v. *Singer,* 130 Atl. 457. (Italics ours).

In the case of *Leunis Co.* v. *Singer, et al.,* reported in 130 Atl. page 457, the Court held:

> "*A letter received in due course of mail, apparently in response to a letter sent by the receiver, is presumed, in the absence of any showing to the contrary, to be the let-*

ter of the person or corporation whose name is signed to it. It is admissible in evidence without proof of the defendant's handwriting, being an exception to the rule requiring proof of handwriting.'' Italics ours).

From the testimony in this case the District Court was justified in finding as a fact that the letters were sent by the defendant and received in due course of mail apparently in response to letters sent by the receiver. This finding of fact was supported by the evidence which disclosed that on March 17th, 1931, a letter was addressed by the plaintiffs' attorneys to Lay Fish Company in New York City, with reference to a suit for damages against them. They were advised to inform their insurance company, if they were insured, of the occurrence of the accident and the receipt of the letter so that the insurance company could, if they desired, take the matter up directly with the plaintiffs' attorneys. (Exhibit P-1, State of the Case p. 33). On March 23rd, 1931, a letter on the stationery of the St. Paul Mercury Indemnity Co. of St. Paul, signed by Thomas F. Gallagher, of the Casualty Department of the Salvage Adjustment Corporation, was received by the plaintiffs' attorneys referring to its assured, the Lay Fish Company, Inc., stating the date of the accident—1/21/31, and referring to its file No. as LIA - S M - 519. This letter stated that the Lay Fish Company, to whom the letter dated March 17, 1931 (Exhibit P-1), had been addressed, was turned over to the St. Paul Mercury Indemnity Co., for its attention and advised the plaintiffs' attorneys to communicate with Thomas F. Gallagher, of the casualty department, by telephone and the case would be

discussed (Exhibit P-2, State of the Case, p. 34). A third letter was received by the plaintiffs' attorneys dated March 28th, 1931. This letter was in response to a letter sent by the plaintiffs' attorneys to the Salvage Adjustment Corporation on March 26th, 1931, and the reply was received in due course of mail. Again, the letter dated March 28th, 1931, was sent by Thomas F. Gallagher, the Claims Examiner for the Salvage Adjustment Corporation, who, the defendant testified, was the duly authorized agent for the defendant, the St. Paul Mercury Indemnity Co. (State of the Case, p. 35, Exhibit P-3).

In the *Leunis* case, *supra,* the reply letters referred to carefully avoid mentioning plaintiff's letters in that case. In our case, the reply letters admitted in our evidence referred to plaintiffs' letters and both of the defendant's letters admitted, stated the date of the accident, the name of its assured and their file number.

The defendants in this case did not offer any proof to show that the letters were not the letters of the defendant company. *As a matter of fact, counsel for the appellants admits in his brief that Gallagher and Koch were the agents of the defendant company* (page 13, Point 2 of appellant's brief).

In the absence of such proof our Supreme Court has held these letters admissible without proof of handwriting.

And this is the law in other jurisdictions, also.

1. *Maynard* v. *Bailey,* 9 A. L. R., 989, 10 R. C. L. 878; 22 C. J. 908.
2. *National Acc. Society* v. *Spiro,* 78 Fed. 774, 24 C. C. A. 334.
3. *White* v. *Tolliver,* 110 Ala. 300; 20 So. 97.

4. *Barham* v. *Bank of Delight,* 94 Ark. 158, 126 S. W. 394, 27 L. R. A. (N. S.) 439.

Appellants cite the case of *Charles H. Scholes Company* v. *Oppenheim,* 136 N. Y. Supp. 37. We believe this case is inapplicable because it dealt with an oral communication, and especially in view of what our Supreme Court said in *Leunis Co.* v. *Singer,* supra, that the letter to be evidential must be received in due course of mail and apparently in response to a letter sent by a receiver. The testimony in the instant case clearly shows that the requirements were met with and the letters were evidential.

Appellants cite the general principle found in Wigmore on "Evidence", paragraph 2130, (Series 1904), regarding authentication of documents. We respectfully invite the Court's attention to paragraph 2131 of the same treatise on evidence where the modes of authenticating documents are detailed, and especially to the learned author's comment:

> "A letter coming in answer by mail, and corresponding in time and contents to a prior letter sent to the purporting writer, may be regarded as sufficient evidence; and in other ways a document's contents may serve the purpose. (Post, paragraphs 2148-2156)."

