New Jersey Court of Errors and Appeals

PHILADELPHIA PICKLING COMPANY, *Plaintiff-Appellant,* *vs.* MARYLAND CASUALTY COMPANY. *Defendant-Respondent.*	Action at Law. On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT.

Statement.

This is an appeal from a judgment in the Supreme Court, entered upon a verdict in the Mercer Circuit, upon the second trial of the issue.

This action was first tried at the Mercer Circuit, and resulted in a verdict in favor of the plaintiff for $4,356.01, rendered November 30, 1914.

Thereafter a motion for a new trial was made by the defendant, which was granted. The rule making rule to show cause absolute and directing a *venire de novo* to issue for the retrial of the action will be found at p. 35f.

This is an appeal from a judgment of the Su-

The second trial was had in the Mercer Circuit on November 22, 1915 (p. 35g).

This cause, therefore, now comes before this Court as if the trial court had directed a verdict in favor of the defendant, at the termination of the first trial, and judgment had been entered upon such verdict, and such judgment appealed from by the plaintiff.

This action is based upon a Policy of Indemnity *against* loss dated November 13, 1906, by the Maryland Casualty Company, the defendant-respondent to the "Philadelphia Pickling Company" (a trade name). The present plaintiff-appellant is a corporation of the same name, which was incorporated November 7, 1908. This Policy was in force for one year from November 25, 1906 (Exhibit P-2, p. 311).

The Policy is known as a "Manufacturers' Employers' Liability Policy."

It developed that the name of the Assured was a trade name, used by one Sallie Wittenberg.

The Policy agreed

> "to indemnify Philadelphia Pickling Company * * * the Assured * * * against loss from the liability imposed by law upon the Assured for damages on account of bodily injuries or death accidentally suffered while this Policy is in *force* by any employe or employes of the Assured, while within the factory, shop or yard described in the Schedule * * * in and during the operation of the trade or business described in the Schedule" (Exhibit P-2, p. 311, ll. 18-35).

subject to certain conditions enumerated in the Policy.

The kind of trade or business described in the Schedule of the Policy was "Manufacturers, dealers and importers of pickles, table condiments and goods of this description" (Statement 4, p. 318, ll. 1-8).

Statement 6 of the Schedule of Statements states that:

> "The operations carried on are those usual to the kind of trade or business described herein" (p. 318).

In Condition B of the Policy it was provided that:

"This Policy does not cover loss from liability for injuries or death to or caused by —(4) Any person in connection with the making of additions to or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or plant or any part thereof" (p. 312, ll. 11-14; 30-35).

In said Condition B of the Policy it was also provided that:

"ORDINARY REPAIRS when made by employes of the Assured whose compensation is included in the estimate set forth in the schedule are permitted" (p. 312, ll. 35-38).

While the Policy was in force and on September 19, 1907, one Walter Chambers, an employee of Sallie Wittenberg, received personal injuries, at her canning and pickling factory, at Eldora, Cape May County, New Jersey.

Chambers when injured was in a trench about four feet deep and six feet long (p. 103) outside of the building digging and undermining the foundation wall of the building, with the purpose of placing underneath the foundation wall an addition to, or an extension of such wall. The wall was also being undermined from the inside (p. 189). While Chambers was so engaged the wall collapsed and fell upon him. The wall had been undermined about 2 1-2 feet (p. 194).

In considering the questions involved, the character of the work, carried on by Sallie Wittenberg at the time Chambers was injured, and the period of time such work consumed, is of importance.

The work began four to six weeks prior to the day Chambers was injured (pp. 93, 204, 232), and continued for a period of from 6 to 7 months after he was injured (pp. 93, 196, 204).

The building in which Sallie Wittenberg was

conducting and had been conducting for several years her business at Eldora, was one which had been previously used as a paper factory (p. 98).

The work consisted of undermining at least 165 running and continuous feet (p. 219) of foundation wall of the building along three sides of the building (p. 208).

These walls were undermined for an average depth of from 1 1-2 to 2 feet (p. 192, 207).

No underpinning or bracing was used to hold up the foundation walls when undermined (pp. 91, 192, 195).

Underneath the walls which had been undermined was placed a new and added extension of the foundation wall, of from 1 1-2 to 2 1-2 feet in depth or height and 18 inches wide, about the same width as the original foundation wall (pp. 192, 199).

This addition or extension to the foundation wall was made of broken stone and concrete or mortar (p. 192).

Before the work was begun, the cellar of the building was divided into three compartments, by means of two stone walls running lengthwise of the building (p. 208). These walls were about 40 to 50 feet long and were about 5 to 6 feet high and 15 to 18 inches thick (pp. 194, 208).

These walls had been used by previous occupants of the building as machinery foundations (p. 208).

The building had been used by the assured for several years.

During the time the walls were in the cellar the only communication with the cellar was through the ends of the building (p. 209), and no communication could be had between the compartments in the cellar, except from the ends of the building.

The broken stone for the added or extended foundation walls was obtained by knocking down one of the stone walls in the cellar, for its entire length, width and heighth (pp. 193, 194), and by knocking or cutting three arches (aggregating about 12 feet in length) (pp. 194, 209) through the second wall in the cellar.

None of the old foundation wall was taken out. The old foundation walls were not raised. They retained their original position (pp. 196, 206).

After the stone wall in the cellar had been torn down and the arches broken through the second stone wall in the cellar, the cellar consisted of two compartments and communication could be had one with the other by means of the arches (p. 209).

The stone walls in the cellar were replaced by wooden posts 12 x 9 inches, one in every 8 feet, to support the floor above (p. 214).

The concrete or mortar for the added or extended foundation walls was made by taking sand from the floor of the cellar and mixing it with cement (at least 60 bags of which were delivered to the building) and water.

Prior to these operations there was no covering or flooring of the cellar of the building (p. 205).

The operations also consisted of the excavation of the cellar and laying thereon a cellar floor consisting of a layer or a bottom of cinders, gravel and cement and a covering thereon of cement and sand (pp. 198-199). The floor of the cellar after the operations even with the concrete floor was much lower than it had been (pp. 98, 226, 227, 230, 231).

The work consumed a railroad carload of cement (p. 197) 50 wagon loads of gravel (pp. 197, 198, and wagon loads of ashes and crushed stone pp. 198, 200).

It would seem from the testimony that the operations also consisted of the construction of a concrete bridge, communicating the building to which the foundation walls were being added and extended with another new building built at the plant. A coal yard with cement walks was also built by the assured (pp. 201, 203).

The doing of the work resulted in an entirely different layout.

In the record it will be noticed that Grounds of the Motion for Non-suit are printed in a little heavier type than the argument addressed to the Grounds. This was done in order to aid the Court in resting its eyes upon the Grounds for the Motion.

Inasmuch as the Record does not contain a concise statement of the transactions and court proceedings or of the dates thereof, antedating the beginning of this suit, or of the claims of the respective parties, it is deemed advisable to set out such a statement in this brief, including therein a similar statement of proceedings pertaining to this action chronologically arranged, together with the claims of the respective parties, for the aid and convenience of the Court, in the consideration of the questions involved.

Statements of transactions and Court proceedings and claims of the respective parties.

Nov. 13, 1906, Policy in suit issued to Philadelphia Pickling Company (Trade name) (p. 311).

Nov. 25, 1906, Policy in suit began to run (p. 311).

Sept. 19, 1907, Walter Chambers injured.

Sept. 21, 1907, Letter of Trade name to Defendant, notifying it of happening of accident (p. 322).

Sept. 24, 1907, Letter of Trade name forwarding Report of accident to Defendant (p. 323).

For report of accident see (p. 324).

Oct. 10, 1907, Letter of Defendant-Respondent to Trade name disclaiming liability because work was construction work, and not "ordinary repairs."

Nov. 25. 1907, Policy in suit expired.

April 1, 1908, Chambers brought an action (in tort) in the New Jersey Supreme Court to recover damages against the Philadelphia Pickling Company (Trade name) (p. 329).

This defendant-respondent did not undertake the defense in the tort action. It did not have notice of the tort action and the summons in suit was not forwarded by the Assured to the Defendants' Home Office as required under the conditions of the policy. Attorneys hired and paid by the assured, defended the action.

Sept. 30, 1908, Verdict for plaintiff in tort action against trade name for $4,000.

October 5, 1908, The Trade name obtained a Rule to Show Cause why a New Trial should not be granted in the tort action (p. 335).

November 7, 1908, SALLIE WITTENBERG incorporated her business in Pennsylvania, under the name of Philadelphia Pickling Company, being the same name as the trade name under which she had been previously conducting her business (p. 355).

November 7, 1908, SALLIE WITTENBERG, trading as Philadelphia Pickling Company, by agreement bearing this date transferred her business to the Pennsylvania Corporation (p. 308). By this agreement the Corporation agreed to pay all debts due by SALLIE WITTENBERG, trading as Philadelphia Pickling Company "together with any and all claims for damages or otherwise arising from

the operation of the business by the said SALLIE WITTENBERG, including any claim now existing or hereafter to be made by Walter Chambers, suit for which has already been brought in the State of New Jersey" (p. 309).

This defendant-respondent was not a party to this agreement.

January 5, 1909, Judgment entered in tort action of Chambers against the trade name, in the amount of $4097.78 (p. 336). This judgment was evidently rebated to the sum of $4091.01, the sum recited in the Plaintiff's Pleadings. The plaintiff-appellant stands on the figures stated in pleadings (p. 158).

February 16, 1909, Rule entered discharging the Rule to Show Cause why a New Trial should not be granted in Tort Action, for failure to prosecute the Rule to Show Cause (p. 337).

Thereafter Chambers had execution issued against certain personal property which he assumed was the property of the trade name. The new Corporation filed a claim to this property and the question was submitted to a jury which found in favor of the judgment creditor (pp. 121, 123, 266).

This verdict on the claim of property was taken, by Writ of Certiorari, to the Supreme Court and the verdict of the jury set aside (p. 123).

The question of the claim for the property was thereafter, for a second time, submitted to a jury, which again found in favor of the judgment creditor. This verdict was also taken to the Supreme Court by a writ of certiorari and for a second time the verdict of the jury was set aside (p. 123).

In 1909 Chambers brought an action (on contract) against the Philadelphia Pickling Company (the Corporation) upon the judgment which he had obtained against the Philadelphia Pickling

Company (the Trade name) and upon the agreement above referred to. and made by Sallie Wittenberg and the Philadelphia Pickling Company (the Pennsylvania Corporation) dated November 7, 1908 (p. 341).

The defendant-respondent in this action, of course, was not a party to this last mentioned agreement.

In this last named contract action a demurrer was interposed to the declaration which was argued before the Supreme Court on January 17, 1910. The Supreme Court awarded judgment to the plaintiff on the demurrer. (*Chambers v. Philadelphia Pickling Co.*, 79 N. J. L., 1; 75 Atl., 159.)

The Philadelphia Pickling Co., the Corporation, then sought to review the decision, rendered by the Supreme Court upon the Demurrer, by Writ of Error, which writ was dismissed by the Court of Errors and Appeals on March 6, 1911, as the rule entered in the Supreme Court overruling the demurrer was not a final judgment, inasmuch as the demurrer had been addressed to but one of the two counts of the declaration. (*Chambers v. Philadelphia Pickling Company*, 81 N. J. L., 388; 79 Atl., 273).

Thereupon Chambers moved his case for trial, in the absence of the defendant, the Philadelphia Pickling Company, a Corporation, before the remittur on the opinion of the Court of Errors and Appeals above referred to, was filed, which resulted in a verdict in his favor.

The Philadelphia Pickling Company (the corporation) then procured a Rule to Show Cause why the Verdict should not be set aside which Rule was made absolute by the Supreme Court on November 13, 1911, on the ground that the lower Court did not have jurisdiction until the Record

was returned. (*Chambers v. Philadelphia Pickling Company,* 82 N. J. L., 1; 81 Atl. 573).

Thereafter, in December, 1911, a second trial of the Contract action against the Philadelphia Pickling Company (the Corporation), was had, which resulted in a verdict against such corporation in favor of Chambers. Judgment was thereupon entered on December 19, 1911, in this action on *contract* against the corporation, for $4900.21 (p. 348).

This Judgment was taken by Writ of Error to the Court of Errors and Appeals, which by a divided Court on June 20, 1912, affirmed the Judgment below. (*Chambers v. Philadelphia Pickling Co.,* 83 N. J. L., 543; 83 Atl., 980).

The Order on Affirmance of Judgment was filed January 5, 1912 (p. 349).

Thereafter and on Aug. 9, 1912, the Philadelphia Pickling Company (the Trade name) made application to Mr. Justice Voorhees for a Rule to Show Cause why the Judgment in the tort action against the trade name entered on Jan. 5, 1909, should not be opened and set aside and a new trial granted, and procured from Mr. Justice Voorhees Rules staying proceedings in execution of the Judgment in both the tort and the contract actions and referring the said application to the Supreme Court for hearing at its next stated term.

The application was argued at the February, 1913, Term of the Supreme Court and the opinion of the Supreme Court was rendered March 7, 1913, denying such application and discharging the rules (pp. 338, 351).

The Rule denying application for Rule to Show Cause was entered March 6, 1913 (p. 351).

Thereafter and on March 12, 1913 (p. 328) the Philadelphia Pickling Company, the Pennsylvania Corporation, but not *the Assured in the*

Policy began making payments on account, which it is contended by this defendant-respondent were on account of the Judgment entered against the Philadelphia Pickling Company, the Corporation.

The Corporation made the following payments on account of the Judgment (Harvey F. Carr, pp. 122-126) (Ex. P-6, p. 328), viz:—

1913	
March 12,	$1300.00
April 14,	1000.00
June 16,	1000.00
July 11,	500.00
August 9,	500.00
October 31,	1205.09
	Total, $5505.09

This sum of $5505.09 was the exact amount due on the contract Judgment on October 31, 1913, (Harvey F. Carr, p. 126).

(*Note*: Our opponents, on page 4 of their brief refer to the payments made aggregating $5305.49. This is an evident typographical error for $5505.49. The difference of 40 cents between our figures of $5505.09 and our opponents' figures, as should be printed, $5505.49 is explained in the following paragraph.)

On April 22, 1914, by check of one Harry Felix, the Philadelphia attorney for the Corporation, a payment of Forty Cents (40c.) was made to the attorney for Chambers, which was used for the purpose of satisfying of record the two Judgments (Harvey F. Carr, p. 122, Felix, p. 109; Exhibit P-6; p. 328).

May 5, 1914, this present action was begun.

The Defendant respondent contends this present action was begun by the Trade name (pp. 1, 36).

June 18, 1914, answer by defendant-respondent in this action filed (p. 6).

November 12, 1914, Notice of Application for

Leave to Amend Complaint in this action served upon the attorney for the Defendant-respondent (p. 18).

Nov. 20, 1914 Rule amending complaint allowed (p. 19).

November, 1914, first trial of this action at the Mercer Circuit Court, resulting in a verdict in favor of the plaintiff for $4356.01, on November 30th (representing the amount of the verdict in the tort action, against the trade name, $4000.00, and costs $91.01 together with interest as taxed by Stipulation at p. 278) (p. 307.)

February 16, 1915, argument before Supreme Court of application for and of Rule to Show Cause why the verdict should not be set aside and a new trial granted.

July, 1915. Opinion of Supreme Court granting application for a new trial and making Rule to Show Cause absolute (p. 35d) 94 Atl. 889.

August 2, 1915. Rule making Rule to Show Cause absolute and directing a *venire de novo* to issue for the retrial of this action (p. 35f).

November 22, 1915. Second trial of this action at the Mercer Circuit, resulting in a verdict in favor of the defendant (p. 35i).

1915, December 9. Judgment on verdict entered in favor of defendant dismissing plaintiff's complaint in this action with costs (p. 35j).

Defendant contends as follows:

(1) That Chambers when he received his injuries was engaged in the character of work above quoted from Condition B., subdivision 4 of the Policy, which the Policy expressly provided were not covered.

That the nature of the work being performed when Chambers was injured, consisted of *"construction work"* and "general repair work" and

not "ordinary repairs" within the meaning of the terms of the last sentence of Condition B. of the Policy.

(2) That the character of work, in which Chambers was engaged when he was injured, was not covered by the Policy of Indemnity, as the injuries he received were not suffered *"in and during the operation of the trade or business described in the schedule"* of the Policy (Statements 4 and 6 of the Schedule p. 318).

(3) There was no assignment of the Policy nor was there any assignment of any claim of loss under the policy; that the Policy was personal in character and not assignable. There could be, in view of the provisions of the Policy, itself, no legal assignment of the Policy or any claim thereunder, as there had been no loss to the Assured, or payment of a loss by the assured, on November 7, 1908; (no judgment had been entered against the trade name on that date.)

(4) That the Amended Complaint substituted the Philadelphia Pickling Company, the Corporation, as party plaintiff, in place of the Trade name which resulted in an institution of a new action between different parties, and raised new questions and deprived the defendant-respondent of an opportunity to plead contract limitations forming part of the contract.

(5) That the judgment paid by the Corporation was the Judgment rendered against it in the contract action, based upon the agreement with Sallie Wittenberg to which the defendant-respondent was not a party and that such loss was not a loss under the policy in suit.

(6) The Policy had been forfeited by Breach of Warranties.

(7) The limitations in the Policy had barred the action.

(a) As more than 90 days had expired between

the time when the full amount due on the Tort judgment against the Trade name had been paid and the date of the beginning of this action.

(b) As more than 90 days had expired between the time when the full amount due on the contract judgment against the Corporation had been paid and the date of the beginning of this action.

(c) As more than 90 days had expired between the time when the full amount due on either the Tort Judgment against the Trade Name or the Contract Judgment against the Philadelphia Pickling Company the Corporation had been paid and the date when the Amended Complaint was allowed substituting the Corporation as the Plaintiff herein.

(8) That there was a lack of proof on the part of the Plaintiff that the compensation of Walter Chambers or any of the other employees of the Assured at work upon the operations were included in the estimate set forth in the schedule of statements.

The plaintiff-appellant's claim for damages ($7,223.03 and interest) was based upon the following:

(a) Amounts paid on the contract Judgment (which payment is alleged in paragraph 8 of its Amended Complaint was "in extinguishment of the liability of the said Sallie Wittenberg, trading as the Philadelphia Pickling Company), to the said Walter Chambers" (p. 22).

(b) Interest on the installment payments which it made on account of the contract Judgment from the date of payment.

(c) Amounts expended by the Trade name in defending the Tort Action.

(d) Amounts expended by the Plaintiff-Appellant Corporation in defending suit brought by

Chambers on Contract to which Defendant-Respondent was not a party.

(e) Amounts expended by the Plaintiff-Appellant Corporation in defending its own claims of property and certiorari proceedings taken by it concerning the same.

As to these items defendant-respondent claims that if there was any liability on its part, such liability would extend only to the amount of the Tort Judgment with interest from the date of its final payment; in other words, the date when it was paid; that, in any event, the maximum amount of defendant-respondent's liability under the terms of the Policy was $5,000; that defendant-respondent could not be held liable for any part of the contract judgment; nor for interest thereon; nor for any monies expended by the plaintiff corporation in defending the contract action, the claims of property or in connection with the certiorari proceedings thereon; that it could not be held liable to the plaintiff-appellant corporation for the amounts expended by the Trade Name in defending the Tort Action, as there had been no proof of any assignment of that claim.

The Court at the first trial (p. 304) limited the recovery to which the plaintiff was entitled to $4,356.01, being the

Amount of judgment entered in Tort Action	$4,091.01
Interest thereon from October 31, 1913 (See Stipulation, p. 279)	265.00
	$4,356.01

The Trial Judge committed error in allowing the Plaintiff after the close of the case, the right to amend the Plaintiff's pleadings, over the objection of the Defendant.

That this injured defendant in a substantial way.

Chambers was not engaged in making "ordinary repairs." The work consisted of additions and alterations to a building; the work was construction work.

The character of repairs permitted by the policy is limited to *"Ordinary Repairs"* (p. 312, ll. 35-38).

The Policy provides in Condition B:

> "This Policy does not cover loss from liability for injuries or death to or caused by — (4) Any person in connection with the making of additions to or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or plant or any part thereof. *Ordinary repairs* when made by employees of the Assured whose compensation is included in the estimade set forth in the schedule are permitted."

It will be observed that the work permitted was of the qualified nature of *"Ordinary Repairs."*

It is submitted that the construction to be given to the words "Ordinary Repairs," as used in the Policy should not be broad enough to include the character of work in which Chambers was engaged when he received his injuries.

The character of the work in which Chambers was engaged at the time he was injured has been set out with considerable detail in the statement in this brief.

It is submitted that the character of the work

comes within the definition given to the word *"Alteration"* as defined by our Supreme Court in considering the Mechanic's Lien Act, in the case of *Updike v. Skillman,* 21 N. J. L., 131, wherein the Court held that adding to the height, extending the depth, or increasing the extent of the interior accommodations of a building are *alterations.*

In the case at bar there was an extension in the depth of the Building, and the interior accommodations of the building were increased. There was an enlargement of the space in the cellar. There was a substantial change in the structure, instanced by the tearing down of the long stone wall in the cellar; knocking down of arches in the second stone wall in the cellar; substituting wooden posts in the cellar, in the place of the stone wall, which had been torn down to permit of access to the changed compartments in the cellar, other than from the ends of the building, as was the case before the work was done.

Certainly such work could not be classified as "Ordinary Repairs" to which the Policy was limited, even though they might on a strained construction be classified as "Repairs."

While there is testimony to the effect that there were some cracks in the foundation walls, there is no proof that such cracks were filled in or that the sides of the foundation wall containing cracks were removed.

The evidence is that none of the old foundation wall was taken out. The old foundation walls were not raised to overcome any claimed settling. They retained their original positions (p. 196). The witness, Henry, said that nothing was done to the old foundation wall (p. 206).

The work made a change in the form or nature of the building and resulted in an entirely different layout.

There is no proof that the foundation walls were strengthened by the extensions added to them.

There was no substitution of a new foundation wall for the old foundation wall. The stone walls in the cellar were not substituted by the wooden posts because of decay in the stone walls.

The work was not included in the ordinary course of business of "Manufacturers, dealers and importers, of pickles, table condiments and goods of this description."

The magnitude of the work and the length of time it covered would, it seems to us, plainly decide that the work was *not* an "ordinary repair."

Our view that the work was not an *"ordinary repair,"* within the meaning of the Policy, is supported by the following authorities:

People's Ice Co. v. Emp. Liab. Assur. Co., 161 Mass., 122; 36 N. E., 754; (copy of Opinion is printed at page 24 of this brief);

Home Mixture Guano Co. v. Ocean Accident & Guarantee Corp., 176 Fed., 600.

As supporting our view, that the work done was an *"alteration"* as distinguished from an *"ordinary repair,"* the attention of the Court is called to the cases of

Kingston Cotton Mills v. Emp. Liab. Assn. Co., 77 S. E., 682;

Harbor & Suburban Building & Savings Assn v. Emp. Liab. Assur. Corp., 140 N. Y. Supp., 717; 79 Misc., 190.

In each of these cases the policies permitted the making of *"repairs"* and *"ordinary alterations."* The Court in each of these cases found that the work done came within the meaning of the words "ordinary alterations."

In the case of *Harbor & Suburban Building & Savings Assn. v. Emp. Liab. Assur. Corp.,* referred to by our opponents on pages 21 and 25 of their brief, the Court dwelt upon the fact that "the insured *was not* tied up to *"ordinary repairs"* which is the phrase used in the policy in this suit.

The Court in that case also commented upon the fact that "none of the exterior walls of the building were injured."

A careful reading of the Opinion of the Court in that case will convince this Court that the case is readily distinguishable from this case.

The case of *Kingston Cotton Mills v. Liability Assurance Corp.,* 77 S. E., 682, (N. C., 1913), is cited by our opponents on page 18 of their brief. The Policy in that case covered and

> "included the making of *repairs* and such *ordinary alterations* as are necessary to the care of the premises and plant and their maintenance in good condition."

It will be observed that the "repairs" permitted were not limited to "ordinary repairs" as in the policy in suit, and that it permitted "ordinary alterations" to be made, which are not permitted by the policy in suit. It excluded liability for injuries caused to

> "any person in connection with the making of additions to, or *structural alterations* in, or the construction of any building or plant."

In that case an employee of the company had been killed while digging sand from a hole on the premises for use in the erection of a brick chimney to take the place of two iron smoke-stacks.

The Court found that:

> "The erecting of a brick chimney in the

> place of the two iron stacks, which had proven unsatisfactory, was an *alteration*, which was necessary to the care of the premises and plant."

The case of *Kresge v. Md. Cas. Co.*, 143 N. W., 668 (Wis. 1913), cited by our opponents on page 24 of their brief is easily distinguishable from this case.

The policy in that case agreed to indemnify the assured against loss from liability for damages on account of injuries accidentally suffered by *any person* while within or upon the premises of the plaintiff's retail store in Milwaukee.

It was what is known as a "Public Policy," and not a "Manufacturers' Employers' Liability Policy" which is involved in this action. It was not limited to cover "employees" "in and during the operation of the trade or business described on the schedule."

The Policy in that action contained the following provision:

> "Additions to or alterations in, or the construction of any building or structure, or elevator, are not covered under this policy."

It will be observed that this provision is not as broad as the provision contained in Condition B, sub-division 4, of the Policy in suit.

It appears from the facts as stated by the Court that

> "The store building of the plaintiff had a frontage of 50 feet and a ground floor area of 9500 square feet. In the front there were three large windows separated by two entrances, which entrances were provided with double swinging doors on the inside. Because such doors did not afford sufficient protection to the employes in cold weather, it was decided to install two vestibules, each having

two swinging doors therein. These vestibules inclosed about 25 to 30 square feet of floor space."

It appears from the Opinion that the work simply consisted of

"putting in of an extra set of doors in each of the entrances"

which created a vestibule in each entrance, and that

"It is conceded that the extra set of doors at each entrance was intended for winter use only, and that but one set would be maintained at each entrance during the summer months."

It can, therefore, be readily seen that the work done in that case was of a *temporary nature,* was not construction work nor did the doing of the work result in an entirely different lay out as in this action.

The Court found that the putting in of these *temporary* extra sets of doors did not constitute an addition, nor an alteration of the building, stating:

"Neither do we think that a *temporary device* put in place to keep out the wind and cold in the winter time should be held to constitute an alteration of the building itself within the meaning of the policy. There was no substantial change in the structure, *if indeed,* there was any change at all * * *" (p. 669). (Italics ours.)

The Court there considered the placing of such *temporary* devices of extra doors as a *"trifling act"* stating:

"It seems reasonably certain that what the defendant aimed to protect itself against was the danger incident to the *construction work* and the wrecking of buildings and not

to a *trifling act* such as is here involved" (p. 670). (Italics ours.)

The construction work being done when Chambers was injured could not be called a "trifling act."

The work done when Chambers was injured was construction work, was not of a simple nature, was not a "trifling Act." It was not a "temporary device" but was of a permanent nature. It made an *"enlargement"* * * * so as to include additional space" and, therefore, an "addition" as construed by the Court in the Kresge case.

It made "a substantial change" in the structure and, therefore, an "alteration" as construed by the Court in that case.

Some of the Common definitions of the word "Ordinary" as found in the dictionaries include "according to established order", "usual," "customary," "common place," "mediocre," "plain," "regular."

Surely it cannot be said that the work done was an ordinary repair within the meaning of any of such terms.

The burden of proving that the work done was usual, customary or common place in the kind of trade or business described in the policy was upon the plaintiff-respondent.

The record is barren of any such proof.

For some definitions of "alterations' see also

Words & Phrases Vol. 1, p. 360 and (Second Series) Vol. 1, p. 196.

Chambers did not receive his injuries "in and during the operation of the trade or business described in the schedule," attached to and forming part of the policy, and the work he was performing was not covered by the policy.

The Policy only agrees to indemnify against loss from the liability imposed by law upon the Assured for damages on account of the injuries to an employe *"in and during the operation of the trade or business described in the Schedule"* attached to the Policy.

In Statement 4 of the Schedule of Statements the "Kind of Trade or business" is described as *"Manufacturers, dealers and importers of pickles, table condiments and goods of this description."*

In Statement 6 of the Schedule of Statements it is set forth *"That the operations carried on are those usual to the kind of trade or business described herein."*

It is urged that it would require an extraordinarily broad interpretation of these statements to bring the character of the work being performed by Chambers within the policy.

"Manufacturers, dealers and importers of pickles, table condiments and goods of this description" did not include construction or general repair work, overhauling, altering or adding to a building; wrecking or tearing down long walls of buildings; undermining stone foundation walls of buildings; adding to or extending foundation walls of buildings; or general mason work.

It is submitted that no construction of the language of the Policy should be made which would include the nature of the work being performed by Chambers and the Assured at the time Chambers was injured.

The *Massachusetts* case of *People's Ice Co. v. Employer's Liability Assurance Corp.*, 36 N. E. 754; 161 Mass., 122; is so strongly in favor of the defendant-respondent's contention, that we quote the opinion in full, as follows:

ALLEN, J.

"In October and November, 1888, before the time when there was any ice to cut, the plaintiff, which was a corporation engaged in the ice business, was building a large, new ice house at Wigwam pond, in Dedham, it already having some smaller ice houses there, as well as at other places. During the process of construction, the new ice house fell, causing injury to several of the plaintiff's employees, to whom the plaintiff afterwards paid compensation. The question is whether these injuries were within the policy. It seems to us that they were not. The policy and the application are to be construed together. The policy in referring to the application says: 'The statements in which the employer warrants to be true and agrees shall be incorporated herein.' Looking then, first at the application, it gives the annual wages at $5,000, and applies for a 'policy to be based upon the following statement of facts, which are to be considered as warranties.' Among other things stated are these: 'The employer's address is 240 Ruggles St., Boston.' 'The employer's works are situated at (state all) as above, and where cutting ice.' 'The trade or business is ice dealers.' 'The operations carried on by the work people are cutting and handling ice.' 'The machinery in use is such as is necessary in cutting ice.' 'There is no information tending to vary the risk, except as herein stated? No.' 'The insurance is to cover the expenditure in wages of five thousand dollars.' Upon this application, a policy was issued in consideration of a premium, which was therein stated to be 'based upon the estimated

yearly pay roll of the employer amounting to $5,000.' The policy stated that 'the sums paid to the employer shall be for personal injury, within the meaning of this policy, caused to any employe in his service while engaged in the employer's work in any of the occupations, or at any of the places, mentioned in the schedule hereto.' The policy was to run for 12 months, and there was a provision in the conditions annexed that, if the amount of wages paid by the employer in that period should exceed the amount on which the premium had been paid, a further premium should be paid. The schedule above referred to contained the following: 'Description of occupation of employes: all operations connected with the business of ice dealers.' 'Places at which employes to whom wages are paid are employed: at 240 Ruggles St., Boston, Massachusetts, and elsewhere in the service of the employer' ".

"Taking the policy and the application together, the risk assumed was for injuries received in connection with the carrying on of the business. No doubt, the words used should be construed with reasonable liberality but they are not broad enough to cover the work of erecting a new and large building which is to be used for storing ice. The erection of new ice houses or stables for the enlargement or better accommodation of the business, is not an operation connected with the business, within the meaning of the policy and application, when construed together. *There is a difference between ordinary day by day repairs, which are incident to the carrying on of the business,* and the erection of large, new buildings, which when completed, are to be used in the business. Such buildings might be built wholly by independent contractors. Whether they are so or not, the agreement between these parties does not refer to or include an operation of that character. Looking at all of the provisions above recited, we are unable to put so broad a construction upon the risk assumed as would

be necessary in order to sustain the plaintiff's case. Since the contract of the defendant did not include such a risk, it is immaterial whether it was customary for people in the ice business to erect their own ice houses. The case depends upon the construction of the contract and the custom, if proved, would not enlarge the defendant's liability" (italics ours).

Another very instructive and pertinent case is that of *Rust Lumber Co. vs. General Accident Fire & Life Assur. Corp., Ltd.,* 64 So., Rep. 122, 134 La., 310, decided by the Supreme Court of Louisiana on an Appeal from the District Court.

In that case the policy of insurance issued to the plaintiff insured it against bodily injuries sustained by the employees of the assured while actually engaged in operations such as are usual to the kind or trade of business, described in the policy.

The trade or business in which the assured was engaged, as described in "Statement 4" of the "Schedules of Statements" in the policy, was:

> "Sawmill; planing mill; mill yards; kilns; sheds; woodsmen aad teamsters."

"Statement 5" of the "schedules of statements" of that policy read:

> "Statement 5. The operations carried on are those usual to the kind of trade or business described herein."

which is word for word that of Statement 6 of the "Schedule of Statements" of the policy in suit.

The plaintiff "finding its water supply inadequate, assigned some of its mill employees," to the work of boring an artisian well in order to obtain a further supply. While so engaged the employees were injured by an explosion at the well.

The Court there held that the operations thus

carried on were *not* "those usual to the kind of trade or business" described in the policy sued on, and *reversed* the judgment which had been entered for the plaintiff.

The Court in its opinion in that case used the following pertinent language, viz:

> "It is true that the business so described presupposes the use of water and the necessity for obtaining it, but so it presupposes the use of fuel wherewith to convert the water into steam, and yet it would hardly be argued that the policy, as written, was intended to insure against the risk of mining for coal, or boring for fuel oil."

See also

Wollman v. Fidelity & Cas. Co., 87 Mo. App., 677;
Phillipsburg Horse Car Co. v. Fid. & Cas. Co., 160 Pa., 350; 28 Atl., 823.

LOUIS WITTENBERG testified that he was in the pickle business and was employed by his wife, Sallie Wittenberg, trading as Philadelphia Pickling Company in 1907. His wife always traded under that name until the corporation took the business November 1908 (pp. 42-94).

His wife had the plant in Eldora in Cape May County, New Jersey, which was used as a *"Canning and pickling* factory" when Chambers was hurt (pp. 53, 94).

He testified that the employes of the Assured did the work; that they did not get outside masons to do it; only the men employed in the canning factory did the work *"between times"* (p. 91). That the day before the accident two or three men worked on the job inside of the building and one man outside the building (p. 91). The man on the outside was shoveling sand. The work started four or six weeks before the accident

(p. 93) and continued "perhaps six months afterwards. Whenever we had time we worked on it." "The repairing was going on from time to time as we had a day, we had time to take the men, every day they kind of worked repairing" (p. 93).

He also testified that on September 19, 1907, the pickling season had not ceased exactly—there were some pickles coming—not very many, and tomatoes were just about beginning to come. It was a slack period of work (p. 97).

CHRISTOPHER WHILDEN testified that he had only worked at the building one day (p. 103). His first job was helping to knock down parts of the stone wall in the cellar (p. 104). Afterwards he was digging a trench on the outside (p. 102).

WALTER S. HAND testified that on the day Chambers was hurt six or seven men were at work on this job (p. 196). Prior to the day Chambers was hurt he had been at work on the operations for four weeks (p. 196) and spent nearly all of that time on the operations affecting the walls. That after Chambers was injured the operations continued for six or seven months. He worked on them during all that period except during the canning season when he worked upstairs in the factory. After the canning season was over he and the other men went back to work in the cellar again (p. 196) "whenever he had nothing to do in the canning factory we worked on the cellar" (p. 197). He worked on the wall operations seven or eight months. Six or seven men worked on the wall during the operations after Chambers was hurt (p. 197). When there was no canning to be done the men worked undermining the wall and cementing the cellar floor.

WALTER E. HENRY testified that the work had been going on probably six weeks before Chambers was hurt, and probably six months after he

was hurt; that for the first month nearly every day some one was at work on the cellar, sometimes two and sometimes as many as six men at a time; that the canning season lasted until the last of October and from the time Chambers was hurt until the last of October that some weeks there would be no men on the job "and other times they would be nearly all the time." That after the latter part of October the work went on continuously and there were men on the work every day for the balance of the period (pp. 204, 205).

The character of work was not a part of the operations of any particular department or any particular branch of the business described in the schedule.

The work was done during the slack period of the canning business.

The employees of the Assured so far as the record discloses were all entirely inexperienced in the kind of work at which they were employed.

Hand had no trade (p. 200); Henry was not a mason; he ran a steam engine (p. 204) and Daniel Chambers was a day laborer (p. 229).

The making of an enlargement or better accommodation of the business is not an operation connected with the business within the meaning of the policy.

The work was not an ordinary day by day repair.

Chambers at the time he was injured was engaged in mason or building work.

There is no proof that a mason or builder was necessary or customarily used in the operation of the trade or business described in the schedule as "Manufacturers, Dealers and Importers of Pickles, Table Condiments and goods of this description."

The reasoning of the opinion of the Court in the

case of *New Amsterdam Cas. Co. vs. Mesker,* 106 S. W., 561 (Mo. 1908), cited by our opponents on page 11 of their brief, is so palpable, that no comment need be made.

The case of *Hoven vs. Employers' Liability Assur. Corp.,* 93 Wis., 201; 67 N. W., 46; 32 L. R. A., 388, cited by our opponents on page 11 of their brief and referred to by them as "the leading case on this subject" upon examination will be found *not* to be pertinent.

The policy involved in that action was not similar to the policy in suit. It was a contract of indemnity against liability, and not a policy of indemnity against loss from liability.

The insurer agreed to pay

> "to the employer * * * all sums for which it shall become liable to its employees."

The assured was the "West Superior Iron and Steel Company."

The "Description of the occupation of employees" was "all operations connected with the business of iron and steel works."

The plaintiff in that action was injured while at work in the operating room, at said iron and steel works, by the fall of a girder which was being raised to its position by an independent crew, engaged in building an addition to the works.

The policy in that suit did not contain any restrictions or exceptions as does the policy in suit, in condition B, viz:

> "This Policy does not cover loss from liability for injuries or death to or caused by —(4) Any person in connection with the making of additions to or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or

plant or any part thereof. *Ordinary repairs* when made by employees of the Assured whose compensation is included in the estimate set forth in the schedule are permitted."

Therefore the Court in that suit held that:

"the operation of constructing a building for the use of the assured in its business, as one of the operations connected with such business."

The case of *Fidelity & Casualty Co. of New York vs. Lone Oak Cotton Oil & Gin Co.*, 80 S. W., 541 (Texas Civ. App. 1904), cited by our opponents on page 12 of their brief, is easily distinguishable from this case.

In that case the assured had during 1901

"constructed a plant for ginning cotton, manufacturing cotton seed oil, etc. The construction was completed about October 1st, and the machinery was installed by the 25th of October, which completed the plant, and complete operations began, though part of the plant had been in operation since September 1st. R. L. Elliott had been employed in the construction of the plant and in installing the machinery.

"On October 28th while removing some scaffolding which had been erected in a lower room of the tower, the water tank crushed through and Elliott was killed.

"He was a carpenter and a few days before his death he had been placed on the appellee's (assured's) list of operatives, a *carpenter being necessary in the operation of the plant*" (italics ours).

The policy in that suit did not cover the making of additions or alterations in any buildings.

The fact that the work being done in that case was not construction work and that the work was finished, was considered pertinent by the Court.

The Court in that case held:

"The construction of the plant was finished.

> *It was in complete operation,* and Elliott had been transferred to the operating list * * *. He was employed as a carpenter, *which is necessary in the operation of the plant, and he was on duty engaged in a work needful in the operation of the plant"* (Italics ours).

and affirmed a judgment entered in favor of the assured.

The case of *Cary Brick Co. v. Fidelity & Casualty Co.,* 147 N. Y. Supp., 414, cited by our opponents on page 12 of their brief is not pertinent. In that case the Policy not only covered "manufacturing of brick" but also included "clay digging and transferring of clay to yard." It appears that a canal was located within the brick lands of the Assured, which connected the Hudson River with its storehouse and docks. Through this canal it had been accustomed to and did carry much of its fuel and supplies for the plant and conveyed away the greater part of its manufactured product. Material from time to time worked into the canal from its banks or from the river by the tide, and was obstructing the passage of barges therein. An employee of the Assured while cleaning or dredging this canal was injured by a boom of a derrick used in the dredging. The derrick was one used not only for dredging the canal but for loading and unloading barges at its docks and storehouse, as well as for other purposes.

The Court there found that as the "Kind of Work" covered was not only "Manufacturing of Brick" but also "Clay digging and transferring of Clay to yard" that it was the intent and meaning of the policy to cover "employees engaged in work by the plaintiff upon its property in all its appropriate operations in connection with the manufacturing of brick to the last act in delivering from its property its completed product."

There is no liability on the part of the defendant-respondent to the plaintiff-appellant, the Philadelphia Pickling Company (the corporation), by reason of an alleged assignment.