Paragraph 2149, Wigmore on "Evidence", reads:

> "The case of an amenuensis, using a typewriter machine, presents a similar impossibility, whenever the signature (as sometimes happens) is also typewritten or stamped; and it would seem that a similar

> necessity justifies a resort to evidence from contents."

And in the note:

> "1900, Re: Deep River National Bank, 73 Comm. 341, 47 Atl. 675, (letters typewritten, and signed by a rubber stamp, held sufficiently proved by the person's custom as to authorizing a stenographer to stamp, etc." "If there were a serious possibility of abuse this step would not be advisable. But in fact there is also a danger of abuse in the opposite direction; for the difficulty of authenticating such a document is sometimes taken advantage of by those who wish to be able to disavow their authorship. It is, no doubt, a question of experience, i. e. which danger is actually the greater. On the whole it would seem safe to authorize the trial Court, in discretion, to allow to go to the jury a typewritten communication bearing sufficient indication of authenticity in its contents and letterhead."

We respectfully submit that the contents of the letters would have made them evidential as an exception to the rule regarding authentication of documents, besides the other exception to this general rule which concerns reply letters received by mail. This distinction is noted by Mr. Justice Black in the case of *Leunis Co.* v. *Singer,* supra, where both of the exceptions to the rule are noted.

Paragraph 2153, Wigmore on "Evidence", states the exceptions to the rule which concerns reply letters received by mail, as follows:

> "When a letter is received by due course of mail, purporting to come in answer from the person to whom a prior letter has been

> sent, there are furnished thereby, over and above mere contents showing knowledge of facts in general (ante p. 2148) three circumstances evidencing the letter's genuineness. First, the tenor of the letter as a reply to the first indicates a knowledge of the tenor of the first. Secondly, the habitual accuracy of the mails in delivering a letter to the person addressed and to no other person (ante 95) indicates that no other person was likely to have received the first letter and to have known its contents. Thirdly, the time of the arrival, in due course, lessens the possibility that the letter having been received by the right person but left unanswered, came subsequently into a different person's hand was answered by him. * * * There seems to be here adequate ground for a special rule declaring these facts, namely, the arrival of mail of a reply purporting to be from the addressee of a prior letter duly addressed and mailed, are sufficient evidence of the reply's genuineness * * * to go to the jury." Citing a great number of cases that this exception is universally recognized.

The Supreme Court in its opinion wherein it affirmed the judgment of the District Court in the instant case said:

> "It seems to us apparent that the defendant was not prejudiced by the receipt of the letters in evidence, *in view of the testimony offered in its behalf.*" (Italics ours).

It was this testimony offered in behalf of the letters which is prescribed as one of the modes for proving the authentication of documents in Wigmore on "Evidence".

We therefore respectfully maintain that the Court properly admitted into evidence the letters

of the defendant-company inasmuch as they were sent in response to letters sent by the plaintiffs' attorneys, and there was no proof that they were not the defendant's letters. It is respectfully submitted that the District Court's findings of facts concerning the letters were supported by the testimony and should not be disturbed.

POINT TWO.

Plaintiffs proved that Gallagher and Kosch were the duly authorized agents of the defendant company.

At this time we respectfully call this Court's attention to the admission of the defendants themselves, that Messrs. Gallagher and Kosch were the agents of the defendant corporation. This appears on page 13 of Point Two of the appellant's brief.

The Supreme Court reviewed the evidence in this case and concluded that it could fairly be inferred from the testimony that Messrs. Gallagher and Kosch were clothed with apparent authority to make a settlement for the defendant.

Appellant's brief cites the case of *Agricultural Insurance Company* v. *Fritz,* 61 N. J. L. 211. In that case the Court merely held that the proofs were insufficient to justify an inference that the agent possessed the extent of authority alleged. *In our case the Court was of the opinion that the proofs justified the inference of the extent of authority.*

The Court in the *Agricultural* case (supra) further held that the extent of authority may be

proved by "acquiescence by the company in the appearance the agent held out, or of ratification by it of his acts in pursuance of the power assumed with knowledge of the assumption, which shall have mislead the insured as to the true extent of the authority he possessed."

This is our point. *The defendants held the Salvage Adjustment Corporation and Messrs. Gallagher and Kosch out as their agents to adjust cases.* (State of Case, p. 28, ll. 25 to 36). The District Court found this to be a fact. Its finding was supported by the evidence of the defendant's own witness. *The testimony of Mr. Hyman, the defendant's only witness was that Messrs. Gallagher and Kosch had authority to discuss figures in settlement of cases.*

> "Q. That is not the question. That is one thing that the Court will decide, Mr. Hyman. The thing is, I am only delving into the course of business which you pursue there. My understanding is during the course of your business when the attorney or claimant involved appear at your office, they have the authority— A. (Interposing) *To discuss figures.*
> Q. *To discuss figures?* A. *They have.*"

The other case cited by the appellants counsel, *Hall* v. *Passaic Water Company,* 83 N. J. L. 771, we respectfully submit supports our position with regard to the *apparent authority of an agent to act for his principal.* In that case Judge Treacy speaking for this Court, said:

> "One who seeks to charge another with the act of an agent must prove that the agent acted within the scope of authority actual *or apparent,* ratification or acquiescence in or acceptance of the benefit on the part of the employer."

We believe that the complete answer to the appellant's argument is found in the opinion of the Court in that case.

> "*Whenever it is out of the usual course of an agents business* to make a guarantee, the party seeking to hold his principal thereon has the burden of showing the agent's authority to make the guarantee, or that the principal subsequently ratified his act."

This is of particular significance in our case. *We respectfully submit that the question of the extent of authority arises only when the agent acts out of the usual course of the agent's business.*

In our case the agents acted within the usual course of their business. They were the usual adjusters of an insurance company with the usual authority to adjust and settle cases and we respectfully submit that the question of the extent of their authority cannot properly arise in this case.

Appellant's brief further cites *Heckel* v. *The Cranford Country Club,* 98 N. J. L. 538, page 540, and italicizes the word "*knowingly*", *but it fails to make note of the court's opinion which further holds that the principal is liable for the acts of his agents which he holds the agent out to the public as possessing.*

Further, appellant's brief does not complete the Court's statement of the law in the *Heckel* case, *supra.* It has left out that portion of the opinion which reads as follows, page 540:

> "*And when established it* (*referring to the liability of the principal*) *cannot on the other hand, be qualified by the secret instructions of the principal.*" (Italics ours).

The significance of this portion of the opinion is all important in our case, inasmuch as appellant's attempt to set up secret instructions by a principal to an agent with reference to the agent's authority (State of Case, p. 29, ll. 29, through to p. 30, l. 9).

In the *Heckel* case, the Court recognizes the existence of the general rule, that a principal's liability cannot be qualified by secret instructions of the principal. *We respectfully submit, therefore, that the secret instructions (if any there ever were), attempted to be set up by the appellant in this case cannot qualify the liability of the defendant company.* The testimony clearly demonstrated that during no time was the plaintiffs' attorney ever advised by any one that any settlement with Messrs. Kosch or Gallagher had to be made with the approval of Mr. Hyman.

> "Q. Were you advised at any time during your course of negotiations with Mr. Kosch or Mr. Gallagher that every settlement had to be made with the approval of Mr. Hyman? A. No, sir, at no time." (State of Case, p. 30, ll. 18-23).

The defendant's own witness did not deny this. Neither did Messrs. Gallagher and Kosch. These men were not even called at all as witnesses by the defendant. This District Court held as a fact that if there were any secret instructions they were never communicated to the plaintiffs, and we respectfully submit that this finding of fact is clearly supported by the evidence. It is significant that none of the letters sent by the defendant expressed any limitation of authority in Messrs. Gallagher & Koch.

The case of *Dowden* v. *Crier,* 55 N. J. L. 321, cited by the appellants, dealt with *special* agents and can have no application to the case at bar.

The testimony of the plaintiffs showed an apparent authority, as well as an express authority, in the Messrs. Gallagher of the Salvage Adjustment Corp. to adjust claims for the defendant company. Under these circumstances a nonsuit was properly denied by the Court.

Messrs. Kosch and Gallagher had authority to submit figures in the way of settlement of a claim. (State of the Case, page 28, ll. 6-16).

The defendants themselves testified that Messrs. Kosch and Gallagher were the agents of the Salvage Adjustment Corporation.