The plaintiff-appellant (the corporation) bases its right to maintain this action upon the agreement made between Sallie Wittenberg and the plaintiff-appellant (the corporation) dated November 7, 1908 (Exhibit P-1, p. 308) and an alleged assignment of the Policy *by delivery.*

The defendant-respondent contends, that at that date, as there had been no loss there could be no valid assignment without the consent of the defendant.

The only testimony in the case concerning the alleged assignment is found in the following testimony of Louis Wittenberg, viz. (pp. 74-75):

"Q. Now, at the time of the transfer of the assets of the Company in November, 1908, by Sallie to the Philadelphia Pickling Company, the Corporation, was anything whatever done with regard to the various insurance policies?

"MR. JONES: Objected to as leading.

"Objection overruled.

"Exception to defendant.

"A. Yes.

"Q. What was done?

"MR. JONES: I object to that as being an attempt to introduce by parol evidence—

"A. All papers pertaining to the business were turned over.

"BY THE COURT:

"Q. To whom? A. To the new corporation, the Pennsylvania corporation.

"BY MR. CARR:

"Q. And among them, what about this policy?

"MR. JONES: Objected to as being an attempt by parol evidence to alter, amend and

modify the agreement of November 7th, 1908, and as not binding upon this defendant.

"Objection overruled.

"Exception to defendant.

"Q. (Question repeated: 'And among them what about this policy?') A. The same as all other policies.

"Q. Say what it was? A. Fire insurance and accident insurance.

"Q. What was done? A. They were all turned over to the new corporation at that time."

The Policy itself was one of indemnity wherein the defendant-respondent: "Agrees to Indemnify" (Ex. P-2, p. 311, l. 17) the Assured, *"against loss from the liability imposed by law upon the Assured"* under certain conditions.

It is submitted that the contract under the Policy was personal in character and was not assignable by the Assured, without the written consent of the defendant-respondent Company. This, it is submitted, is clearly borne out by Condition F of the contract, between the parties.

In Condition F the parties to the contract agreed as follows:

> "No action shall lie against the Company to recover for any loss under this policy unless it shall be brought *by the Assured.*"

There can be no question as to the meaning of the words *"by the Assured."*

In *Cremo Light Co. v. Parker,* 118 App. Div., 845; 103 N. Y. Supp., 710, the "Cremo Light Co.," bought all the assets and business of the "Cremo Incandescent Light Co." and then attempted to sue on an insurance policy issued to the "Cremo Incandescent Light Company as now or hereafter may be constituted." The Court in sustaining a demurrer to the complaint said:

> "That a policy of insurance is a personal contract running to the assured and that it

> may not be assigned to another without the consent of the insurer, is familiar law. It is equally clear that a new corporation, organized under a separate charter, is quite a different entity from a former corporation organized under a different charter; and the two corporations are still to be considered different entities, notwithstanding one may have been formed for the express purpose of taking over and may have taken over all the assets and business of the former."

We submit that the testimony of Wittenberg is not sufficient to prove an assignment of the Policy of Indemnity.

We also submit that the testimony of Wittenberg does not show an assignment of any claim to which the Assured, might, at some date subsequent to November 7, 1908, have against the defendant-respondent Company.

The agreement between Sallie Wittenberg and the Corporation did not in and by its terms assign or attempt to assign either the Policy or any claim which might subsequently accrue to the Assured, the Trade name, under the Policy.

On November 7, 1908, the Assured did not have a claim for *loss* against the defendant-respondent Company. There was no claim then in existence.

The judgment in the tort action of Chambers against the Trade name had not been entered. There was no loss on that date and there could be no loss under the Policy of Indemnity until a judgment had been paid (Condition F, p. 313).

Counsel for plaintiff-appellant contend that under Section 19, of the 1903 Practice Act, notwithstanding the provision contained in the policy and in particular with reference to Condition F thereof, Sallie Wittenberg on that date had a claim under the policy which was a "chose in in action" which was assignable, without the consent of the insurer.

But it is respectfully submitted that even though this court should be of opinion that a claim under the Policy of Indemnity was a "Chose in action" which was assignable, there was no claim under the Policy or "Chose in Action" in existence on November 7, 1908, inasmuch as there had been no loss by the Assured. Neither she nor the trade name had a cause of action until she or it had paid judgment, or at least until a Judgment had been entered against the assured.

Counsel for plaintiff-appellant cite certain authorities wherein fire insurance policies, as distinguished from Policies of Indemnity, were involved. Upon examination of those authorities it will be observed that the assignments in those cases were made *after* the fire or loss.

The *loss* under a Fire Insurance Policy occurs when the fire takes place.

The *loss under a Policy of Indemnity,* such as is involved in this action occurs after the Assured has paid, in money, a judgment rendered against the Assured.

We respectfully claim that this distinction was not recognized by the trial judge, upon the first trial.

The opinions of the Courts affecting claims under fire insurance policies are not pertinent to the question of assignment in this action.

Counsel for plaintiff-appellant in support of their view respecting this question, also cite at pages 37 and 40 of their brief, the case of *Maryland Casualty Company v. Omaha Electric Light and Power Company,* 157 Fed., 514. The opinion in that case should not be conclusive upon our Courts in determining the broad question of Assignment under the Policy.

The facts in that case are easily distinguishable from the facts in this case.

In that case a Judgment had been entered against the Assured and had been affirmed by an upper Court, *before* the Omaha Co. took over by assignment "the claim against the Casualty Company in its policy of Indemnity."

The Court in that case evidently recognized that there was the distinction between an attempted assignment of a policy of indemnity and a claim thereunder made *before* a judgment had been entered against the Assured, and an assignment made *after* judgment had been entered against the Assured.

That Court stated in the case just referred to, that:

> "The *assignment* in *question* was made after the *Assured sustained the* loss and after it had been adjudged to be a *legal liability* against it."
>
> "Dent (the injured employee) had been injured. His administratrix had instituted suit and had prosecuted it to *final judgment* against the Assured *before the latter transferred its claim against the re-insurer to the Plaintiff* * * * its and the insured's liability had become fixed and like any other chose in action was assignable regardless of the conditions of the Policy in Question."

There is also a difference between the provisions of the policy in the Omaha action and the provisions of the policy in this action. In the Omaha action there was no requirement that the loss sustained and paid by the Assured should be *"in money."* In condition F of the policy in this action, it is required that the loss sustained and paid by the Assured shall be "in money."

It will therefore be observed upon a careful reading of the opinion in the Omaha case that instead of supporting the views of the plaintiff it supports the views of the defendant.

The only case in New Jersey which can be said to be pertinent to this question (other than cases dealing with fire insurance policies which it is above contended are not pertinent) is *Moses v. Travelers Insurance Company,* 63 N. J. Eq., 260; 49 Atl., 720, and cited by our opponents on page 43 of their brief.

That case is easily distinguishable from the case at bar.

In that case the injured brought suit against her employer the Assured and recovered a Judgment in the Supreme Court against the Assured after a trial of the issue.

On the same day that the Judgment was obtained against the Assured, a petition in bankruptcy was also filed against the Assured in the U. S. District Court for the Southern District of New York and in the *following month* a similar petition was filed in the U. S. District Court, for the *District of New Jersey.* Thereupon in the following month the Assured was adjudged a bankrupt and the trustee in bankruptcy was appointed and qualified as such.

Afterwards the Judgment creditor (employe) proved her claim in bankruptcy and it was allowed.

On these facts the trustee and Assured filed a bill in equity against the insurance company making the injured employe a party defendant, to require the insurance company to pay to the employe the sum for which it was responsible.

The Court of Errors and Appeals (opinion by Mr. Justice Dixon) said:

> "By force of section 70 of the United States Bankruptcy Act of July 1, 1898, the property of the lamp company was transferred to the trustee in bankruptcy on his appointment and qualification. This transfer was made for

> the satisfaction of all claims against the company provable under the act, and when the Bardzik Judgment *was so proved it was for the Satisfaction of that Judgment.*
>
> "From that time the trustee became trustee for her to the extent of her share of the rights which had passed to him from the company, and to that extent the company had actually paid her trustee and agent by the transfer of its property" (Italics ours).

The contract in that case as in the Omaha case, is further to be distinguished from the contract in this case by reason of the fact that the contract in the Moses case did not require that the action against the insurance company should be brought by the Assured for loss actually sustained and paid *in money* by the Assured.

This distinction was recognized by the Court of Errors and Appeals, in its opinion, wherein Mr. Justice Dixon states:

> "The contract of the insurance company does not require that payment should be made *in cash* and this payment in property is sufficient compliance with its terms. Before payment was actually made by the lamp company, the right under the contract was substantial and valuable as an asset, *but was immature.* As soon, however, as payment was made, its right became perfect and eodem instante passed by operation of law to the trustee, and the trustee became at once entitled to enforce it" (italics ours).

It will therefore be noted that in the Moses case there was no assignment or attempted assignment by the acts of the parties, as is alleged to have occurred in this case, but the assignment was by operation of law and subsequent to the entry of a judgment against the Assured.

We submit that this Moses case is not authority for the proposition that the policy in this action or any claim thereunder can be assigned by the

act of parties prior to the payment of the loss by the Assured.

We have not found an authority wherein was involved an assignment of an indemnity policy made prior to the entry of a judgment against the Assured.

In considering the questions of the attempted assignment of fire insurance policies, without the consent of the insurer, the attention of the Court is called to the following cases:

Kase v. Hartford Fire Insurance Company, 58 N. J. L. 34; 32 Atl. 1057, Gummere, J.;
Weinberger v. Agricultural Ins. Co., 80 N. J. L. 262, 76 Atl. 342; Bergen, J.;
Kupfersmith v. Delaware Insurance Co., 80 N. J. L. 191; 76 Atl. 329, Bergen, J.

In all these cases a bond and mortage had been assigned by an instrument in writing and the policy of insurance was delivered by the assignor to the assignee, but was not assigned nor was consent obtained from the Insurance Companies. Subsequently a fire or loss occurred and an attempt was thereupon made to recover under the policy of insurance. In each case the Court held that there could be no recovery prior to the happening of the loss, in view of the provisions of the Policy, inasmuch as there had been no assignment made and assented to by the insurance company.

It is submitted that the questions in this case stand on all fours with the last three above referred to cases.

Mr. Justice Gummere, in writing the opinion for the Supreme Court, in the case of *Kase v. Hartford Fire Insurance Co.,* 58 N. J. L., 34-36; 32 Atl., 1057, stated:

"A policy of insurance is a contract of indemnity, personal to the party to whom it

> is issued, or for whose interest the insurer undertakes to be responsible in case of loss, and cannot be transferred to a third person, so as to be valid in his hands against the insurer, without the insurer's consent."

In *Hillman v. New York State Steel Co.*, 209 Fed. 715, the Court in an equity suit instructed the Receivers of an insolvent corporation, not to compromise or settle a judgment recovered against the corporation by an employe, and in discussing the character of the policy the Court used the following language:

> "I believe the Policy to be distinctly one of indemnity, one that does not by its terms compel the insurance company to pay the Judgment when the liability is established, but only to reimburse the Assured for the loss sustained."

It is submitted that neither the policy in suit nor any claim thereunder was assignable, by the acts of the parties. The mere obtaining of a Judgment against the Assured for personal injuries does not give cause of action, to the Assured against the insurer;

Frye v. Bath Gas & Electric Co., 97 Me. 241; 54 Atl., 395 (Me); 59 L. R. A. 444; 94 Am. St. Rep. 500;

White vs. Maryland Casualty Co. (1910) 123 N. Y. Supp. 840; 139 App. Div. 129;

Cremo Light Co. v. Parker (1907) 103 N. Y. Supp., 710; 118 App. Div. 845; 137 N. Y. State Rep;

Burke vs. London Guarantee & Accident Co. 47 Misc. Rep., 171; 93 N. Y. Supp., 652;

Connolly v. Bolster, 187 Mass., 266; 72 N. E., 981;

Cushman vs. Carbondale Fuel Co. et al 122 Iowa 656; 98 N. W. 509;

Allen vs. Gilman McNeil & Co. (*Aetna Life Ins. Co.* C. C. E. D. Pa.), 137 Fed. 136 affd. by C. C. A. 3rd Cir. 145 Fed. 881; 76 C. C. A. 265; 7 L. R. A. (N. S.) 958;

Finley vs. U. S. Casualty Co., 113 Tenn., 592, 83 S. W., 2 (Tenn.);

Puget Sound Imp. Co. vs. Frankfort Marine A. & P. G. Ins. Co., 100 Pac. Rep., 190; 52 Wash., 124;

Ford vs. Aetna Ins. Co., 70 Wash., 29, 126 Pac. Rep., 69;

O'Connell v. N. Y., N. H. & H. R. R. Co., 187 Mass., 272; 72 N. E., 979;

Lett v. Guardian Fire Ins. Co., 125 N. Y., 82.

Fidelity and Casualty Co., v. Martin 163 Ky., 12; 173 S. W. 307;

Goodman v. Georgia Life Ins. Co., 66 Southern Rep., 649 (Ala).

The trial judge committed error in admitting the filing of the amended complaint in the action over the objection of the defendant-respondent.

This action was begun on May 5, 1914, (P. 1). The defendant contends that the Summons was issued in the name of the Philadelphia Pickling Company, a Trade Name.

The Amended Complaint is the name of the Philadelphia Pickling Company, a corporation.

Pursuant to the 1912 Practice Act, Rule 54, the plaintiff complied with the following provision:—viz:—

> "The complaint shall be annexed to the Summons or Capias ad respondendum and returned therewith, and a copy thereof shall be served with the Summons or Capias."

It is respectfully submitted that under this Rule the Summons and Complaint should be read together.

The Defendant-Respondent having in mind that it had issued a *Policy of Indemnity* read the Summons and Complaint together. It is submitted that by so doing, no other conclusion could be reached that that the plaintiff was its Assured, the Philadelphia Pickling Company the trade name.

The Summons did not set out that the Plaintiff was a corporation. Neither did the Complaint allege that the Plaintiff was a corporation.

As bearing out the view of the defendant-respondent particular attention is called to the Complaint, wherein,

In paragraph 1 it recites that the Policy, therein referred to, was "executed and delivered to plaintiff". This allegation could not mean the Corporation, as the policy was not issued to it. The Corporation was not in existence when the Policy was issued.

In Paragraph 2 it recites that while said policy was in force, the employment by *plaintiff* of one Walter Chambers, and that the compensation paid by *plaintiff* to Chambers was included in the estimate set forth in the schedule forming part of the Policy.

This allegation could not refer to the Corporation. Chambers was employed by the trade name and paid by it. The corporation was not in existence while the policy was in force.

In Paragraph 3 it recites, that while the policy was in force and on September 19, 1907, Chambers while employed by the Plaintiff suffered injuries.

This allegation could not refer to the Corporation. The Corporation was not in existence while the Policy was in force or on September 19, 1907. It did not employ Chambers on that day. Cham-

bers suffered injuries while employed by the Assured or Trade name.

In Paragraph 4 it recites, "That *plaintiff* has duly performed all the conditions of said policy, which by the terms thereof, *Plaintiff* was required to perform."

This allegation could not refer to the corporation. It was the Assured which was required to perform the conditions.

In Paragraph 7 it recites the payment by the *Assured* of the Judgment therein referred to.

This allegation could only refer to the Trade name which had been assured, and not the Corporation.

The Complaint did not allege that the Plaintiff was an assignee of the Assured under the Policy.

After the action was begun the only communications passing between the attorneys for the respective parties were a few letters about unimportant matters until November 12, 1914, when the notice of application for leave to amend the Complaint was served upon the Attorney for the Defendant-respondent (p. 18), with which was sent a copy of the Amended Complaint (p. 274).

Mr. Harvey F. Carr, one of the Attorneys for the plaintiff-appellant who tried the case, admitted in his testimony that prior to November 11, 1914, he had no communication with the attorney for the defendant-respondent in which he called the attention of the Attorney for the Defendant-respondent to the fact that the Philadelphia Pickling Company was a corporation (p. 274).

The motion to Amend the Complaint was made by Mr. Carr, before Judge Lloyd at the opening of the Mercer Circuit on November 16, 1914, at which time the motion was allowed over the objection of the defendant-respondent, to which excep-

tion was taken, with the right to the defendant-respondent to file an Answer to the Amended Complaint, reserving its rights and without waiving but reserving its objections and exceptions (p. 24), and with leave to renew the objections upon the record, when the case should be called for trial.

The defendant-respondent on November 20, 1914, when the case was called for trial, renewed its objections to the allowance of the Amended Complaint upon the record (p. 36).

The Trial Judge again allowed the amendment (p. 40).

The Defendant-respondent's answer to the Amended Complaint was then filed subject to its reservations of its objections and exceptions (p. 24).

The question involved is an important one and may bear materially upon the legal defense which the Defendant-respondent is entitled to interpose, with respect to the limitation of the time within which suit should be brought under Condition F, of the Policy of Insurance which is as follows, viz (p. 313):

> "Condition F. No action shall lie against the Company to recover for any loss under this Policy unless it shall be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a judgment after trial of the issue; *nor unless such action is brought within ninety (90) days after such judgment,* by a court of last resort, *against the Assured has been so paid and satisfied.* The Company does not prejudice by this condition any defenses to such action it may be entitled to make under this policy" (italics ours).

It is submitted that the corporation should not be permitted to be substituted, as the party plaintiff, in the place of the Trade name or Assured.

This action was begun by the Assured on May 5, 1914, (p. 1). The order allowing the Amended Complaint was made November 20, 1914. The allowance of the amendment gave the Corporation the benefit of more than six months time.

The present Attorneys for the Plaintiff-appellant, Messrs. Wilson and Carr, or Messrs. Wilson, Carr and Stackhouse, of which firm they were members, have been the attorneys in the Chambers litigations since as early as April 6, 1909. (See Ex. P6, p. 328). Mr. Carr testified they were the attorneys when the tort Judgment was entered (p. 125).

The fact that the names of the Assured (Trade name), and the corporation are the same forms no basis for granting or allowance of the Order of Amendment.

Assuming that the Assured had borne one name and the Corporation had borne a different name, could counsel successfully argue that such an amendment and substitution would be proper?

We submit, particularly in view of the authorities referred to under this Point, that such an Argument would be without force and that no such amendment would be permitted.

It is submitted that the allowance of the amendment resulted in the institution of a new action between different parties, and raised new questions, and that the defendant was deprived of a defense it would have if the action were commenced in the name of the Corporation;

Lower v. Segal, 60 N. J. L., 99, 36 Atl., 777;

Fitzhenry v. Consolidated Traction Co., 63 N. J. L., 142; 42 Atl., 416;

Rankin v. Central R. Co. of N. J., 77 N. J. L., 175; 71 Atl., 55;

Doran v. Thomsen, 79 N. J. L., 99; 74 Atl., 267;

Hubbard v. Montross Metal Shingle Co., 79 N. J. L., 209; 74 Atl., 252;
Maitland v. Worthington, 59 N. J. L., 114; 35 Atl., 759.

It is therefore submitted that the verdict and judgment entered in favor of the defendant-respondent should be sustained.

The judgment paid by the Philadelphia Pickling Company a corporation was the judgment rendered against it in the contract action based upon the agreement with Sallie Wittenberg and was not a loss under the terms of the policy in suit.

All of the moneys paid by that corporation were in satisfaction of the Judgment entered against it in the *Contract* Action.

The payment of the Judgment in that action was not a "loss from the liability imposed by law *upon the Assured* for damages on account of bodily injuries * * * accidentally suffered," while the policy in suit was in force by "employe of the Assured," * * * "in and during the operation of the trade or business described in the Schedule."

Mr. Harvey F. Carr, who made the payments on account of the Judgment, testified to the items of payments on account of the Judgment (p. 122) and at page 126 he testified that the payments made were on account of the judgment on contract in the suit against the Corporation.

The payments made were not a loss from liability *imposed by law* upon the Assured or the plaintiff, for damages *on account of bodily injuries* suffered by an employe of the Assured in and during the operation of the trade or business described in the Schedule.

They were made by that corporation as a result of the agreement it made with Sallie Wittenberg, to which the defendant-respondent was not a party, and in which it was not interested.

The payments in view of the terms of the policy were made by a mere volunteer.

The Philadelphia Pickling Company, the Corporation was therefore not entitled to recover any part of that contract judgment paid by it nor any interest thereon paid by it.

It is therefore submitted that the plaintiff was not entitled to maintain this action and the verdict was therefore in accordance with the evidence and the Judgment entered thereon should be sustained.

The verdict and Judgment should be sustained as the Policy had been forfeited by reason of the breach of express warranties.

The policy states (Ex. P-2, p. 311, lines 9-13) that it is issued in consideration of a certain premium and "The statements hereinafter set forth in the Schedule of Statements, *which statements the Assured makes and warrants to be true* by the acceptance of this policy." In the Schedule of Statements (page 317) is contained the following:

> Statement 1,
>
> Name of Assured: Philadelphia Pickling Company.
>
> "Statement 3,
>
> The Assured is: Company.
>
> (State whether individual, co-partnership, Corporation, receiver or other trustee.)

Louis Wittenberg testified that the policy in suit was one "obtained by Sallie Wittenberg, trading as the Philadelphia Pickling Co. (p. 52) and

that she had the plant at Eldora, where Chambers was hurt, in 1907 (pp. 53, 94) and that she always traded under the name of Philadelphia Pickling Company, until November, 1907, when the Corporation took charge" (p. 42).

There was therefore a breach of warranty, which was urged on the motion for non-suit (p. 145) and on the motion to direct verdict (p. 268).

Furthermore, the truth of the warranties was made by the terms of the policy conditions precedent to recovery, and the burden of proving their truth was upon the plaintiff.

The breach of these warranties resulted in a forfeiture of the policy.

As was said by Mr. Justice Voorhees, in the opinion of the Court of Errors and Appeals, in *Orr Trucking & Forwarding Co. v. Metropolitan Surety Co.*, 77 N. J. L. 749, 754; 73 Atl. 541, 543, in considering one of the statements attached to the Policy of Indemnity involved in that suit.

> "This appears to be a Warranty of a fact known to the plaintiff (*Finn v. Met. Life Ins. Co.*, 70 N. J. L. 255, 57 Atl., 438), and its falsity will avoid the policy."

The plaintiff-appellant is barred by the provisions of the policy from maintaining this cause of action.

The provisions of the policy pertinent to this question are found in Condition F. (Exhibit P-2, p. 313.

> "CONDITION F. No action shall lie against the Company to recover for any loss under this Policy unless it shall be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a Judgment after trial of the issue; nor unless such action is brought within ninety (90) days after such judgment, by a court of last

resort, against the Assured has been so paid and satisfied."

The Supreme Court discussed the subject of the limitation of time within which to begin suit in its opinion rendered upon the application for a new trial (p. 35d., 94 Atl., 889).

The opinion in full, is as follows, viz:—

"PER CURIAM. We think only one point requires an expression of opinion. The policy requires that action shall be brought within 90 days after the judgment is paid and satisfied. We think the judgment was paid and satisfied as early as October 31, 1913. Since the action was not begun until May 5, 1914, the 90 days had expired. The plaintiff seeks to escape the difficulty upon the ground that 40 cents was paid by the attorney to Chambers' attorney for satisfaction pieces and for cancelling the judgments.

"The answer to this contention is twofold: (1) This payment was not one that the plaintiff corporation was obliged to make, since the statute made it the duty of Chambers' attorney to enter the satisfaction. C. S. 1910, p. 2960, pl. 22; (2) the payment was not a payment to the plaintiff in the judgment. At best, it was a payment to the clerk of his fee for entering the satisfaction and filing the warrant. It would moreover be quite unreasonable to adopt a construction which would enable the assured to extend the time for bringing suit indefinitely or as long as he chose to forbear the entry of satisfaction.

"The plaintiff is not helped by the provision of the policy allowing action to be brought within 90 days after the judgment is paid and satisfied. Satisfied and paid are here synonymous. It is satisfaction in fact, not the entry of that satisfaction upon the record, that the policy means.

"The defendant was entitled to a verdict on this issue, and the rule must be made absolute."

The limitation is a *contractual limitation.*

By the terms of this condition the parties to the contract agreed that an action to recover for any loss under the policy should be brought by the *Assured.* This action is not brought by the Assured.

Under the terms of the policy no loss could be sustained until the judgment had been paid in money. Neither the happening of an accident, the beginning of an action for damages, nor the entry of a judgment would be a "loss actually sustained" by the Assured.

The parties agreed in the contract that no action was to be begun unless it was brought by the Assured for loss actually sustained and paid in money, by the Assured in satisfaction of a judgment after trial of the issue.

It was not brought by the *Assured* for loss actually sustained and *paid in money* by the Assured.

It was not brought by the Assured for loss actually sustained and paid in money by the Assured, in satisfaction of a judgment after trial of the issue.

It was not brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a judgment after trial of the issue, nor brought within ninety (90) days after such judgment, by a Court of Last Resort had been so paid and satisfied.

The loss sustained, if any, was sustained by the Corporation—*not* the Assured.

The loss, if any, to the Corporation was sustained by it, *not under the Policy, but under the agreement it made with Sallie Wittenberg.*

The money which was paid in satisfaction of the judgment was money paid by the Corporation and not by the Assured.

The judgment which was satisfied, was the judg-

ment in the contract action against the Corporation and not the judgment against Assured.

If the money which was paid by the Corporation and not by the Assured, is viewed by this Court as having been paid in satisfaction of the Tort Judgment against the Trade name, we submit the judgment was not by a "Court of last resort."

The judgment entered in the Tort action was entered in the Supreme Court upon a verdict had at the Circuit. While it might be contended that had the Trade name or the defendant in the tort action taken no further steps, the judgment so entered was a judgment by a Court of Last Resort, we submit that in view of the special facts in the case such contention should not prevail. In the tort action the defendant procured from the Trial Judge a Rule to Show Cause returnable before the Supreme Court, why the verdict entered should not be set aside and a new trial granted (p. 335). The obtaining of a rule indicated that there was, in the minds of the Trial Judge and the attorneys for the Trade Name sufficient reasons for the review of the questions in the case. This Rule to Show Cause was vacated for lack of prosecution (p. 337).

It is submitted that the abandonment of the Rule to Show Cause precluded the Assured or the plaintiff from maintaining this action.

The Court of Errors and Appeals was during the time of the Chambers action the Court of Last Resort in this State.

The tort action was not carried to the Court of Errors and Appeals (p. 126).

If the money which was paid by the corporation and not by the Assured is viewed by this Court as having been paid in satisfaction of the tort judgment against the Trade Name, we submit that this action was not brought *within 90 days* after

such judgment against the Assured had been so *paid and satisfied.*

"Paid and satisfied" are synonymous. It was so held by the Supreme Court in its Opinion, *supra.*

The testimony of Louis D. Smith a witness called on behalf of the defendant-respondent sets out a number of calculations which prove conclusively that on October 31, 1913, being the date of the last payment made by the Corporation on account of the contract judgment, sufficient moneys had been paid by the Corporation to satisfy every penny which could be legally due on that date, on the tort judgment obtained by Chambers against the Assured.

These calculations made by Smith show that more than $300 had been paid in excess of the amount which was legally due on that date.

This action was begun on May 5, 1914. From October 31, 1913, when the contract judgment was paid in full, to May 5, 1914, was a period of 186 days.

Harvey F. Carr, one of the present attorneys for the plaintiff-appellant testified that on October 31, 1913, all the moneys legally due on the judgment in the contract action against the Corporation, amounted to $5505.09 (p. 126). Mr. Carr also testified that the payments made by him on account of such contract judgment, including the payment of October 31, 1913, also amounted to $5505.09 (p. 126).

Mr. Carr testified that on October 31, 1913, there was considerably less due on the tort judgment than on the contract judgment (p. 126).

The attention of the Court is called particularly to the odd amount which was paid on October 31, 1913, $1205.09. This item corroborates the testimony of Mr. Carr which shows on its face that the figures were arrived at by close and careful calculation.

The only item of money which could possibly bring this case within the 90-day clause is the item of forty cents ($.40) paid on April 22, 1914, not by the check of the Plaintiff Corporation, the present plaintiff-appellant, but by the check of one Harry Felix, the Philadelphia attorney of the present plaintiff-appellant.

Mr. Carr testified that this check of 40c. was delivered to Attorney Wescott and was used for the purpose of satisfying of record the two judgments (p. 122).

Considering that this payment was by a lawyer and not by the Corporation, that it was for the small sum of forty cents; that it was made nearly six months after the payment of October 31, 1913, which payment in itself was for an odd amount and that it was made within so short a time prior to the beginning of this suit, warrant us in stating that the payment was made in an attempt to comply with the 90-day clause.

The fact that it was made by check indicates the questions which had arisen in the minds of the Philadelphia attorney, and indicates that it was made in such a way that it might be presented in evidence in this case to combat the defense which naturally would be interposed under Condition F of the policy.

It is, however, submitted that this payment of forty cents will not save the plaintiff-appellant inasmuch as all the moneys which could be legally due on the tort judgment had been paid nearly six months prior to the making of this forty cents payment.

It is submitted that a gratuitous payment, or the payment of a sum greater in amount than was legally due on the tort judgment certainly would not extend the period of time from which the 90-day provision was to run.

It is maintained that more than sufficient

moneys had been paid on October 31, 1913, to procure the execution of a warrant to satisfy the tort judgment and to pay the cost of satisfying the judgment of record if the defendant-respondent is held to be properly and legally charged with the expenses and cost of procuring such warrent, and satisfying the same of record.

It is, however, submitted that while under §23 of *"An Act Concerning Judgments"* 3 Compiled Statutes, p. 2960, it is *lawful* for the party receiving satisfaction to execute and deliver a warrant to satisfy a judgment, *it does not become necessary to procure such a warrant.* While the party making a satisfaction of the judgment may request such a warrant, it is not the legal duty of the person receiving satisfaction to execute and deliver such a warrant. It is submitted, therefore, that the expense in procuring the warrant cannot be properly chargeable to this defendant.

But by the provision of §22 of the same Act, it is provided that *"it shall be the duty"* of the party receiving satisfaction to "either by himself or his attorney, *forthwith* to enter an acknowledgment of satisfaction upon the record of said judgment," etc.

§22 of *"An Act Concerning Judgments,* is as follows" (3, Compiled Stat., p. 2960).

> "22. PERSONS REQUIRED TO ENTER SATISFACTION; FORM OF ENTRY:—That whenever any party, in whose favor a judgment is rendered in the Supreme Court, Circuit Court or Court of Common Pleas in this state, shall have received satisfaction of such judgment *it shall be the duty* of said party, either by himself or his attorney, *forthwith to enter an acknowledgment of satisfaction upon the record of said judgment,* or in case the judgment shall not have been made up and recorded, then such acknowledgment shall be entered in the minutes of the court where such judgment shall have been rendered; and it shall

thereupon become the duty of the clerk of such court, as soon as the record of such judgment is entered in the judgment-book, to make the entry of satisfaction in the manner prescribed in the foregoing section, and in the following form:

"Satisfaction of this judgment has been duly acknowledged by A. B. (or his attorney, as the case may be), in the minutes of this court, of the term of ————, in the year ————, agreeably to the act of the legislature in such case made and provided, (Rev. 1877, p. 523)" (itals. ours).

As the full amount due on the contract judgment had been paid by the Corporation on October 31, 1913, it should have been satisfied of record by the party receiving satisfaction.

No explanation is made or offered for the delay from October 31, 1913, to April 22, 1914.

The latest reported authority on this question appears to be the case of

Automatic Sprinkler Company of America v. Employers' Liability Assurance Company, Limited of London, 148 N. Y. Supp., 1013, 163 App. Div., 671; (Sup Ct. App. Div., 2nd Department, 1914).

The facts in that case as set out in the opinion were as follows:

"On Sept. 27, 1909, one O'Neill, an employe of the Assured who was within the scope of the Contract, accidentally suffered bodily injuries. On Oct. 11, 1909, he commenced an action against the Assured to recover damages. The cause was tried April 26 to May 2, 1910, and on May 5, 1910, judgment was entered upon a verdict in O'Neill's favor for $17,120.05. On May 26, 1910, the Assured directed the insurer to appeal from the judgment. * * * On July 15, 1910, the assured consolidated with

> the plaintiff. The judgment was affirmed, and on March 20, 1911, it was paid by the plaintiff. To the amount paid the defendant (the insurer) contributed $5,000 and the costs on Appeal. On October 12, 1911, this Action was commenced. Upon the trial the defendant expressly stated that it did not question the right of the plaintiff to prosecute the action as the successor of the assured."
>
> " * * * It pleaded, as a bar to the action, the defense of a short limitation prescribed by the written contract of the parties."

The limitation contained in the policy involved in that action was almost identical with the Condition F of the Policy in suit. It was, as follows, viz:—

> "Condition F: No action shall lie against the Corporation to recover for any loss or expense under this policy unless it shall be brought by the assured, for loss or expense incurred and paid in money by the assured, after the trial of the issue; nor unless such action is brought within ninety (90) days after the payment of such loss or expense."

The Court unanimously affirmed an order of the lower Court setting aside a verdict in favor of the plaintiff because the action was not commenced within the period prescribed in the contract as the limit within which an action to recover under the policy must be brought. Citing:

> *Tolmie v. Fid. & Cas. Co.,* 95 App. Div., 352; 88 N. Y. Supp., 717; affd. 183 N. Y., 581; 76 N. E., 1110.

See also:

> *Peoples v. American Steam Boiler Ins. Co.* 10 N. Y., App. Div., 9; 41 N. Y. Supp., 631;

White v. Maryland Cas. Co. (1910), 123 N. Y. Supp., 840; 139 App. Div., 129.

The defendant and the assured made this 90 day limitation condition a part of their contract and are bound by it.

The parties had a right to prescribe a shorter limitation for the enforcement of an action under the Policy than that provided by statute.

Surely an allowance of 90 days after loss within which to begin suit against the Insurer cannot be said to be unreasonable.

In Riddlesbarger v. Hartford Ins. Co., 74 U. S., 386, at page 390; 19 L. Ed., 257, Mr. Justice Field said:

> "The Contract of Insurance is a voluntary one, and the insurers have a right to designate the terms upon which they will be responsible for losses. And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the Assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible."

A condition in an insurance policy, providing that the action is barred unless commenced within a stipulated period, is valid, and unless waived by the insurer is a conclusive bar to an action brought after the stipulated period.

Goddard v. Casualty Co. of America, 167 Fed., 750, 752; C. C. A., 9th Cir., citing;

Riddlesbarger v. Hartford Ins. Co., supra;

Thompson v. Phoenix Ins. Co., 136 U. S., 287 (297); 10 Sup. Ct., 1019; 34 L. Ed., 408;

Arthur v. Homestead Fire Ins. Co., 78 N. Y., 462; 34 Am. Rep., 550.

No waiver or estoppel as to this provision as to limitation was pleaded or proven.

On the contrary, in the original complaint herein (par. 7, p. 3) and in the Amended Complaint herein (par. 8, p. 22) is contained the following allegation, viz:

> "That each of the aforesaid Judgments has been paid and satisfied not more than ninety days prior to the commencement of this suit."

If, as is contended by us there was a substitution of parties plaintiff as a result of the allowance of the Amended Complaint in this action, 385 days expired between October 31, 1913, the date of the last substantial payment by the plaintiff, and November 20, 1914, the date when the Order allowing the Amended Complaint was entered, and 207 days had expired between April 27, 1914, the date of the payment of the item of forty cents, which was used for the purpose of satisfying of record the two judgments (p. 122), and the date of November 20, 1914.

There was lack of proof on the part of the plaintiff-appellant that the compensation of Walter Chambers or any of the other employees of the assured, at work upon the operations, were included in the estimate set forth in the Schedule of Statements.

This is one of the Conditions precedent compliance with which it was necessary to be shown by the assured in order to maintain a cause of action against this defendant upon the policy. This condition precedent is contained in Condition B of the policy in suit which is as follows:

> "Condition B. This Policy does not cover loss from liability for injuries or death to

or caused by—(1) Any person unless his compensation is included in the estimate set forth in the Schedule."

The only testimony in the case on this subject is to be found in the testimony by Louis Wittenberg, which is as follows (p. 78, ll. 4-29):

"Q. Now, I ask you whether or not the compensation of Chambers was included within the estimate of $15,000 appearing upon the schedule of statements, making the compensation for property of policy $15,000?

"MR. JONES: Objected to.

"THE COURT: Is it in writing?

"MR. JONES: No, the schedule—there is no detailed statement on the first page, the policy says it is purely an estimate.

"THE COURT: You want to know whether this man, whether the wages of this man was included in the estimate of compensation appearing on the schedule? I see no reason—

"MR. JONES: I object as leading and calling for a conclusion and not being the best evidence.

"(Objection overruled.)

"(Exception to defendant.)

"A. Certainly, everybody in the payroll was included.

"Q. Was he on the payroll? A. Yes."

Even assuming, which it is not conceded, that this testimony of Wittenberg was sufficient to show that the wages of the injured man Chambers were included in the estimate set forth in the Schedule, or on the payroll, there is no proof that the compensation of the witnesses Whilden, or Hand, were included in the estimate set forth in the schedule.

There is no proof that these men were upon the pay roll.

It is submitted that this objection is vital.

Walter S. Hand, a witness called by the defendant-respondent, was working inside the building, undermining the same foundation wall which fell upon Chambers (p. 189).

Christopher Whilden testified that the was working with Chambers at the time of the accident. They were both in the same trench. They were "digging a trench outside; we got down as low as the bottom of the wall, stones gave way and came over in the hole." The wall fell outward. The wall struck Chambers and pinned him in and hurt Chambers. He had been in trench about 1 hour when Chambers was hurt (pp. 103-104). He had only been working there 1 day and left the next day (p. 103).

It is submitted that the evidence shows that the injuries were caused by Chambers, Hand and Whilden.

Chambers had only been in the employ of the Assured for a period of three weeks, when he was injured (pp. 53, 78).

This subject was considered in the case of *East Carolina Ry. Co. v. Maryland Cas. Co.*, 58 S. E., 906; 145 N. C., 114 (1907), where the Court held that:

> "Under a contract to indemnify an employer against liability for accidents to employes, provided 'this policy does not cover loss for liability for injuries as aforesaid to, or caused by, any person unless his wages are included in the estimated wages, named in the Schedule,' the wages of the employe causing the injury, as well as those of the employe injured, must be so included, to make the indemnity company liable."

If the plaintiff-appellant is entitled to recover, it is only entitled to recover the amount of the principal of the tort judgment and interest from the time when the tort judgment against the trade name had been finally and fully paid.

If the plaintiff-appellant corporation is entitled to maintain this action and to a recovery thereunder, based upon the payments which it made on account of the judgment against it in the *Contract Action,* it is submitted that the views of the trial judge were correct, which directed that the recovery could be only for the amount of the principal of the tort judgment with interest thereon from Oct. 31, 1913, the date of the last substantial payment by the corporation.

At the first trial of this action, upon the assumption that the 90-day provision in Condition F of the policy did not arise in this case (p. 258), the trial judge held and charged that interest was only recoverable by the plaintiff from October 31, 1913, the date when the last installment payment was made by the Corporation (p. 304). The amount of the interest from October 31, 1913 to November 30, 1914, the date when the Verdict was rendered, was agreed by counsel for both parties, to be $265.00 (p. 279).

The plaintiff, however, contended that it was entitled to recover an amount which would represent the interest due upon the tort judgment, from the date of its entry,—January 5, 1909, to October 31, 1913, deducting of course, the interest upon the sums representing the installment payments, from the dates of such payment to October 31, 1913. Counsel also agreed that the amount of such figures would be $1,103.73 (p. 278).

The trial judge, at the first trial of this action in holding that there could be no recovery of interest until the judgment had been fully paid, took the view adopted by the Court in *Maryland Casualty Company v. Omaha Electric Light and Power Co.,* 157 Fed. Rep., 514. In that case the judgment was not paid until after the Determination of an Appeal; in consequence of which, interest was added to the judgment, and during which time of course, the judgment debtor had the use of the money. In that case the court used the following language, in denying an allowance of claim for interest:

> "The value of the use is equal to the accrued interest, that being only a consideration paid for the use of money or for forbearance in demanding it when due. Accordingly the Assured lost nothing by the delay occasioned by the appeal or by paying the interest accumulated pending the Appeal. The assured stood after paying the interest exactly as it would have stood if it had paid the Judgment of $5,000 on January 3, 1902, when originally rendered. Nothing was lost by the appeal, as the interest ultimately paid was neutralized by the use and enjoyment of the money before that time."