> "Q. Do you know Mr. T. F. Gallagher? A. I do.
>
> Q. And Mr. Koch? A. Yes.
>
> Q. He was connected with the Salvage Adjustment Corporation? A. Yes. (State of Case, p. 26, ll. 10-15).
>
> Q. Mr. Hyman, both Mr. Koch and Mr. Gallagher are in your employ? A. Yes, sir. (State of Case, page 26, ll. 27-28).

A letter was sent by plaintiff's attorneys to the Lay Fish Market Company informing the latter that a suit would be instituted unless an amicable adjustment was arranged (Exhibit P-1). No reply was received from the Lay Fish Market Co., but the Salvage Adjustment Corp., *on the stationery of the St. Paul Mercury Co. replied to this letter and requested the plaintiff's attorney to communicate with them to discuss the case* (Exhibit P-2). The usual procedure incident to the examination of the plaintiff in an accident case was had in this case upon the request of Mr. Gallagher

who signed the defendant's letter. A conference was arranged in New York to discuss settlement which was attended by counsel and a settlement with the persons who had signed the letters was entered into. *Certainly, this course of business shows an express if not an apparent authority to adjust suits.* This is the usual practice in accident cases. A lawyer is attended by an adjuster of an insurance company and settlement is arrived at. *It is not necessary to show an express agency; an apparent authority to act for a principal being sufficient.*

In the case of *American Well Works* v. *Royal Indemnity Co.*, 109 N. J. Law, page 104, 10 N. J. Advance Reports, volume 23, Mr. Justice Trenchard, speaking for this Court, held:

> "A principal is bound by the acts of his agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. The question in every case depending on apparent authority of the agent is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question; and when the party relying upon such apparent authority presents evidence which would justify a finding in his favor, he is entitled to have the question submitted to the jury."

The facts in that case with reference to the letters and agency is somewhat analagous to the instant case. The claim numbers were stated in the letters, there was no limitation of authority

on the letterheads and this Court found that there was apparent authority for the agent to bind its principal.

The testimony showed that the plaintiffs' attorney called at the office of the Salvage Adjustment Company, who were adjusting cases for the defendant, St. Paul Mercury Indemnity Co., and spoke to Messrs. Gallagher and Kosch. He was informed by them of the letters sent to the company. The statements of witnesses were discussed. Settlement was discussed. We submit that these facts are evidence tending to prove agency on the part of Gallagher and Kosch.

> *Smith* v. *Delaware Atlantic T. & T. Co.*,
> 66 N. J. Eq., 53 Atl. 818.

We respectfully submit that the fact that the suit letters were turnd over to Mr. Gallagher goes far toward supporting the conclusion that the latter was expressly acting as the duly authorized agent and adjuster of the defendant company. But assuming that such authority was not actually vested in Mr. Gallagher, that fact is not necessarily a bar to the plaintiff's right of action, *but acts within his apparent authority are binding upon the principal as well as such acts as are done with express authority.*

Mr. Justice Katzenbach speaking for the New Jersey Court of Errors and Appeals said in the case of *Heckel* v. *Cranford,* 97 N. J. L. 538:

> "A principal is bound by the acts of its agent, within the apparent authority, which he knowingly permits the agent to assume, *or which he holds the agent out as possessing.*" (Italics ours).

And in the case of *White Door* v. *United States,* 7 A. R. 862, 146 Atl. 216, the Court held:

> "As between principal and third persons, the limit of the agent's power to bind the principal *is apparent authority with which he is vested, since to permit a principal to dispute his agent's authority in such cases would be to enable him to commit fraud on innocent persons.*" (Italics ours).

And again in the case of *Horner* v. *Georgia Casualty Company,* 100 N. J. L. 347, which case we believe is especially significant, Mr. Justice Katzenbach speaking for the Court of Errors and Appeals said:

> "An officer or agent can only bind a corporation to the extent that the power to do the act in question has been expressly conferred upon the officer or agent by the charter, by-laws or corporate action of the stock holders, or board of directors, *or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred* * * * * Aerial League v. Aircraft Fire Proof, 97 N. J. L. 530. (Italics ours.)

And this is also the law in the *United States Supreme Court.* Mr. Justice Story delivering the opinion in the case of the *United States* v. *Gooding,* 12 Wheat. 460, 6 L. Ed. 693, held:

> "The argument is that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel are not evidence to charge the owner with an offense; that the doctrine of the

> binding effect of such declaration by known agents, is, and ought to be confined to civil cases. We cannot yield to the force of the argument. In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority binds his principal, and is deemed his act. It must, indeed, be shown, that the agent has the authority, and that the act is within its scope; but these being conceded or proved, *either by the course of business* or by express authorization, the same conclusion arises, *in point of law,* in both cases." (Italics ours).

And in 32 Corpus Juris 1063 under the topic "Insurance", sub topic, "Acts within Scope of Authority", the following proposition of law can be found:

> "As in the case of agencies in general, an insurance company is bound by all acts, contracts or representations of its agent, whether general or special, which are within the scope of a real or *apparent* authority, (Citing list of cases among which is the New Jersey case of Millville v. Mechanics, 43 N. J. L. 662), *notwithstanding they are in violation of private instructions, or limitations upon his authority, of which the person dealing with him, acting in good faith has neither actual nor constructive knowledge.* Citing Manhattan v. Carder, 82 Federal, 986, 27 C. C. A. 344. (Italics ours.)

In the case of *Snyder* v. *The Insurance Company,* 59 N. J. L. 544, an insurance company was held bound by the acts of its agent within his *apparent* authority. Mr. Justice Depue, speaking for the Court of Errors and Appeals said:

> "A local insurance agent entrusted with

> policies of insurance in blank and authorized to issue them upon the application of parties seeking insurance, *is thereby clothed with apparent authority to bind the company* in reference to any condition of the contract, whether precedent or subsequent, and may waive notice of proof of loss, *and may bind the company of his admission in respect thereto.* (Italics ours).

In our case the defendant company clothed its agent with apparent authority to settle cases. It furnished the letterheads with the name Salvage Adjustment Corp. printed in red letters on its letters on its letterhead (State of Case, p. 7, ll. 10-12).

> Q. *Now these letters which were introduced into evidence are letters signed by the Salvage Adjustment Corporation?* A. *May I see these letters?*
>
> Q. *Certainly; here they are (handing letters to witness).* A. *They are letters, and they are signed—one letter is signed by Mr. Gallagher with the title of Claims Examiner, and the other letter is signed by Mr. Gallagher on a form on which is printed "Salvage Adjustment Corporation", and the printing underneath that is "Casualty Department."*
>
> Q. *On the letter, on the top of it, is St. Paul Mercury Indemnity Company?"* A. *Yes, sir.*
>
> Q. *You are authorized to use that?* A. *We are.* (State of Case, p. 26, l. 36 through p. 27, l. 12).

What other meaning can be attributed to the word "adjustment" other than the impression it gives to those dealing with the adjustment company that it has the power to adjust cases?

And this is the general law generally throughout the United States.

In the case of *National Fire Insurance Company* v. *O'Rear,* 80 So. 167, 60 Ala. App. 593, Topic—"Insurance", 3 Dec. Dig. 565, the court held:

> *"In an action on a fire insurance policy, a question by the defendant of its witness whether the adjuster had authority to agree on any amount of loss was properly excluded; the company being bound by the adjuster's acts within the apparent as well as real extent of his authority."* (Italics ours).

And in the case of *Smith* v. *St. Paul,* 204 Ill. App. 575, the Court held:

> "An insurance company is bound by the acts of the adjuster within the scope of his authority."

In the case of *Yost* v. *Empire State,* 125 Pac. 167, 69 Wash. 397—topic "Insurance" 2nd Dec. Dig. 567, the Court held:

> *"Where a surety company held one out as an adjuster, without any notice as to limitations on his power, one treating with him in the settlement of the claim is warranted in assuming that he has power to bind the corporation in the transaction."* (Italics ours).

And again in the case of *Schlessinger* v. *Columbia Fire Insurance Company,* 56 N. Y. Supp. 37, 37 App. Div. 531, Court held:

> *"Where a company knows that a person is acting as its adjuster in fixing a loss, and fails to repudiate his acts until after the amount has been fixed and determined, it cannot afterwards question his authority."* (Italics ours).

As a matter of law the principal has been estopped from denying the authority of its adjusters.

In the case of *Germania* v. *Fort Worth,* 274 Southwestern 123, the Court held:

> *"Insurer held estopped from denying authority of certain persons to represent it in adjusting fire loss where it availed itself of all the services of such person in attempting to adjust the loss, and used such information to defeat the policy, and insured in giving it acted in good faith, and at expense and loss of time."* (Italics ours).