This question of interest was also considered in *Puget Sound Imp. Co., v. Frankfort M. A. & P. G. Ins Co.,* 100 Pac. Rep., 190; 52 Wash., 124, wherein the Court held:

> "Inasmuch as the contract in suit was one of indemnity against loss and not against liability merely, there was no right of action on the contract until the Assured had actually paid the Judgment rendered against it, and no interest could accrue prior to that date."

In *Saratoga Trap Rock Co. v. Standard Accident Ins. Co.,* 143 App. Div., 852; 128 N. Y. Supp., 822, it was held that there could be no recovery for interest until Judgment was paid and there could

be no recovery for interest for the period pending an appeal. In this latter case is collected most of the leading authorities on this subject.

Practically all of the time intervening between the entry of the Judgment in the tort action against the trade name and the time when the Plaintiff Corporation first began to make payments on account of the judgment against it, was consumed in litigating the questions involved in the contract action brought by Chambers against the Corporation, which was based upon the contract between Sallie Wittenberg and the Corporation and to which this plaintiff-appellant was not a party and had no interest.

It is submitted that it cannot be seriously contended that this defendant-respondent would be chargeable with an accumulation of interest for the period of the litigation in the contract action and of the delay in paying that judgment.

If, however, this Court is of the view that the plaintiff-appellant is entitled to recover interest as claimed by it, the total amount, including interest to which it is entitled to recover should be limited to $5,000. (See Condition A, of Policy, p. 312).

If the plaintiff-appellant corporation is entitled to recover it is not entitled to recover from the defendant-respondent a sum in excess of $5,000.

The Policy limits the amount payable thereunder.

This provision of the Policy is to be found in Condition A, which is as follows:

> "Condition A. The Company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand and 00/100 Dollars ($5,000.00)." (Exhibit P-2, p. 312.)

In *Travellers Ins. Co. v. Moses,* 63 N. J. Eq., 260, 263; 49 Atl., 720, it was held:

> "The obligation of the insurance company was with the lamp company only, and is explicity defined by the contract, which limits it to such sum, not exceeding $5,000, as the lamp company may have actually paid in accordance with the policy. No person claiming under this contract can enforce any larger obligation, for it rested wholly within the power of the contracting parties, subject only to public law, to fix the bounds of liability."

The plaintiff-appellant corporation was not entitled to recover the moneys expended by it in litigating the contract action.

The trial judge at the first trial of this action held that the plaintiff corporation was not entitled to recover the moneys expended by it, in its litigation with Chambers, in the action on Contract, involving the agreement between Sallie Wittenberg and the Corporation (p. 267).

It is submitted that the ruling of the trial judge on this subject was correct.

The defendant-respondent company was not a party to such agreement and had no interest in it nor in the litigation arising out of it, and consequently should not be chargeable with any of the expenses of such litigation.

The plaintiff-appellant corporation was not entitled to recover the moneys expended by it in defending its claims of property and in prosecuting the writs of certiorari.

The trial judge at the first trial of this action held that the plaintiff corporation was not entitled to recover the moneys expended by it defending

the Claims of property and in prosecuting the writs of certiorari concerning the same (p. 267).

It is submitted that the ruling of the trial judge on this subject was correct.

Neither the Defendant Company nor the Assured (the Trade name) were parties to those proceedings. Neither was interested in the outcome thereof.

The plaintiff-appellant corporation was not entitled to recover the moneys expended by the trade name in defending the suit against it.

The Trial Judge at the first trial of this action held that this Plaintiff Corporation was not entitled to recover the moneys expended by the Assured (the Trade name) in defending the tort action against the Trade Name (p. 304).

It is submitted that the ruling of the trial judge on this subject was correct if the plaintiff was entitled to recover. There was no evidence in the case that any such claim was assigned or attempted to be assigned to the plaintiff-appellant.

The trial judge committed error, in allowing after the close of the case, an amendment to the plaintiff's pleadings over the objection of the defendant.

This amendment involved the pleading of a letter of disclaimer (p. 296), (Exhibit P-5a—p. 327).

The amendment was made and allowed on Monday, November 30, 1914 on the last day of the trial, after the case had been summed up.

All the testimony in the case had been taken and the case had been summed up to the jury on the preceding Friday, November 27.

In the original complaint in this action (par. 4, p. 3), and in the Amended Complaint in this Action (par. 4, p. 21), the original Plaintiff and the present Plaintiff have pleaded performance generally of "all the conditions of said Policy, which by the terms thereof" they were required to perform.

The Defendant in its Answer (p. 6), and in its Answer to the Amended Complaint (p. 24), pursuant to Sec. 118 of the 1903 Prac. Act, specified the Conditions Precedent of the policy, the performance of which it intended to contest.

It is submitted that the Plaintiff having so averred generally the performance of all the conditions of the Policy, it was precluded from proving the question of waiver of any of the conditions precedent by it or the assured to be performed, and that it was incumbent upon the Plaintiff, as part of its case, to affirmatively prove that it and the Assured had complied with all of the conditions precedent of the policy by it or either of them to be performed.

This subject having been made a ground for the Motion for Non-Suit (page 127); and a ground for the Motion to Direct Verdict, and having thereby been brought to the attention of the Court and to the attention of Counsel for the Plaintiff, three days before this Amendment was allowed, it is respectfully submitted that there was error in allowing such amendment under all the circumstances.

It is submitted that the allowance of such Amendment in the manner as requested, did not properly plead a waiver of any of the conditions precedent of the policy to be performed by the Assured or the Plaintiff.

Burden of Proof.

The burden of proof was upon the Plaintiff-Appellant to affirmatively show that it and the Assured had complied with all of the conditions precedent set out in the policy of insurance, by it or the assured to be performed, to maintain this action, the performance of which the defendant-respondent specified in its answer it intended to contest.

Orr v. Metropolitan Surety Co., 77 N. J. L., 749; 73 Atl., 541;
Shinn v. Haines, 21 N. J. L., 340;
Franklin v. Empire Manufacturing Co., 72 N. J. L., 58; 60 Atl., 186.

CONCLUSION.

It is respectfully submitted that the judgment entered in favor of the defendant-respondent upon such verdict, should be sustained.

Respectfully submitted,

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NEW JERSEY
COURT OF ERRORS AND APPEALS.

PHILADELPHIA PICKLING COMPANY, *Plaintiff-Appellant,* vs. MARYLAND CASUALTY COMPANY, *Defendant-Respondent.*	ACTION AT LAW. ON APPEAL.

BRIEF OF PHILADELPHIA PICKLING COMPANY, PLAINTIFF-APPELLANT.

STATEMENT OF THE CASE.

The record—explanatory.

This is an appeal from judgment in the Supreme Court upon the second trial of the issue. Upon the first trial of the case a verdict was given for the plaintiff in the sum of $4356.01. A motion for a new trial was then addressed to the trial Court and was successful.

The issue was not in fact retried, however, but counsel for the two parties, with the consent of the trial Judge, entered into a stipulation "that the case should be submitted to the jury upon the printed record used in the Supreme Court and that the printed record should have the same force and effect as though the testimony were taken orally in court and all the witnesses were sworn and testified, and that counsel should have the benefit of all exceptions and rulings of the Court as though they were made as if the case were personally tried in court, and the benefit of all motions and all rulings that were made in the original trial and all exceptions taken during that trial." (*S. of C. p.* 35h.)

Following this stipulation of counsel, the Court instructed the jury to return a verdict for the defendant. The plaintiff directed his exceptions to this direction and brings the whole record of the case before this Court on appeal.

The result is that the case now comes before this Court exactly as if the trial Court had directed a verdict at the conclusion of the original trial, and this action had been appealed from.

In drawing up the state of the case, the original record of the pleadings and testimony has been used and there has been added the additional proceedings subsequent to the order of the Supreme Court granting a new trial. It should be noted that there has been included, by inadvertence, in this state of the case the following:

> The denial of the motion to direct verdict. Page 279 (Upon the new trial, this motion was not denied but granted. See p. 35c).
>
> Charges to the jury; exceptions to charges to jury; verdict. Pages 298-307 (These matters occurred at the original trial and have no place in the record of the second trial).

Facts.

This action was brought by the Philadelphia Pickling Company, a Pennsylvania corporation, organized in November, 1908, against the Maryland Casualty Company, upon "A Manufacturers' Employers' Liability Policy." The trial resulted in a verdict in favor of the plaintiff against the defendant for $4356.01.

The policy was in the usual form of liability insurance policies; the assured was to be indemnified for "loss from the liability imposed by law upon the assured for damages on account of bodily injuries or death accidentally suffered by any employee, etc.," and, in addition, was to be saved the expense of necessary litigation in defending suits for injuries, the company agreeing to conduct such defense. The policy covered injuries received in "ordinary repairs," but not in any alteration or addition to the assured's buildings.

While the policy was in force in August, 1907, certain employees of the assured were set to work to strengthen the wall of the assured's factory at Eldora, New Jersey. Two of the men, among them Walter Chambers, were digging a trench on the outside of the wall; another was excavating from within. While so employed the wall suddenly fell outward, burying Chambers in its ruins. For the injuries received in the accident, Chambers brought suit against the assured on April 1st, 1908, in the New Jersey Supreme Court, winning a judgment, on January 5th, 1909, of $4,000.00 damages and $91.01 costs.

It happened that the policy had been issued to "Philadelphia Pickling Company," as the assured had designated herself. The Pickling Company was,

in reality, Sallie Wittenberg, who had adopted that name for her business, and had taken out her employers' insurance in the Trade Name. On November 7th, 1908, after the Chambers suit had been commenced, and a verdict reached, but before final judgment, Sallie Wittenberg transferred her business to the plaintiff, a corporation, known also as the Philadelphia Pickling Company, who took the assets and assumed the liabilities of the Trade Name. Included in these assets was the policy of the Maryland Casualty Company involved in this suit, which passed by parol transfer and delivery. (*S. of C., pp.* 74, 75.)

Chambers thereafter brought suit in the New Jersey Supreme Court, *ex contractu* against the Philadelphia Pickling Company, the corporation, basing his suit on the judgment obtained in the tort action against the Trade Name, and the assumption of its obligation by the corporation. This suit resulted in a judgment entered on December 29, 1911, in favor of Chambers and against the Philadelphia Pickling Company, for $4816.05 debt and $84.16 costs. This judgment was later affirmed by this Court.

It is the Philadelphia Pickling Company, the corporation, that has prosecuted the present suit, and its action is claimed by the defendant to be in defiance of a condition of the policy, which purported to forbid assignment of the policy, or suit by any but the assured.

The Philadelphia Pickling Company, the corporation, paid Chambers the sum of $5305.49 in payment of both judgment, interest and costs; and in addition there was paid by Sallie Wittenberg prior to the incorporation $251.50, and by the corporation, $1666.04, a total of $1917.54, in counsel fees, costs and expenses paid and incurred in the tort and contract suits and the matters incident thereto.

The Court need not deal with any question of counsel fees or disbursements incurred by the Philadelphia Pickling Company or Sallie Wittenberg, as the only claim allowed by the jury was the amount of the tort judgment, to wit, $4091.01, and the amount of interest due thereon as fixed by stipulation.

Questions of Law.

The questions involved in this appeal all concern the construction of certain provisions of the policy, whose proper understanding is necessary before the rights of the parties can be accurately determined. Believing, therefore, that the most intelligent discussion of the case will result from a logical study of the policy, we have in the following brief taken up in order the different provisions of the policy called in question by the defendant, as they appear, and have considered each in detail.

As precisely the same facts were before the trial Judge on the second trial as upon the first, he was bound to direct the jury to return a verdict for the defendant in accordance with the decision of the Supreme Court in granting the motion for a new trial.

This decision of the Supreme Court appears on pages 35d-e of the state of the case, and is based upon a single fault found by that Court in the plaintiff's case. That was the failure to bring suit, as the Court found, within ninety days after satisfaction and payment of the judgment. The single ground of appeal, noted by plaintiff, is "that the trial Court erred in directing a verdict for the defendant" (*S. of C. p.* 35k). We do not understand, however, that the correctness of this directed verdict is the sole question of law involved in this appeal. Justifica-

tion of the directed verdict might as well be attempted on other grounds. A number of meritorious questions were raised at the trial. The whole record of the proceedings is before this Court, and we shall deal in order with every substantial question of law which such record presents.

The plaintiff-appellant, therefore, offers the following conclusions of law as representing the proper construction of the different conditions of the policy, brought in issue by the facts of the case, and submits that it was entitled to the instructions prayed in accordance with those conclusions and that there was error in the trial Court's action in directing the verdict.

I. Policy proper. The fact that the judgment paid by the plaintiff was based upon a contract action does not defeat its right to recover under the policy.

II. Ibid. The character of the work in which Chambers was engaged when injured was part "of the operation of the trade or business of the assured."

III. Condition B. The question whether the work on which Chambers was engaged was a work of ordinary repairs or one of alteration or addition should have been left to the jury.

IV.-1. *Condition F.—forbidding assignment.* Condition F of the policy requiring that no action shall be brought against the company except by the assured and except for loss actually sustained and paid by the assured, does not preclude recovery by the plaintiff.

IV-2. *Condition F—limitation.* Plaintiff has not failed to comply with any limitation as to time of suit.

V. Statement 3. There was no breach of warranty involved in the statement "the assured is: company."

ARGUMENT.

I. POLICY PROPER.

Loss Due to Action Ex Contractu.

This policy (*S. of C. p.* 311) is in the usual form of employers' liability policies. It agrees to indemnify the assured "against loss from the liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered by any employee of the assured."

These damages, in the great majority of cases, are determined by a tort action brought against the assured by an employee. The unusual feature of this case is that the damages which were finally paid, and constituted the loss under the policy, were damages resulting directly from an action *ex contractu.* This unusual situation stirred our opponents to argue at the trial that such payment was not a loss under the terms of the policy.

There is nothing in the policy to support their claim. The terms of the company's agreement do not restrict the assured to indemnity for damages fixed in a suit *ex delicto.* No special form of action is in any way indicated. The phrase is simply "damages *on account of* bodily injuries."

The damages in question were given on account of bodily injuries. An action in tort was brought against the assured by her employee and judgment obtained thereon. When the unforeseen contingency arose of a transfer of the entire assets and liabilities of the assured to another party, such judgment

became incapable of realization, and the injured employee, in order to recover the damages found to be due him on account of his injuries, was compelled to sue in contract upon the agreement of transfer between his original employer and her successor. He recovered against such successor the exact amount which the jury in the tort action had declared he was entitled to receive, and it is this exact sum—the amount of the early tort judgment—with interest, which the plaintiff claimed in the present action.

It is thus impossible to escape the conclusion that the loss sustained under this policy was on account of "a liability imposed by law for damages on account of bodily injuries accidentally suffered by an employee."

The mere accident that the final litigation took the form of an action *ex contractu,* we submit is no ground for releasing the company.

II. THE POLICY PROPER.

The Work of Chambers as Covered by Policy.

The policy, after defining the cause of indemnity, goes on to limit the right of the assured to liability for injuries suffered "in and during the operation of the trade or business described in the schedule." (*S. of C. p.* 311, *ll.* 33-35.)

The business is there described as that of "manufacturers, dealers and importers of pickles, table condiments and goods of this description." (Incorrectly omitted in *S. of C. p.* 317, where it should appear under statement 4.) The assumption of our opponents is that the work of manufacturing pickles

does not include general repair work, either of the nature of the work on which Chambers was engaged nor *general mason work.*

They claim to find support for their contentions in the 6th statement of the schedule (*S. of C. p.* 318, "the operations carried on are those usual to the kind of trade or business described herein"). This latter clause, however, is without significance to the present issue. A printed form in the policy to which the assured merely gives his assent, it means nothing more than an assurance that the trade or business described is not being operated in an unusual or hazardous manner. The operations referred to are those dealing with the actual method of production, and not the incidental mason or carpenter work always necessary in a large factory. The statement in question is descriptive only and does not pretend to define or limit liability, being the mere response of the assured to a question put him by the company. It has, therefore, no effect in limiting the rights of the assured, and the only use to which it could have been put by opponents was to show that the method of manufacturing pickles was unusual and unprecedented, in which case the statement of the assured would have constituted an affirmative breach of warranty.

Were the injuries of Chambers received during the operation of the business of manufacturing pickles? Our opponents would persuade the Court that only work directly and immediately concerned with the production and output of the company's product was covered and that all the incidental work of the plant necessary to production was unprotected. This view applies a strict interpretation of the policy in favor of the insurance company, and forgets the maxim, *verba chartarum fortius accipiuntur contra proferentem.*

To carry the thought of our opponents to its logical conclusion, no work which was not a part of the actual process of manufacture, although absolutely necessary to enable such manufacture to continue, would be protected. We must look, however, to the real intent of the parties, and in so doing it is impossible to avoid the conclusion that all work imperatively connected with the business, or necessary to its successful prosecution, was intended to be covered by the policy. If this reasonable significance of the words employed were not adopted, various shades and refinements of meaning could doubtless be applied to restrict the rights of the assured. Under the general rule of a reasonable construction favoring the assured we are permitted to extend the scope of the phrase in question to all necessary operations of the insured company.

> "Indemnity from liability for injuries to employees generally, while engaged in operations connected with the business of a particular kind, will cover the employees in all the branches of such business, or any of the ordinary operations of the assured in the conduct thereof, unless the intention otherwise appears to restrict the indemnity to employees in a particular department of such business."
>
> *Cyc. Permanent Annot.* 1913, p. 2752.

The same question has arisen in a number of cases whose authority supports the right of the assured in this respect.

Authorities.

This question of construction was brought up in *New Amsterdam Cas. Co. vs. Mesker,* 106 S. W. 561 (Mo. 1908), in the interest of the insurer. The suit was brought for the recovery of premiums which, as in all policies of this sort, were based on the wages of employees. "The trade or kind of business" of the company was stated in some of the policies sued on to be "galvanized iron, cornice and wrought iron work, including drivers," and in others "kind of business—galvanized iron and sheet iron work, wrought iron work, erecting." It was contended by the assured that these descriptive phrases did not include such employees as workers on skylights, tinners, carpenters, shippers, machinists, engineers and night watchmen. The Court *held,* however, that the premiums should be computed on the wages, not only of employees working on cornices or wrought iron, but of all employees whose tasks contributed and were essential to the manufacture of such products. This construction took in the classes which the insured contended should be excepted.

The leading case on this subject in *Hoven vs. Employers' Assurance Corp.,* 93 Wis. 201; 67 N. W. 46; 32 L. R. A. 388. There a policy indemnifying an employer for claims for personal injuries to employees while engaged in "operations connected with the business of iron and steel works" was *held* to cover injuries to an employee through the fall of a girder which was being raised by an independent crew building an addition to the works. The Court *held* the operation of constructing an addition to the factory as one connected with the business of iron and steel works.

The case of *Fidelity & Cas. Co. vs. Lone Star Cotton Oil, etc., Co.*, 80 S. W. 541 (Tex. Civ. App. 1904), presents facts much in point with the case at bar. The policy there covered loss from liability for damages on account of any injuries suffered by any employee of insured "while on duty within the factory, shop or yards," of the company. The policy, like that of the defendant company, excluded from its scope additions to or alterations in any building, but permitted ordinary repairs. A carpenter had been employed in the construction of the plant and the installation of the machinery, all of which had been fully completed at the time of the accident. He had also been placed on the list of the company's operatives. While he was removing some scaffolding from the water tower the tower fell upon him and his death resulted from the injuries sustained. It was *held* that the insurance company was liable for damages recovered against the plaintiff for the accident, the Court declaring that the work of removing the scaffolding was necessary to the operation of the plant, and therefore within the scope of the policy.

The most recent authority on the subject is *Cary Brick Co. vs. Fidelity & Cas. Co.*, 147 N. Y. S. 414 (App. Div. 1914), wherein it was *held* as follows:

> "A policy which insured a corporation engaged in the manufacture of bricks against loss for injuries to its employees while engaged in the manufacture of brick, digging and transferring of clay in its plant at a designated place, covered liability for injuries received by an employee while he was assisting in dredging a canal which was located entirely within the brick-yards, and was used in bringing in supplies and shipping out brick. * * * *"

The following language of the Court is pertinent:

> "The description of the kind of work is general and not specific; there is no attempt to define the different steps in 'manufacture of brick,' the different processes used for the materials, facilities or equipment of this plaintiff that are to be included in the expression 'manufacture of brick.' * * * * The policy not only covers men engaged in the production of brick but those engaged in making ordinary repairs upon the plant and its facilities. These repairs are customarily made by the regular employees of the company, and an employee engaged in making such ordinary repairs is within the scope of the policy. The repair of the canal on the property of the plaintiff was the repair of one of its necessary facilities, dredging the material which gradually worked into the canal from its banks or from the river by the tide, and was obstructing the passage of barges therein, is a part of ordinary repairing. * * * * To uphold a finding that the policy covers a risk, it is not essential to find that the insurance company knew every detail or every facility of the enterprise covered by its insurance. It is not probable that at the time an insurance contract was made either party has in mind every detail, every appliance or every facility covered. *By using a general term they mean to cover all.*"

Two opposing cases: *People's Ice Co. vs. Employers' Liability Assurance Corp.*, 161 Mass. 122, and *Phillipsburg Horse Car Co. vs. Fidelity & Cas. Co.*, 160 Pa. 350, may be cited by the defendant. These authorities, however, are not in point, and were fully distinguished in *Hoven vs. Assurance Corp., supra.*

In the Massachusetts case the accident sued on was similar to that which formed the basis of the Hoven case, but the Massachusetts policy, although it insured the employer against liability for injuries received "in all operations connected with the business of ice dealers,"—the identical language of the Hoven policy—nevertheless limited the scope of this phrase by various representations of the assured dealing with the nature of the assured's business, such as "the operations carried on by the work are cutting and handling ice," "the machinery in use is such as is necessary in cutting ice." These expressions the Court held were sufficient to restrict the liability of the insurance company and to distinguish the cases.

In addition it should be noted that the issue in the Massachusetts case was wholly different from that now in question. In that case the injured employees of the assured were engaged in the erection of a new ice house; in the case *sub judice,* the injured employee was merely repairing the factory of his employer. The wide difference between the construction of an entirely new building and the strengthening of the wall of a structure already standing was in the mind of the Massachusetts Court when it wrote its decision.

> "Taking the policy and the application together the risk assumed was for injuries received in connection with the carrying on of the business. No doubt the words used should be construed with reasonable liberality; but they are not broad enough to cover the erection of a new and large building which is to be used for storing ice. * * * * There is a difference between ordinary day by day repairs which are incidental to the carrying on of the business and the erection of large, new buildings which, when completed, are to be used in the business."

Application of Condition B.

Our final reply to our opponent's argument under this head is based on the privision in Condition B, immediately following the policy proper, wherein the company makes the following statement:

> "Ordinary repairs when made by employees of the assured, whose compensation is included in the estimate set forth in the schedule, are permitted." *S. of C. p.* 312, *ll.* 36-39.

This statement, taken in connection with the requirements of the policy preceding it, that injuries must be received during the operation of the trade described, is either one of two things. It is either an admission that ordinary repairs constitute a part of the operation of the trade, or it is a special exception thereto, whereby ordinary repairs are specifically allowed. Whichever view this Court may take, it must find that the work of Chambers was within the policy, provided only that this work was one of ordinary repairs. It should be clearly understood at this point that the "ordinary repairs" referred to are repairs to buildings. This is evident from the text immediately preceding. The policy makes an exception of "additions to or alterations in, or the construction of any building or structure or plant, or in connection with the wrecking or demolition of any buildings or structure or plant or any part thereof"; and then follows immediately with the phrase concerning ordinary repairs quoted above.

The question of whether the work of Chambers was within the policy as being one of ordinary repairs was the main issue at the trial, a factual issue

which the Court properly left to the jury. The jury found Chambers was so engaged in a work of ordinary repairs, and gave verdict for the plaintiff. That there was sufficient evidence to support this conclusion we have shown at length under our next argument heading.

We wish here simply to call attention to the fact that, while we believe the reasonable interpretation of the policy requires the conclusion that the work which caused the injuries to Chambers was part "of the operation of the trade or business of the assured," this question, in any event, by virtue of the provision permitting ordinary repairs, is to be determined by the issue of fact as to whether or not the work of strengthening the wall was, in fact, a work of ordinary repairs. Only by ignoring entirely the provision permitting repairs can this Court find that Chambers' injuries were not received in the operation of the assured's business.

III. CONDITION B.

Work of Chambers as "Ordinary Repairs."

Condition B provides:

> "This policy does not cover loss from liability for injuries or death to or caused by * * * * any person in connection with the making of additions to or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or plant or any part thereof. Ordinary repairs when made by the employees of the assured whose compensation is included in the estimate set forth in the schedule are permitted." (*S. of C. p.* 312.)

Chambers was injured in the course of a work whose purpose was the strengthening of a weakening factory wall. Under the terms of the policy the question arose as to whether or not such work was an addition or alteration to the plant, or merely a work of ordinary repairs. This question of fact the trial Judge should have left with the jury.

Right of Jury to Pass on Question.

The question of the character of the work on which Chambers was engaged was one of fact and if there was any conflicting testimony as to the nature of the work, or if reasonable men might have drawn different inferences from the evidence presented, the trial Judge was bound to submit the question to the jury.

Bassell vs. American Fire Ins. Co., Fed. Cas. 1094;

Home Ins. Co. vs. Favorite, 46 Ill. 263;

Coen vs. Denver, &c., Ins. Co., 155 Ill. App. 332;

Niagara Fire Ins. Co. vs. De Graff, 12 Mich. 124;

Carrigan vs. Lycoming Fire Ins. Co., 53 N. W. 418.

In the recent case of *Lebanon Co. vs. Franklin Fire Ins. Co.,* 237 Pa. 360, 85 Atl. 419, a provision of the policy that the work of carpenters in building or repairing the premises without permission of the insured would avoid the policy, was held not to apply to repairs necessary to the preservation of the property, and the question of the necessity for such repairs was held to be for the jury.

In *Fidelity & Casualty Co. of New York vs. Phoe-*

nix Mfg. Co., (C. C. A. Wis. 1900), 100 Fed. 604, the defendant issued a policy by which it agreed to indemnify the plaintiff, a manufacturing concern, against losses from liability for damages on account of injuries to employees whose wages were included in its payroll. Plaintiff was at the time engaged in foundry work, the building, repairing and setting up of engines and other machinery and fixtures, and erecting buildings wholly or partly of wood, under contract, the latter in some cases including the tearing down of old buildings to be replaced. It was understood by the parties that the intention was to cover by the policy the employees engaged in all branches of the plaintiff's work. The business of the company was stated to be "manufacturers or erectors of machinery, show-cases and fixtures and *general wood work.*" Certain carpenters employed by the plaintiff whose wages were included in its general payroll were injured while engaged in tearing down an old building preparatory to the erection of a new one on its site. Action was brought on the policy to recover for losses incurred by reason of such accident, and it was held in the upper court not error to submit to the jury the question whether such damages were within the scope of the policy, and whether the term "general wood work," as commonly understood, or as agreed upon by the parties, covered the work in which the men were engaged when injured.

Probably the most convincing case on the question of the jury's right to determine the issue of "ordinary repairs" is *Kingston Cotton Mills vs. Liability Assurance Corp.* (N. C.), 77 S. E. 682. In that case the Supreme Court reversed a decision of non-suit in the court below, on the ground that the question should have gone to the jury. The action was

brought on an employers' liability insurance policy excluding injuries in connection with additions to or structural alterations in the employer's cotton mill, but including repairs and ordinary alterations necessary to the care and maintenance of the premises and plant. An employee of the company had been killed while digging sand from a hole on the premises for use in the erection of a brick chimney to take the place of two iron smokestacks. The upper Court held that the question of whether this accident was within the policy was for the jury. The words "structural alteration" were thus construed:

> "Under an employers' liability insurance policy excluding injuries in connection with additions to or structural alterations in the employer's plant, a 'structural alteration' was such alteration as would change the physical structure of the building and plant."

From these cases the right of the plaintiff to have the jury pass on this question is clear, provided evidence was adduced by it to show that the work on which Chambers was engaged was a necessary part of the manufacture of the company's product. Before discussing the evidence submitted at the trial, it will be well to present the judicial interpretation of the meaining of the phrases involved.

Judicial Interpretation of Words.

The words are defined in standard dictionaries as follows:

> "*Addition.* Anything added; annexed; accession."
>
> *Standard Dictionary.*
>
> "*Alteration.* A change of form or state."
>
> *Century Dictionary.*
>
> "*Repair.* Restoration after decay, waste, injury or partial destruction; supply of loss; reparation."
>
> *Standard Dictionary.*
>
> "*Repair.* Good or sound condition kept up by repairing."
>
> *Century Dictionary.*

An "addition" has been defined in insurance cases as a building or habitable structure adjoining and connecting with the structure considered in the insurance policies.

Peoria Sugar Refining Co. vs. People's Fire Ins. Co., 24 Fed. 773;
Holbrook vs. Chamberlin, 116 Mass. 155, 162;
Cargill vs. Mut. Ins. Co., 33 Minn. 90; 22 N. W. 6;
Phoenix vs. Martin (Miss.), 16 S. 417;
Marsh vs. Concord Mut. Fire Ins. Co., 71 N. H. 253; 51 Atl. 898, 899;
Maisel vs. Fire Assn. of Phila., 69 N. Y. S. 181, 183;
Carpenter vs. Allemania Fire Ins. Co., 156 Pa. 37; 26 Atl. 781.

It has been held that, to make an alteration in a building, it is necessary to change the form or nature of the building without destroying its identity.

Harbor & S. B. & S. Assn. vs. Employers' Liability Assurance Corp., 140 N. Y. S. 717 (1913);

Davenport vs. Magoon, 13 Or. 3, 4 P. 299;

Chicago Lumber & Coal Co. vs. Darner, 132 Iowa 282, 109 N. W. 780.

It is difficult to find any qualifying force in the adjective "ordinary" attached to the word "repairs." It would seem that repairs not ordinary, *i. e.,* extraordinary, would be indicated by the words "alterations" or "additions." Indeed, "repairs" and "ordinary repairs" are used interchangeably and synonymously in the reports, being placed in constant opposition to extraordinary operations such as the making of additions or alterations to buildings.

The term "repairs," says the Court in *Harbor & S. B. & S. Assn. vs. Employers' Assurance Corp.,* 140 N. Y. S. 717, "has a very broad meaning and includes restoration to a sound or good state after decay, waste, injury, or partial destruction." (*Citing* 34 *Cyc.* 1337.) This "*very broad meaning*" as we gather from the cases includes two main ideas, the idea of maintenance and the idea of restoration. Thus it has been frequently declared that "repairs" or "ordinary repairs" includes all work necessary to the proper *preservation* of the property.

34 *Cyc.* 1338;

Abell vs. Brady, 79 Md. 94, 28 Atl. 817;

Dwight vs. Ludlow Mfg. Co., 128 Mass. 280, 282;

Verdin vs. St. Louis, 131 Mo. 26; 27 S. W. 447, 451;

Seaboard Natl. Bank vs. Woesten, 147 Mo. 467; 48 L. R. A. 279; 48 S. W. 939, 944;
Barber Asphalt Co. vs. Hezel, 155 Mo. 391, 48 L. R. A. 285; 56 S. W. 449, 457;
Stephens vs. Milnor, 24 N. J. Eq. 358, 373;
Breun vs. Troy, 60 Barb. 417, 421;
Pittsburgh Rwy. Co. vs. Pittsburgh, 80 Pa. 72, 76;
Gulf City Rwy., &c., Co. vs. Galveston, 69 Tex. 663, 7 S. W. 520.

The purpose of *restoration* as included within the scope of the word "repairs" reveals the most extreme limit of its meaning, and justifies such extensive operations as the rebuilding of a house either partially or wholly destroyed by fire.

34 *Cyc.* 1338;
In re Freund's Est., 131 Cal. 667; 63 P. 1080;
Gulliver vs. Fowler, 64 Conn. 556; 30 Atl. 852;
Meyers vs. Myrell, 57 Ga. 516;
Vincent vs. Frelich, 50 La. Ann. 378, 28 S. 370, 375;
Callender vs. Marsh, 1 Pick. 418, 429;
Abby vs. Billups, 35 Miss. 618, 632;
Wattels vs. Ice & Coal Co., 50 Neb. 251, 36 L. R. A. 424, 69 N. W. 785;
Beech vs. Crain, 2 N. Y. 86, 93;
Hoy vs. Holt, 91 Pa. 88, 90;
Pittsburgh, &c., R. Co. vs. Pittsburgh, 80 Pa. 72, 76;
Douglass vs. Com., 2 Rawle. 262, 264;
State vs. White, 16 R. I. 591, 594; 18 Atl. 179;
Armstrong vs. Maybee, 17 Wash. 24, 48 P. 737;

H. & N. H. R. Co. vs. Grant, 11 Fed. Cas. 699, 701.

It seems clear that "repairs" would include enlargements of the structure repaired when such enlargements are incidental to the necessary work of repairs. Thus it was held in *Weaver vs. Templin,* 113 Ind. 303; 14 N. E. 600, that under authority to repair there can be no enlargement and improvement *except in so far as the work of repair necessarily enlarges and improves.* And in *Townsend vs. Northwestern Ins. Co.,* 18 N. Y. 168, the Court allowed as a work of repair the substitution of a new bulkhead for one that had become useless by decay, though more durable material was used in the change.

Thus, if as opposing counsel say (*p.* 16 *of brief, l.* 13), the work resulted in an entirely different layout, this fact is not material if the change was merely incidental to the main purpose of the work.

Special attention is called to the case of *Stevens vs. Milnor,* 24 N. J. Eq. 359. There a testator had directed that the income of his residuary estate should be used for "defraying the expenses incident to said estate, the taxes, repairs, etc." And the question arose whether new roofing and plumbing and the grading and flagging of sidewalks and streets in front of the premises were within the scope of the direction quoted above. The Court held that they were; interpreting "repairs" as "whatever was reasonably necessary to *keep up the* house." The following excerpt from the Chancellor's opinion sums up the law:

> "Under the head of repairs should be included new roofing, new plumbing, *and whatever is reasonably necessary to keep up the house.*

> Grading and flagging the sidewalks, and grading and paving the streets in front of the premises, and fencing the lots, all these, though they are improvements of a permanent character, and go to the benefit of the estate and of those in remainder, are expenses incident to the real estate * * * * . Additions to the houses, and adaption of premises to new uses are not fairly within the direction, and should be paid for out of the estate and not out of the income."

Our opponents may cite the case of *Updike vs. Skillman,* 27 N. J. L. 131, but the case is not an authority in point. The difference lies in this: There the mechanics' lien statute was being construed,which statute drew a distinction between additions and alterations, allowing a lien for the former and not for the latter. There the words "alterations" and "repairs" were used synonymously in contra-distinction with additions. In the case at bar the two words "alterations" and "additions" are used synonymously and are opposed to "repairs." Hence the Court approached the question of interpretation from a different angle and contrasted different things. The result manifestly is not applicable to the present situation.

Court Decisions on the Facts.

In two cases the Courts have themselves dealt with the question of interpretation at issue, and in each case found that the work was one of repairs and not an addition or alteration. Their conclusions are of especial significance.

In *Kresge vs. Md. Cas. Co.,* 143 N. W. 668 (Wis.

1913), the policy, written by the present defendant company, insured the holder against liability for injuries to persons while in its stores, and provided that additions to and alterations in or the construction of any building or structure were not covered thereby. Certain vestibules occupying twenty-five or thirty square feet of floor space were installed to protect employees in cold weather. These, although more elaborate, were of the same general nature as storm doors and windows. The Court *held* that they "were not an 'addition,' which is an enlargement or extension to include additional space, an 'alteration,' which means a substantial change, nor a 'structure,' which is applied to a building of some size."

In *Harbor S. B. & S. Assn. vs. Employers' Liability Assurance Corp.,* 140 N. Y. S. 717, the Court discussed fully the meaning of the terms involved in the present policy, and concluded by holding as follows:

> "The replacing of a roof of a building destroyed by fire constitutes repairs, within the meaning of an indemnity policy, and is not either an 'alteration' or 'addition.' "

We are now concerned with the question whether the deepening of a building's foundations, made necessary by danger of its collapse, is within the meaning of the terms "addition," "alteration" or should be classed as "ordinary repairs." We have seen that the mere fact of enlargement will not prevent the work from constituting repairs, when such enlargement is merely incidental to the necessary work of repair. *Weaver vs. Templin,* 113 Ind. 302; 14 N. E. 600, and *Townsend vs. Northwestern Ins. Co.,* 18 N. Y. 168. We must choose one of these con-

trasting terms. If the work was not one of alteration, it was a work of ordinary repairs. If it was ordinary repairs, it was not an alteration or an addition.

Such work, we submit, falls clearly and logically within that meaning of the phrase "ordinary repairs," which includes all work necessary to the preservation of the premises. The work on which Chambers was engaged was necessary to the preservation of the factory.

The following synopsis of the evidence shows the nature and necessity of the work:

Plaintiff's Evidence.

The testimony of Louis Wittenberg, the manager of the plant, was that repairs were being made to the foundation wall; that this wall was "cracked all around"; and had settled, on account of the heavy loads carried in previous years; and that the building was not safe. (*S. C., pp.* 54 *and* 55.)

The work consisted in putting stone under about one-quarter to one-third of the entire foundation wall. The witnesses vary in their estimates of the depth of the wall placed under this portion of the foundations, these estimates running from a foot to two feet.

Wittenberg's testimony is that the purpose of the work was to repair by strengthening the foundation wall which had weakened and cracked. An attempt was made by the defendant to show that the cellar had been deepened, and to draw therefrom the inference that the work was an alteration or addition. There is a conflict of testimony as to whether or not the capacity of the cellar was increased. Wittenberg denies that it was. (*S. C., p.* 92, *ll.* 28 *to* 31.)

Henry, one of the defendant's witnesses, testified that the wall had settled and cracked; that this was noticeable in the floor and in the building, and that the rafters had come apart, one side down lower than the other. (*S. C., p.* 218.)

Henry also testified that the cellar was about on the same level after all the work was complete. (*S. C., p.* 215, *ll.* 10 *and* 11.)

Daniel Chambers testified that the cellar was about a foot deeper. (*Page* 222, *l.* 9, *S. C.*)

Jesse Warwick testified that the cellar floor was lowered about a foot. (*S. of C., p.* 230, *ll.* 22 *to* 31.) This witness also noticed that the walls were cracked.

Edward Cramer, a witness for the defendant, testified that the cellar wall had been lowered about a foot, and he likewise remembered seeing the cracks in the foundation walls. (*S. C., pp.* 232-233.)

No witness contradicts Wittenberg's testimony that the work was being done to strengthen the walls, and practically every one of the defendant's witnesses corroborates Wittenberg to the extent of indicating a need for repairs by admitting the presence of cracks in the walls.

There is an absolute conflict of testimony as to whether the cellar was deepened or not. If the work was one of ordinary repairs necessary or proper for the maintenance or preservation of the building, it would not matter that as an incident to the work the cellar was slightly deepened. However, there was a dispute on the question of fact as to whether the cellar was not deepened, and this it was the province of the jury to determine.

The evidence adduced by the defendant must so preponderate over that of the plaintiff as to leave no room in any reasonable mind for the conclusion that the work was one of repairs only; otherwise the

directed verdict was error. The evidence offered by the defendant has produced nothing more than a certain amount of contradiction upon immaterial points. We need not discuss this evidence, for in any event there were disputed matters of fact which should have gone to the jury for their decision.

IV. CONDITION F.

1. Plaintiff's Right Under the Assignment.

Condition F provides that:

> "No action shall lie against the company to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue * * * * ."
>
> *S. of C., p.* 313.

Counsel for defendant have contended that the assured has forfeited its rights under the policy by breach of this condition. Their arguments fall naturally under two separate heads, which may be distinguished respectively as the theoretical and the technical.

Under the first head they may invoke the basic theory of insurance law that a contract of insurance is a contract of indemnity, and the resulting relation between the parties a confidential relation, wherein the contract rights are unassignable.

The second is a more technical argument, and claims as a matter of fact, that the loss was not "actually sustained and paid in money by the assured" nor was the action "brought by the assured."

These separate themes of objection will be argued separately.

Common Law Right of Assignment.

Our opponents have contended that entirely irrespective of any written provision of the policy, the assured was prevented by the established principles of insurance law from making assignment of his rights under the policy. They argued that the contract between the parties, being one of indemnity, comprehended rights and duties which were purely personal in their nature and incapable of assignment. The general principle is not to be disputed, and we are free to admit that when the policy passed from the Trade Name to the new corporation, it carried with it no rights of protection from future accidents. But the rule has one essential limitation. The disability of alienation applies only to the uncertain rights of future protection given by the policy; it has no possible reference to the claim for remuneration *after* loss under the policy. In the latter event, the right is not a contract right at all, but a chose in action, assignable at the will of its owner.