We respectfully submit that all that the plaintiffs had to show in the presentation of their case was a contract of settlement with the defendant company with one who had either express or apparent authority to settle the case. This, we respectfully submit, the plaintiff did, and the Court below was justified in denying the motion for a non-suit.

A non-suit is equivalent to a demurrer to evidence. For the purpose of this motion the defendant admits the truth of the evidence presented by the plaintiff, and of every legitimate inference that may be drawn therefrom. In passing upon the motion the trial court will regard the plaintiff's evidence in the light of the most favorable inferences to which such testimony is legitimately susceptible. *If two inferences may reasonably be deduced from the evidence, one favorable to the plaintiff, and one against him, a jury question is presented and non-suit is properly refused.*

1. *Cons. Traction* v. *Reeves,* 58 N. J. L. 573.
2. *Coxe* v. *Fuld,* 13 N. J. L. 215.

3. *McLaughlin* v. *Dambold,* 125 Atlantic 314.
4. *Centefonte* v. *Camden,* 78 N. J. L. 662.
5. *Cowell* v. *Penn. R. R.,* 2 N. J. Misc. 966.

Under these circumstances and upon all the testimony submitted, we respectfully submit that the court could have done nothing else but to have denied the motion for a non-suit.

Assuming but not admitting and must less conceding, that there was error in refusing the motion for a non-suit, such error was absolutely cured at the end of the entire case when the testimony of the defendants themselves showed that the Messrs. Gallagher and Kosch had express authority to adjust cases. Private limitations or restrictions upon their authority which are not known to third parties certainly cannot effect such third parties.

In the case of *American Well Works* v. *Royal Indemnity Company,* supra, this Court held:

> "If the trial judge admits evidence of what an alleged agent said in the matter in question, before any evidence had been given that he was the agent of the party for whom he acted, such irregularity will not result in a reversal of the judgment against the principal, if afterwards, in the progress of the cause, the evidence tended to sufficiently prove that he was the duly constituted agent for the purpose."

In that case the defendant contended that there should be a reversal because the Court permitted questions to be asked as to conversations with an

agent, without proof of the agent's authority, and also because the questions were put before there was any evidence of the agent's apparent authority. Mr. Justice Trenchard, speaking for the Court at page 109, said:

> "Assuming, without deciding that this was so, we think it was immaterial because, if irregular in that respect, it was harmless and will not lead to a reversal, for there was evidence afterwards given in the progress of the cause which certainly tended to show that Carle was the duly constituted agent of the defendant for the purpose and authorized to act for it in the premises."

Bunting, Admr. v. *Allen,* 18 N. J. L. 299.
Cokran & Melony v. *Taylor,* 77 Id. 195.

In the case of *Seffler* v. *Vanderbeck,* 88 N. J. L. 636, Mr. Justice Trenchard speaking for this Court held:

> "A refusal to non-suit for failure of proof will not justify a reversal if the defect was supplied by evidence thereafter taken in the progress of the cause."

In the case of *Cappucio* v. *Hammontion,* 98 N. J. L. 6, Chief Justice Gummere speaking for our Supreme Court said on page 7:

> "It is further argued that the non-suit should have been allowed because there was nothing in the proofs submitted by the plaintiff upon which to predicate the existence of negligence on the part of the defendant. *But this is immaterial, if, on the whole there was evidence to justify the conclusion that such negligence existed.*"

And in the case of *Harrison* v. *Dickerson,* 87 N. J. L. 92, Mr. Justice Kalisch speaking for our Supreme Court (Swayze, Parker and Kalisch, *JJ.*) held:

> "At the conclusion of the plaintiff's case it appeared that the contract sued upon was made upon Sunday, and a motion to non-suit on that ground was made and refused. The defendant was then placed on the stand, and from his testimony it was made to appear that the contract was not made on Sunday but on Friday or Saturday. *Upon review it was held that the error in the refusal to non-suit was cured by the later testimony, which made the question one for the jury.*"

And in the case of *Esler* v. *Camden,* 71 N. J. L. 180, Mr. Justice Hendrickson held:

> "Refusal to non-suit for failure of proofs is no error, if the defect was supplied by evidence taken in the progress of the cause."

And in the case of *Maudsley* v. *Richardson,* 120 Atl. 139, this Court held:

> "*In passing upon a motion to non-suit the Court cannot weigh the evidence, but must take as true all testimony which supports the view of the party against whom the motion is made and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor; and a refusal to non-suit for failure of proofs will not justify a reversal, if the defect be supplied by evidence thereafter taken during the progress of the cause.*"

See also,
Benoliel v. *Homac,* 87 N. J. L. 375.
Wilson v. *Brauer,* 97 N. J. L. 482.

At the end of the case the entire testimony revealed both an express and apparent authority in the Messrs. Gallagher and Kosch of the Salvage Adjustment Corp. to adjust cases for the defendant, and a motion to direct a verdict for the defendant, was properly refused by the Court.

If there was any doubt that the Messrs. Gallagher and Kosch had express if not implied authority to adjust cases, there could be none after the testimony of the defendant was offered. Mr. Hyman the president of the Salvage Adjustment Corporation willingly supplied proof in his evidence, which sustained the plaintiff's case that the Messrs. Gallagher and Kosch had express authority to adjust cases. He testified that they had such express authority, and upon the whole case we respectfully submit, that the plaintiff is entitled to a judgment and the Court's refusal to direct a verdict for the defendant was proper. Nothing that the plaintiff testified to was contradicted. All of its evidence was admitted by the defendant. Express and apparent authority were both proven. Neither Messrs. Gallagher nor Kosch were called by the defendant to deny their authority to settle this or any other case. The Court could have done nothing else, we respectfully submit, but deny the motion for a directed verdict. For this reason we respectfully submit that the judgment of affirmance of the Supreme Court should be affirmed.

POINT THREE.

The plaintiffs have established a consideration for the agreement between them and the defendant.

The argument of the defendant's counsel with reference to privity of contract was properly overruled by this Court since this was a suit for a definite sum as the result of a compromise.

Prof. Cooley in his treatise, "Briefs on Law of Insurance", Vol. 4, page 3585, states the following proposition of law:

> "Where the adjustment of a loss at a definite sum is the result of a compromise, the company agreeing to pay such sum to avoid litigation, though claiming that it is not liable at all, or that it is not liable for so large a proportion of the loss considered in the adjustment, it will be bound to pay such sum *as under a separate agreement.* (Author's italics). Citing
>
> 1. *Farmers* v. *Chestnut,* 50 Ill. 111.
> 2. *Stache* v. *St. Paul,* 49 Wisc. 89.
> 3. *Sears* v. *Grand Lodge,* 163 N. Y. 374.
> 4. *Illinois* v. *Archdeacon,* 82 Ill. 236.

The case of *Sanders* v. *Frankfort,* 57 Atl. 655, was a case where the company had assumed—in legal effect, agreed to pay the assured liability to the plaintiff to the extent of Five Thousand ($5,000.00) Dollars. The Court required the defendant insurers to perform their agreement by payment to the plaintiff. In its opinion the court said that no action could have been maintained

against the insurance company if they denied liability, or refused to take care of suit before the plaintiff sued the assured. *But, the entire situation was changed where the insurance company assumed, and, in legal effect, agreed to pay. The privity question disappears when the defendant company agrees and undertakes to settle the case.*

And in the case of *Neibles* v. *Minneapolis R. Co.*, 37 Minn. 151, the Court held:

> "And if an unliquidated claim arising out of negligence and compromised by an agreement to pay a certain sum to the injured party in full consideration of his damages, *the contract will be upheld.*"

We respectfully submit also that the forebearance to sue in this case was adequate consideration for the agreement of settlement. Williston on "Contracts", Vol. 1, page 299, states the following proposition of law:

> "It is immaterial whether the claim foreborne is against the promisor *or is a claim against the third person; the detriment to the promisee is the same, and it is not essential that there should be benefit to the promisor.* The nature of the claim foreborne is also immaterial. It may be a claim for debt, *for damages for tort,* for contesting the probate of a will, for enforcing a right to divorce or nullity of marriage, or for anything else to which the plaintiff may claim a legal right."

CONCLUSION.

We respectfully submit that the District Court properly admitted into evidence letters from the defendant company; that the plaintiffs proved that Messrs. Gallagher and Kosch were the duly authorized agents of the defendant company; that the plaintiffs have established a consideration for the agreement between them and the defendant.

For these reasons we respectfully submit that the judgment of the Supreme Court affirming the District Court should be affirmed.

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