The principle contended for by our opponents is that contracts of indemnity, being personal in their nature, are not assignable. To this we answer that so long as that personal relationship subsists, and for so long only, are the rights of the parties unassignable. The test lies in the survival of the insurable interest. So long as *the subject of insurance* is within the control of the assured, the law recognizes a continuance of the *delectus personae,* based on the insurer's dependence on the honesty and prudence of his assured; the instant *the subject of insurance* is removed, the personal relationship goes with it. *Vance on Insurance, p.* 468.

The subjects of insurance in the present case are the employees of the assured; the *insurable interest,* the master's concern for their safety and freedom from accidents.

> "The assured in an employer's liability policy has an insurable interest in the safety of those whose accidental personal injury is made the foundation of his claim of indemnity. The happening of such an accident will be of disadvantage to the insured and will subject him to pecuniary loss, for which such policies afford him a desirable means of indemnity."
>
> *Cyc. Anot.* 1913, *p.* 2749.

So long then as the subject of insurance remained under the control of the assured, no assignment of the latter's rights and responsibilities was permitted by the common law of insurance. The moment that subject was removed, the relationship, the *delectus personae,* went with it, and the rights and obligations it left were mere choses in action. It follows that after Chambers had been injured, the risk no longer existed; the contingency insured against had occurred.

True, the actual money loss had not as yet been suffered, but its occurrence was a mere matter of time. The substantial event insured against had befallen; what remained was a mere series of proceedings by which the amount of liability was determined. In principle, these proceedings differed in no way from the proceedings attendant upon a fire loss, the preparation of affidavits and proofs of loss, etc. We are dealing now with the question in its theoretical aspect, and not from its technical viewpoint, and so are justified in applying the essential purpose of the law. It is said that, as a matter of

fact, the assignment of the right now sued on took place before the loss had been paid; it is answered that, as a matter of fact, that right was a chose in action at the time of the transfer.

Termination of Contractual Relations by Defendant's Own Act.

The defendant has not contended that these contractual relations subsisted after the accident. Had the company, as it was bound by the policy to do, undertaken the conduct of the litigation, there might have been force in its insistment that the *delectus personae* remained, and that as long as the litigation continued the duty of the assured under the policy to supply the company with necessary information, witnesses anl so forth, rendered it impossible to transfer these duties to another. But it is clear that all relations between the parties were terminated by the act of the defendant itself. A few words will make this clear:

Condition D of the policy (*S. of C., pp.* 312-313), required that upon the occurrence of an accident the assured should give immediate written notice thereof, that he should in addition give the company information of any claim based upon the accident, and when suit was brought, forward to the home office summons or other process. Whereupon, the policy reads, "the company will, at its own cost, defend such suit in the name and on behalf of the assured, unless the company shall elect to settle the same. * * * * " (*S. of C., p.* 313, *ll.* 17 *to* 20.) The obligation of the company under its contract was, therefore, twofold; first, to pay an indemnity (limited to

$5000); and secondly, to defend suit brought against the company by an employee.

The first of the requirements of Condition D was scrupulously observed by the assured. Notice of the accident was forwarded with all reasonable dispatch. (*S. of C., pp.* 322-326, *Exhibits P*3, *P*4 *and P*5.) All subsequent conditions, however, were rendered impossible of performance. In reply to the assured's report the company wrote, in unmistakable language, the repudiation of its contract duty.

> "After careful consideration of the circumstances and facts, as we have them, concerning the above captioned accident, we are of the opinion that the same is not covered and shall, therefore, have to disclaim liability."
>
> *S. of C., p.* 327.

This letter ended *eo instanti* all relations, confidential or otherwise, between the parties. By this letter the company washed its hands of the whole matter for all time. Its disclaimer of liability, as the trial has proved, was a breach of its contract, and a breach that put an effectual end to any duty of the assured that might have rested upon it by virtue of the contract. This act of the company rendered the assured's interests a chose in action, whose exact amount awaited only judicial ascertainment.

Thus it is evident that no possible confidential duty existed between the parties to this policy at the time the assignment in question took place, that that assignment did not transfer active duties or personal responsibilities of either party, but that it was the mere assignment of a debt and, as such, protected by the public policy of the State.

It must be borne in mind that the defence of the Chambers litigation by the Pickling Company was

the result of no duty imposed by the policy or required by law of the assured. The policy guaranteed the assured an absolute freedom from all litigation; this guaranty was part of its contract, part of the inducement for the payment of its premium. When the company broke its agreement and refused to defend the assured under the terms of the policy, the Trade Name had a perfect right to stand by and do nothing, suffer the judgment, and then demand its payment by the insurer. The fact that it and its successor did nothing of the sort, but instead actively and energetically opposed the Chambers claim was more in the interest of the insurance company than their own.

It is not fair that all this enterprise be now recalled to penalize the plaintiff. The company's insistence upon the transfer as a breach of faith loses its force when we consider that that transfer was made while the assured was defending a suit which the company itself was under contractual obligation to defend. The inequitable character of their present defence is apparent when we remember that if the assured had stood supine and made no manner of objection to the Chambers suit—as its contract with its insurer gave it the undoubted right to do—the loss could have been paid and the present suit brought before the transfer ever took place.

Valid Assignment of the Chose in Action.

We have shown that the claim of the assured against the company at the time of the assignment on November 7, 1908, was a valid chose in action. The validity of its assignment by the assured to the plaintiff corporation cannot be called in question.

The agreement of November 7 (*S. of C. p.* 308) purported to transfer and assign the entire property of the Trade Name to the corporation, and it would seem that under such general assignment the rights of action of the Trade Name passed with the other assets.

However, a more certain evidence of the assignment is found in the transfer of the policy to the corporation. The evidence of this transfer appears on pages 74 to 75 of the record. A chose in action, being an intangible thing, cannot pass by assignment save by symbolic transfer through the delivery of something representative of its existence. Such symbolic transfer is found in the delivery of this policy.

It cannot be disputed that an insurance policy and all the rights arising therefrom pass by parol assignment.

Section 19 of the *Practice Act*, 3 *Comp. St.* 4056, provides that:

> "* * * all choses in action arising on contract shall be assignable at law and the assignee can sue thereon in his own name. * * *"

Considering this section, *Martz vs. Cumberland Mut. Fire Ins. Co.*, 44 N. J. L. 478, *held* that it included insurance policies. That choses in action were capable of verbal assignability was settled by the early cases of *Vreeland vs. Van Horn*, 17 N. J. Equity, 137, and *Winfield vs. Hudson*, 28 N. J. L. 225, 264.

The cases of *Kase vs. Hartford Fire Ins. Co.*, 58 N. J. L. 34; *Weinberger vs. Agriculture Ins. Co.*, 80 N. J. L. 202; *Kupfersmith vs. Delaware Ins. Co.*, 81 N. J. L. 664, where the right of assignment was denied, were all cases wherein the insured, a mort-

gagee, attempted to transfer the policy after an assignment of the mortgage. The Court held that this was impossible inasmuch as the insurable interest was lost through the transfer of the mortgage.

That an insurance policy after loss may be transferred by parol so as to convey a valid right of action is well settled.

> "The intention of the parties that an assignment should take place is determinative and no particular form is necessary in order to transfer a collectable interest in the proceeds to the assignee. * * * * A verbal assignment is sufficient."
>
> 19 *Cyc.* 632.

The same rule is recognized in Pennsylvania, where the act of transfer took place. In *Ross vs. Wells,* 5 Pa. Co. Ct. 430, the owner of a policy delivered it to a creditor saying that he wished to make an assignment thereof and that he wished the creditor to take it and collect it. The Court considered this a complete and valid assignment.

Other authorities from the same jurisdiction supporting the validity of a parol assignment are *Malone's Appeal,* 38 L. I. 303 (1881); *Hallstead's Estate,* 2 Kulp. 508 (1883).

Technical Compliance with Condition F.

Turning now to what may seem at first glance the more difficult of the two arguments possible under this condition of the contract, to wit: the technical insistence that the loss was not "actually sustained and paid in money by the assured," nor was this action "brought by the assured." Here are two dis-

tinct conditions subsequent, whose breach, it is asserted, will prevent recovery.

Our answer is that one of the conditions has been fulfilled, and that the other, being invalid, charges us with no duty of fulfillment.

Qui facit per alium facit per se.

We say that in the eye of the law the loss under this policy was actually sustained and paid by the assured. Such payment by the assured is found in the following facts:

On November 7, 1908, the assured, by written act of transfer, assigned all its assets to the corporation, the present plaintiff. A valuable consideration of money and shares of stock was paid by the corporation on its part. At the time of this written contract Chambers had recovered his verdict of $4000.00; the liability of the assured's successor seemed certain, and it is clear that the parties provided for its payment in their agreement. The corporation was to answer for any final judgment that might be recovered by Chambers (*S. of C. p.* 309, *ll.* 30 *to* 40). It is, therefore, not only a fair but a necessary presumption that this pending liability figured as part of the consideration for the transfer. It is a reasonable inference that this liability of $4000.00 diminished by that much the amount of the purchase price. The certain effect of this agreement was to render the succeeding corporation, the present plaintiff, the agent of the assured for the payment of the Chambers liability.

The intricate and prolonged history of the subsequent litigation was not anticipated by the parties. At the end, the payment by the assignee of this

$4000.00, with its accumulations of interest and costs, was the payment by the assured, through its agent, of a judgment which it had been insured against. *Qui facit per alium facit per se.* In *Maryland Casualty Co. vs. Omaha Light and Power Co.*, 157 Fed. 514 (soon to be more fully discussed), the maxim of the law of agency just quoted was applied to an identical situation.

"Action Brought by the Assured."

It is usual in policies of insurance to insert a phrase forbidding any assignment of the policy save with the consent of the insurer. This general purpose has been accomplished in this policy by the provision that "no action shall lie against the company unless it shall be brought by the assured."

Let us assume—we do not concede it—that this action can in no way be regarded as having been brought by the assured. Putting aside for the moment all question of agency, we say, in answer to this Condition, that in its wording and present application to the facts of this case it is absolutely void and of no force. Briefly, it offends the well-established public policy that protects the essential freedom of alienation. Insofar as the provision requires that no transfer shall take place during the life of the policy, insofar as it seeks to enforce the basic doctrine that an assignment of confidential duties will not be allowed, it is valid; but when it is attempted to go beyond these and enforce the provision as against those to whom the accrued rights under the policy have been assigned after loss, favorable interpretation must be refused and the policy to that extent held void.

We have already shown that the common law of insurance recognizes and allows the right of transfer after loss has occurred and the confidential relations of the parties have been dissolved. We will show now that this right cannot be affected by any act or language of the insurer, but is an absolute privilege which the public policy of the State protects as necessary to the common welfare.

Wood, in his text on Fire Insurance, states the doctrine thus:

> "Where the policy prohibits an assignment, an assignment without the insurer's consent invalidates it, but, in the absence of such a condition, the validity of the policy is not affected thereby, but still remains operative as to the assured; nor does an assignment after a loss has transpired invalidate it. In such case the insurer becomes absolutely a debtor to the assured for the amount of the actual loss to the extent of the sum insured, and it may be transferred or assigned like any other debt. After the loss the *delectus personae* no longer becomes material, and even though the policy prohibits such an assignment, and provides that if so assigned the policy shall be void, it is held that such prohibition is void, as the insurer cannot restrict the assignment of a debt. The reasons that induce the restrictive clause have no existence or application after the risk has ceased."
>
> *Vol.* 2, *Sec.* 361.

So too:

> "An assignment is valid even though the policy provides that it shall be void if assigned without the consent of the insurer, for such a provision does not apply to an assignment after

loss, and *it is valid even though the policy stipulates that it shall be void if assigned without consent* before or *after loss*, for such a provision is against public policy, and is invalid because it is intended to prevent the assignment of choses in action."

13 *A. & E. Ency. of L.* 201.

The following authorities support the quoted text:

Spare vs. Home Mut. Ins. Co., 17 Fed. 568;
Bergson vs. Builders' Ins. Co., 38 Cal. 541;
Ga. Corp. F. Assoc. vs. Borchardt, 123 Ga. 181; 51 S. E. 429;
Roger Williams Ins. Co. vs. Carrington, 43 Mich. 252;
Goit vs. National Protection Ins. Co., 25 Barb. (N. Y.) 189;
Carroll vs. Charter Oak Ins. Co., 40 Barb. (N. Y.) 292;
Courtney vs. New York City Ins. Co., 28 Barb. (N. Y.) 116;
Carroll vs. Charter Oak Ins. Co., 38 Barb. (N. Y.) 402, affirmed 1 Abb. App. Dec. (N. Y.) 316;
West Branch Ins. Co. vs. Helfenstein, 40 Pa. St. 289, 80 Am. Dec. 573;
Pennebaker vs. Tomlinson, 1 Tenn. Ch. 598;
Stolley vs. Aetna F. & M. Ins. Co., 10 W. Va. 546, 27 Am. Rep. 593;
Alkan vs. New Hampshire Ins. Co., 53 Wis. 136.

Md. Casualty vs. Omaha Electric and Power Co.

Two cases similar in fact with the case *sub judice* are found, whose holdings require special consideration. The first of these is *Md. Casualty Co. vs. Omaha L. & P. Co.*, 157 Fed. 514.

The policy sued on there was written by the present defendant company and was in substantially the same language as the policy before this Court. The facts, too, were substantially the same. An employee of the assured, the New Omaha Thomson-Houston Co., during the period of insurance was accidentally killed. Suit for the death was brought against the assured and resulted in a judgment for $5000.00. This judgment was tagen by petition in error to the Supreme Court of Nebraska and there affirmed. Later a rehearing was granted, and after two years the judgment was again and finally affirmed. After the rendition of the judgment and its first affirmance, the Thomson Co. transferred its assets and liabilities to the plaintiff company, the Omaha Electric L. & P. Co. The final judgment in the tort action was paid and satisfied by the plaintiff company, who thereupon brought suit on the policy against the defendant. The District Court found for the plaintiff and the Circuit Court of Appeals, (8th Circuit), affirmed the judgment.

Exactly the same contentions seem to have been made for the defendant in this case as have been made in the case at bar. Thus it was argued that the policy could not be assigned because of the personal relations of the parties. To this the Court answered:

"At that time (the time of the transfer) the

term of the policy had expired, and the character of the assured for integrity and prudence, on the strength of which the insurer might have relied in making its contract, could no longer affect its liability. The recognized reasons for the prohibition of assignments without the consent of the insurer had ceased. Its liability had become fixed, and like any other chose in action was assignable regardless of the conditions of the policy in question. This is settled by the great weight of authority. (Citing cases.)"

p. 516.

It was likewise insisted by the company that the technical requirements that judgment be paid and suit brought by the assured, had been violated. And the Court in answer to this contention replied, first that the agreement of transfer between the Thomson Co. and the Omaha Electric Co. rendered the latter an agent for the older concern to pay the judgment when it should be finally adjudicated.

"The plain meaning of the provision in question, taken in connection with the established assignability of the claim to the plaintiff, is that to render defendant liable on the contract there must have been a loss to the assured, that loss must have been fixed by a final judgment, and that judgment must have been paid, in order to constitute a loss within the terms of the policy. Such is the substance and meaning of the contract. *Whether the loss is actually paid directly by the hand of the assured, or by some assignee of the claim for indemnity who, for value received from the assured, has assumed the judgment liability, is immaterial. Qui facit per alium facit per se.* The plaintiff paid the judgment

> against the assured as part consideration for the transfer of its assets, and that was payment by the assured within the purview of the policy."
>
> *p.* 517.

The Court also quoted the text from *Wood on Fire Insurance,* set forth above, as authority for the public policy which protects the alienation of a mere debt or chose in action.

Our opponents attempted, on the trial, to distinguish this case by pointing out that the employee's suit had gone as far as the Supreme Court, when the transfer took place, whereas in the case at bar it had only reached the trial Court. This is only a difference, however, in the stage of proceedings. In each case the vital thing, the accident to the employee, had occurred. Moreover in the Omaha case the litigation was being conducted, in pursuance of the terms of the policy, by the company, and it could have been argued there with some show of force that the confidential relationship founded on the contract of insurance still subsisted between the parties so long as this litigation continued. On the other hand, in our case this contractual relationship had been absolutely and finally terminated by the action of the company itself. The point attempted by our opponents returns against them with added force. If the Federal Court was willing to uphold a transfer made when the contract of insurance was still in force between the parties, how much more reason is there for this Court's upholding a transfer made after the contractual relations had been forever terminated?

Moses vs. Travelers' Insurance Co.

The Federal Court cited the decision of this Court in *Moses vs. Travelers' Ins Co.*, 63 N. J. Eq. 260. The facts in that case are not identical with those in the case *sub judice*. There the "payment by the assured" required in the policy was found in the adjudication of bankruptcy, and the consequential transfer of the assets of the assured to a trustee for the benefit of the creditors, among whom was the injured employee. Here the situation was different inasmuch as the trustee was the agent, not of the assured, but of the creditor employee, and payment to the trustee was payment direct from the assured to the agent of the creditor, whereas the assignee in the Federal case, and in the case at bar, were in each instance the agent of the assured to make payment, and payment by them was made direct to the injured employee.

Manifestly, the difference is one of fact and not of principle. In this case, as in the Federal decision, our Court refused to allow an unlooked-for situation, merely because it was without precedent and had not been anticipated by the parties, to operate as a forfeiture of rights under the policy. In each case, the court sought the real intent of the parties and applied it.

A point of high significance in this case is that the payment to the employee, which this Court held occurred by the mere adjudication of bankruptcy, was by no act of the party, but by the constructive action of the law; in other words payment by operation of law was held to be payment by the assured. This finding went further than that of the Federal Court, which dealt with the actual payment by an

agent of the assured. And if payment by act of law constitutes a "payment by the assured" can it be denied that payment by an appointed agent of the assured is a payment within the meaning of the policy?

IV. CONDITION F.

2. Compliance With Limitations as to Time of Suit.

Condition F provides in full as follows—(the italicized portion covering that part of the Condition which we shall now discuss):

> "*No action shall lie against the company* to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue; nor *unless such action is brought within ninety* (90) *days after such judgment, by a court of last resort, against the assured has been so paid and satisfied.* The company does not prejudice by this condition any defenses to such action it may be entitled to make under this policy."
>
> *S. of C. p.* 313.

After hearing the argument upon the defendant's motion for a new trial the Supreme Court reached the conclusion that suit had not been brought by the plaintiff within ninety days as required by the section. This was the sole ground assigned by it for allowing the motion. The Court in its *per curiam* opinion said:

"The policy requires that action shall be brought within ninety days after the judgment is paid and satisfied. We think the judgment was paid and satisfied as early as October 31st, 1913. Since the action was not begun until May 5th, 1914, the ninety days has expired. The plaintiff seeks to escape the difficulty upon the ground that forty cents was paid by the attorney to Chambers' attorney for satisfaction pieces and for cancelling the judgments. The answer to this contention is twofold; (1) this payment was not one that the plaintiff corporation was obliged to make, since the statute made it the duty of Chambers' attorney to enter the satisfaction. C. S. 2960, pl. 22; (2) the payment was not a payment to the plaintiff in the judgment; at best it was a payment to the clerk of his fee for entering the satisfaction and filing the warrant. It would, moreover, be quite unreasonable to adopt a construction which would enable the assured to extend the time of bringing suit indefinitely or as long as he chose to forbear the entry of satisfaction."

S. of C. p. 35d.

We have no particular objection to the correctness in themselves of the grounds assigned by the Supreme Court for its conclusions. Our objection to the decision is that it quite overlooks the main argument made by counsel for the plaintiff against the application of the ninety days' limitation. We believe that this argument is determinative of the defendant's insistence upon the limitation and submit it accordingly.

This argument is twofold.

First, condition F was wholly dependent upon the concurrent performance by the insurer of its obligation to defend the action brought by an employee against its assured; performance of this contractual duty of the insurer was refused by the company, and upon its refusal the contractual obligations falling upon the assured by the terms of the policy ceased *eo instanti*.

Secondly, the limitation as to time of suit prescribed in condition F, by its own terms, had no application to the present suit.

To gain a full understanding of what Condition F intended, it is necessary to bear in mind certain other conditions of the parties' contract.

Condition D of the policy declared that:

> "If thereafter any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy * * * the company will, at its own cost, defend such suit in the name, and on behalf of the assured, unless the company shall elect to settle the same, or to pay the assured the indemnity provided for in Condition A hereof."

The obligation of the insurer under its contract of insurance, therefore, was twofold; first, to pay to its assured any loss, up to a certain amount, suffered through the recovery of a judgment against it by an injured employee; secondly, to undertake the defence of any such suit brought against its insured, and to pay all costs and charges connected with it. It is evident that the latter condition was as vital a part of the parties' contract as the former. They were associated conditions. The assured employer

was anxious not only to protect himself against the liability of responding in damages upon a tort action of an employee, but to escape the expense and worry of the litigation.

When the Chambers suit was reported to the company it had the election, under this Condition, to settle the same or to pay the assured the indemnity provided, and thus by either of these means escape the responsibility of conducting the defence. In the alternative, it was obligated to defend against the employee's suit. The defendant refused to do any of these things and notified its assured to that effect. (See Maydwell letter, *S. of C. p.* 327.)

1. The Limitation Dependent Upon Defendant's Conducting Suit.

As a party must be presumed to intend the due performance of its lawful promises, we must conceive the entire policy as based upon the assumption of the employee's suit being defended by the Insurance Company. Reading Condition F in this light, it is evident that it was designed to meet two different contingencies, and that it is accordingly divided into two parts, each dealing with one of these separate contingencies.

The first was the event of a verdict which the company did not intend to appeal.

> "No action shall lie against the company * * * unless * * * for loss actually sustained and paid in money by the assured *in satisfaction of a judgment after trial of the issue.*"

In such case, it should be noted, *no limitation of time* is placed upon the right of the assured to sue.

The second contingency is the appeal by the Insurance Company of the verdict in favor of the employee:

> "* * * or unless such action is brought within ninety days after such judgment by a court of last resort against the assured has been so paid and satisfied."

In this event the assured is required to bring suit on the policy within ninety days after the judgment by the Appellate Court has been both paid and satisfied.

To sum up, it was the company's intention in Condition F to acquire full control over the situation arising on a suit being brought by an employee, a necessary precaution in order to avoid paying an unwarranted claim. Condition F, therefore, is based upon the hypothesis of a tort action against the assured *defended by the insurer.*

As no such event has occurred in the suit at bar this provision of Condition F was designed to apply to a situation which never arose. The Chambers suit was not defended by the company; on the contrary the company repudiated its contractual obligation so to do and this breach of its contract makes it all the more difficult for the defendant to insist that it is entitled to the full protection of a condition whose performance could only follow a due performance by itself. That performance having been refused, why should the defendant company now be heard to argue that the assured has broken a condition dependent for its existence upon the company's own performance of its contract? We submit that the whole section in the present situation is inapplicable.

2. Limitation Not Applicable.

In any event, even if we apply Condition F to plaintiff's case, the ninety days' limitation therein cannot be applied. As we have shown, the company herein made two provisions: First, *where there was no appeal, no limitation upon suit;* secondly, where an appeal occurred, a limitation of 90 days in which to sue. There was no appeal; hence the assured was bound by no limitation.

Nor can it be contended that the assured was in duty bound to appeal the verdict obtained against it. As it was under no duty even to defend suit in the first instance, it can scarcely be argued that it was called upon to appeal the suit it defended. There is nothing in the policy about the assured's duty to defend, that duty being placed upon the insurer. Nor is there any provision as to the evidently unlooked-for contingency of a breach of the contract duty to defend imposed upon the company.

To insist on a forfeiture for failure to appeal, even in the absence of all provision on the subject, is to demand a construction of the contract of insurance which offends the public policy of the State. Vexatious litigation is never encouraged, and yet this Court is asked to require the final prosecution of an issue whose merits have been finally determined, for the mere sake of the technical requirement of a collateral insurance policy.

The phrase, it should be noted, is: "*a* court of last resort," the use of the indefinite article, instead of the definite, indicating that the court of *actual* last resort was intended by the insurer, and not the court of the last *possible* resort. And as this "court of last resort" was the court to which the *company* should make a last resort in the course of

its conduct of the litigation, it is idle to argue, in the absence of any action by the company, that this Court of Errors and Appeals in any event should have finally passed on the merits of the Chambers claim.

Meaning of "Paid and Satisfied."

We have shown that Condition F has no possible application to the facts of this case and that even if it had, its ninety days' limitation cannot be applied to the plaintiff's case in the absence of an appeal. This renders unnecessary any discussion of the meaning of the phrase "paid and satisfied."

However, it is submitted that if Condition F were held to apply, its provisions have nevertheless been satisfied by a suit brought within ninety days after judgment "against the assured was paid and satisfied." The use of the two verbs "paid" and "satisfied" indicate two successive actions, the action of paying, followed by the action of satisfying. The latter indisputably means the formal satisfaction of record that finally releases the judgment debtor. This has been the construction placed upon it in such cases where the word has come before the courts for judicial definition. Thus it has been held that:

> "Satisfaction is a technical term, and in its application to a judgment it means the payment of the money due on the judgment *which must be made of record;* and nothing but this is legal satisfaction of the judgment."
>
> *Planters Bank vs. Calvit,* 11 Miss. 143, 194;
> *Armour Bros. Banking Co. vs. Addington,* 1 Ind. Ter. 304, 37 S. W. 100;
> *Jackson vs. Shaffer,* 11 Johns. 513;
> *Mumford vs. Stocker,* 1 Cow. 178;
> *Doty vs. Russell,* 5 Wend. 129.

That action in this case was brought within ninety days after the Chambers judgment was finally satisfied of record cannot be disputed, and unless a different meaning is given to the word "satisfied" than that applied in the adjudicated cases, we submit that no breach of Condition F has been proved against the plaintiff.

V. STATEMENT 3.

Breach of Warranty in Characterization of Assured.

The defendant at the trial attempted to urge that the assured was guilty of breach of warranty in making the third statement in the schedule of the policy that "the insured is * * * * company."

No testimony was offered by either side as to the meaning of the word or the fair inference to be drawn from it. The only question, therefore, was whether or not Sallie Wittenberg had been guilty of a breach of warranty in so describing her business, and unless the breach was so clear as not to admit of any doubt by reasonable men, the Court was required to leave the decision of the question with the jury.

Manifestly, the answer of the assured in this particular was irresponsive, and the situation is really the same as though the question remained unanswered and the company had issued its policy thereupon. If it had desired more specific information the company should have called for it before the issuance of the policy. The only purpose of the inquiry was to identify the assured and if the company was satisfied with a vague or incomplete identification, it cannot now be heard to complain.

We do not deem it necessary to discuss this point at any further length. In closing, however, it will be well to note the case of *State Board of Assessors vs. Central Railroad Co.*, 48 N. J. L. 146, in which "company" was held to include individuals. It was there *held* that the statute providing that the Board of Assessors should ascertain the true value of all property used for railway and canal purposes of each *canal company* in the State, included, not only corporations, but also individuals and associations owning or operating railroads or canals under a franchise.

CONCLUSION.

The objections that have been raised against the plaintiff's recovery are almost wholly technical. In each instance, our opponent's grounds of objection were based upon a suggested interpretation of some clause or provision of the policy. The questions of law involved are essentially questions of interpretation.

We need not remind this Court that a contract of this nature is invariably construed in favor of the assured and against the insurer, the writer of the policy, and that it is the aim of courts to carry out the substantial intent of the parties.

We call attention to the fact that the form of policy used in this case is not one of those prescribed by law, but the language is that chosen by the insurer. The maxim *verba chartarum fortius accipiuntur contra proferentem* is applied to policies of liability insurance in the same manner as it is applied to the older branches of insurance.

"Policies of liability insurance should be con-

strued like other contracts so as to give effect to the intention and express language of the parties according to the natural meaning of such language, * * * *. In case of a doubtful or ambiguous clause it should be most strongly construed against the insurance company, because it prepared the contract and is responsible for the words used in it."

Cyc. Permanent Ann., 1901 to 1913, p. 2750;
Home Mixture Guano Co. vs. Ocean Accident & Guarantee Corp., (C. C. N. D. Ga. 1910) 176 Fed. 600;
Cary Brick Co. vs. Fidelity Cas. Co., 147 N. Y. S. 414 (App. Div. 1904).

The plaintiff brings before this Court a policy involving, on the part of the insurer, a twofold obligation: *First*, to indemnify the assured against its liability as an employer for industrial accidents; *secondly*, to take charge of the defence of such litigation brought against the assured.

The chief line of objection attempted by the defendant has been a technical insistence upon the alleged failure of the plaintiff to observe certain *conditions subsequent* in the policy. These conditions, whose enforcement will operate as a forfeiture, will of course be more strictly construed against the insurer than the proof of those facts and conditions which surround and make up the loss insured against. Here three specific duties were required of the assured. It was to furnish the com pany with notice of an accident, secondly with notice of any claim advanced because of such accident, and thirdly to forward to the company all summons or other process served upon it. Generally it was also required to aid the insurer in the conduct of liti-

gation. These duties were personal to the parties, and it might be argued that they established a confidential relationship whose duties and responsibilities could not be assigned by either of the parties. These conditions, however, based as they were upon the contract of insurance, were dependent for their vitality upon the continued life of that contract, and terminated themselves with the existence of the contractual relation.

It therefore follows that when the company, on October 10, 1907, addressed "the Maydwell letter" to the assured, wherein it finally repudiated its agreement to defend the suit brought by Chambers, all dependent duties of the assured with regard to such litigation were thereby terminated by this affirmative breach of the defendant. If the company would not defend suit, neither could the assured perform its duties dependent upon such suit. Accordingly its responsibilities ceased; and among them ceased also the necessity for observing a limitation period for suit of ninety days after a final judgment on appeal *brought by the insurer.*

This breach of its contract by the insurer affected still further the relations of the parties. The right, of the assured, which, but for the breach in question, might have been regarded as based on a continuing contractual relationship, and unassignable, became thereby a mere chose in action, whose assignment no words of the policy could prevent. Accordingly the fact that this suit has been brought by an assignee of the assured's, whose rights accrued after the substantial event insured against had occurred and after the company's termination of contractual relations, alters in no way the original rights of the parties to the contract of insurance.

Nor is the condition providing that the actual loss

resulting from litigation should be paid by the assured itself effective to limit the rights of its assignee. This highly technical requirement, as we have shown, has been construed by the Courts with particular strictness, and the logical principle of the law of agency expressed by the maxim *qui facit per alium facit per se* has been applied in a previous case to attribute payment by the assignee of the assured to the act of the assured himself. Such a judicial construction, we submit, is the just and practical answer to a narrow and technical insistment, which, when made to urge a forfeiture, and against the real intent of a written instrument, should be most strictly dealt with by the Courts.

We respectfully submit that the substantial justice of the case calls for a ~~dismissal of the defendant's petition~~. reversal of the judgment entered by direction of the trial court.

JOHN W. WESCOTT,
WILSON & CARR,
Counsel for Plaintiff-Appellant.

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PLAINTIFF'S EXHIBITS.

1—Agreement between Sallie Wittenberg and Philadelphia Pickling Company (Pennsylvania Corporation), dated November 7, 1908. Offered at page 52; printed at 308

2—Policy issued by Defendant to Assured. Offered at page 53; printed at 311

3—Letter of Philadelphia Pickling Company (trade name) to Maryland Casualty Company, dated 9/21/07. Offered at page 56; printed at 322

4—Letter of Philadelphia Pickling Company (trade name) to Maryland Casualty Company, dated 9/24/07. Offered at page 57; printed at 323

5—Photographic copy of Report of Accident. Offered at page 57; printed at 324

5-a—Letter of Maryland Casualty Company to Philadelphia Pickling Company, dated October 10, 1907. Offered at page 58; printed at 327

6—Checks produced by Plaintiff. Offered at page 77; printed at 328

7—Record of proceedings in Supreme Court in *Tort* Action of Walter Chambers, by next friend, vs. Philadelphia Pickling Company (trade name). Offered at page

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115; printed at 329

8—Record of proceedings in Supreme Court in *Contract* Action of Walter Chambers by next friend, vs. Philadelphia Pickling Company (Pennsylvania corporation) Offered at page 116; printed at 341

8-a—For identification. Letter, Maurice W. Sloan to Philadelphia Pickling Company, dated September 11, 1907. Offered at page 184

DEFENDANT'S EXHIBITS.

1—For identification. Affidavit of Louis Wittenberg. Offered at page 97

2—Exemplified copy of Certificate of Incorporation of Philadelphia Pickling Company (Pennsylvania Corporation). Offered at page 158; printed at 354

3—Check of Maurice W. Sloan to order of Harry Felix, dated December 28, 1908—($33.33). Offered at page 164; printed at 361

3-a—Letter of Maurice W. Sloan to C. W. Maydwell, Mgr., Claim Division, Maryland Casualty Company, Baltimore, Md., dated October 2, 1907. Offered at page 169; printed at 362

4—Notice of Application for leave to Amend Complaint. Offered at page 252; printed at 18

5—Original Complaint in this Action. Offered at page 277; printed at 2

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Summons and Complaint.

(Filed, May 5, 1914.)

THE STATE OF NEW JERSEY, TO MARYLAND CASUALTY COMPANY:

(Seal.)

You are summoned to answer the annexed complaint of Philadelphia Pickling Company, in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Chief Justice of the Supreme Court, at Trenton, this Fifth day of May, Nineteen hundred and fourteen.

WILLIAM C. GEBHARDT,
Clerk.

WILSON AND CARR,
Attorneys.

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

PHILADELPHIA PICKLING COMPANY, *Plaintiff,* *vs.* MARYLAND CASUALTY COMPANY, *Defendant.*	Action at Law. Complaint.

Plaintiff, a resident of the City and County of Philadelphia and State of Pennsylvania, says that:

1. That on November 13th, 1906, defendant executed and delivered to plaintiff, a certain Policy of Insurance, designated by the defendant as a "Manufacturers' Employers' Liability Policy," a copy of which is hereunto annexed and is hereby made part hereof.

2. That while said policy was in force, there was employed by plaintiff at plaintiff's factory, described in the schedule forming part of said policy, in Eldora, Cape May County, New Jersey, one Walter Chambers, and that the compensation paid by plaintiff to said Walter Chambers, was included in the estimate set forth in the schedule forming part of said policy.

3. That while said policy was in force, and on September 19th, 1907, the said Walter Chambers while employed by the plaintiff as aforesaid, within the factory, shop or yard described in the schedule forming part of said policy, or upon the sidewalk or other ways immediately adjacent thereto, and in and during the operation of the trade or business described in said sched-

ule, and while employed in making ordinary repairs to the wall or some other portion of said factory, accidently suffered bodily injuries as a result of said wall or some part thereof falling upon or against and exerting pressure upon his body, and otherwise injuring him, and that thereby a liability was imposed by law upon the Assured to respond for such damages as the said Walter Chambers sustained by reason of said accident.

4. That plaintiff has duly performed all the conditions of said policy, which by the terms thereof, plaintiff was required to perform.

5. That to recover damages for the bodily injuries suffered by him as aforesaid, the said Walter Chambers brought suit against the Assured in the New Jersey Supreme Court, on or about April 1st, 1908, and such proceedings were thereafter had in said suit, that on January 5th, 1909, final judgment was entered in said New Jersey Supreme Court, in favor of the said Walter Chambers and against the Assured, for $4,000.00 damages and $91.01 costs.

6. That thereafter the said Walter Chambers brought suit based on the aforesaid judgment, in the New Jersey Supreme Court, against the Philadelphia Pickling Company to recover the amount due on the aforesaid judgment, and such proceedings were thereafter had in said suit, that on December 29, 1911, final judgment was entered in the said New Jersey Supreme Court, in favor of said Walter Chambers and against the Philadelphia Pickling Company for $4,816.05 debt, and $84.16 costs, which said judgment was thereafter affirmed by the Court of Errors and Appeals of the State of New Jersey.

7. That Assured paid last said mentioned judgment, and that each of the aforesaid judgments

has been paid and satisfied not more than ninety days prior to the commencement of this suit.

8. That defendant has failed to pay to plaintiff the loss from the liability imposed by law on account of the bodily injuries suffered by the said Walter Chambers as aforesaid, and repudiates any and all liability to make such payment.

9. That by reason of the repudiation of liability by the defendant as aforesaid, and the refusal and neglect of the defendant to defend the aforesaid suits at its own cost in the name of and on behalf of the Assured, a right of action has accrued to plaintiff to recover from defendant not only the amount paid in satisfaction of the aforesaid judgments, and the costs of litigation and suit as taxed, but also the reasonable and proper expenses incurred by plaintiff in defending or causing the aforesaid suits to be defended.

10. That plaintiff has expended in the payment and satisfaction of the aforesaid judgments, and the interest and costs thereof, the sum of $5,305.49 and has reasonably and properly expended in defending the aforesaid suits the further sum of $1,767.54.

11. Plaintiff demands as damages the sum of $7,073.03, together with interest on the sum of $5,305.49 from October 31st, 1913, and interest on the sum of $1,767.54 from January 1st, 1912.

WILSON & CARR,
Attorneys for Plaintiff.

(For copy of Policy see Exhibit P-2, p. 34.)

(Notice Endorsed on Back.)

To the within named defendant:

In case the within summons and complaint are served upon you by the same being served personally upon any of your officers or directors, or your registered or authorized agent in New Jer-

sey: then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of the service hereof upon you, and that unless you file such affidavit, judgment by default will be entered against you at the end of said ten days; and that in case you file said affidavit, unless you file an answer within twenty days from the date of service hereof upon you judgment by default will in such case be entered against you at the end of said twenty days.

In case the within summons and complaint are served upon you in any other manner, then take notice that unless you appear and file an answer within twenty days after the date of such service hereof upon you judgment will be entered against you.

WILSON & CARR,
Attorneys.

Answer.

(FILED JUNE 18, 1914.)

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

PHILADELPHIA PICKLING COMPANY, *Plaintiff,* vs. MARYLAND CASUALTY COMPANY, a Corporation, *Defendant.*	Action-at-Law. Answer.

The MARYLAND CASUALTY COMPANY, a Corporation, organized and existing under and by virtue of the Laws of the State of Maryland, of Baltimore, Maryland, and admitted to transact business in the State of New Jersey, appearing by its attorney, Richard F. Jones, answers the plaintiff's Complaint in this action, as follows, viz.:

1. The defendant AVERS that it has no knowledge or information thereof sufficient to form a belief as to the allegations contained in Paragraph 1 of the Complaint herein.

The defendant ADMITS that on November 13th, 1906, it issued, executed and delivered to the "Philadelphia Pickling Company" which it has since learned was a trade or business name under which one "Sallie Whittenberg" transacted business, a certain policy of insurance, a copy of which is annexed to the Complaint herein.

2. The defendant DENIES the allegations contained in Paragraph 2 of the Complaint herein.

3. The defendant DENIES the allegations contained in Paragraph 3 of the Complaint herein.

Answer.

4. The defendant DENIES the allegations contained in Paragraph 4 of the Complaint herein.

5. The defendant DENIES the allegations contained in Paragraph 5 of the Complaint herein.

6. The defendant AVERS that it has no knowledge or information thereof sufficient to form a belief as to the allegations contained in Paragraph 6 of the Complaint herein.

7. The defendant DENIES the allegations contained in Paragraph 7 of the Complaint herein.

8. The defendant ADMITS that it has not paid any moneys to plaintiff on account of bodily injuries suffered by Walter Chambers, referred to in the Complaint herein, and denies any and all liability to make such payment as alleged in Paragraph 8 of the Complaint herein, but DENIES any and all liability on its part to make such payment or that there is any liability imposed by law upon or against it, to make any such payment, on account of such bodily injuries, as alleged in said Paragraph 8 of the Complaint.

9. The defendant DENIES the allegations contained in Paragraph 9 of the Complaint herein.

10. The defendant DENIES the allegations contained in Paragraph 10 of the Complaint herein.

11. The defendant DENIES that the plaintiff or Assured was a corporation, at the time of the date of the Policy of Insurance referred to in the Complaint herein, or on September 19, 1907.

FIRST DEFENSE.

The defendant DID NOT UNDERTAKE AND PROMISE, in manner and form, as complained of in this action.

SECOND DEFENSE.

The defendant DOES NOT OWE the said sum of money, demanded in the Complaint in this action, or any part thereof.

THIRD DEFENSE.

The defendant DENIES that there is any liability on its part, to the plaintiff, of or for any loss or damages under the contract in writing, or Policy of Insurance, referred to in the Complaint herein, as the result of or from bodily injuries to, or suffered by, the said Walter Chambers, referred to in the Complaint herein.

FOURTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint herein referred to, and in "Condition A" thereof, it was provided, as follows, viz.:

> "Condition A. The Company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand and 00/100 Dollars ($5,000.00), and subject to the same limit for each person, the Company's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to Ten Thousand and 00/000 Dollars ($10,000.00)."

That pursuant to the terms and conditions of "Condition A" of said contract in writing, or Policy of Insurance, the defendant's liability, if any, thereunder, in this action, is limited to the sum of $5,000.

FIFTH DEFENSE.

That under the terms and condtions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint herein referred to, and in "Condition B" thereof, it was provided, as follows, viz.:

> "Condition B. This Policy does not cover loss from liability for injuries or death to

or caused by—(1) any person unless his compensation is included in the estimate set forth in the Schedule" (attached to and forming part of the Policy of Insurance and which was made by the Assured and *warranted* to be true).

That the Policy of Insurance, referred to in the Complaint herein, does not cover loss from liability for injuries to or caused by said Walter Chambers, inasmuch as the compensation of the said Walter Chambers, mentioned in the Complaint herein, was not included in the estimate set forth in the said Schedule, attached to and forming part of the said Policy of Insurance and which was made by the Assured and *warranted* to be true, and the plaintiff or Assured is therefore not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

SIXTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint herein referred to, and in "Condition B" thereof, it was provided, as follows, viz.:

"Condition B. This Policy does not cover loss from liability for injuries or death to or caused by— * * * (4) any person in connection with the making of additions to or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or plant or any part thereof."

That the Policy of Insurance referred to, in the Complaint herein, does not cover loss from liability for injuries to or caused by said Walter Chambers, inasmuch as the bodily injuries to and received by the said Walter Chambers, mentioned

in the Complaint herein, were received by the said Walter Chambers in connection with the making of additions to or alterations in or the construction of a building or structure or plant or in connection with the wrecking or demolition of a building or structure or plant or a part thereof, and the plaintiff or the Assured is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

SEVENTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint herein referred to, and in "Condition C" thereof, it was provided, as a Condition Precedent to any recovery upon said Policy for Indemnity, as follows, viz.:

> "Condition C. Upon the occurrence of an accident the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time to the Company's Home Office or to the Company's authorized agent. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in his power."

That upon the occurrence of the accident, wherein the said Walter Chambers, mentioned in the Complaint herein, received bodily injuries, the plaintiff or the Assured did not give immediate written notice thereof, with the fullest information obtainable at the time to the Company's Home Office or to the Company's authorized agent and did not, when the claim was made on account of such accident, wherein the said Walter Chambers received bodily injuries, give like notice thereof with full particulars, and did not at all

times render to the Company all co-operation and assistance in his power, as provided for in said "Condition C," and the plaintiff or Assured is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

EIGHTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint herein referred to, and in "Condition D" thereof, it was provided, as a Condition Precedent to any recovery upon said Policy for Indemnity, as follows, viz.:

> "Condition D. If thereafter any suit is brought against the Assured to enforce a claim for damages on account of an accident covered by this Policy, the Assured shall immediately forward to the Company's Home Office every summons or other process as soon as the same shall have been served on him."

The plaintiff nor Assured did not immediately forward to the Company's Home Office, any or every summons or other process as soon as the same had been served on him in the suit or suits brought against the Assured to enforce a claim for damages on account of an accident covered, or alleged to have been covered, by said Policy, wherein the said Walter Chambers, mentioned in the Complaint herein, received bodily injuries, as provided for in said "Condition D" and the plaintiff or Assured is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

Answer.

NINTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint herein referred to, and in "Condition E" thereof, it was provided, as a Condition Precedent to any recovery upon said Policy for Indemnity, as follows, viz.:

> "Condition E. The Assured shall not voluntarily assume any liability, nor shall the Assured, without the written consent of the Company previously given, incur any expense or settle any claim, except at his own cost, or interfere in any negotiation for settlement or in any legal proceeding; except that the Assured may provide *at the time of the accident* such immediate surgical relief as is imperative."

That the plaintiff and Assured did voluntarily assume liability, and the Assured, without the written consent of the defendant Company previously given did incur expense, and did interfere in the legal proceedings; begun or brought by the said Walter Chambers referred to in the Complaint herein, contrary to the provisions of said "Condition E," and the plaintiff or Assured is therefore not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

TENTH DEFENSE.

That under the terms and conditions of the contract in writing, or the Policy of Insurance, herein referred to, and in the Complaint herein referred to, and in "Condition F" thereof, it was provided as a Condition Precedent to any recovery upon said Policy for Indemnity, as follows, viz.:

"Condition F. No action shall lie against the Company to recover for any loss under this Policy unless it shall be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a Judgment after trial of the issue; nor unless such action is brought within ninety (90) days AFTER SUCH JUDGMENT, BY A COURT OF LAST RESORT, against the Assured has been so paid and satisfied."

That this Action against the Company has been brought by the plaintiff or Assured to recover for an alleged loss under the said Policy of Insurance and referred to in the Complaint herein, and it has not been brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a Judgment after the trial of the issue; and such action has not been brought within Ninety (90) days after such Judgment, BY A COURT OF LAST RESORT, against the Assured has been so paid and satisfied, contrary to the provisions of said "Condition F," and the plaintiff or Assured is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance, and the claims, if any, of said plaintiff or Assured have been forfeited.

ELEVENTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint herein referred to, and in "Condition H" thereof, it was provided as a Condition Precedent, to any recovery upon said Policy for Indemnity, as follows, viz.:

"Condition H. If the Assured carry a Policy of another insurer whether valid or not, against a loss covered by this Policy, the Assured shall not be entitled to recover from the

Company, a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance."

That the plaintiff and Assured, carried Policies of other Insurers against the loss covered by the said Policy, referred to in the Complaint herein, and the plaintiff or Assured is, therefore, not entitled to recover from the defendant Company, a larger proportion of the entire loss than the amount insured, in the Policy of Insurance referred to in the Complaint herein, bears to the total amount of his insurance.

TWELFTH DEFENSE.

That in the Statements set forth in the Schedule of Statements attached to and forming part of the Policy of Insurance, herein, referred to, and in the Complaint herein referred to, which statements the Assured made and warranted to be true, are the following statements, viz.:

"Statement 1. Name of Assured—Philadelphia Pickling Company."

* * * * *

"Statement 3. The Assured is—Company."

That the name of the Assured was "Sallie Whittenberg," and not the "Philadelphia Pickling Company" and the Assured was an INDIVIDUAL and not a "COMPANY" and that said statements and warranties so made by the Assured, were false and known by the Assured to be false and the plaintiff or Assured, is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

THIRTEENTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint herein re-

ferred to, the Defendant's Liability, if any, thereunder, in this action, is limited to the amount recovered in the action brought by Walter Chambers against the "Philadelphia Pickling Company," a trade or business name, under which one "Sallie Whittenberg" conducted business.

FOURTEENTH DEFENSE.

That the said Walter Chambers, referred to in the Company herein did not receive or suffer bodily injuries, while or when making "ORDINARY REPAIRS," within the meaning of the terms and conditions of said Policy of Insurance, and the plaintiff or Assured is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

FIFTEENTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance herein referred to, and in the Complaint herein referred to, the defendant only agreed to indemnify the Assured, against loss from the liability imposed by law upon the Assured, for damages on account of bodily injuries * * * accidently suffered * * * by any employee * * * of the Assured, while within the factory, shop or yard described in the Schedule (attached to and forming part of said Policy) or upon the sidewalk or other ways immediately adjacent thereto provided for the use of such employee or the public, in and during the operation of the trade or business described in the Schedule (attached to and forming a part of said Policy) viz.:— "Kind of trade or business—Manufacturers, dealers and importers of pickles. Table condiments and goods of this description" (see Statement 4 of such Schedule of Statements).

Answer.

That the said Walter Chambers did not accidently suffer bodily injuries, while within the factory, shop or yard described in the Schedule (attached to and forming part of said Policy) or upon the sidewalk or other ways immediately adjacent thereto provided for the use of such employee or the public, in and during the operation of the trade or business described in the Schedule (attached to and forming part of said Policy of Insurance), or those usual to the kind of trade or business described therein, viz.:— "Manufacturers, Dealers & Importers of Pickles, Table Condiments and Goods of this Description" (see Statement 4 of such Schedule of Statements), and the plaintiff or Assured, is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

WHEREFORE, the defendant DEMANDS judgment, that the Complaint herein be dismissed, with the costs and disbursements in this action.

RICHARD F. JONES,
Attorney for Defendant,
Office Address,
1 Exchange Place,
Jersey City, N. J.

Reply.

(Filed, July 8, 1914.)

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY, *Plaintiff,* *vs.* MARYLAND CASUALTY COMPANY, *Defendant.*	Action at Law. Reply.

Plaintiff replying to defendant's answer says that:

1. Plaintiff accepts the joinder of issue resulting from the denial by defendant, in its answer, of the allegations of the complaint.

2. With respect to the fifteen several defenses set up in the answer, plaintiff admits that the policy of insurance therein mentioned contains the several clauses or paragraphs which said answer recites it to contain, but denies the truth of all the other facts and allegations in said defenses set up.

WILSON & CARR,
Attorneys for Plaintiff.

Notice of Application for Leave to Amend Complaint.

(Filed, November 20, 1914.)

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY,
Plaintiff,
vs.
MARYLAND CASUALTY COMPANY,
Defendant.

Action at Law. Notice of Application for leave to Amend Complaint.

To Richard F. Jones, Attorney of the Defendant above named:

TAKE NOTICE, that upon the trial of the issue joined in the above stated cause, we shall apply to the Honorable Frank T. Lloyd, or to such other Judge or Justice as may sit at the trial of such issue for leave to amend the plaintiff's complaint according to and in conformity with the proposed amended complaint of which a draft is herewith submitted to you.

WILSON & CARR,
Attorneys for Plaintiff.

Service of the within notice is hereby acknowledged on this 12th day of November, A. D., 1914.

RICHARD F. JONES,
Attorney for Defendant.

Rule Amending Complaint.

(Filed, November 20, 1914.)

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY,
Plaintiff,

vs.

MARYLAND CASUALTY COMPANY,
Defendant.

Action at Law. Rule Amending Complaint, to which is Annexed the Amended Complaint.

Due notice of this application having been given, and Wilson and Carr appearing for the plaintiff, and Richard F. Jones, Esquire, appearing for the defendant; and it appearing to the court that leave should be given to amend the complaint;

IT IS, on this sixteenth day of November, nineteen hundred and fourteen, ORDERED that the plaintiff be and it is hereby given leave to file the annexed amended complaint.

Entered, December 5, 1914.

On motion of

WILSON & CARR,
Attorneys for Plaintiff.

Let this rule be entered.

FRANK T. LLOYD,
C. C. J.

A true copy.

WM. C. GEBHARDT,
Clerk.

Amended Complaint.

(Filed, November 20, 1914.)

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY, *Plaintiff,*		Action at Law. Amended Complaint.
vs.		
MARYLAND CASUALTY COMPANY, *Defendant.*		

Plaintiff, a corporation of the State of Pennsylvania, carrying on business in the City and County of Philadelphia, and State of Pennsylvania, says that:

1. That on November 13th, 1906, defendant executed and delivered to the plaintiff's assignor, Sallie Whittenberg, trading as Philadelphia Pickling Company, a certain Policy of Insurance, designated by the defendant as a "Manufacturers' Employers' Liability Policy," a copy of which is hereunto annexed and is hereby made part hereof.

2. That while said Policy was in force, there was employed by plaintiff's assignor, Sallie Whittenberg, at her factory, described in the Schedule forming part of said Policy, in Eldora, Cape May County, New Jersey, one Walter Chambers, and that the compensation paid by the said Sallie Whittenberg to said Walter Chambers, was included in the estimate set forth in the Schedule forming part of said policy.

3. That while said policy was in force, and on September 19th, 1907, the said Walter Chambers while employed by the said Sallie Whittenberg as aforesaid, within the factory, shop or yard described in the schedule forming part of

said Policy, or upon the sidewalk or other ways immediately adjacent thereto, and in and during the operation of the trade or business described in said schedule, and while employed in making ordinary repairs to the wall or some other portion of said factory, accidently suffered bodily injuries as a result of said wall or some part thereof, falling upon or against and exerting pressure upon his body, and otherwise injuring him, and that thereby a liability was imposed by law upon the Assured Sallie Whittenberg, trading as Philadelphia Pickling Company, plaintiff's assignor, to respond for such damages as the said Walter Chambers sustained by reason of said accident.

4. That plaintiff and plaintiff's assignor, Sallie Whittenberg, trading as aforesaid, has duly performed all the conditions of said Policy, which by the terms thereof they or either of them was or were required to perform.

5. That to recover damages for the bodily injuries suffered by him as aforesaid, the said Walter Chambers brought suit against the Assured describing the defendant in said suit as "Philadelphia Pickling Company," in the New Jersey Supreme Court on or about April 1st, 1908, and such proceedings were thereafter had in said suit, that on January 5th, 1909, final judgment was entered in said New Jersey Supreme Court, in favor of the said Walter Chambers and against the Assured, described as the "Philadelphia Pickling Company" for $4,000.00 damages and $91.01 costs.

6. That on or about November 7th, 1908, plaintiff a corporation of the State of Pennsylvania took over and acquired the assets of the said Sallie Whittenberg, trading as the Philadelphia Pickling Company, and assumed all the liabilities of the said Sallie Whittenberg, trading as aforesaid, incident to the business theretofore

conducted by the said Sallie Whittenberg, trading as aforesaid, included among which said liabilities was a claim of the aforesaid Walter Chambers, growing out of the accident heretofore referred to herein, and which liability was theretofore liquidated by the verdict of a jury in a certain cause therein pending in New Jersey Supreme Court, wherein the said Walter Chambers was plaintiff, and the assured was defendant and included among the assets so taken over by the plaintiff herein from the said Sallie Whittenberg, trading as aforesaid, was the Policy sued on in this suit, together with all rights of action thereon and thereunder.

7. That thereafter the said Walter Chambers brought suit based on the aforesaid judgment, in the New Jersey Supreme Court, against the plaintiff to recover the amount due on the aforesaid judgment, and such proceedings were thereafter had in said suit, that on December 29th, 1911, final Judgment was entered in the said New Jersey Supreme Court in favor of the said Walter Chambers and against the plaintiff for $4,816.05, debt, and $84.16 costs, which said judgment was thereafter affirmed by the Court of Errors and Appeals of the State of New Jersey.

8. That plaintiff paid said last mentioned judgment in extinguishment of the liability of the said Sallie Whittenberg, trading as the Philadelphia Pickling Company, to the said Walter Chambers, and that each of the aforesaid judgments has been paid and satisfied not more than ninety days prior to the commencement of this suit.

9. That defendant has failed to pay to plaintiff the loss from the liability imposed by law on account of the bodily injuries suffered by the said Walter Chambers as aforesaid, and repudiates any and all liability to make such payment.

Amended Complaint.

10. That by reason of the repudiation of all liability by the defendant as aforesaid, and the refusal and neglect of the defendant to defend the aforesaid suits at its own cost in the name of and on behalf of the assured, a right of action has accrued to plaintiff to recover from defendant not only the amount paid in satisfaction of the aforesaid judgments, and the costs of litigation and suit as taxed, but also the reasonable and proper expenses incurred by plaintiff to defending or causing the aforesaid suits to be defended.

11. That plaintiff has expended in the payment and satisfaction of the aforesaid judgments, and the interest and costs thereof, the sum of $5,505.49 and has reasonably and properly expended in defending the aforesaid suits, the further sum of $1,717.54.

12. Plaintiff demands as damages the sum of $7,223.03, with interest on $1,300 from March 12th, 1913, and interest on $1,000 from April 14th, 1913, and interest on $1,000 from June 16th, 1913, and interest on $500 from July 11th, 1913, and interest on $500 from August 9th, 1913, and interest on $1,205.09 from October 31st, 1913, and interest on $.40 from April 27th, 1914, and interest on the sum of $1,717.54 from January 1st, 1912.

WILSON & CARR,
Attorneys for Plaintiff.

It is agreed and understood by and between counsel for the plaintiff and defendant, that the above amended complaint shall be deemed and taken as having attached to it the copy of the Policy attached to the original complaint.

WILSON & CARR,
Attorneys for Plaintiff.

Attorneys for Defendant.

Answer to Amended Complaint.

(Filed, November 20, 1914.)

NEW JERSEY SUPREME COURT.

MERCER COUNTY.

PHILADELPHIA PICKLING COMPANY, *Plaintiff,* *vs.* MARYLAND CASUALTY COMPANY, a Corporation, *Defendant.*	Action-at-Law. Answer to Amended Complaint.

The MARYLAND CASUALTY COMPANY, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, of Baltimore, Maryland, and admitted to transact business in the State of New Jersey, appearing by its attorney, Richard F. Jones, answers the plaintiff's Amended Complaint in this action, as follows, viz.:—(*reserving all rights and without waiving but reserving its objections and exceptions made and taken and interposed to the granting of leave to file the Amended Complaint herein.*)

1. The defendant AVERS that it has no knowledge or information thereof sufficient to form a belief as to the allegations contained in Paragraph 1 of the Amended Complaint herein.

The defendant ADMITS that on November 13th, 1906, it issued, executed and delivered to the "Philadelphia Pickling Company," a certain policy of insurance, a copy of which is annexed to the Complaint herein.

2. The defendant DENIES the allegations contained in Paragraph 2 of the Amended Complaint herein.

3. The defendant DENIES the allegations contained in Paragraph 3 of the Amended Complaint herein.

4. The defendant DENIES the allegations contained in Paragraph 4 of the Amended Complaint herein.

5. The defendant DENIES the allegations contained in Paragraph 5 of the Amended Complaint herein.

6. The defendant DENIES the allegations contained in Paragraph 6 of the Amended Complaint herein.

7. The defendant AVERS that it has no knowledge or information thereof, sufficient to form a belief, as to the allegations contained in Paragraph 7 of the Amended Complaint herein.

8. The defendant DENIES the allegations contained in Paragraph 8 of the Amended Complaint herein.

9. The defendant ADMITS that it has not paid any moneys to plaintiff on account of bodily injuries suffered by Walter Chambers, referred to in the Amended Complaint herein, and that it denies any and all liability to make such payment as alleged in Paragraph 8 of the Amended Complaint herein. It DENIES any and all liability on its part to make such payment or that there is any liability imposed by law upon or against it, to make any such payment, to the plaintiff, on account of such bodily injuries, as alleged in said Paragraph 8 of the Amended Complaint herein.

10. The defendant DENIES the allegations contained in Paragraph 10 of the Amended Complaint herein.

11. The defendant DENIES the allegations contained in Paragraph 11 of the Amended Complaint herein.

12. The defendant DENIES that the plaintiff or Assured was a corporation, at the time of the date of the Policy of Insurance referred to in the Amended Complaint herein, or on September 19, 1907.

FIRST DEFENSE.

The defendant DID NOT UNDERTAKE AND PROMISE, in manner and form, as complained of in this action.

SECOND DEFENSE.

The defendant DOES NOT OWE the said sum of money, demanded in the Complaint or Amended Complaint in this action, or any part thereof.

THIRD DEFENSE.

The defendant DENIES that there is any liability on its part, to the plaintiff, or the Assured, of or for any loss or damages under the contract in writing, or Policy of Insurance, referred to in the Complaint or Amended Complaint herein, as the result of or from bodily injuries to, or suffered by, the said Walter Chambers, referred to in the Complaint or Amended Complaint herein.

FOURTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint or Amended Complaint herein referred to, and in "Condition A" thereof, it was provided, as follows, viz.:

> "Condition A. The Company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to Five Thousand and 00/100 Dollars ($5,000.00), and subject to the same limit for each person, the company's total liability for loss from any one accident resulting in bodily

injuries to or in the death of more than one person is limited to Ten Thousand and 00/100 Dollars ($10,000.00)."

That pursuant to the terms and conditions of "Condition A" of said contract in writing, or Policy of Insurance, the defendant's liability, if any, thereunder, in this action, is limited to the sum of $5,000.

FIFTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint or Amended Complaint herein referred to, and in "Condition B" thereof, it was provided, as a Condition Precedent as follows, viz.:

"Condition B. This Policy does not cover loss from liability for injuries or death to or caused by—(1) any person unless his compensation is included in the estimate set forth in the Schedule" (attached to and forming part of the Policy of Insurance and which was made by the Assured and *warranted* to be true).

That the Policy of Insurance, referred to in the Complaint and the Amended Complaint herein, does not cover loss from liability for injuries to or caused by said Walter Chambers, or caused by any other person, inasmuch as the compensation of the said Walter Chambers, mentioned in the Complaint and the Amended Complaint herein, or that of the person causing such injuries, was not included in the estimate set forth in the said Schedule, attached to and forming part of the said Policy of Insurance and which was made by the Assured and *warranted* to be true, and the plaintiff or Assured is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

SIXTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint and Amended Complaint herein referred to, and in "Condition B" thereof, it was provided, as a Condition Precedent, as follows, viz.:

> "Condition B. This Policy does not cover loss from liability for injuries or death to or caused by— * * * (4) any person in connection with the making of additions to or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or plant or any part thereof."

That the Policy of Insurance referred to, in the Complaint and Amended Complaint herein, does not cover loss from liability for injuries to or caused by said Walter Chambers, or caused by any other person, inasmuch as the bodily injuries to and received by the said Walter Chambers, mentioned in the Complaint and Amended Complaint herein, were received by the said Walter Chambers in connection with the making of additions to or alterations in or the construction of a building or structure or plant or in connection with the wrecking or demolition of a building or structure or plant or a part thereof, and the plaintiff or the Assured is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

SEVENTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint and Amended Complaint herein referred to, and in "Condition

C" thereof, it was provided, as a Condition Precedent to any recovery upon said Policy for Indemnity, as follows, viz.:

> "Condition C. Upon the occurrence of an accident the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time to the Company's Home Office or to the Company's authorized agent. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in his power."

That upon the occurrence of the accident, wherein the said Walter Chambers, mentioned in the Complaint and Amended Complaint herein, received bodily injuries, the plaintiff or the Assured did not give immediate written notice thereof, with the fullest information obtainable at the time to the Company's Home Office or to the Company's authorized agent and did not, when the claim was made on account of such accident, wherein the said Walter Chambers received bodily injuries, give like notice thereof with full particulars, and did not at all times render to the Company all co-operation and assistance in his power, as provided for in said "Condition C", and the plaintiff or Assured is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

EIGHTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint and Amended Complaint herein referred to, and in "Condition D" thereof, it was provided, as a Condition Pre-

cedent to any recovery upon said Policy for Indemnity, as follows, viz.:

> "Condition D. If thereafter any suit is brought against the Assured to enforce a claim for damages on account of an accident covered by this Policy, the Assured shall immediately forward to the Company's Home Office every summons or other process as soon as the same shall have been served on him."

The plaintiff nor Assured did not immediately forward to the Company's Home Office, any or every summons or other process as soon as the same had been served on him, in the suit or suits brought against the Assured to enforce a claim for damages on account of an accident covered, or alleged to have been covered, by said Policy, wherein the said Walter Chambers, mentioned in the Complaint and Amended Complaint herein, received bodily injuries, as provided for in said "Condition D" and the plaintiff or Assured is therefore not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

NINTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint and Amended Complaint herein referred to, and in "Condition E" thereof, it was provided, as a Condition Precedent to any recovery upon said Policy for Indemnity, as follows, viz.:

> "Condition E. The Assured shall not voluntarily assume any liability, nor shall the Assured, without the written consent of the Company previously given, incur any expense or settle any claim, except at his own cost, or interfere in any negotiation for settlement or in any legal proceeding; except that

the Assured may provide *at the time of the accident* such immediate surgical relief as is imperative."

That the plaintiff and Assured did voluntarily assume liability, and the Assured, without the written consent of the defendant Company previously given did incur expense, and did interfere in the legal proceedings; begun or brought by the said Walter Chambers referred to in the Complaint and Amended Complaint herein, contrary to the provisions of said "Condition E," and the plaintiff or Assured is therefore not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

TENTH DEFENSE.

That under the terms and conditions of the contract in writing, or the Policy of Insurance, herein referred to, and in the Complaint and Amended Complaint herein referred to, and in "Condition F" thereof, it was provided as a Condition Precedent to any recovery upon said Policy for Indemnity as follows, viz.:

"Condition F. No action shall lie against the Company to recover for any loss under this Policy unless it shall be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a Judgment after trial of the issue; nor unless such action is brought within ninety (90) days AFTER SUCH JUDGMENT, BY A COURT OF LAST RESORT, against the Assured has been so paid and satisfied."

That this action against the Company has been brought by the plaintiff or Assured to recover for an alleged loss under the said Policy of Insurance and referred to in the Complaint and Amended Complaint herein, and it has not been brought by the Assured for loss actually sustained and

paid in money by the Assured in satisfaction of a judgment after the trial of the issue; and such action has not been brought within ninety (90) days after such judgment by a court of last resort against the Assured has been so paid and satisfied, contrary to the provisions of said "Condition F", and the plaintiff or Assured is therefore not entitled to receive or maintain this action under the terms and conditions of said Policy of Insurance, and the claims, if any, of said plaintiff or Assured have been forfeited.

ELEVENTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint and Amended Complaint herein referred to, and in "Condition H" thereof, it was provided as a Condition Precedent, to any recovery upon said Policy for Indemnity, as follows, viz.:

> "Condition H. If the Assured carry a Policy of another insurer whether valid or not, against a loss covered by this Policy, the Assured shall not be entitled to recover from the Company, a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance."

That the plaintiff and Assured, carried policies of other insurers against the loss covered by the said Policy, referred to in the Complaint and Amended Complaint herein, and the plaintiff or Assured is therefore not entitled to recover from the defendant Company, a larger proportion of the entire loss than the amount insured, in the Policy of Insurance referred to in the Complaint herein, bears to the total amount of his insurance.

Answer to Amended Complaint

TWELFTH DEFENSE.

That in the statement set forth in the Schedule of Statements attached to and forming part of the Policy of Insurance herein referred to, and in the Complaint and Amended Complaint herein referred to, which statements the Assured made and warranted to be true, are the following statements, viz.:

"Statement 1. Name of Assured—Philadelphia Pickling Company.

* * * * *

"Statement 3. The Assured is—Company."

That the name of the Assured was not the Philadelphia Pickling Company" and the Assured was an INDIVIDUAL and not a "COMPANY" and that said statements and warranties so made by the Assured, were false and known by the Assured to be false and the plaintiff or Assured, is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

THIRTEENTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance, herein referred to, and in the Complaint and Amended Complaint herein referred to, the defendant's liability, if any, thereunder, in this action, is limited to the amount recovered in the action brought by Walter Chambers against the "Philadelphia Pickling Company," a trade or business name, under which an individual conducted business.

FOURTEENTH DEFENSE.

That the said Walter Chambers, referred to in the Complaint and Amended Complaint herein, did not receive or suffer bodily injuries, while or

when making "ORDINARY REPAIRS," within the meaning of the terms and conditions of said Policy of Insurance, and the plaintiff or Assured is therefore not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

FIFTEENTH DEFENSE.

That under the terms and conditions of the contract in writing, or Policy of Insurance herein referred to, and in the Complaint and Amended Complaint herein referred to, the defendant only agreed to indemnify the Assured, against loss from the liability imposed by law upon the Assured, for damages on account of bodily injuries * * * accidently suffered * * * by any employee * * * of the Assured, while within the factory, shop or yard described in the Schedule (attached to and forming part of said Policy) or upon the sidewalk or other ways immediately adjacent thereto provided for the use of such employee or the public, in and during the operation of the trade or business described in the Schedule (attached to and forming a part of said Policy) viz.:—"Kind of trade or business—Manufacturers, dealers and importers of pickles, table condiments and goods of this description" (see Statement 4 of such Schedule of Statements).

That the said Walter Chambers did not accidently suffer bodily injuries, while within the factory, shop or yard described in the Schedule (attached to and forming part of said Policy) or upon the sidewalk or other ways immediately adjacent thereto provided for the use of such employee or the public, in and during the operation of the trade or business described in the Schedule (attached to and forming part of said Policy of Insurance), or those usual to the kind

of trade or business described therein, viz.:— "Manufacturers, Dealers & Importers of Pickles, Table Condiments and Goods of this Description" (see Statement 4 of such Schedule of Statements), and the plaintiff or Assured, is, therefore, not entitled to recover or maintain this action under the terms and conditions of said Policy of Insurance.

SIXTEENTH DEFENSE.

The defendant DENIES that it agreed to indemnify the plaintiff, the Philadelphia Pickling Company, a corporation of the Commonwealth or State of Pennsylvania, under the contract in writing or Policy of Insurance referred to in the Complaint or Amended Complaint herein.

WHEREFORE, the defendant DEMANDS judgment, that the Complaint and Amended Complaint herein be dismissed, with the costs and disbursements in this action.

RICHARD F. JONES,
Attorney for Defendant,
Office and Post Office Address,
1 Exchange Place,
Jersey City, N. J.

RULE FURTHER AMENDING COMPLAINT.

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY, *Plaintiff,* vs. MARYLAND CASUALTY COMPANY, *Defendant.*	ACTION AT LAW. RULE FURTHER AMENDING COMPLAINT.

Application having been made therefor during the progress of the trial to the Court for leave to further amend the complaint herein, and it appearing to the Court that such an amendment is necessary in order that the pleadings may conform to the proofs, and in order that a fair trial may be had upon the merits:

It Is, on this thirtieth day of November, nineteen hundred and fourteen, on motion of Wilson and Carr, attorneys for the plaintiff, Ordered that the said complaint be and the same is hereby amended by inserting after paragraph 3 of the said complaint the following:

> "3. That the assured upon the occurrence of the accident hereinabove referred to gave immediate written notice, with the fullest information obtainable at the time, to the defendant's authorized agent, and that in

reply to such notice the assured received the following letter from the defendant:

'C.#19457J October 10, 1907.

Assured Pickling Company
Injured Chambers
Philadelphia Pickling Company,
Eldora, New Jersey.

Gentlemen:—

After careful thought and consideration of the circumstances and facts, as we have them, surrounding the above captioned accident, we are of the opinion that the same is not covered and shall, therefore, have to disclaim liability. As you know, your policy, according to the application, applies only to the following, viz: "Manufacturers, dealers, and importers of pickles, table condiments and goods of this description." Repair work and construction work are entirely irrelevant to and not incidental with the terms of the policy, as they could not be classed as ordinary repairs. We must, therefore, disclaim liability.

Trusting you will have no future trouble as a result of this accident, we beg to remain,

Yours very truly,
Charles W. Maydwell,
Mgr., Claim Division.'

That by reason of the disclaimer of liability contained in the said letter the defendant waived all the requirements of conditions D and F of its policy of insurance."

It is further ordered that a copy of this order, as well as a copy of a certain amended complaint and answer to the amended complaint filed herein on the twentieth day of November, nineteen hundred and fourteen, be returned with the transcript

of pleadings and postea as a part of the record in this cause.

Let this rule be entered.

FRANK T. LLOYD,
Circuit Court Judge.

STIPULATION.

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY,
Plaintiff,

VS.

MARYLAND CASUALTY COMPANY,
Defendant.

ACTION AT LAW.
STIPULATION.

It Is, on this tenth day of February, nineteen hundred and fifteen, stipulated between the plaintiff and defendant, by their respective attorneys, that if upon the application for a rule to show cause for a new trial, which application is to be made by the defendant at the February Term, 1915, of this Court, the questions raised by said application are argued as though on the return of a rule to show cause, the defendant shall waive any right to a review of the judgment herein by writ of error.

WILSON AND CARR,
Attorneys for Plaintiff.
RICHARD F. JONES,
Attorney for Defendant.

r the word "argued"on the fourth line from the bottom of
stipulation, the words "by consent of the Court" should

OPINION OF SUPREME COURT.

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING Co.,
vs.
MARYLAND CASUALTY Co.
} FEBRUARY TERM, 1915.

Argued February 16th, 1915; Decided July , 1915.

Defendant's Rule to Show Cause.

Before Justices SWAYZE, PARKER and KALISCH.

MARSHALL VAN WINKLE, ESQ., for the rule.

HARVEY CARR, ESQ., opposed.

Per Curiam:

We think only one point requires an expression of opinion. The policy requires that action shall be brought within ninety days after the judgment is paid and satisfied. We think the judgment was paid and satisfied as early as October 31st, 1913. Since the action was not begun until May 5th, 1914, the ninety days has expired. The plaintiff seeks to escape the difficulty upon the ground that forty cents was paid by the attorney to Chambers' attorney for satisfaction pieces and for cancelling the judgments. The answer to this contention is

New Jersey State Library

two-fold: (1) this payment was not one that the plaintiff corporation was obliged to make, since the statute made it the duty of Chambers' attorney to enter the satisfaction. C. S. 2960, pl. 22; (2) the payment was not a payment to the plaintiff in the judgment; at best it was a payment to the clerk of his fee for entering the satisfaction and filing the warrant. It would, moreover, be quite unreasonable to adopt a construction which would enable the assured to extend the time for bringing suit indefinitely or as long as he chose to forbear the entry of satisfaction.

The plaintiff is not helped by the provision of the policy allowing action to be brought within ninety days after the judgment is paid and satisfied. Satisfied and paid are here synonymous. It is satisfaction in fact, not the entry of that satisfaction upon the record that the policy means.

The defendant was entitled to a verdict on this issue, and the rule must be made absolute.

RULE MAKING RULE TO SHOW CAUSE ABSOLUTE.

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY, *Plaintiff,* versus MARYLAND CASUALTY COMPANY, *Defendant.*	ACTION AT LAW. ON RULE TO SHOW CAUSE. ORDER.

The defendant having made an application for a rule to show cause in this matter why the verdict of the jury rendered in favor of the plaintiff should not be set aside, and a new trial ordered, and the same having been regularly placed on the list for the February, 1915, term of this court, and counsel for the respective parties, having consented in open court, that this Court should consider the application as though a rule to show cause why the verdict of the jury rendered in favor of the plaintiff, should not be set aside and a new trial ordered, had been allowed, and the Court assenting, and Marshall Van Winkle, Esquire, having been heard in support of said rule, and Harvey F. Carr, Esquire, in opposition thereto, and the Court being of opinion that said rule to show cause should be made absolute.

It is Ordered that said rule to show cause be

and it is hereby made absolute, and that a *venire de novo* do issue for the retrial of the cause.

Rule actually entered this 2nd day of August, 1915, on motion of

RICHARD F. JONES,
Attorney for Defendant.

Enter
Aug. 2, 1915.
F. J. SWAYZE,
J. S. C.

A true copy.
WM. C. GEBHARDT,
Clerk.

TESTIMONY.

SUPREME COURT,
MERCER CIRCUIT.

PHILADELPHIA PICKLING Co.,
vs.
MARYLAND CASUALTY Co.

OCTOBER TERM, 1915.

Before HON. FRANK T. LLOYD, J., and a Jury.

Trenton, Mercer County, N. J., November 22, 1915.

APPEARANCES:
WILSON & CARR, ESQS., for Plaintiff;
RICHARD F. JONES, ESQ., for Defendant.

Colloquy

Mr. Carr: If your Honor please, this case went to the Supreme Court on a rule to show cause why a new trial should not be allowed. As a result, upon the return of that rule, the verdict of the jury was set aside and the cause remanded, and opinion filed,—a *per curiam* opinion, filed before Justices Swayze, Parker and Kalisch. It is the purpose of the plaintiff to take this record to the Court of Errors and Appeals, and Mr. Jones and myself have entered into a stipulation that the case may be submitted to the jury upon the printed record used in the Supreme Court, and that the printed record shall have the same force and effect as though the testimony were taken orally in court, and all of the—and the witnesses were sworn and testified, and that counsel shall have the benefit of all objections and rulings of the Court as though they were made if the case were personally tried today in court, and that counsel shall have the benefit of all motions and all rulings that were made in the original——

The Court: And all exceptions that were taken during the trial?

Mr. Carr: Yes.

The Court: Let me see the opinion, please.

Mr. Carr: I have a carbon copy; it is a little difficult, perhaps, to read.

The Court: I have read it once, perhaps; but let me see how mandatory it is. (Paper shown to Court.)

The Court: There is a request—wasn't there—providing for instructions in the proceeding—there is a request in the record?

Mr. Carr: You mean on behalf of the defendant?

The Court: Yes.

Mr. Carr: I am quite sure there was.

The Court: I don't think it is possible that was overlooked.

Mr. Jones: That is covered.

The Court: (To the jury) Gentlemen, you will render a verdict for the defendant in this case.

(To the stenographer) And note an exception to the Court's charge to the jury—to the plaintiff.

(The verdict is directed by the Court for the defendant.)

Mr. Jones: The minutes will show that a motion for direction of a verdict at this time was made, based upon the——

The Court: I assume that; that is implied in my previous question.

Mr. Jones: Motion for direction was made based upon the same grounds as made at the previous trial.

(Motion granted. Jury directed to return verdict in favor of defendant. Exception to plaintiff.)

JUDGMENT.

This case was tried before Judge Frank T. Lloyd, with a jury, at the Mercer Circuit, on November 22, 1915.

The jury rendered a general verdict against the plaintiff and in favor of the defendant.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendants recover of the plaintiff, its costs, which are taxed at the sum of $

Costs $

Judgment entered Dec. 9, 1915.

WM. S. GUMMERE,
C. J.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twenty-eighth day of December, A. D. nineteen hundred and fifteen.

[SEAL]

WM. C. GEBHARDT,
Clerk.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY,
Plaintiff, Appellant,

vs.

MARYLAND CASUALTY COMPANY,
Defendant, Respondent.

ACTION AT LAW.
NOTICE OF APPEAL.

To Richard F. Jones, Attorney of Defendant, Respondent:

SIR: Take Notice, that the plaintiff appeals from the whole of the judgment entered in this cause, to the Court of Errors and Appeals of the State of New Jersey, on the following ground:

That the trial Judge erred in directing a verdict for the defendant.

WILSON & CARR,
Attorneys for Plaintiff.

TESTIMONY.

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY,
Plaintiff,
vs.
MARYLAND CASUALTY COMPANY,
Defendant.
} ACTION AT LAW.

Transcript of testimony, etc., taken in the above entitled matter, at the Court House, Trenton, New Jersey, on Friday, November 20th, 1914, at ten thirty o'clock in the forenoon, before Hon. Frank T. Lloyd and a Jury.

APPEARANCES:

HARVEY F. CARR (Wilson & Carr), and ATTY. GENERAL WESCOTT, for Plaintiff.

RICHARD F. JONES, ESQ., for Defendant.

Mr. Jones: If your Honor please, before the jury is drawn I would like at this time to renew upon the record, as your Honor directed I could, my objections and exceptions to your Honor's ruling on the motion made by Mr. Carr on Monday for permission to amend the complaint and file the amended complaint.

The original cause of action was begun in the name of the Philadelphia Pickling Company. In the complaint it was alleged that the plaintiff was the assured in a policy of insurance thereto attached and annexed. It was also alleged in the original complaint that one Chambers was an employe of the assured, the plaintiff, and while in its employ he received certain in-

juries which the plaintiff claimed came within and were embraced in the policy of insurance. It thereby was clearly pointed out that it was not the present plaintiff in this case or the plaintiff which is to be made the plaintiff by the amended complaint. The amended complaint recites the plaintiff as the Philadelphia Pickling Company, the corporation. From the papers in this suit there is no question and it is admitted by Mr. Carr that at the time this policy of insurance was issued and upon which this action is based, the Philadelphia Pickling Company, the Pennsylvania corporation, was not in existence; it likewise was not in existence during the life of that policy of insurance; it likewise was not in existence at the time this man received the personal injuries.

THE COURT: When is it in existence, in 1908?

MR. JONES: It was not in existence at the time the original tort action was started. Hence, an attempt——

THE COURT: It brings in a corporation which is not the assured, which you say did not exist at the time of the insurance of the loss?

MR. CARR: If your Honor please, this is not an attempt to substitute one plaintiff for another. This action was begun by the Philadelphia Pickling Company, a corporation. The complaint incorrectly recited the facts, because of the identity of the name, the pleader drew his pleadings assuming that the assured and the Philadelphia Pickling Company were one and the same person. In order to correctly

prosecute this cause of action it is necessary to name, not by substitute, another plaintiff, but by setting up that this action is brought by the Philadelphia Pickling Company, the same plaintiff, by reason of its having taken by assignment the policy of insurance in question, and it then sets up in addition to that that the assured was Sallie Wittenberg, that the business of the Philadelphia Pickling Company was incorporated in November, 1908; that the corporation took over all of the property of Sallie Wittenberg, assumed all of her debts, including this debt, and took over at the same time the policy of insurance, but it is not a substitution of one plaintiff for another.

MR. JONES: If your Honor please—

THE COURT: This is an effort to—

MR. JONES: It suggests the Pennsylvania corporation on the record rather than the assured.

MR. CARR: No, a suit was brought by the Philadelphia Pickling Company but in the recitals of fact—

THE COURT: What is your ground to to amend the caption of the case?

MR. CARR: We do not wish to. The pleadings as to correctly give the facts, that is all.

MR. JONES: In reply to Mr. Carr's statement that it was founded upon a mistake of the pleader or that I am mistaking the facts—

THE COURT: What difference does it make to you whether you answer the woman or the company?

MR. JONES: It makes a great deal of

difference. I say we are entitled to plead here our limitations. The question is important because to allow the amendment and bring in the corporation as the plaintiff would bar our right to plead the ninety-day limitation under the policy of insurance within which suit should be brought after the payment of loss. If they didn't begin a suit under ninety days after a judgment by a court of last resort, they cannot maintain their action upon the policy of insurance, and if the plaintiff is a corporation and if that corporation is substituted as a plaintiff on November 16th, which was the first time this matter was broached to the Court, then more than ninety days had expired. I am entitled—

THE COURT: That all will come up in another application you may make. It hasn't any bearing on this question.

MR. JONES: It has a great deal. If your Honor will recall the case of *Fitzhenry v. Consolidated Traction Company,* 63 N. J. L., page 142, where the parent inadvertently brought suit for pecuniary injury under the death act instead of as legal representative of the estate of the deceased, and thereafter attempted to amend the summons by alleging that the plaintiff was the legal representative, the Court refused to allow the amendment, because it would be the institution of a new action between different parties, and raising new questions. I say as far as the complaint is concerned, it was brought in the name of the assured and in my answer, in paragraph 11, I set

forth this allegation: "The defendant denies that the plaintiff or assured was a corporation at the time of the date of the policy insurance referred to in the complaint herein, or on September 19th, 1907."

The defendant denies under corporation laws of 1903, page 490, that the plaintiff or the assured was a corporation at the time of the issuance of the policy and on the day when Chambers was injured.

In the reply to the answer what did I get from Messrs. Wilson & Carr, the attorneys for plaintiff? I have to do that by inference. They admittedly, in their Reply state that it was not a corporation, because they accepted joinder of issue. There is absolutely nothing in the Reply which denies that it was not a corporation and under the new Practice Act I am to have the benefit of the pleadings in my answer, and what is not denied or what is not admitted by reason of the reply, by words, must be accepted as admitted by the Court. I say under the pleadings in the case, without any argument as to the conditions of these names, show positively that the plaintiff in the case was the assured. Unfortunately there is this situation, that the trade name, or the assured, was the same name as the corporation. That is the reason, in my answer I drove home that denial, and I submit to grant this motion would be to institute a new cause of action between new parties and would raise new questions which were not raised.

THE COURT: I will allow the amendment.

Exception to defendant.

Colloquy.

MR. CARR: This has been submitted to my adversary and he has admitted—

THE COURT: You do not plead surprise, do you, Mr. Jones?

MR. JONES: I do not, no, sir. I want to file my answer to the amended complaint, reserving my objections and exceptions as have been noted.

THE COURT: Certainly.

Jury called and sworn.

Mr. Carr opened for plaintiff.

MR. CARR: Notice to produce was given for a number of papers, one being a letter dated September 24th, 1907, and another dated September 21st, 1907, and a report of the accident itself. Have you those letters?

MR. JONES: There is no such letter that we can find as of date September 24th, 1907.

I am unable to give you the original report of the accident but on our files we have a photographic copy, which I think will answer.

LOUIS WITTENBERG, sworn on behalf of Plaintiff.

DIRECT EXAMINATION BY MR. CARR:

Q Mr. Wittenberg, where do you live? A. Philadelphia.

Q. What is your business? A. I am in the pickle business.

Q. By whom were you employed in 1907? A. By Sallie Wittenberg, my wife.

Q. How did she trade? A. Always traded under the name of Philadelphia Pickling Company.

Q. Until what time? A. Until November, 1907.

Q. And then what happened? A. Then the business was sold out, was incorporated.

Q. A corporation? A. A Pennsylvania corporation took charge of it.

.Q Did they take over the business?

MR. JONES: Objected to.

THE COURT: I suppose that is in writing. . .

Q. There was a written agreement between Sallie Wittenberg and the Philadelphia Pickling Company dealing with the transfer of the business? A. Yes.

Objected to.

Objection overruled.

Exception to defendant.

Q. Where is that written agreement? A. I haven't got it here.

Q. I know that. Where did you last see it? A. Oh, I saw it last in the lawyer's hands.

Q. What lawyer? A. Wilson & Carr.

Q. Meaning myself as one of them? A. Yes.

Q. Was it used in litigation? A. Yes.

Q. And has it ever been returned to you? A. No; none of the papers.

Q. Would you be able to identify a copy of the agreement? A. Yes.

Q. I show you on page 6 of a book entitled "New Jersey Court of Errors & Appeals, *Chambers v. Philadelphia Pickling Company,* State of the Case", at pages 6, 7, 8 and 9, what appears to be a printed copy of an agreement dated November 7th, 1908, between Sallie Wittenberg and the Philadelphia Pickling Company. Will you kindly examine it and say whether or not that is a copy of the original agreement?

MR. JONES: I object to that question, as the instrument or the paper shown to the witness on its face clearly indicates that it is not complete, because the schedules are not annexed.

THE COURT: Where does it show it?

MR. JONES: The schedules referred to.

THE COURT: Why isn't the agreement here?

MR. JONES: Because the schedules referred to form part of the agreement.

THE COURT: Why cannot this be? Do you maintain it shows on its face it is not complete, on the fact that the agreement is not printed as it is?

MR. JONES: The agreement should be printed with the schedules, and I also object on the ground that it is not the best evidence.

Objection overruled.

Exception to defendant.

MR. CARR: At this point I want to state that counsel has made diligent search for the original agreement. I will have to tes-

tify unless my statement is accepted by counsel. I want to make this statement, that the original of this agreement was last seen by me at the Cape May Court House when it went to the jury as an exhibit. It has not been returned to me since.

MR. JONES: I still renew my objection that this is not the best evidence, in view of the latter part of this statement.

Objection overruled.

Exception to defendant.

Q. (Former question repeated as follows: "I show you on page 6 of a book entitled "New Jersey Court of Errors and Appeals, *Chambers v. Philadelphia Pickling Company*, State of the Case" at pages 6. 7, 8 and 9, what appears to be a printed copy of an agreement dated November 7th, 1908, between Sallie Wittenberg and the Philadelphia Pickling Company. Will you kindly examine it and say whether or not that is a copy of the original agreement"?) A. Yes; this is a copy of it.

MR. CARR: I offer the copy in evidence and ask that it be marked. I am only offering that part of the record which contains the copy.

MR. JONES: I am agreeable that a typewritten copy of that be used without waiving my objection that it is not the best evidence, and on the ground that on its face it is not a complete copy.

THE COURT: Do I understand that you accept the statement of Mr. Carr that this copy was last in his hands and that he has made proper search for it and it cannot be found?

MR. JONES: I do not admit that, and that is not Mr. Carr's statement. No, I do not admit that, and I still maintain my objection. I am willing to take Mr. Carr's statement for what he has stated.

THE COURT: What do you claim is insufficient in the statement to justify the admission of secondary evidence?

MR. JONES: You have asked me if I would admit that he has made diligent search to obtain the original, or a copy, that I am unwilling to do.

THE COURT: I am asking you a question now.

MR. JONES: I am willing to admit that the last time Mr. Carr—

THE COURT: My question is whether or not Mr. Carr has stated anything or stated sufficiently upon which you are willing to concede that there is a basis laid for the admission of secondary evidence, and if not, in what respect it is insufficient.

MR. JONES: It is not so. It is not sufficient and proofs have not been adduced to show that there is sufficiency. I think Mr. Carr ought to try his own case. It is not a carbon copy which is produced. There may be a carbon copy in existence.

THE COURT: Is that the only ground of the objection?

MR. JONES: I want to see copies of those schedules.

THE COURT: I am speaking now on the question of the proof of a lost instrument.

MR. JONES: I don't think that there has been sufficient proof.

THE COURT: My question is in what respect is the statement lacking that you claim?

MR. JONES: I don't know. I don't know until I see what is the evidence. I say that is not sufficient.

THE COURT: I ask you in what respect it is not sufficient.

MR. JONES: I am trying to—I don't know who had this paper, Mr. Carr says the last he saw of it was when it was at Cape May Court House.

THE COURT: You mean by that you think the mere fact it was left with the jury and the search Mr. Carr says he has made is not sufficient?

MR. JONES: That is it, sir. I am willing to do this, if you, Mr. Carr, are willing to make the statement that in the schedule annexed is not recited this policy or any claim under the policy—I want to know whether or not it is assigned—and if you are willing to admit that it is not included in the schedule I am willing to accept that as the copy. I am willing to waive all this question if you are willing to do that.

THE COURT: Have you got the schedule, Mr. Carr?

MR. CARR: No, there never was any schedule.

THE COURT: Was there ever any schedule affixed to that original agreement?

MR. CARR: No, sir.

THE COURT: There seems to be a schedule referred to in the agreement.

THE WITNESS: What do you mean by schedule?

THE COURT: That is what you agreed to. And the question is whether or not there was any schedule made in pursuance of that.

MR. JONES: That is objected to, as the agreement was not made with this witness.

Objection overruled.

Exception to defendant.

Q. Was there any schedule in the list of things fastened to this agreement? A. No, sir, not that I know of.

THE COURT: Just read the portion of the contract that calls for that.

MR. CARR: In the agreement it says: "In consideration of the above agreement on the the part of the said Sallie Wittenberg, the company agrees hereby to purchase the stock, good-will, fixtures, plant and real estate belonging to the said business for the sum of Fifty thousand dollars, to be paid in the manner hereinabove set forth, and the company further agrees to pay any and all debts due by said Sallie Wittenberg trading as the Philadelphia Pickling Company, as shown by the books of the company on the first day of November, A. D., 1908, set forth in the annexed schedule, marked Exhibit B—with any and all claims for damages or otherwise arising from the operation of the said business of said Sallie Wittenberg, including any claim now existing or hereafter to be made by Walter Chambers, suit for which has aleady been brought in the State of New Jersey."

THE COURT: Was there any schedules?

MR. CARR: Detailed lists.

Q. Was there any detailed lists?

MR. JONES: Objected to.

Objection overruled.

Exception to defendant.

Q. Was there or was there not? A. There certainly was a list made out of all we had at that time; we took stock account.

Q. Was it ever annexed to this agreement? A. That I don't know.

MR. JONES: Same objection.

Same ruling; exception to defendant.

Q. Who had charge of the preparation of it, do you know? Mr. Felix?

THE COURT: He said he did not know.

A. Mr. Sloan, I think had it, the attorney.

THE COURT: Mr. Carr, you see you have to try a highly technical case.

MR. CARR: May I suspend this witness in order to get straight on this question?

THE COURT: Yes.

Witness withdrawn.

HARRY FELIX, sworn on behalf of plaintiff.

DIRECT EXAMINATION BY MR. CARR:

Q. Mr. Felix, are you a Philadelphia lawyer? A. Yes.

Q. I notice in the copy of the agreement between Sallie Wittenberg and the Philadelphia Pickling Company that the name Harry Felix appears as one of the subscribing witnesses. Are you the Harry Felix that witnessed? A. I witnessed that original agreement.

Q. Had you anything to with the preparation? A. I had nothing to do with the preparation of the agreement itself, that was attended to by Mr. Sloan.

Q. Did you see the agreement in its final form? A. I did.

Q. And did you afterwards have the custody of it? A. I had the custody of it until the time we went down to Cape May, I had it that time and turned it over there, and that was the last I ever saw it. That is the only time I ever had it.

Q Can you say whether or not there was any schedule attached to it when it was delivered?

MR. JONES: I object to that, as an attempt by parol evidence to alter the written instrument.

Objection overruled.

Exception to defendant.

THE COURT: How is it an attempt to modify by parol evidence?

MR. JONES: It speaks itself of the annexed schedules and forming a part thereof.

THE COURT: But if there is none——

MR. JONES: This witness does not know whether there was or not, by the testimony.

He says it subsequently came to his hand.

MR. CARR: A subscribing witness.

THE COURT: Ask him about that, Mr. Carr.

Q. Were you one of the subscribing witnesses? A. I was a witness. There was never any schedule at any time. I can state what was said about the schedule at that time.

CROSS EXAMINATION BY MR. JONES:

Q. Mr. Felix, where was that instrument executed? A. Mr. Sloan's office.

Q. And who was present? A. Mr. Maurice Sloan, Mrs. Wittenberg and myself.

Q. Mr. Wittenberg present? A. Yes, Mr. Wittenberg, he was there. That was in the Drexel Building, Philadelphia, and the evening was hot, and we afterwards went to a cafe in South Street.

MR. JONES: I object to that.

A. I am giving you my best memory, sir.

LOUIS WITTENBERG resumes the stand.

THE COURT: Mr. Carr, do you know whether this is a compared copy or not? I have no doubt if you make this statement to counsel it will be accepted.

MR. CARR: I have compared this, I know it to be a correct copy except for the minor typographical errors. The signature was S. Wittenberg. It appears here as S. Whittenberg, but with the exception that the name of Whittenberg is thereto misspelled with an H, it is an absolutely accurate copy.

MR. JONES: So far as it goes I am willing to admit that it is, as far as it goes.

THE COURT: And you don't make any objection that the original agreement is not part of it?

MR. JONES: I still maintain that, sir.

THE COURT: I heard your objection to be that this was not a copy and that it was an attempt to alter a written paper by parol, but not that the original contract was not part of it.

MR. JONES: Because the schedules referred to are not proven.

THE COURT: It has not yet been proven, this contract. I want to know positively whether your objection is on that ground at all?

MR. JONES: I am willing to concede, upon Mr. Carr's statement, so far as this paper goes that it is an accurate copy of that part which it alleges to be a copy of.

THE COURT: Of what?

MR. JONES: Of an agreement. That part only.

THE COURT: About what?

MR. JONES: Of a contract made between Sallie Wittenberg and the Philadelphia Pickling Company.

THE COURT: And you admit that contract has been executed?

MR. JONES: And that a contract of which at least this was a part has been executed. I am not willing to admit it was the whole contract.

THE COURT: Very good.

MR. CARR: I think this was previously offered. I will offer it now as Exhibit P-1 and will substitute——

THE COURT: Under the testimony as now given I will admit it.

Exception to defendant.

Paper referred to marked Exhibit P-1, 11/20/14.

Q. Now will you say whether this policy No. A108978, of the Maryland Casualty Company, which I now show you, was the policy obtained by Sallie Wittenberg, trading as the Philadelphia Pickling Company? A. Yes.

MR. CARR: The policy itself—the execution of the policy, is admitted in the pleadings. I therefore offer it as Exhibit P-2.

MR. JONES: I object to it as an exhibit in this case, on the ground that it is an agreement or policy of indemnity which is personal in its nature and is not assignable and that this cause of action is not brought by the assured, and therefore the plaintiff in this case cannot maintain a cause of action upon this policy.

THE COURT: I suppose that does not prevent the plaintiff proving his case, Mr. Jones. It may be in the end it will all be

insufficient, but counsel has a right to present his proofs.

THE COURT: I will admit it and note an exception.

Exception to defendant.

Policy received in evidence and marked Exhibit P-2.

Q. Did Sallie have a plant down New Jersey somewheres? A. Yes.

Q. Sallie Wittenberg? A. Yes.

Q. Where was that? A. Eldora, New Jersey.

Q. Where is that town, in Cape May County? A. Yes.

Q. What kind of a plant was that down there? A. A canning factory and pickling factory.

Q. Who had charge of the hiring and firing of the men down there? A. I did.

BY THE COURT:

Q. Were you the manager? A. Yes.

BY MR. CARR:

Q. Did you know a man named Walter Chambers in 1907? A. Yes.

Q. Who hired him? A. We hired him at the factory.

Q. Who did the hiring, you? A. At that time we had a foreman. He hired the help.

Q. How long had Chambers been working down there in 1907, do you know? A. About three weeks.

Q. Then what happened? A. Then he met with an accident.

Q. What was Chambers doing when the accident happened? A. He—

MR. JONES: If he knows of his own knowledge.

BY THE COURT:

Q. Were you there at the time, Mr. Wittenberg? A. I was not there.

BY MR. CARR:

Q. Do you know what the character of the work was upon which Chambers was engaged?

MR. JONES: I ask that that question be limited as to time. It is indefinite and obpected to for that reason.

THE COURT: He is asking at that time.

Q. Do you know what his general work was? A. Yes, I know exactly.

Q. What was his general work on the day of the accident?

MR. JONES: Objected to.

Objection overruled.

Exception to defendant.

A. The day of the accident he was shoveling dirt away from the outer wall outside that the other men had thrown out of the cellar window into the street.

Q. What was going on at the plant that caused that? A. We were repairing the foundation wall.

Q. What were you doing to it? A. We were repairing the cracks that had formed about a year before.

BY THE COURT:

Q. Some cracks in the foundation wall you say? A. Yes, she cracked all around.

Q. And he was shovelling the dirt, you say? A. Had to take some dirt out.

BY MR. CARR:

Q. What happened to the wall? A. The wall had settled on account of the heavy loads we had on there prior years.

BY MR. JONES:

Q. Heavy what? A. Loads on the floor.

BY MR. CARR:

Q. You were not there at the time of the accident. Did you see the condition of the wall a short time after the accident? A. After the accident, yes. Then it was caved in.

Q. Which way had it fallen, inside or outside? A. The wall had fallen outside and over against the sand.

Q. What was the reason for making these repairs to the foundation wall? A. Because the wall had settled and cracked about a foot and a half to two and a half feet; it had been underpinned a few years before and that is where the cracked wall about one-third of the cellar.

Q. So was the building safe or dangerous, or what?

MR. JONES: Objected to, as calling for a conclusion, and also leading.

Objection overruled.

Exception to defendant.

A. The building was not safe, otherwise we would not have went to that expense of repairing it. We patched it and repaired it when it was necessary.

Q. Did you get a report about Chambers being hurt? A. Yes.

Q. And when you got such a report did you notify the Maryland Casualty Company?

MR. JONES: I object to that as leading.

THE COURT: Is there any doubt about the fact, Mr. Jones?

MR. JONES: Yes, there is.

THE COURT: All right.

Q. Was any notice given by anybody to the Maryland Casualty Company about this accident? A. Yes.

Q. By whom was it given? A. I dictated a letter.

MR. CARR: I call for the production of a letter dated 9/21/07, addressed to the Maryland Casualty Company. Have you the letter?

I call for another letter dated—

THE COURT: Are they produced?

MR. CARR: They are not produced.

Q. Can you tell me whether a letter-book impression copy was made of the letters I have just referred to? A. Yes, every letter was copied.

Q. I call your attention to an impression copy of a letter dated 9/21/07, addressed to the Maryland Casualty Company and appearing upon page 165 of letter book #30, and ask you to examine that and say whether or not that is a copy of the original letter? A. Yes, that is a copy of the letter.

MR. CARR: I offer that in evidence and ask that it be marked Exhibit P 3.

THE COURT: Do you wish to see it, Mr. Jones?

MR. JONES: Yes. Where is the other?

THE COURT: If you have copies of that letter that should be put in instead of the book; it would be better.

MR. CARR: Yes, I have copies here.

MR. JONES: I have no objection.

MR. CARR: May I use these now?

MR. JONES: Without the letterhead. That is the letterhead of the corporation; it was not in existence then.

MR. CARR: I mean as to the body of the letter.

THE COURT: Tear off the tops then.

MR. CARR: I now offer copy of letter dated 9/24/07, addressed to the Maryland Casualty Company, signed Philadephia Pickling Company, Louis Wittenberg, Manager.

Received in evidence and marked Exhibit P 4.

MR. CARR: Letter just offered is as follows: (Reading letter).

I read another letter: (Reading.)

I call for the original accident report which accompanied the letter of 9/24/1907.

MR. JONES: I have already produced that. Not the original, I could not locate the original.

Counsel produces in response to the call a photographic copy of the report of the accident.

Q. Mr. Wittenberg did you make a letter press copy of the accident report which accompanied your letter of the 24th? A. Yes.

Q. And was the original enclosed with that letter? A. The letter we sent to them, yes.

MR. CARR: I now offer the photographic copy of the accident report which is produced by counsel for the defendant, to be marked as an exhibit.

Marked Exhibit P. 5.

Q. Does the accident report correctly show the date of the accident, do you know? A. Yes.

Q. Can you tell me what the date of it was? A November 23rd, wasn't it?

Q. Can you tell me by reference to the report itself? A. Yes, September 19th (referring to report).

Q. September 19th, 1907, is that right? A. Yes.

Q. Now, did you receive any reply to your letters addressed to the Maryland Casualty Company at all? A. Yes.

MR. CARR: I call upon Mr. Jones for the production of a copy of a letter dated October 10th, 1907—about that—addressed to the Philadelphia Pickling Company Never mind, you can cancel my requisition.

Q. I show you a letter dated October 10th, 1907, addressed to the Philadelphia Pickling Company, Eldora, New Jersey, and signed Charles W. Maydell, Manager, Claim Dept., and ask you whether or not that is the reply received to your two letters? A. Yes, that is the letter.

MR. JONES: I dare say, Mr. Carr, you didn't intend that. I will give you a photographic copy of that letter that you can use but that is not the letter. That is only a copy made of some letter.

THE COURT: Is it the same date?

MR. JONES: That letter never went through our office.

THE COURT: Have you any objection to its use? Its language is correct?

MR. JONES: No, I haven't any objection to using the photographic copy nor that copy if it is a correct copy.

MR. CARR: No. I offer the last letter as an exhibit.

Marked Exhibit P. 5. a.

(Reads letter to Jury.)

I think I will return the photographic copy.

Q. Now, was suit brought by Chambers upon this accident? A. Yes.

Q. Did the summons finally reach your hands? A. Yes.

Q. Then what did you do? A. I took it to Mr. Sloan.

Q. Who was he? A. Attorney of the Maryland Casualty Company.

Q. And what talk did you have with Sloan? A. Mr. Sloan says that corroborated the letter, and says that they would not do anything, would not defend the case so I instructed him—

MR. JONES: I object to this further line of testimony, on the ground that there is no proof in the case that Mr. Sloan was an authorized agent or the agent of the Maryland Casualty Company, the defendant in this case.

MR. CARR: That was answered without objection.

THE COURT: I suppose, Mr. Carr, the objection is made, you will have to prove even obvious things.

Q. How do you know Sloan was agent of the Maryland Casualty Company?

MR. JONES: Objected to.

Q. I mean attorney.

MR. JONES: I object to that.

A. I got dozens of letters from him.

THE COURT: Mr. Jones, doesn't that prove what you are objecting to?

MR. JONES: No. Under the policy of insurance, under condition C, upon the happening of an accident written notice shall go to the company's Home Office, or to the Company's authorized agent. Under Condition D, if suit is brought, the assured shall immediately forward to the company's Home Office every summons or other process

as soon as the same shall have been served on him.

THE COURT: Do you disclaim responsibility for Sloan? He wasn't your attorney.

MR. JONES: He wasn't our attorney, so far as the transactions of the Wittenberg's were concerned. And under condition D there is a provision "If thereafter any suit is brought against the Assured to enforce a claim for damages,"—and so forth,—"the Assured shall immediately forward to the Company's Home Office every summons or other process" and under condition O—

THE COURT: Was there any obligation to do that in view of the disclaimer to have anything to do with that?

MR. JONES: Yes, they are under every obligation—we had no opportunity to say whether or not we would defend the suit.

THE COURT: But you had had final knowledge of the case. Mr. Jones, we must start somewhere. The facts of this case, as they are now testified to shows a communication was made on September 21st, on this date of the accident. Now, on the 24th a total account was apparently given of it.

MR. JONES: We had a report of the accident. There are three conditions in the policy one is a notice of the occurrence of an accident the second is a notice of the claim, and the third the forwarding of the summons. I say because they sent us a report of the accident, if that notice was in compliance with that condition, we may be bound under the oral ruling. But with respect to the summons, of having received that, our disclaimer under report of the accident does not preclude us or force upon us a waiver of the compliance of the other

conditions of the policy. Before they can maintain a suit here there must have been a loss under one of the conditions by a payment in money.

THE COURT: Go on, Mr. Carr, with your proofs.

Q. (Former question repeated: "How do you know that Sloan was agent of the Maryland Casualty Company?")

THE COURT: I suppose under that you have got to show that Sloan was the representative of the company.

MR. CARR: All right.

Q. How do you know that Sloan was the attorney of the company? A. How do I know?

MR. JONES: I object to that. They are precluded under condition O of the policy.

THE COURT: Is there any case in which this company can possibly be liable for anything that it insures?

MR. JONES: Yes, but not liable to this corporation.

THE COURT: Is that the real case we are trying?

MR. JONES: They are all interwoven, sir. We say, as a matter of fact, they were not making an ordinary repair, we say this suit—

THE COURT: Were these questions being dealt with? I suppose that a reputable member of the Philadelphia Bar, who is acting as a counsel for this company and takes its summons must have some authorization for it. Do you say that Mr. Sloan was not acting for the company here?

MR. JONES: Yes, I say he was not.

THE COURT: How did the witness come to go to Sloan?

A. We had dozens of transactions with the Maryland Casualty Company through Mr. Sloan, their attorney.

Q. Had you ever been sent there by the company? A. All cases were settled through Mr. Sloan.

BY THE COURT: The question is whether in previous cases you had been sent to Mr. Sloan.

A. I must have. Yes, I have been going there many years.

BY MR. CARR:

Q. Did they refer you to him as the proper attorney to deal with in these cases? A. Through him all cases were settled.

Q. In these cases? A. Oh, yes.

Q. In this one included? A. I went as usual to Sloan, thinking that as he is the same—

MR. CARR: I might state, if your honor please, that the object of these questions is two-fold-one, charge the company with notice, two, to show the steps that were taken in the employment of counsel, as that is a part of our claim here for counsel fees expended as a result of the amount of judgment paid. I don't think that we were bound to take that summons to the company, in view of their disclaimer of liability. The only object of taking the summons to the company is that they might defend the suit if—

THE COURT: Is there an averment of the— Is this one denied?

MR. JONES: Yes, we set that up as a special defense.

MR. CARR: I think we also have a right to say that by a course of continued dealing covering years that Sloan had acted for the company in these matters, claims of this character.

THE COURT: I am inclined to admit it, Mr. Jones.

Exception to defendant.

Q. Now, what talk did you have with Sloan?

MR. JONES: Same objection.

Exception to defendant.

A. We had a general talk on what steps we were to take and I asked him to employ counsel when the suit was brought.

Q. What did he say about the company in the first place?

MR. JONES: I object to that, on the ground that there is no proof that he was an authorized agent.

THE COURT: I am inclined to let this in on the unobjected testimony, that this witness said Mr. Sloan was agent of the company.

Exception to defendant.

THE COURT: Apart from the subsequent question as to whether their prior dealings justified.

Q. (Former question repeated): "What did he say about the company in the first place, whether the company would defend the suit or not? A. They absolutely refused to protect us in this case.

Q. What did you do or say? A. I told him to employ counsel in New Jersey, and he said,—he later said—I asked him to fight the case for us, the same as if it was their own, at our own

expense, and he then employed Gaskell & Gaskell, in Camden. I asked him to fight the case.

BY THE COURT:

Q. He didn't say he would? A. No, he refused.

BY MR. CARR:

Q. Did he hire Mr. Gaskell? A. Hired Gaskell & Gaskell.

Q. Did the suit go on? A. He stated that was the company's lawyer in New Jersey and General counsel.

MR. JONES: Objected to.

THE COURT: I don't know, Mr. Carr, whether statements may go so far as to—

MR. CARR: It simply identifies Gaskell as being a competent man.

MR. JONES: I will admit that feature of it, but—

THE COURT: I doubt very much whether Mr. Sloan's employment to receive summons or whatever it may be would give him the right to impress his opinion as to—

Question withdrawn.

Q. Did Gaskell take the case? A. Yes.

Q. Did Sloan help him? A. Mr. Sloan went along.

Q. And did you get licked? A. We got a judgment for $4000 against us.

Q. How did you come to get Gaskell & Gaskell? A. Through the recommendation of Mr. Sloan, telling me that he was the company's lawyer.

MR. JONES: Objected to.

THE COURT: I will admit so much that they came to get Gaskell & Gaskell at the suggestion of Mr. Sloan.

MR. JONES: And ask the jury to disre-

gard that he was the company's counsel?

THE COURT: Yes, that can come out.

Q. After you got licked were you satisfied or dissatisfied? A. I certainly was not satisfied.

Q. Were any legal steps taken? A. Yes, Sloan again advised me.

THE COURT: It appears on its face as not responsive. You asked if any further steps were taken in the suit.

Q. Were any more lawyers hired? A. Yes, Goldenberg.

BY THE COURT:

Q. Did Mr. Sloan participate in the trial of the case? A. Yes, he was there two days.

BY MR. CARR:

Q. Who was Goldenberg, the Prosecutor at Atlantic City? A. Yes.

Q. And you conferred with him? A. Yes, we had a consultation with him.

Q. And he advised you as to your rights? A. Yes. He thought first we had a good case.

Q. Did you afterwards employ other counsel? A. Yes.

Q. Who? A. Employed Wilson & Carr.

Q. A firm of which I am a member? A. Yes.

Q. And then you had plenty of litigation? A. Then we had four or five years fighting.

Q. And who was opposed, the present Attorney General? A. Yes.

Q. And he gave you a good run for your money, too, didn't he? A. Sorry to say yes.

Q. What was the final result of all this litigation? A. Final result that we had to pay.

MR. JONES: I object to that as calling for a conclusion and this is not the best

evidence. We are getting down now to the meat of the case.

MR. CARR: We propose to put in evidence a certified copy of the record in both proceedings.

THE COURT: Let me know—he said that he paid. Do you mean the corporation?

THE WITNESS: Certainly, somebody paid this judgment. I signed every check.

Q. How much money did you pay out? A. $7200, a little more, I think.

Q. And from that you inferred that you were defeated, I suppose? A. Yes.

Q. Who had charge of the disbursements of the moneys in this case? A. You paid it. It was all turned—

Q. Where did I get it from? A. We paid it all to you.

Q. Who, on behalf of the Philadelphia Pickling Company, paid out the moneys? A. I did; I signed the checks.

Q. And you say you paid out that $7200? A. Yes.

Q. Was that chiefly by checks? A. Pretty near, all by checks, some small sums were paid in cash.

Q. And those checks, were they of the Philadelphia Pickling Company, the corporation? A. Yes.

Q. I show you a large number of checks, many of them signed "Philadelphia Pickling Company, Sallie Wittenberg, President, Louis Wittenberg, Treasurer; many of them signed "Philadelphia Pickling Company, Louis Wittenberg, Treasurer," with an occasional check from Harry Felix. I ask you whether those are the checks that were used to make the disbursements?

MR. JONES: I object to those checks produced and referred to as having been signed by the Philadelphia Pickling Company, the corporation, on the ground that if those moneys were disbursed they were not disbursed by the assured under the policy of insurance and therefore there can be no recovery in this case for moneys paid by third parties, particularly as this policy is an agreement of idemnity.

THE COURT: What is the date of that agreement?

MR. CARR: November 7th, 1908.

THE COURT: Where is the provision of this policy, Mr. Carr, which deals with the expenses of litigation.

MR. CARR: Section D, I think, says that "the company will defend at its own cost any suit." If your honor wishes to hear any authority on this question that Mr. Jones has been raising or as to the assignee to sue, and especially where the assignee has made the payments itself, I am quite willing to submit authorities at this time.

THE COURT: That wasn't quite what I had in mind. If the company is going to stand on the ground that no notice was ever given to them at their Home Office, and therefore they are not obliged to defend this action, I suppose the limit of recovery would be the $5000.

MR. CARR: No that isn't so. We have a case exactly in point with this, against this very company. (Citing cases)— and it was there set out that the limit of liability was $5000, the court said "No, you did two things, you engaged to save the assured harmless to the extent of $5000 and you

engaged also to defend at your own cost."

THE COURT: Yes, but that is not what I am calling attention to. Counsel is objecting that you have not yet brought home to the Home Office this suit and have not performed the conditions precedent to your right to recover for the expenses that you incurred in litigating.

MR. CARR: My answer is that we were not obliged to do that when we had reported this accident to the company and they had said "we disclaim all liability." We went, in my judgment, farther than we had to go. We went to their attorney, the man who had been handling all these matters for years back took him the summons and as Mr. Wittenberg said, he corroborated the letter and said "We won't have anything to do with this, our company is not liable." Being advised by the company's attorney that they were not liable and then to go and send our summons to Baltimore it would be a foolish thing to do.

THE COURT: I suppose there is some evidence about waiver?

JUDGE WESTCOTT: Sloan was present and he very well argued as their attorney—knew all about this situation and it was a mere effort on their part to shuffle off their responsibility. Whether it wasn't a game on their part from the beginning down to the present hour, they were apprised of the accident, of this claim—that they admit. but they deny responsibility.

MR. JONES: I do want to know how many are going to argue this question. I assumed when one started, the rule was that he was to complete it. I think that is the rule.

THE COURT: I don't know that it is.

MR. JONES: On the question of waiver, I want to call your honor's attention to Section 118 of the Practice Act, in view of the pleading in this case, where they have alleged the general performance of all the conditions, where the defendant comes forward in his pleadings and says there are certain conditions precedent that you have not performed. Then the burden of proof is still upon the plaintiff: (Citing cases: Orr Trucking Co. v. Metropolitan Surety Co., 77 N. J. L., 749; 73 Atlantic, 541; Shinn v Haines, 21 N. J. L., 340; Franklin v. Empire Rubber Co., 72 N. J. L., 58; 50 Atlantic, 186.) In this case, there is absolutely no waiver pleaded, and in the Orr case, it was held that waiver must be pleaded.

THE COURT: I suppose, Mr. Jones, there is no doubt that if the company insures for an amount of $5000, that that is the end of its liability with interest, but if it expects to pay something else, pay costs and expenses and so on, isn't that to be additional to this $5000?

MR. JONES: Mr. Carr brings in the latter part of Condition D of the policy. I would like to call your honor's attention to those words and just read them. "And the Company will, at its own cost, defend such suit in the name and on behalf of the assured unless the company shall elect to settle the same or to pay the assured the indemnity provided for in Condition A hereof." But you have to go back to the preceding portion of condtion D. "If thereafter, any suit is brought against the assured to enforce a claim for damages on account of an accident covered by this policy, the assured shall im-

mediately forward to the company's home office every summons or other process as soon as the same shall have been served on him." And if it is not covered by the policy, there is no liability.

On the question of counsel fee, there is a leading case in New York—Cornell v. Travellers Ins. Company, 175 New York, 239.

THE COURT: Mr. Jones, I think this condition perfectly evident in its meaning. By its own terms the policy provides for a loss not exceeding $5000 for injury to one person, and then goes on to say "If therefore, any suit is brought by the assured—and so forth— "And the company will at its own cost defend such suit in the name and on behalf of the assured unless the company shall elect to settle the same or to pay the assured the indemnity provided for in Condition A hereof."

That undoubtedly means they may elect to do one of two things, either stand upon their $5000 obligation or that they may let that stand and in addition to that assume the risk of a further litigation in the hope of reducing their $5000 loss (Illustrating). You take the position that the defendant here—I am asking whether the plain provisions of this policy do not first provide in the first instance the company shall not be liable beyond $5000 and they may pay that. If they elect not to do so and suit is brought, they may then have the option to pay the $5000, and go on paying $5000 if they have to do and need not defend the suit. On the other hand, isn't the damage then to the defendant, the bur-

den of going on and defending it itself? If it omitted to do that, wouldn't you say right away you were negligent?

MR. JONES: The situation is this: we can go abead and defend that case at our own expense, which we always do, but when we say there is no liability on our part, then it is incumbent upon the person who carries the insurance.

Under the clause of the policy which your honor has not had called to your attention by Mr. Carr, Condition E, they are precluded, unless they get our consent in writing, from spending one cent or one dollar in defending any case and then attempt to hold us. They have the right to defend and if we are not liable, it is their duty to protect their own interest, to go forward and defend, but under Condition E of our policy, if they go forward and do not obtain our consent in writing, then—

THE COURT: Then, Mr. Jones, this policy, written by this company, amounts to this, that a company insures an employer and agrees to give him $5000 in case of loss; in addition to that it agrees to defend him against litigation, and if it does not defend him in a proper case but refuses, and the defendant, the insured, proceeds then to defend himself the company is not answerable for it in any way, simply because they have put in here a provision that he shall not spend the money?

MR. JONES: No, we would then be liable for the amount of the judgment.

THE COURT: You don't think this policy means that, do you?

MR. JONES: I do, sir, and I have cases that bear me out.

THE COURT: I should say it behooved everybody to look at their insurance policies.

The question I am trying to get now is whether or not this policy precludes the recovery of any expense beyond the $5000.

MR. JONES: It is my view, under Condition E of the policy and the various cases I have referred to, taken in connection with other cases in this State, that they are actually precluded from recovering for moneys expended.

I have a further objection, and if your honor holds ultimately that they are entitled to effect proof as to the amounts expended in defending the suits, that proof should be limited to the actual sums of money expended in the tort action. There was one action in tort. Then Mr. Westcott could not collect his money, and on the basis of this contract which has been introduced in evidence, Mr. Westcott says "I will apply Section 28 of the Practice Act." Then he sues the corporation because they had agreed to pay and he gets his verdict there, he gets the judgment. They cannot recover for any moneys in defending contract suits against us. We had no agreement with the Philadelphia Pickling Company, the corporation, and most of this money was expended in the contract action. Those opinions to which I call your honor's attention were all contract cases. There is no written opinion reported in the tort action.

THE COURT: I think it is better to put the evidence in, Mr. Jones.

MR. JONES: Will your honor allow me an exception?

Exception to defendant.

THE COURT: And then the question can

be raised formally whether or not the plaintiff's rights of action is complete.

Exception to defendant.

Q. (Former question repeated as follows: "I show you a large number of checks, many of them signed "Philadelphia Pickling Company, Sallie Wittenberg, President;" Louis Wittenberg, Treasurer," with an occasional check from Harry Felix. I ask you whether those are the checks that were used to make the disbursements") A. Yes.

THE COURT: My understanding of the facts are that this loss occurred while the Philadelphia Pickling Company was simply a trade name—I mean, these injuries.

MR. JONES: Yes.

THE COURT: And then suit was brought against the Philadelphia Pickling Company as a trade and a judgment obtained?

MR. JONES: Yes.

THE COURT: And then thereafter an attempt to fasten the responsibility which was ultimately assessed also against the corporation?

MR. JONES: No. An independent suit on contract was brought against the corporation The plaintiff's cause of action was based upon the phrase in the contract reading as follows: (Reads) Mr. Westcott then—

THE COURT: I mean on the fact that they had assumed it.

MR. CARR: Not on debts.

MR. JONES: The question of assignment may come in there.

THE COURT: And the court held by reason of that situation the corporation was liable on contract. Now this corporation is the present plaintiff seeking to recover from the insurance company for that loss?

MR. CARR: For the loss they have paid.

THE COURT: Were these moneys paid out by the corporation or by the trade name?

MR. CARR: By the corporation.

Q. Do you know whether in addition to the counsel you have named our distinguished friend Justice Collins—

MR. JONES: I will admit that Judge Collins was employed.

A. Yes.

Q. Now, were all of this array of counsel paid? A. Yes. There is another gentleman; I can't think of his name.

Q. Not Judge Westcott, he got it also? A. I mean he was employed.

Q. Now, at the time of the transfer of the assets of the company in November, 1908, by Sallie to the Philadelphia Pickling Company, the corporation, was anything whatever done with regard to the various insurance policies?

MR. JONES: Objected to as leading.

Objection overruled.

(Exception to defendant.)

A. Yes.

Q. What was done?

MR. JONES: I object to that as being an attempt to introduce by parol evidence—

A. All papers pertaining to the business were turned over.

BY THE COURT:

Q. To whom? A. To the new corporation, the Pennsylvania corporation.

BY MR. CARR:

Q. And among them, what about this policy?

MR. JONES: Objected to as being an attempt by parol evidence to alter, amend and modify the agreement of November 7th, 1908, and as not binding upon this defendant.

(Objection overruled.)

(Exception to defendant.)

Q. (Question repeated: "And among them, what about this policy?") A. The same as all other policies.

Q. Say what it was? A. Fire insurance and accident insurance.

Q. What was done? A. They were all turned over to the new corporation at that time.

At this point the court took a recess for one hour, until 1:30 o'clock in the afternoon.

AFTER RECESS:

MR. CARR: I wish to offer these various checks which show disbursements in this matter.

THE COURT: Are they questioned at all?

MR. JONES: Yes; I object on the ground that the checks themselves are not evidence of payment of the judgment; certainly to such checks as are signed by Louis Wittenberg, as Manager, which antedate the date of the incorporation of the Philadelphia Pickling Company. As to those I object on the ground that this is not the suit by the assured and those checks were checks of the assured; and as to those checks signed by the Philadelphia Pickling Company, by Sallie Wittenberg, President, and Louis

Wittenberg, as Treasurer, I object upon the ground that this policy of insurance is a policy of indemnity, or agreement of indemnity, which is personal in nature and not assignable; on the further ground that there is no proof of a contract between the defendant of this suit and the Philadelphia Pickling Company, the corporation; and upon the further ground that payment by the Philadelphia Pickling Company, the corporation, is not a payment by the assured, in payment or in satisfaction of the judgment entered against the assured in a court of last resort.

MR. CARR: This offer is made simply to show—

THE COURT: I think they are admissible. (Exception to defendant.)

THE COURT: Is there any denial of the statement of the witness, that these moneys are paid—is there any denial? Do you expect to offer proof to contradict it?

MR. JONES: No.

THE COURT: Then how are you hurt by these papers which the jury would be obliged to accept by his testimony?

MR. JONES: My view is it is not evidence of checks to Chambers.

THE COURT: Aren't they in the case of *Luse v. Jones,* they are the— The court said properly they were part of the res gestae, by which the payments were made.

MR. JONES: That may be so, sir, from one point.

I want to object further that there is no evidence in this case of agency on the part of Harry Felix—

MR. CARR: We will supply that. If you want to insist on that I will prove myself

that I handed that check to Judge Westcott.

MR. JONES: I asked you to prove the payments right up. That is the important feature in this case.

MR. CARR: I am the man that made the payments. Judge Westcott is the man that got it.

MR. JONES: There is a payment of forty cents which perhaps from one point of view may bring it within ninety days, which was made six months after the last substantial payment was made on account of the judgment.

MR. CARR: Is that the particular payment?

MR. JONES: Yes.

MR. CARR: We will prove the circumstances as to that one check.

Q. Mr. Wittenberg, I show you again Exhibit P-5 and I ask you where you got that letter which appears to be a copy instead of an original? A. I got that in Mr. Sloan's office, the attorney of the Maryland Casualty Company at that time.

Q. And how did you come to be in Mr. Sloan's office? A. Mr. Felix and I went there with reference to this matter, and that is where this letter was handed to me.

Q. By whom? A. By Mr. Sloan.

Q. And was it then that he had the conversation with you about the company not being liable? A. Yes.

MR. JONES: I object to that as leading, and ask that the answer be stricken out.

THE COURT: Well, it is leading.

Q. What talk did he have with you at that time?

MR. JONES: I object to that as leading.
THE COURT: Is the same conversation?
MR. CARR: Yes.

Q. Now, I ask you whether or not the compensation of Chambers was included within the estimate of $15,000 appearing upon the schedule of statements, making the compensation for property of policy $15,000?

MR. JONES: Objected to.
THE COURT: Is it in writing?
MR. JONES: No, the schedule—there is no detailed statement on the first page, the policy says it is purely an estimate.
THE COURT: You want to know whether this man, whether the wages of this man was included in the estimate of compensation appearing on the schedule? I see no reason—
MR. JONES: I object as leading and calling for a conclusion and not being the best evidence.
Objection overruled.
(Exception to defendant.)

A. Certainly, everybody in the payroll was included.
Q. Was he on the payroll? A. Yes.

CROSS EXAMINATION BY MR. JONES:

Q. Mr. Wittenberg, were you not mistaken when you said that Mr. Chambers had been working at the plant for two or three weeks?

THE COURT: Three weeks, he said.

A. About three weeks.
Q. Have you your books with you? A. Yes.

Q. Won't you examine the books and see if it is not a fact that he was only in your employ about one week prior to the date of this accident?

MR. CARR: I object to that. It seems that is highly immaterial.

MR. JONES: Will you admit it?

THE WITNESS: I don't know how long he was there.

THE COURT: We won't take the time to have the witness. You may examine him any way you please now.

Q. Is it not a fact that he was only in your employ for one week prior to the accident? A. I was under the impression three weeks.

Q. Might it not have been very much less? A. No; it was more than one week.

Q. Are you sure it was much more than a week? A. I am sure it was more than one week.

Q. Are you sure it was two weeks? A. Well, if I get the papers I could tell you all about it.

MR. CARR: Objected to.

THE COURT: Counsel has the right to ask the question.

Q. You are not certain? A. I haven't looked this up for six or seven years as to the time. I think it is even more than three weeks.

Q. With respect to the work that was being done to that wall, it didn't consist of the digging of a trench on the outside of the building and alongside of the wall? A. No, sir; not the outside.

Q. Did it not consist of the digging of a trench of about a foot to a foot and a half on the inside of the wall below the bottom of the wall? A. We had to straighten—

Q. Answer my question yes or no. A. It was not a trench; no.

Q. Did you not excavate the earth away, dig out the dirt by means of axes and other implements on the inside of the wall? A. About a foot, we had to.

Q. And did you not dig the dirt out on the outside of the building and alongside the wall? A. No, sir.

Q. Sure as to that? A. Positive.

Q. You don't know where Chambers was working when he was hurt, of your own personal knowledge? A. No.

Q. Did not also the work consist of the digging of the earth and shovelling it out from under the foundation wall of the building? A. Shovelling it from under?

Q. Taking it from under the foundation? A. To make room enough—

Q. Answer the question. A. About a foot, foot and a half.

Q. I asked you as to the dirt taken away underneath the wall. A. About a foot.

Q. And did not the work that you were doing consist of making a concrete addition to the wall into the earth; yes or no? A. I cannot say yes or no the way you place that question.

Q. Did you not add to the wall of that building some additional concrete mixture, making a deeper wall for the building? A. We had to repair the wall.

Q. Yes or no, I ask that be stricken out.

THE COURT: Yes. Answer the question.

A. We dug a little sand out.

Q. I am asking yes or no. Did you not, when that work was being done, have an addition added to the foundation wall which consisted of concrete, so that the wall went into the ground a distance of an average of at least a foot deeper than it had been when that work was begun? A. Consisting of stone and cement.

Q. And sand? A. Only the sand in the cement.

Q. And water? A. Yes.

Q. And did not the cement and sand and water and rock make a concrete? A. Yes.

Q. And did not that work begin at one point of the building and continue around the four sides of the building? A. Every three feet in addition.

Q. And as you would complete that addition to the foundation wall for a distance of three feet would you not then skip about three feet and then start another foundation and add to the foundation wall? A. Wherever it was necessary.

Q. Yes, or no? A. Not always.

Q. Did you not in most of the occasions do that? A. Yes.

Q. And then allowing sufficient time for the first piece of your concrete wall to dry and harden would you not then return to where you had left off and then take out the earth underneath the wall and do the same piece of work by adding the concrete wall to the finished or joining point? Yes or no.

MR. CARR: I object to the constant "yes or no." He has no right to insist on a yes or no answer to every one of those questions.

THE COURT: Mr. Jones, it is better not to dictate to the witness.

MR. JONES: Pardon me for that.

Q. After the piece had that added concrete portion—

THE COURT: This witness seems to have some difficulty in understanding the questions. Suppose you extract as small an amount as you think he can carry.

Q. After you had added a section of three feet, would you say, to the original foundation wall of the building, going into the earth for a distance of a foot or a foot and a half, would you not then allow that piece to dry, and then after it had dried and hardened would you not add a piece to the wall adjoining that section? A. Underneath the wall, underneath the foundation wall we strengthened it —

MR. JONES: I ask the answer be stricken out.

THE COURT: Answer the question.

A. The question was how we did it?

THE COURT: No, counsel asked if it was not done in a particular way. If you will listen to the questions—

Q. (Question repeated.) A. Yes.

Q. And then you would skip a section of the wall and do the same work for another strip of three or four feet of foundation? A. Wherever it was necessary.

MR. JONES: I didn't ask for that and ask that it be stricken out.

THE COURT: That is a responsive question.

MR. CARR: He cannot answer otherwise than the truth. He said "we did it where it was necessary. Did not do it in every case.

MR. JONES: This is leading; on cross-examination I am entitled to bring it out.

THE COURT: I think the witness' answer is substantially a proper one.

(Exception to defendant.)

Q. As a matter of fact the walls of each side of the building, had added to them—the long sides I refer to—an addition to the foundation wall, did they not? A. Not alongside of it.

Q. The long side of it, I said. A. Underneath the foundation wall we had to put——

MR. JONES: I ask that it be yes or no.

THE COURT: Yes, I think he may answer yes or no.

Q. (Former question repeated.) As a matter of fact, the walls of each side of the building had added to them—the long sides I refer to—an addition to the foundation wall, did they not?" They went for the whole length of the wall? A. No, sir.

THE COURT: Mr. Wittenberg, wherever you can answer the question "yes" or "no," do so.

BY MR. JONES:

Q. Did the long sides of the building face east and west or north and south? A. North and south.

Q. Now drawing your attention to the north side wall, how much of that wall, in feet, I mean, did you have added to it an addition of the concrete mixture which you have referred to? A. How much of it?

BY THE COURT:

Q. In what distance in feet, did you have the concrete? A. That is the short wall.

Q. Mr. Wittenberg, you are talking about a wall which you say was repaired here. He is asking how much of the wall the concrete did not run along. A. You said the north wall.

BY MR. JONES:

Q. Yes, that is one of the long sides. A. I want to correct that. The two walls run east and west.

Q. Then take the east wall, the east wall how much was repaired of it?

MR JONES: I didn't ask that. I asked how much of the wall did you have added to it, this addition of concrete mixture which you have referred to?

A. About two-thirds of it.

Q. Now take the west wall, how much of that did you have added to it? A. About the same.

Q. Do you know from whom you bought your cement? A. Yes.

Q. You bought it from Mr. French, Race Street, Philadelphia? A. Yes.

Q. Do you know how much cement you used on the job, in bags I mean? A. No, I do not.

Q. There were over two hundred bags of cement used, were there not? A. Positively not.

Q. Have you your books here showing the price paid for the cement?

MR. CARR: Objected to as not cross examination.

THE COURT: Yes; he may answer.

A. The books on that cement?

Q. Yes, your ledger account shows how much you paid to French? A. I don't know whether that ledger will show it.

Q. Your ledger is here? A. Yes.

Q. The main ledger and the Eldora? A. Yes.

Q. And either one or the other will show the expenses paid to French for cement? A. Yes.

Q. Will you please point to that ledger?

MR. CARR: I object.

THE COURT: I am not going to keep this examination going on—

MR. JONES: I want to show the magnitude of this contract.

THE COURT: I understand, but we cannot take the time while the witness goes off and examines his books.

MR. JONES: May I ask that the witness at this point be instructed to examine his books and have the privilege of cross-examing for that purpose? Will you examine your books and be ready to answer that question?

MR. CARR: I object to that. I happen to know this job embraced the cementing the cellar. It is only a waste of time and I am not going to instruct my client unless the court tells me, to examine any further questions.

Q. You purchased some crushed stone for that work, did you not, Mr. Wittenberg? A. Not for that work.

Q. Was there crushed stone purchased for the cellar? A. No, sir.

Q. Flooring? A. No, that was long long afterwards.

Q. At the same time that this wall had added to it these sections which you have spoken of, was not also the cellar dug out and made deeper? A. No, sir; that was long afterwards.

Q. Long afterwards? A. That was done in the winter.

Q. Where did you get the crushed stone from which formed the added portions to the new wall? A. Didn't use any crushed stone. Stone, not crushed stone.

Q. Where did you get the stone from? A. Lots of stone lying around in our yard.

Q. Where did that come from? A. We didn't use much stone. As we chopped pieces out of the wall—

BY THE COURT:

Q. Just tell us where they came from, what you had? A. The stones that we used we chopped out and used them again.

BY MR. JONES:

Q. Where did you chop them from? A. The wall.

Q. Where was the wall? A. The wall was very much thicker than what we put in.

Q. Wasn't there another wall in the cellar? A. Yes.

Q. Did you break down the wall in the cellar to get that stone? A. Yes.

Q. Did you break down the other wall the length of that cellar? A. No.

Q. Weren't there two walls in that cellar? A. Yes.

Q. And they ran lengthwise of the building? A. Yes.

Q. And did you tear down part of one wall and leave holes in it? A. We broke arches in it.

Q. And did you tear down the other wall entirely? A. No.

Q. How much did you tear out of that? A. I don't know how much.

Q. How long was that building? A. Two hundred feet long.

Q. And how wide were these two walls you have referred to in the cellar, portions of which you tore down? A. How wide?

Q. Yes; how wide? A. You mean apart?

Q. No; how thick through? A. About fifteen—eighteen inches.

Q. And how high were they? A. Why, five or six feet, something like that.

Q. Now, what proportion of each wall did you break down? A. Of the small walls we broke down perhaps ten, fifteen, twenty feet.

Q. And how much of the other wall? A Broke in arches.

Q. How many arches did you break through? A. Two, I believe.

Q. Are those walls still in the building? A. The arches, yes.

Q. No; the walls that you didn't tear down. A. The walls we didn't tear down are still in the building, sure.

Q. Now, coming back to this talk with Mr. Sloan, you didn't leave that summons with him at that time, did you? A. I left it with him as soon as I got it.

Q. And with instructions to obtain a New Jersey lawyer, did you, and that was the reason you left it with him? A. That is what he suggested.

Q. And that is the reason you left it with him? A. Yes.

Q. And that Jersey lawyer was to represent you and your wife in that proceeding? A. That Jersey lawyer.

Q. To represent you and your wife or Mrs. Wittenberg alone? A. To take care of the case.

Q. For you and Mrs. Wittenberg? A. Yes; Mrs. Wittenberg.

Q. And Mrs. Wittenberg or you paid him? A. Yes.

Q. Where was Mr. Sloan's office at that time? A. I think it was Fifth and Chestnut.

Q. Where it is today, isn't it, except it is moved from one floor to another? A. That is possible.

Q. He was a general practitioner of the law there? A. That I don't know, I know he represented—

Q. Never mind that. Are you willing to waive all privileges that the law imposes upon Mr. Sloan to testify in this case as to the actual talk you had with him?

THE COURT: You can get that information from him outside if you want it. Mr. Sloan, if he is called, can get this wit-

ness' consent then. It has nothing to do with it now, Mr. Jones.

Q. Did you purchase any gravel for that job?

BY THE COURT:

Q. Did you purchase any gravel for that job; did you or didn't you? A. No; we did not.

BY MR. JONES:

Q. Do you know Mr. Hampton, J. W.? A. Yes.

Q. Did you purchase gravel from Mr. Hampton for that job? A. Not for that job. We purchased thousands of loads for filling up streets back and places.

Q. Wasn't part of it used for the cellar? A. No, sir; not at that time.

Q. It was being hauled there, was it not? A. It has been hauled there—

Q. Wasn't some of it being hauled there that time? A. Possibly; I don't know.

Q. Do you know a man named Creamer? A. Yes.

Q. He did some of the hauling? A. Yes.

Q. And Whilden and Hampton? A. They did all our hauling.

Q. And Bishop was another? A. Yes.

Q. And Heneman and Chambers? A. All those teams done hauling.

Q. And this cement came by railroad and was hauled from the railroad down to your factory? A. Yes.

Q. You had some cinders shipped from your Philadelphia plant, did you not? A. Not for that work.

Q. I didn't ask for that. Were not boards used and driven down into the earth on both sides of the wall to hold the cement in place after it was poured in, or the concrete mixture? A. To this repairing job. No, sir; not that I know of.

Q. How was that concrete mixture held in place underneath the old wall? A. Well, they only took enough sand out to fill it up, that is the way we did it while I was there.

Q. And you have to dig, of course, along side of the added wall or the place where the added wall was to go to give the man chance to work? A. Underneath?

THE COURT: Mr. Jones, is it your theory that it was an addition or alteration?

MR. JONES: That is my theory, sir.

THE COURT: That is your theory that it was added?

MR. JONES: Yes, what the witness states, a new wall.

THE COURT: Do you call that an addition?

MR. JONES: Yes. If your Honor would take the Mechanics' Lien Act you will find the case of *Updike v. Skillman,* which speaks of an alteration or addition as a lateral part of the work. Alterations may be the addition to the foundation.

THE COURT: Go on with your examination.

Q. How was the concrete poured in it, hole dug out in the earth underneath the foundation wall? A. As far as I saw they was putting stones under.

Q. How would they get stone there? A. Shoving the cement there and shoving the stones under.

Q. You couldn't push the stone under without digging a hole alongside of the hole underneath the wall? They dug from alongside the wall, as you say. After they put stone in there how would they put this mixture of cement, water and

sand? A. Naturally shoving it in between the stones.

Q. Both sides? A. No, one side, inside.

Q. Then it wasn't cemented on the outside? A. No.

BY THE COURT:

Q. Mr. Wittenberg, did you use the same stones where the old wall stood or more stones? A. We used the same stones. The wall had been underpinned two or three years, we found that it wasn't right. Then it settled.

Q. What I want to know is whether or not in repairing or adding to this wall you used the same thickness of wall, simply put your material underneath it? A. Dug a little hole under the wall and filled it up so it couldn't settle any more.

Q. Did you make the wall any wider? A. No, sir.

BY MR. JONES:

Q. Do you know what proportion of cement was used to the sand? A. No, I do not.

Q. Wasn't it three to one of cement? A. Possibly; I cannot remember.

Q. It became more or less of a liquid, didn't it, when the sand and cement and water were mixed? A. No, kind of a mortar.

Q. Then the mortar was poured in among this stone? A. Yes.

Q. What would hold the mortar in place? You had a hole alongside of where the wall was to be, what would hold the mortar? A. They filled it up with sand right as they went along. That's the way it was done when I was there.

Q. Now, was there any underpinning done to that wall? A. If you call this repairing underpinning.

Q. I did not ask you that.

MR. JONES: He is always interposing. I ask it be stricken out.

THE COURT: Do you mean was there any bracing to the wall while this was being added?

THE WITNESS: No; it wasn't necessary.

Q. What would hold the wall up after the wall had been dug from underneath it? A. There was such a small hole it held itself up, there was no need of bracing it or putting cement there. They dug a hole under the wall—

THE COURT: You told us about that.

Q. How many men did you have?

BY THE COURT:

Q. Did your own men do this? A. Yes, sir.

Q. You didn't get outside masons to do it? A. No, sir, only the men worked there in the canning factory between times.

BY MR. JONES:

Q. How many men were at work on this wall on September 19th, 1907, the day of the accident? A. I wasn't there; only the men we employed at the factory.

Q. Do you know how many were employed there on that day and on that wall? A. No; I do not.

Q. When had you been to the factory and observed that wall next previous to September 19th? A. The day before.

Q. How many men were then at work on that wall? A. About two or three inside and one outside.

Q. And what was the one outside doing? A. Shovelling sand.

Q. Where? A. The earth that they threw out

the window, half the time wasn't doing anything.

Q. And where this accident occurred was at the corner of the building? A. Yes.

Q. And just a few feet from each corner was a window, is that not so? A. Yes, about three or four feet.

Q. And it was between those two windows, wasn't it, that the wall caved in, is that not so? A. That other one came in afterwards.

Q. I am asking on September 19th? A. I say the other one did happen the next day—

Q. When the one side fell down the other came?

Q. It was kind of caved in when you went there the next day? A. Yes.

Q. And that was a distance of about six feet, was it not? A. About that.

Q. And you found that the wall had been dug underneath the corner A. No. I couldn't see no more, it was filled up.

Q. But it was deeper at the corner than it was at the other point? A. Stone and everything was laying there, I couldn't tell.

Q. And that was the only point where the wall had caved in on September 19th? A. Yes, sir.

Q. After this job was completed you found that your cellar was larger, did you not? A. Larger?

Q. Yes. A. No.

Q. Before this job was started you didn't have a cement floor in the cellar, did you? A. Nor after it was finished either.

Q. Did you put in a cement floor in that cellar? A. In the winter we put that in when we had nothing else to do.

Q. How long after this accident was that?

THE COURT: What has that got to do with it? There must be an end to this examination.

Q. When did this work start? A. Oh, four or six weeks before, perhaps.

Q. I renew my question, when did this work cease? A. You mean the job on the wall?

Q. The general work you were then doing and had been going on four or five weeks before the date of the accident. A. Perhaps six months afterwards. Whenever we had time we worked on it.

Q. So that it carried over a period all told of about eight months? A. From time to time.

Q. And during that period you put in that cement floor in the cellar, did you? A. Afterwards.

Q. I ask if you will frame your answer as taking in that period. A. What period?

Q. Period of eight months. A. That doesn't cover the period of eight months. The repairing was going on from time to time as we had a day, we had time to take the men, every day they kind of worked repairing.

MR. JONES: I ask that the answer be stricken out.

THE COURT: I don't think you ought to let the witness go on and answer the questiin and then find out whether you like it or not.

Q. Was not that cement floor in the cellar put in within a period within four months after the accident?

THE COURT: You said eight months.

Q. Within a period of four months after the accident was not that floor put in the cellar? A. No, longer than that.

Q. Within five months? A. Possibly, yes.

Q. So that it may have been within that period of eight months to which you have testified this

work ran over? A. No, it has not.

Q. It has not?

THE COURT: He says no.

Q. Who was conducting the business at the time of the accident?

MR. CARR: That has been covered.

MR. JONES: I think the time of the issuance of the policy.

A. Which business?

Q. The business at Eldora. A. I was—

BY THE COURT:

Q. Who ran the business?

Q. You did, and who did you run it for, your wife? A. Yes.

BY MR. JONES:

Q. And who ran it at the time the first suit was begun by Chambers? A. Sallie Wittenberg.

Q. Your wife? A. Yes.

Q. These payments were based on what figures, the payments represented by checks which you have produced were based on what figures, Mr. Wittenberg? A. I don't quite understand the question.

Q. How came you to make the payments aggregating, totalling the sums represented by these checks? A. Those payments were made after we employed counsel.

Q. These payments were made on account of what? A. Account of judgment.

Q. Look at the checks. A. I know what the checks are. All paid out to the lawyers.

Q. Do you know the basis of the figures upon which the totals of these figures are based? As a matter of fact, these checks represented the payments on the judgment obtained by Chambers, is that not so? A. Yes.

Q. And the judgment obtained against the Philadelphia Pickling Company, the corporation? A. That's right.

THE COURT: Mr. Carr, isn't there a point here where these checks are inadmissible? The costs that were incident to the suit against Mrs. Wittenberg may be entirely competent but as to those which go beyond that and in the efforts to get collection from the Wittenberg Company, the Pickling Company, how can they be proper?

MR. CARR: If your Honor please, when this case came to me it was my belief that the judgment which was obtained against the Philadelphia Pickling Company, the old nominee, was not a good judgment; that Sallie Wittenberg never having been served with process and the corporation not having come into existence. In order to test out that rule and with the approval of Mr. Sloan, a claim of property was interposed in Cape May County. Execution had been issued—

THE COURT: All these expenses beyond the expense of the suit of the first plaintiff are suits to determine your status under these agreements?

MR. CARR: No, I think not. When finally the suit was brought upon the contract based upon this judgment that case was tried, as the record will disclose, by starting with the judgment recovered in the tort suit, and after it was unpaid and something liable. We attempted to meet that by showing that Sallie Wittenberg had never been served. The Court of Errors finally held that the basis of the contract claim was a valid judgment against Sallie

Wittenberg. But until that time we felt that Sallie Wittenberg had no status to go in court and object to a judgment which was not against her. When that was done we then went into the Supreme Court and asked leave to vacate the original judgment. Since it had been found to be a valid judgment by the Court of Errors in a contract suit. It was then that the court finally dismissed the application. The matter gave everybody a lot of trouble but the Court of Errors finally reached the conclusion that this judgment was a good judgment against Sallie Wittenberg and it was made the basis of the contract suit, and I don't see how we could have done otherwise.

THE COURT: Was that the only basis made—

MR. CARR: Yes, that was the only basis there. First was that Sallie had not been served with process.

THE COURT: Was that the only basis made by the Pickling Company?

MR. CARR: In the contract suit, yes. And the court permitted testimony then to be taken practically to amend the record in the Supreme Court. We could not determine the validity of that judgment against the Philadelphia Pickling Company until we had taken those steps, and the whole thing was done with the knowledge and approval of Mr. Sloan.

MR. JONES: Of course, I object to those statements by counsel in the presence of the jury, because there is absolutely no proof as to the agency of Mr. Sloan.

THE COURT: Yes, and it is not proof as to his approval or disapproval.

MR. JONES: Will your Honor instruct the jury to disregard the statements?

THE COURT: I guess they will after what you and I have said.

Q. I show you an affidavit, Mr. Wittenberg, bearing the signature of Louis Wittenberg and wife, dated July 31st, 1912, before Stella Irvin, Notary Public. Is that your signature? A. Yes.

Q. And that was an affidavit you made in the proceeding of *Chambers v. Philadelphia Pickling Company,* the trade name, under which your wife transacted business, is it not?

THE COURT: Perhaps Mr. Carr will help you out.

MR. CARR: I admit.

Q. And the statements you made in that affidavit are true? A. I suppose so.

Q. They were true when you swore to it? A. Yes.

MR. JONES: I ask that this affidavit be offered in evidence and marked for identification.

THE COURT: Is counsel willing to use a copy instead of original, coming from the Clerk of the Supreme Court?

MR. CARR: Surely.

Affidavit marked D-1 for identification, 11/20/14.

Q. Had the pickling season ceased on September 19th, 1907? A. Not exactly; in September still pickles coming.

Q. Only a few? A. Not very many.

Q. And tomatoes were just about beginning? A. Yes.

Q. So it was a slack period of work? A. Yes.

Q. And this factory had been used before you and your wife had possession of it as a paper factory, had it not? A. So I understood.

Q. Had you ever been in there and seen it at work? A. No, sir.

Q. How long were the walls on the short sides of the building, Mr. Wittenberg? A. Oh, about twenty-five, thirty-five feet.

Q. Might be thirty-five? A. On the short side, you said.

Q. On the short side? A. I hardly think more than thirty.

Q. Thirty—thirty-five?

Q. Well, we will take it on a basis of thirty. That made a total on the sides of 460 feet, is that not so? A. How do you make that out?

Q. You said the long sides were 200 feet deep, each wall is 200 feet long? A. Yes.

Q. That makes 400? A. Yes.

Q. And two sides thirty? A. Makes sixty.

Q. You said how much was the short side? Was one a little shorter than the other? A. Perhaps four or five feet.

Q. Well, it came to 455 feet, then, is that not so? A. I never figured it out. Two hundred feet long—

Q. After this cellar floor had been concreted and cemented you found that you had a deeper cellar than you had before this work had begun, didn't you? A. Not much. About a foot or ten, twelve inches in some places.

Q. Yes, it averaged so it gave you a general average of a foot isn't that so? A. I never figured it out.

Q. And you found that you could use that for storing purposes after that cement floor was put in? A. No, we couldn't.

Q. You found you had more room in the cellar, didn't you? A. Not in that part, no.

Q. I am talking of the entire portion of the cellar. You had more room in the entire cellar after the work was completed than before? A. No, we were operating there three or four years.

Q. I am speaking, Mr. Wittenberg, of the period just before this work begun and the period just after this work was completed.

MR. CARR: What do you mean by "this work", work on the wall?

MR. JONES: Work on the wall and cement floor of the cellar.

MR. CARR: It isn't completed.

Q. When you ceased doing work there you found that you had more room in that cellar than when you began, didn't you? A. We took out some blocks and—

Q. But you took down the walls, too, didn't you? A. Part of it.

Q. And that gave you a great many more cubic feet than you had before the walls were taken down? A. Possibly it did.

Q. You know you had more cubic feet there? A. Yes, we had more than when we began.

Q. And you found your cellar then gave you—did you not, more cubic feet when you had a deeper cellar? A. Yes.

THE COURT: That follows, Mr. Jones.

RE-DIRECT EXAMINATION BY MR. CARR:

Q. Mr. Wittenberg, was your object to repair those walls or was your object to increase the depth of the cellar?

MR. JONES: Objected to as leading and calling for a conclusion.

Q. (Question repeated.)

MR. CARR: The cross-examination has appeared to have for its object the idea—

THE COURT: Mr. Carr, that has been gone all over. He said this wall had gone down and in order to fix it up they commenced to build up on to the foundation.

MR. CARR: No questons, Mr. Wittenberg.

CHRISTOPHER WHILDEN, sworn on behalf of plaintiff.

MR. JONES: I understood from the examination of Mr. Wittenberg that these checks only pertained to the principal of the judgment, so I would like to examine on them.

MR. CARR: We have the books here, we are willing to show every dollar. They will tell a great deal better than Wittenberg.

MR. JONES: I want to find out how much was spent on the contract, that's all.

THE COURT: Mr. Jones, can't you get that more satisfactorily from counsel?

MR. JONES: He may be willing to tell me.

MR. CARR: The exact amount spent in favor of this judgment, $5505.09.

MR. JONES: But there are also checks here on account of expenses and I want to examine Mr. Wittenberg as to what proportion or what checks which have been presented here represent checks on account of the suits.

THE COURT: Are you willing to take counsel's statement of that, Mr. Jones?

MR. JONES: As to what?

THE COURT: As to the fact that he paid?

MR. JONES: Yes, and of this total amount.

THE COURT: The witness has already sworn to $7200; counsel admits that $5505.09 was paid.

MR. CARR: If your Honor please, they were paid in satisfaction of both judgments. That is the amount of the second judgment which included the first with interest.

THE COURT: Is there any other fact that you want?

MR. JONES: I am not willing to take that with your Honor's statement. This man Wittenberg has testified that this was made on account. Mr. Carr now states that $5505 was the amount paid on the judgment itself, as I understand, against the Pickling Company.

THE COURT: The corporation?

MR. JONES: Yes. That's all right. I want to know—there is a difference between the amount they have expended and this $5500 of some sixteen or seventeen hundred dollars. I want to know how much of that was expended to defend this suit, which was the suit on contract.

MR. CARR: I can give you all those figures with explanations.

MR. JONES: Are you willing to admit that none of the checks representing payments for expenses in defending the suit and made by the corporation were made in defending the suit against the trade name? That follows as a matter of fact—

MR. CARR: I don't quite consent to that.

THE COURT: You heard Mr. Carr's statement in answer to the court's question that these expenditures were made necessary

by reason of the fact they contested process of the service in the original suit. I am trying to get you satisfied by not calling this witness back when counsel can give information much more satisfactory.

MR. JONES: It follows as a matter of fact, I think, that these checks drawn by the corporation were not paid in defending the suit against the trade name, because the corporation, as I recall, was not in existence until just about the time the judgment was entered in the suit against the trade name. It was entered January 5th, 1909, I ask that I be afforded the privilege of cross-examining the witness on those points.

THE COURT: Mr. Carr, you can go on with this witness for the present.

DIRECT EXAMINATION BY MR. CARR:

Q. Mr. Whilden, were you working in September, 1907, at Eldora? A. I was.

Q. Who were you working for? A. Wittenberg, I guess.

Q. What was the name of the concern you were working for? A. Philadelphia Pickling Company.

Q. Do you remember the day of the accident to Chambers? A. I do.

Q. Were you working along with Chambers at the time of the accident? A. I was.

Q. What was it happened at that time? A. Well, we were digging on the outside, digging a trench on the outside, we got down as low as the bottom of the wall, stones gave way and came over in the hole.

Q. You mean stone of the wall came over on you or the wall fell outward? A. Yes.

Q. And was Chambers hurt? A. He was.
Q. And what was it hurt him? A. The wall.
Q. The wall struck him, did it? A. Yes.
Q. Pinned him in? A. Pinned him in.

CROSS EXAMINATION BY MR. JONES:

Q. Was Chambers in this trench? A. Yes.
Q. Are you sure there was a trench on the outside of the building? A. I am.
Q. You were in the trench? A. I was.
Q. And that trench extended down about four feet, didn't it? A. About.
Q. And you were there how long on the job? A. I don't know, really.
Q. I mean approximately? A. Probably an hour.
Q. How long had you been working in that building while that work was going on? A. A day.
Q. You had been living in Eldora, had you? A. I had not.
Q. When did you first strike Eldora? A. What do you mean, to work at pickling?
Q. No, I mean when had you first been in Eldora? A. Left right the next day.
Q. When did you first get to Eldora looking for that job? A. Day before that.
Q. Had you been there the day before that? A. Not for a job.
Q. How long was this trench you have spoken of on the outside? A. Probably six feet.
Q. And what was the work they were doing there in the trench? A. I don't know the meaning.
Q. What were they digging the trench for?

MR. CARR: Objected to. This is cross-examination. I don't think this witness was asked anything about that. He was not asked for the purpose of the work.

Q. What kind of work that was being done by you and the other men in that trench and on that wall?

MR. CARR: I object. It is getting a conclusion.

THE COURT: He can tell what kind of work he was doing.

A. I was digging.

Q. Had they poured in any cement or concrete in the trench while you were there? A. They did not.

Q. Did you know about that wall in the cellar that was torn out?

MR. CARR: This is not cross-examination. I don't see what this has to do with it.

MR. JONES: He says he went to work there in the morning of that day and was working on the job, is testifying to the work that was being done. I think that, together with the statement that he was in the trench—

THE COURT: Yes, you may ask him that.

Q. What else were you doing during that day at or around that building? A. My first job was the stone walls. I went to work, helped knockng down parts of them.

Q. Where was that wall located? A. In the cellar.

Q. And how thick was the wall?

MR. CARR: I object. This witness is called to prove the mere fact of the accident itself.

THE COURT: This is competent cross-examination. The witness is asked his employment on that day.

Q. Now, tell us about that wall, won't you? A. I should judge it was about two feet thick.

Q. And how high? A. Probably six feet.

Q. And how long was it, run the entire length of the building? A I don't really know. I don't think it did.

Q. How much did you help in tearing down? A. I did work on about half an hour.

Q. How much of it was then torn down? A. I don't know—

THE COURT: If you are trying to get at things under the guise of examining this witness you might as well stop it.

MR. JONES: He has opened the doors by asking where he was at the time of the accident.

THE COURT: And I have let you go the limit but am not going to let you go unlimitedly.

Q. How much of this wall had been torn down when you arrived at the plant? A. I don't really remember.

Q. In feet, about how many feet long?

THE COURT: If he doesn't remember—

Q. Were there as many as twenty feet torn down? A. I couldn't say.

Q. As many as ten? A. I think there was.

Q. And did you notice whether or not the cellar was being concreted? A. Yes, it was.

Q. Did you help concrete that cellar floor? A. No.

Q. Who was doing that that day? A. I don't know. Don't think anyone was that day.

Q. How much of it was concreted?

MR. CARR: Objected to. This witness is under subpoena on the other side. It is

evidently an attempt to get his direct testimony in by the leading questions.

THE COURT: Mr. Jones, I am inclined to think that is true. This witness has not been called in any sense as to the conditions.

MR. JONES: Your Honor will recall Mr. Carr asked him where he was at work, about the trench?

THE COURT: Yes.

MR. JONES: He was there when Chambers was hurt. I respectfully submit that has opened the doors.

(After argument.)

MR. JONES: May I place the question?

Q. How much of the cellar floor had been concreted or cemented on the day that you were at work at the Philadelphia pickling plant where Chambers was hurt?

MR. CARR: Objected to.

Objection sustained.

Exception to defendant.

Q. Did you see any bags of cement in or around that building on that day?

MR. CARR: Same objection.

THE COURT: Mr. Jones, you don't contend that this bears upon his credibility or the accuracy of what he has testified to?

MR. JONES: I cannot say that in fairness to the witness or to myself. I don't contend that. I contend merely on the rules of evidence.

Objection sustained.

Exception to defendant.

Q. Did you observe any gravel in or around that building on the day you were at work there?

MR. CARR: Same objection.
Objection sustained.
Exception to defendant.

RE-DIRECT EXAMINATION BY MR. CARR:

Q. You are under subpoena from Mr. Jones, are you not? A. Yes. Not for Mr. Jones, I guess.

Q. You are here under subpoena? A. Yes.

Q. By whom?

MR. JONES: Objected to. This is not re-direct examination.

A. The Maryland Casualty Company.

Q. Your expenses are being paid by them?

MR. JONES: Objected to.

THE COURT: I think you are entitled to show his interest.

Q. You are being paid by them, your expenses? A. They are.

RE-CROSS EXAMINATION BY MR. JONES:

Q. And by expenses you mean merely witness fees? A. Yes.

Q. Witness fees per diem and mileage fees paid by law? How much are you being paid? A. Five dollars a day.

RE-RE-DIRECT EXAMINATION BY MR. CARR:

Q. And expenses? A. No.

Q. Meals and railroad fare? A. No.

RE-RE-CROSS EXAMINATION BY MR. JONES:

Q. Where do you live? A. Delmont.

Q. And how far is Delmont from Trenton? A. About ninety miles.

Q. Each way? A. It is.

Q. That makes 180 miles? A. Yes.

MR. JONES: The court will, of course, take judicial notice that he is entitled to mileage and also one dollar a day as witness fee.

HARRY FELIX, sworn on behalf of plaintiff.

DIRECT EXAMINATION BY MR. CARR:

Q. Mr. Felix, are you a lawyer? A. Yes.

Q. A member of the Bar of Pennsylvania? A. Yes.

Q. Mr. Felix, I show you a letter, Exhibit P-5, and I ask you where you first saw that letter, under what circumstances? A. This letter came to me in my hands from Maurice Sloan, of Philadelphia. I don't know whether that was the original letter or not, but in consequence of a telephone conversation--

MR. JONES: I object to that part of the answer.

Q. I have asked you under what circumstances.

MR. JONES: He says he don't know whether it is a copy or not.

THE COURT: Is that the objection, Mr. Jones?

MR. JONES: Yes.

Objection overruled.

(Exception to defendant.)

A. In consequence of a telephone conversation with the Maryland Casualty Company I went with Mr. Wittenberg to Mr. Sloan's office, and it was there that we were given this letter. The conversation at the time I don't remember, but I know I got that letter while Mr. Wittenberg was

there from Mr. Sloan. Whether it was the letter sent to him or copy I don't know. I know at the time I made notation of it, which is there now.

Q. And Exhibit P-5 was in the possession of Mr. Sloan when you called at his office? A. I got it from him.

Q. Now, I show you a check dated April 21st, 1914, to the order of John W. Westcott, for forty cents, signed by Harry Felix, and having passed through the bank as being paid—

MR. JONES: I object to that as calling for a conclusion and as leading.

Q. —and bearing the bank's cancellation mark "paid," and I ask you whether you signed that check? A. I did.

Q. And for what purpose was that check delivered by you to him? A. The check was delivered by me through you for the purpose of turning it over to Judge Westcott.

MR. JONES: I object, as showing on its face it is not responsive.

THE COURT: I don't think it is irresponsive.

MR. JONES: He says it was delivered through Mr. Carr.

A. In order that the judgment against the Philadelphia Pickling Company, or as Mrs. Wittenberg trading under the name, and also the corporation might be satisfied.

Q. Satisfied of record? A. Satisfied of record.

Q. And what was your relation with the Philadelphia Pickling Company at the time you signed the check? A. I was their attorney.

Q. And at whose request or direction did you sign the check and deliver it to me as the counsel of the Pickling Company? A. Request of the Treasurer of the Company, Mr. Louis Wittenberg.

MR. CARR: I want to have the check itself marked.

MR. JONES: I object to that at this time, on the ground—

MR. CARR: All right, I withdraw my offer.

Q. Just one question I overlooked. Did you say whether or not the Casualty Company directed you to go to Sloan in this matter?

MR. JONES: I object to that, as there is no proof of conversation or transaction of any sort by Mr. Felix with the Home Office of the Maryland Casualty Company. If this question is directed to the question of service of summons your honor will remember that the policy requires forwarding to the home office.

Objection overruled.

(Exception to defendant.)

MR. JONES: Unless the foundation is laid, showing agency of the person with whom he had this conversation as our agent and acting under and on behalf of the Maryland Casualty Company, I object that the question would be irrelevant, and incompetent.

THE COURT: This question calls for a yes or no answer.

MR. JONES: Yes or no, but it also calls for a conclusion.

MR. CARR: I will withdraw the question.

Q. Did you have any interview or talk with the office of the Maryland Casualty Company in Philadelphia?

MR. JONES: I object, as indefinite. This is a corporation and unless the proof is directed to some office—

THE COURT: It don't do you a bit of harm

if you talk to a thousand people if you don't tell what he said.

(Exception to defendant.)

A. In consequence of a conversation—

Q. No, the question is whether or not you had any conversation with the insurance people. A. I did.

Q. With whom did you talk? A. I called up over the 'phone the office of the Maryland Casualty Company in Philadelphia and asked for the claim agent and was then directed by the claim agent that we should see Mr. Sloan about the matter. This was in consequence of the general statement made that the company would not take any cognizance of this claim. The matter came to me at the office of the Philadelphia Pickling Company and it was at that office I called up the Maryland Casualty Company and then it was we were directed to Mr. Sloan.

By the Court:

Q. When was this? A. In 1907, immediately after the accident. It must be some time in October, I judge. The end of September or the beginning of October.

Cross Examination by Mr. Jones:

Q. Prior to the receipt by you of the copy of the letter to which you have referred, bearing date October 10th, 1907? A. This was prior to that time.

Q. And you don't know whether this particular paper to which you have referred was the original paper which you received from Sloan or not? A. I don't know.

Q. Do you know whether it was typewritten in your office? A. It was not.

Q. Do you know the basis of the figures upon which this check to which you have referred, in amount forty cents, was paid? A. No, I did not make up the record that was received from Judge Westcott and gone over by Messrs. Wilson & Carr. Never got over the figuring at all.

Q. What previous payments had been made through you? A. You mean on account of—

Q. Of the judgment. A. Oh, yes.

Q. Had you had any figures on previous occasions? A. Yes. The figures in the original instance was given, the total amount. I never got that in my office, and if I received any figures I simply sent their letter down.

Q. And this was inferred to be the final figure? A. In the contract case and the other case also.

Q. And did it pay the amount involved in the contract case? A. It positively did.

Q. Which was greater in amount than the amount in the tort case? A. By reason of the extra costs.

Q. Had you made any calculations as to what was due on the tort judgment on April 21st, 1914? A. No; I had not. I obtained my figures from Mr. Carr. I know that Judge Westcott had refused—

Q. No; I didn't ask you about that, Mr. Felix. Then you did not know whether or not on April 21st, 1914, sufficient moneys had been paid by the Philadelphia Pickling Company to pay the amount of the judgment entered in the tort case with the accrued interest, did you? A. I knew sufficient had not been paid.

Q. Had you been able to calculate that out? A. No; I didn't calculate it out. I knew from the figures that had been received that all the money had not been paid.

Q. In the tort case? A. Both.

Q. I am speaking of the tort case. A. I beg your pardon. Not enough between them.

Q. You have already said that the judgment of the contract case was a good many hundred dollars more than the tort case on account of costs and interest. A. That would be, naturally.

Q. And this was the last item due on the contract judgment? A. On both, because they were both together.

Q. Did it clear the amount involved in the contract judgment? A. Absolutely.

Q. So that that necessarily went to clear a sum greater than the amount due on the tort judgment because you have said the contract judgment was several hundred dollars larger than the tort judgment? A. Yes; I think you are true, but—

Q. That is all I asked.

MR. CARR: I want to offer in evidence a certified copy of the record of the New Jersey Supreme Court in the suit of Walter Chambers, by next friend, Margaret Whilden, vs. the Philadelphia Pickling Company, an action in tort.

MR. CARR: May I ask Mr. Felix a question I had forgotten?

RE-DIRECT EXAMINATION BY MR. CARR:

Q. Has Mr. Sloan been here in the court room this afternoon? A. Mr. Sloan; yes.

BY THE COURT:

Q. Mr. Felix, won't you come back just a moment, please? When you were referred by the Claim Agent to Mr. Sloan, how were you referred, what was said? A. I can only recollect that I called up and asked about the claim and we were told to take it up with Mr. Sloan. That is my recollection of the matter. There may have been a long conversation but I cannot remember.

Q. Were you told anything about any papers of

any kind, as to what disposal should be made of them or just in general terms to take the matter up with him? A. No, sir; just to take the matter up with him.

Q. Was anything said about his relation? A. Yes; that we were to take it up with Mr. Sloan, our attorney, and in our conversation with Mr. Sloan he admitted he was the attorney.

MR. JONES: It does not contain the order. Recites here—

MR. CARR: I am going to stand on the record of the Supreme Court, as certified by them.

MR. JONES: I object to the offer of the copy of the proceedings in the case of Walter Chambers, by next friend, against Philadelphia Pickling Company, being the tort action, on the ground that in this suit the plaintiff at the present time is the Philadelphia Pickling Company, the corporation, the cause of action being based upon a policy or contract of indemnity, which is personal in character and not assignable, and that the plaintiff did not succeed to any rights of the policy of insurance; on the further ground that on its face, under the certification of the clerk, there is a rule discharging the application for a rule entered in March, 1913, missing. I think Mr. Carr is willing to admit that there was such an order.

MR. CARR: You have not admitted anything. I am going to stand on this record under the Statute.

MR. JONES: It is not complete then.

THE COURT: You mean to say that your recollection is there should be another paper there?

MR. JONES: Not recollection, I am positive. There is a rule to show cause which was argued in February, 1913, and the opinion of the court is included in this transcript but the rule entered upon that opinion is not included.

THE COURT: Is that a material omission, assuming that it is?

MR. JONES: There may be some question about it. I want the matter submitted to the court.

THE COURT: I want to know whether in substance you claim there is something there—

MR. JONES: We agreed that it should go in, Mr. Carr and I. We went to the Clerk s office and had the clerk make it up, to go in.

MR. CARR: The clerk said he would not certify anything that did not appear in the files. What actually happened was that the court wrote one opinion in the two cases and one order was ordered on them, and it was filed in the contract suit because it was so entitled. No separate order was entered in the tort suit. I haven't the slightest doubt in the world one order was made to cover both suits. That is exactly the way it appears in the Supreme Court.

THE COURT: It will be received.

(Exception to defendant.)

Received in evidence and marked Exhibit P-7.

MR. CARR: Certified copy of the record in the Supreme Court, Walter Chambers, by next friend, against Philadelphia Pickling Company, an action on contract, is offered in evidence.

MR. JONES: I object to that on the ground that the cause of action on which

the judgment entered in that case is founded upon an action on contract based upon the contract between Sallie Wittenberg and the Philadelphia Pickling Company to which the assured was not a party, and that the judgment entered in that case was not for a loss by the assured for personal bodily injuries to a person accidently suffered while the policy was in force,—by any employee of the assured, while within the factory, shop or yard described in the schedule or upon the sidewalk or other ways immediately adjacent thereto provided for the use of such employees or the public, in and during the operation of the trade or business described in the schedule, and policy of insurance which has been offered in evidence in this case.

THE COURT: I think it would be better, Mr. Jones, to determine these questions at a later stage in the case. Better to let the plaintiff put in all his proofs, then if you are right I can rule upon them as an entirety dealing with the case. If he is right he is entitled to have them in.

MR. JONES: And if your Honor rules against me my exception will be noted?

THE COURT: I will give you an exception now.

(Exception to defendant.)

THE COURT: I merely stated that I thought the better plan would be to rule after the evidence was in.

(Paper referred to received in evidence and marked Exhibit P-8.)

MR. JONES: May I have Mr. Wittenberg called now, while it is in my mind about those checks?

THE COURT: Yes.

LOUIS WITTENBERG, resumes the stand.

BY MR. JONES:

Q. Mr. Wittenberg, I refer you to the checks which have been marked in evidence which do not refer to the payment of the principal or interest on the judgment in the case against the corporation. They represent, as you say, the payments made for expenses in defending the suits. All of the checks signed Philadelphia Pickling Company, Louis Wittenberg, Treasurer, for such expenses, were for expenses in defending the suits in contract brought against the corporation? A. Defending the suit and paying expenses.

Q. Of the suit against the corporation when the checks were signed by you as treasurer of the corporation? A. Which checks do you allude to?

Q. These checks, Mr. Wittenberg. Suppose we run through them by number or date?

MR. CARR: This is an awful waste of time. I am prepared to go on the stand and tell this contract and tort— This witness—

THE COURT: I suggested to counsel that the information would be very much better given by counsel.

MR. JONES: If your Honor will protect me so that I will not be precluded from the statement of this witness.

(Witness withdrawn.)

PAXTON T. SMOOT, sworn on behalf of plaintiff.

DIRECT EXAMINATION BY MR. CARR:

Q. Mr. Smoot, are you a bookkeeper for the Philadelphia Pickling Company? A. Yes.

Q. Did you, at my request, check up a list of the disbursements in the matter of Chambers vs. the Philadelphia Pickling Company from the books of the company? A. Yes.

Q. Did you absolutely verify that item by item? A. I did.

Q. And is this the list which you so compared? A. Yes.

Q. Do you know it to be an accurate list? A. Yes, sir.

Q. How much money was expended altogether in that account according to the books? A. Something like $7,200.

Q. Won't you give me the exact figures, please? A. $7,223.03.

Q. I notice a charge of $200 as a final item advanced by Harry Felix, 3/12/13. Can you explain that item? A. The Philadelphia Pickling Company drew a check on March 12, 1913, for $1,100. Mr. Felix gave me his check in exchange, advancing $200.

Q. What was the amount of the Felix check? A. Amount of his check being $1,300.

Q. Have you here the two checks about which you have just testified? A. Yes; there are the two checks (indicating).

Witness refers to check 3186 of the Philadelphia Pickling Company to the order of Louis Wittenberg for $1100, endorsed by Wittenberg and Felix, and to the check dated March 12th, 1913, check No. 2731 for $1300, to the order of Wilson & Carr, signed Harry Felix, endorsed, "Pay to the order of

Westcott & Westcott, for Walter Chambers, Wilson & Carr."

Q. Are they the two checks that explain that transaction? A. Yes.

Q. I also note a charge of forty cents, the final entry on account. What was that? A. That was a check drawn by Mr. Felix on April 21st, 1914, completing—

MR. JONES: It is quite apparent this witness don't know about Mr. Felix's checks.

Q. Have you seen the checks? A. I have seen the checks; yes.

CROSS EXAMINATION BY MR. JONES:

Q. From where did you get the figures representing $7,223.03. Mr. Smoot? A. Philadelphia Pickling Company's books.

Q. The ledger? A. Yes.

Q. Have you that ledger here? A. Yes.

Q. Did you receive bills representing those payments when the checks were drawn? A. Not always; no.

Q. And you did receive bills in the majority of cases? A. Some of them I received bills for those.

Q. Your checks show each of these items marked "C" as having been drawn by check of the Philadelphia Pickling Company? A. Yes.

Q. Are you sure about that? A. Upon the checks.

Q. Checks for all of these payments?

THE COURT: Does that statement correspond with the checks endorsed here?

MR. CARR: Yes; with the exception that there are a few items, cash disbursements, amounting to about $30.00, like railroad fares, and so forth.

Q. Do you know how much of those charges or payments were made on account of the suit brought by Chambers against the Philadelphia Pickling Company, the corporation, the Pennsylvania corporation? A. I do.

Q. Do you know how much of those charges or how much of those items expended represent the disbursements and counsel fee charged for the two claims of property of the Philadelphia Pickling Company, the corporation, and also the two certiorari proceedings to the Supreme Court? A. I don't know that I quite understand your question. I know which disbursements are for expenditures of lawyers' fees and other expenses entirely separate from what was paid on judgment.

Q. Do those items represent every dollar expended in any of the suits of Chambers or in any of the matters of Chambers against the Philadelphia Pickling Company, the corporation, or in any other matters in which the Philadelphia Pickling Company as a corporation was interested whereon claims of property were made arising out of the judgments in the Chambers suits? A. To the best of my knowledge and belief.

Q. That list is complete? A. To the best of my knowledge and belief.

Q. And all the payments made for counsel fees to Gaskell & Gaskell or to Sloan, or to Wilson, Carr & Stackhouse, or Wilson & Carr, or to Mr. Goldenberg from the years 1908 to date are included in that list, are they not? A. Yes.

Q. And also including any fee that was made to Judge Collins of it was made to him direct? A. As far as I know.

Q. And you have made a careful examination of the books? A. Yes.

Q. Now, then, tell us how much of the items of $7,223.03, excluding the amounts paid on ac-

count of the judgments, were expended for the various services in the various matters in which the Philadelphia Pickling Company, the corporation, was interested. A. I cannot give it to you from memory.

THE COURT: There was a statement he made exactly as to what was paid on judgments.

MR. JONES: He says he can testify.

A. Can I answer it in this way, give you the amount that was paid on the judgment?

THE COURT: How much was the amount on the judgment?

MR. CARR: $5,505.09, admitted to be paid on the judgment.

Q. Now, the difference is something like— A. $1,717.94.

Q. Now, how much of that $1,717.94 represent expenses paid by the Philadelphia Pickling Company, the corporation, or properly charged against the corporation for services in which it was interested as a result of the Chambers suits?

THE COURT: You see the Pickling Company was defendant in a second suit. Counsel wants to know how much of these charges went for that suit?

THE WITNESS: I cannot answer.

THE COURT: You say there were expenses paid for certiorari and for contest of property?

MR. CARR: Two claims of property and two certioraris.

THE COURT: I presume there are some items that are not properly part of this claim. They ought to be ascertained.

MR CARR: It seems to me that I am the person who can answer that.

MR. JONES: That is all.

HARVEY F. CARR, sworn on behalf of plaintiff.

DIRECT EXAMINATION BY JUDGE WESTCOTT:

Q. Mr. Carr, you are the attorney of record in this case, are you? A. Yes; I am.

Q. A member of the firm of Wilson & Carr? A. Yes.

Q. And you are the gentleman who for many years kept me from realizing the judgment? A. I am; yes.

Q. And if you had succeeded in that then this Casualty Company would not have been here as defendant, would they? A. They would not.

Q. Will you please give us your knowledge of the disbursements of the plaintiff's money that came into your hands? A. Yes. There came into the hands of Wilson & Carr for the purposes of the payment of the judgment a total of $5,505.09, exclusive of 40 cents which was paid in April of this year, represented by a check which I think you have. The payments made on account of the judgment were as follows March 12, 1913, $1300; April 14, 1913, $1000; June 16, 1913, $1000; July 11, 1913, $500; August 9, 1913, $500; October 31, 1913, $1205.09, making a total of $5505.09. In addition to that there was the sum of 40 cents paid by check of Mr. Felix, which I delivered to Judge Westcott.

Q. And that is it (handing witness check)? A. Yes, dated April 21, 1914, for 40 cents, which was used for the purpose of satisfying of record the two judgments. In addition to the moneys paid to Westcott & Westcott, there was received by Wilson & Carr a total of $1250.86, represented by checks which have been here produced and marked. Of the sum of $1250.86, $565 went to Wilson & Carr as fees in the matter; $148.40

went to Judge Collins as his fees and expenses; the balance of $537.46 represents sundry disbursements incident to the litigation, such as printers' bills, stenographer's bills, court charges, and the like.

BY THE COURT:

Q. That necessary to the litigation, you say? A. Absolutely necessary to the litigation; yes. $565 covered thirteen days actually in court on practically that number of proceedings.

BY MR. WESTCOTT:

Q. Was the fee a reasonable one? A. The fee was a very reasonable fee.

Q. That paid to Judge Collins, was that a reasonable fee? A. Yes.

Q. Is there anything else you wish to say? A. No; I think that is all.

BY THE COURT:

Q. What were all these other items that have been suggested about contests over claim of property and on certiorari of this proceeding? A. I think I can give you the amounts of them.

Q. There were how many of those contests, Mr. Carr? A. Claims for property? There were two trials, for the first of which, including a retaining fee $50.00 was charged, and for the second, I think $25.00 was the charge. Both of those verdicts were certioraried to the Supreme Court and a charge of $50 each was made in the Supreme Court making a total of $175 applicable to the claim of property and the arguments in the Supreme Court on those claims.

Q. Both of those certioraris taken by you were successful? A. Yes; they were successful. Each time resulted in setting aside the verdict in Cape May County.

CROSS EXAMINATION BY MR. JONES:

Q. There were some printing charges, too? A. Yes.

Q. Can you give me the amounts of the disbursements on the two suits before the jury in Cape May? A. Claim on property?

Q. Yes; and the totals of the amounts for disbursements for printing and so forth before the Supreme Court? A. The first item appears to be $15 stenographer's fee, Mirrows & Mirrows (?). There was a charge of $35, too, Huzinger (?) for printing the book and there was a sheriff's fee, $30 jury. Then there was $12.75 for Mirrow & Mirrow on the second claim of property, reporting the trial and $15 for the case, testimony, and Mr. Huzinger got $35 for printing another book.

Q. Approximately, what were the Clerk's figures? A. They were charged against Judge Westcott.

Q. That makes a total of $142. Now, how much of the charge of $565, less the $175 chargeable for the jury claims of property and the two certiorari proceedings, leaving the balance of $390, was properly chargeable against the suit brought by Chambers against the Philadelphia Pickling Company, the corporation, the contract case? A. All the rest of it.

Q. That was all chargeable to contract? A. Yes.

Q. None of it to the tort? A. No; except this, that at the end of the proceedings, all other hopes having failed, we retained Judge Collins and that was an assault upon the tort proceedings and of course it was overthrown with the contract suit as well, because we got a stay of proceedings in the contract proceedings.

Q. Take the items of disbursement, totalling

$537.46. How much of those, exclusive of $142.75 were properly chargeable against the suit by Chambers against the Philadelphia Pickling Company, the corporation, being an action on contract? A. All, except the item of the last printed book and the Master and Stenographer's fees incident to that, which I could give you. The Commissioner's fees, which included the stenographer's fees, $48.98. The printer's fees were $43.45. They are the only items that we have charged.

By the Court:

Q. That is in the certiorari matter, not in application— A. The tort itself. An application was made to vacate the tort judgment. That was the last step in any proceedings.

Q. And that motion or the application to open the judgment, to vacate the same was argued before the Supreme Court by Judge Collins in February, 1913? A. Yes.

Q. And the court decided the matter—the order was entered on that rule? A. The record itself will show.

By Mr. Jones:

Q. At the time of the entry of the judgment in the tort action you said your firm, the firm of Wilson & Carr appeared for the Philadelphia Pickling Company, did you not, as attorneys of record? A. Yes.

Q. And at that time what was the highest court in this State, Mr. Carr? A. At the time of the entry of the—

Mr. Westcott: I think his Honor knows.

Q. It was the Court of Errors and Appeals, was it not? A. I should say so.

Q. What was the basis upon which the payments on account of the judgments were made?

A. Well, the amount of the judgment with interest and costs on the 12th day of March, 1913, was $5360.74. Of that $359.34 was interest computed from December 9th, 1911, to March 9th, 1913. The difference in interest which accrued between March 12th, 1913, and October 31st, 1913, was $144.35, making the total of $5505.09.

Q. That is $359.34? A. And that went to make up a total of $5360.74 which was due on March 12th, 1913. I said the item of $144.35 was the interest which had accrued between that date and the date of the payment of the last installment, to wit, October 31st, 1913.

Q. You have spoken of the judgment, interests and costs. What judgment, interest and costs did you refer to? A. The judgment on contract for $4816.05, the interest of $84.16, making a total of $4900.21 entered December 19th, 1911.

Q. And that is in the suit against the corporation? A. Yes.

Q. Do you know the amount in dollars and cents which was due on October 31st, 1913, on the judgment entered in the tort action? A. No, I do not.

Q. Considerably less than the amount due on the contract action? A. Must be so.

Q. The tort action didn't go to the Court of Errors and Appeals, did it? A. It did not.

Q. At the time of the entry of the judgment in that case, the defendant was entitled to have a writ of error from the Court of Appeals to the Supreme Court, wasn't it? A. If a proper cause existed; yes.

RE-DIRECT EXAMINATION BY MR. WESTCOTT:

Q. The tort judgment, you say, did not go to the Supreme Court? A. No, did not go to the Court of Errors.

Q. Wasn't the tort judgment lost in the contract judgment? Wasn't the contract judgment suit to recover the tort judgment?

MR. JONES: I object to that, as calling for a legal conclusion and as a matter of law.

THE COURT: I suppose the record discloses it all, does it not?

MR. JONES: Yes; I guess it does.

MR. JONES: I ask at this time **for a nonsuit, on the ground that the action is not brought by the assured in the policy of insurance.**

Secondly, on the ground there is no liability on the part of the defendant to the plaintiff. The contract did not agree to indemnify the plaintiff or anyone other than the assured.

(See *Hillman v. N. Y. State Steel Co.*, 209 Fed. Rep., page 715.)

Of course your Honor is familiar with the questions discussed in the case of *Kupfersmith v. Delaware Ins. Co.*, 80 N. J. L., 191, and I think by *Weinberger v. Agricultural Insurance Co.*, 80 N. J. L., page 202, respecting the personal character of policies of fire insurance, where the mortgagee in assigning the bond and mortgage did not transfer or assign his policy of insurance, and it was held that there was no claim when the loss occurred.

Thirdly, that the plaintiff has not borne the burden of proof which it must bear.

Fourthly, that the plaintiff, to be entitled to recover, must affirmatively prove the compliance with all of the conditions precedent set out in the policy by the assured to be performed, the performance of

which the defendant specified in its answer it intended to contest.

There was no waiver by the defendant of any of the conditions of the policy to be performed by the assured. (Quoting *Orr v. Metropolitan Surety Co.*, 77 N. J. L., page 749; 73 At., 541.)

The plaintiff averred performance of the conditions precedent, generally. The defendant specified in its answer the conditions precedent, the performance of which it intended to contest.

(*Shinn v. Haines*, 21 N. J. L., 340;)

(*Franklin v. Empire Manufacturing Co.*, 72 N. J. L., 58; 60 At., 186.)

As to these conditions precedent, I want your Honor to direct your attention,—if you have a minute—to that case of *Orr v. Metropolitan Surety Co.* and to the policy of insurance in this case. In that case the court distinguishes between the conditions precedent which must be complied with prior to the time of the loss and something which the assured must do after the loss. And Justice Voorhees lays down the law, I think, very frankly. Your Honor wants to bear in mind under this policy of insurance there is no loss so far as our insurance is concerned until the judgment of the court of last resort has been paid in money by the assured. Until that time each and every one of the conditions in that policy of insurance must be specifically complied with and the burden of proof rests upon the plaintiff in the case.

THE COURT: Mr. Jones, don't you distinguish between the court of last resort and a court of last resort? This policy

says, "a court of last resort." I presume this litigation arose in the Circuit Court.

MR. JONES: No, this arose in the Supreme Court.

THE COURT: Did it go up on a Rule to Show Cause?

MR. JONES: No, sir; there was a Rule to Show Cause granted but not prosecuted. It was dismissed on February 16th, 1909, as shown by the order in the transcript which has been offered in evidence. That was filed February 16th, 1909.

THE COURT: Have you any authority on this?

MR. JONES: No, sir.

Fifth: There is no liability on the part of the defendant to pay to the plaintiff any damages as the result of or for bodily injuries to or suffered by Walter Chambers.

Upon the ground that there is lack of proof that the injuries received by Chambers were covered by the policy.

THE COURT: You mean by that you think the case ought to be tried over again here on the merits on the extent of the injuries?

MR. JONES: No. What I mean by that is that the injuries which he received were not covered by the policy, because they were not received while he or the assured were engaged in making ordinary repairs.

Upon the further ground that there is lack of proof that immediate written notice upon the occurrence of the accident, with the fullest information obtainable was given by the assured to the company's Home Office or to the company's authorized Agent.

This accident occurred on September 19th, 1907, and the report of the accident is dated September 22nd, 1907, is not signed by the assured, the trade name of the assured; was received by the defendant September 24th, 1907, and bears date September 22nd, 1907.

THE COURT: That there was some other notice ahead of that?

MR. JONES: No proof of any report of the accident with fullest particulars.

There is one New Jersey case on that. It does not come down to as short a period of time—

THE COURT: How far is that waived by the company?

MR. JONES: The company gave notice when they received this that they would have nothing to do with this.

THE COURT: Yet disclaimed liability on the policy. Wasn't that a waiver of report—

MR. JONES: No, sir. In all the cases—

At this point, the Court adjourned until Monday, November 23rd, 1914, at ten thirty o'clock, A. M.

MONDAY, NOVEMBER 23RD, 1914.

CASE RESUMED.

MR. JONES: On the question as to sufficiency of the immediate notice,—I think that was the last ground of the motion on Friday—I want to call your Honor's attention to the case of *Roumage v. Mechanics Fire Insurance Company,* 13 N. J. Law,

110—where notice of five days was held to be insufficient.

I also want to call your Honor's attention to the well-known cases in this State on the question of filing and recording chattel mortgages, where the Statute refers to immediate recording, and as your Honor well knows, I think there are two or three cases where forty-eight hours have been held to be too late.

THE COURT: What was the hour of this accident? Has it appeared?

MR. CARR: Nine thirty A. M., the 19th. Notice was mailed on the twenty-first.

MR. JONES: **I also base my motion upon the ground that there is a lack of proof that Chambers received his injuries while he or the assured were engaged in making ordinary repairs, under the terms of the policy.**

THE COURT: That was very fully discussed Friday.

MR. JONES: No, I had only touched on that point.

THE COURT: My memory is very much at fault, then.

MR. JONES: I think the Stenographer will bear me out. However, I want to take but a few minutes.

There is one witness called by the plaintiff on that point. Wittenberg is not called on that topic. Wittenberg admits he was not at the plant on the day of this accident.

THE COURT: Testified to the nature of the work being done.

MR. JONES: But not of the character of the work being done by Chambers at the

time of the accident. Under Condition B, I think it is 4, if the accident occurs—if at the time of the accident a person is engaged in that class of work which is forbidden by the policy then there can be no recovery.

THE COURT: Do you contend that these were alterations or additions?

MR. JONES: Yes, I do maintain that, sir, and seriously. Wittenberg's testimony was entirely devoid of a syllable respecting the class of work which was being performed by Chambers or any other employees of the assured on the day of the accident, and at the place or point where this accident occurred and where the wall collapsed; the only testimony in the case is the testimony of Whilden, and Whilden is positive that he was in a trench on the outside of the building, digging the earth, and had come below the foundation wall—and for the purpose, as I recall the testimony—of adding to the wall itself, the foundation wall. And while so at work the corner of that building, from the two windows, one on either side, collapsed and Chambers thereby received his injuries.

THE COURT: Doesn't it appear from the testimony that the purpose of this work was to brace the wall, and practically the main purpose?

MR. JONES: There is no testimony. That is a conclusion.

THE COURT: I say doesn't it appear?

MR. JONES: No, I don't think there is any legal evidence in the case showing that purpose, because Wittenberg himself says

the character of the work being done was the increase in depth of the foundation wall. There isn't a syllable in this case that a particle of that wall was repaired or that a particle of the old wall was taken down and replaced, but the testimony shows that the work was to increase the depth of the foundation wall.

THE COURT: Your argument would go to the point that if any point of the foundation wall was a foot wide in one place and should be in danger of collapse, if they added six inches on it it would not be a repair? Isn't that your contention now?

MR. JONES: In part. I don't think I am held to that.

THE COURT: Pass on to the next.

MR. JONES: I just want to call your Honor's attention to the case of *Updike v. Skillman,* 27 N. J. L., 131-132.

THE COURT: That is a mechanic's lien. They are all against you. The Mechanics' Lien Law recognizes two things; it does not mean that everything that is added on the ground is an addition.

MR. JONES: The Chief Justice says an alteration in a former building, by adding to its height, or to its depth, or to the extent of its interior accommodations is an alteration.

THE COURT: Yes, if you put a story on you are altering—you are making an addition.

MR. JONES: But by adding to its depth, in alterations to a former building, by adding to its height or depth or to the extent of its interior accommodations—

THE COURT: Even though no purpose was served?

MR. JONES: I am willing to take the law as I find it and in construing we must get what is meant by the court.

THE COURT: You cannot take any literal reading of any opinion and expect to find its application to all causes.

MR. JONES: I think your Honor will hold, and what I respectfully submit, is the law, that when the law has been shown by a court in this State as to the meaning of certain words—

THE COURT: I don't think it is worth while to press that argument further. I feel very clear that this is a question for the jury.

MR JONES: Going back to the question of a motion for non-suit.

I urge the motion on the further ground that there is a lack of proof in this case that the repairs were, to use the phrase of the policy, "in and during the operation of the trade or business described in the Schedule in the policy."

Now, what is the trade or business which is described in the schedule of the policy, and which forms part of the policy itself? I refer you now to, I think, statements "4" and "6" of the Schedule, and your Honor will there find clearly set out that the trade or business is that of "manufacturers, dealers and importers of pickles and table condiments and goods of this description." That is in Statement 4. In Statement 6, the operations carried on are those usual to the kind of trade or business described herein" and that is manufacturers, dealers and importers of pickles, table condiments and goods of this description.

I submit that when your Honor is to construe—and I submit it is the court's duty to construe the terms of the policy—and that no such construction can be placed upon the words or phrases of that policy as to cover the character of work which was then being performed by the assured or by this man Chambers,—and for that reason the motion should be granted.

I urge that that character of the work which was then being performed was not contemplated by those terms of the policy.

Now you have had several cases referred to you by Mr. Carr and you will recall the ice case that he referred you to. I think the ice case in itself is sufficient authority for your Honor to grant the motion.

THE COURT: Mr. Jones, the provisions of this policy are against loss imposed by law upon the assured for damages on account of bodily injuries or death accidently suffered while this policy is in force, by any employee while within the factory, shop or yard described in the schedule or upon the sidewalk or other ways immediately adjacent thereto, in and during the operation of the trade or business described in the schedule, including, however, drivers and drivers' helpers mentioned in the Schedule when on duty in the vicinity of the locations designated in the Schedule, subject to the following conditions. Then comes Condition B. "Any person in connection with the making of additions to or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any

building or structure or plant or any part thereof is excepted."

"Ordinary repairs when made by employees of the Assured whose compensation is included in the estimate set forth in the schedule are permitted."

Now can there be any other construction than the one that under the first clause of that form, in the employes, would be entitled to this protection, subject to the conditions that if he is working on alterations or additions he would not be entitled, but in working on ordinary repairs he would?

MR. JONES: Providing your Honor does bring in this last limitation, that it must be in and during the operations of the business described in the schedule. Not only must that employe receive bodily injuries—

THE COURT: It is in the alternative, doing—

MR. JONES: I submit it is not in the business or during the business, if it may be construed by the Court to be in the alternative. I say it is in the operation of the trade or the business,—that is the alternative.

THE COURT: Is this a standard policy or is it one that is prescribed by the company itself?

MR. JONES: It was a standard policy used at that time.

THE COURT: It is not a statutory—

MR. JONES: No, I understand not.

THE COURT: Is it a policy created by law? It is the company's own policy then, is it?

MR. JONES: I have no knowledge positively of that, sir.

I have just extracted from Cooley's Brief on Insurance, his reference to the Ice case and I am going to read that to your Honor (reading).

(*Peoples Ice Co. v. Employees Liability Assurance Corp.*, 161 Mass., 122; 36 N. E., 754.)

I also base my motion upon the ground that the proofs clearly show that the injuries to Chambers were received by him and caused by a person in connection with the making of additions to or alterations in or the construction of a building or structure or plant or in connection with the wrecking or demolition of a building or structure or plant or a part thereof—

THE COURT: That has all been presented.

MR. JONES: I want to base it as a ground.

THE COURT: You don't have to argue that.

MR. JONES: I want to call your Honor's attention to this situation, when considering the meaning of ordinary repairs. The proofs in this case show that the character of the work that was being carried on,—if you are to take the testimony of Wittenberg at all—extended for a period of eight months, began at least six weeks or two months before this accident occurred and extended for a period of about six months thereafter. I submit in view of that state of facts it was not within the terms of the policy, an ordinary repair which was being carried on.

I also base my motion upon the fact that there is a lack of proof that immediate written notice that a claim was made on account of said accident with full particulars was given by the assured to the defendant.

Also upon the ground that there was a lack of proof that the assured did immediately forward to the Company's Home Office every summons or other process as soon as the same had been served upon him, meaning the assured.

On the further ground that there is lack of proof that the plaintiff did immediately forward to the Company's Home Office every summons or process which had been served upon it, in the suits begun by it against Chambers.

I submit that under the case of *Orr v. Metropolitan Surety Company* each of these conditions of the policy are conditions precedent and must be complied with before there can be a recovery, and that the burden still remains upon this plaintiff to show compliance with the conditions of this policy where, as was done in this case, the defendant averred performance of conditions precedent generally, and the defendant sets up in its answer the conditions which it intends to contest and where there is no waiver pleaded in the complaint or amended complaint, and therefore I submit that upon the last two grounds the application for a non-suit should be granted.

I also make my motion based upon the facts that the proofs show the assured or the plaintiff did voluntarily assume liability in the suits begun by Chambers

against his employer, or the plaintiff in suits brought by Chambers against it, and without the written consent of the defendant company first previously given, in curred expense and interfered in the legal proceeding other than for the immediate surgical relief as was imperative at the time of the accident.

Going back to the question of the sending of a summons, I want to direct your attention to the sending of the summons to the Home Office.

THE COURT: Mr. Jones, when the Home Office is told they are to have all communications with the attorneys?

MR. JONES: There is no proof of that. I submit in the proofs—

THE COURT: I certainly supposed I was carrying some of this case in mind. Mr. Felix testifies the Claim Agent of the Home Office.

MR. JONES: No, sir; the Home Office is in Baltimore. I alleged that the defendant is of Baltimore, and furthermore, the policy itself, if your Honor will look at the last page, you will see that it is signed at the Home Office in Baltimore.

THE COURT: I supposed reference was to the Home Office.

MR. JONES: No, sir. No question about Mr. Felix calling at the Philadelphia office.

I base my motion for non-suit further upon the ground that this action or suit has not been brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue.

This suit is brought, since the amended

complaint has been allowed, by the corporation, which is not the assured. The proofs show that the money was not paid by the assured—The proofs show that the money was not paid by the assured in satisfaction of a judgment after trial of the issue. I think this policy, as the leading authorities in this country hold, is a policy of insurance, a policy of indemnity. And we have the right when we set our figures and premiums to take into consideration the financial responsibility, if we so desire, of the assured, and while I personally know nothing about the financial responsibility of the assured, at the time this policy was issued, I have a right to argue that the assured was not financially responsible and having never paid any judgment rendered against it, then there would be no loss which we would have to pay, because, until there is a payment of judgment, there is no loss under this policy of insurance. I respectfully submit that there should be no construction placed upon this policy which would permit an alleged assignment to come in and be permitted as a basis for a cause of action against us.

THE COURT: Where do you find anything in the policy which requires the assured to pay the money?

MR. JONES: For loss actually sustained and paid in money by the assured? Yes, that is to be found in Condition F.

Now it may well be in this case that the corporation—and there is no proof on the record, and I am entitled to argue to the extent which I shall discuss—I have a right to assume that this corporation has

succeeded to the rights of ten or twelve other individuals and that, too, it is on a sound financial basis, and at the time these moneys were paid it was on a sound financial basis, and I have a right to assume and argue that the assured was not on a sound financial basis which would permit it to pay any judgments which had been obtained against it, and it may well be that our premium was based upon the consideration of certain facts which may have come to our knowledge as to the irresponsible financial ability of the assured, and I submit it would not be good law to permit an assignee under those circumstances and conditions to come in and pay a judgment against the assured and then sue us on this policy.

I also base my motion on the ground that this contract is personal in character and is not assignable.

I also base my motion upon the ground that this action is not begun or brought within ninety days after a judgment against the assured by a court of last resort.

I submit, in view of the proofs in this case—referring now to the testimony of Mr. Carr, Mr. Felix, and, I think, Mr. Wittenberg, to the fact that when the amount of money paid on judgments against the corporation had been fully paid—that more than a few hundred dollars had been paid in excess of the amount which had been due on the tort judgment, and I think your Honor will take judicial notice that those few hundred dollars, at least were more than sufficient to pay any interest which

might have accrued on any unpaid amount which might be due on the judgment in the tort action from October 31st, 1913, the date of the last substantial payment testified to, and therefore more than ninety days expired from October 31st, 1913, to the beginning of this action, which I claim to be 186 days.

THE COURT: Mr. Jones, the provision is that it must be brought within ninety days after judgment by a court of last resort has been paid and satisfied.

MR. JONES: Has been paid and satisfied, and I say the payment satisfies the judgment. Now, if in good faith the parties decline to satisfy, which they must under the law—

THE COURT: No, you mean by that it does not apply to a finally entered satisfaction, but it must be in point of satisfaction by the parties in good faith only upon payment of certain sums of money. Is not the burden on the other side to sue it out to have better satisfaction?

MR. JONES: No, sir; I submit no excessive payment which shall be exacted by the judgment debtor, shall form the basis of extending the period of time, but I say if the facts are—and they appear here in this case—if they show that all they could be legally required to pay on that judgment had been paid on October 31st, 1913, this action is barred under the provisions of the policy—

THE COURT: I am not sure that that does not mean the entry of satisfaction.

MR. JONES: If it had been the entry of satisfaction it would have said satisfaction

of record. There is absolutely no question but that it is unnecessary.

THE COURT: You may be right about that.

MR. JONES: There is nothing in the policy which requires any living soul to satisfy the judgment of record.

THE COURT: That would be beyond the control of the assured, if, as a matter of fact, the judgment is paid—must satisfy the judgment.

MR. JONES: Now this judgment which has been satisfied—if my argument is not sufficient to convince on that point—is a judgment which has been entered against not the assured but against the corporation. That is the basis upon which the payments were made and was testified to by Mr. Carr and Mr. Felix and Mr. Smoot, and let me call your Honor's attention to this, that the judgment entered against the corporation was not for injuries covered by that policy; it was on a contractural relationship. It was based absolutely upon another contract of indemnity to which we were not a party.

I also submit that the motion should be granted because the action was not begun within ninety days after a judgment by a court of last resort.

I submit that the usual construction of that clause of the policy means the court of last resort. It has been testified to in this case that the court of last resort in this State at the time of this accident and at the time of these suits was the Court of Errors and Appeals. In this case,—and I am speaking now of the tort action—the

case of the employe against the assured—nothing was attempted to be taken, so far as the proof shows, to the Court of Errors and Appeals of this State. But if my argument on that ground be insufficient, the testimony shows that the cause of action was begun in the Supreme Court and that after that verdict was rendered and before the judgment had been entered they took the legal steps, which they were entitled to take, and procured from the Trial Judge a Rule to Show Cause why that verdict should not be set aside, and the records or evidence of this plaintiff show that they never went to the Supreme Court in order to argue out that rule to show cause, and that my friend, Mr. Westcott, my opposing attorney, made an application to the Court for an order dismissing that rule to show cause for lack of prosecution, which was granted; and therefore I say if it must be a court of last resort that the judgment entered was not by a court of last resort when it was entered upon a verdict had at the Circuit of the Supreme Court issue.

THE COURT: Do you remember where—the question was discussed as to what was the court of last resort in this State? The question was raised on an effort to take a review, you remember, from the Supreme Court to the Court of Errors, by the State in a criminal case. This decision was in 1900, and resting on the Act of 1704, the Court of Appeals in the case by Justice Dixon, recited under that Act "that errors happening in the Supreme Court of this State shall be heard, recti-

fied and determined by the Court of Appeals."

MR. JONES: **I also base my application for non-suit upon the ground that the non-compliance with the conditions precedent and the lack of proof of the performance of the conditions precedent, by the plaintiff or the assured, resulted in a forfeiture of any claim which might be had under this policy.**

Also on the ground that there was a breach of warranty as to Statements "1" and "3" of the Schedule now attached to the policy.

All these schedules, you will find, the assured warranted to be true, upon which, of course, the assured based the issue of the policy itself. You will find the name of the assured is set out as the Philadelphia Pickling Company, and under Statement "3" that it is a Company.

THE COURT: The answer does not say any word of the three specified; it says it is a corporation.

MR. JONES: Yes, but it says—

THE COURT: Isn't the answer ambiguous?

MR. JONES: I think not, sir.

THE COURT: When they are asked to define whether it is one, two or three, they put in four, which may mean one of the two, possibly, and may mean the four. Isn't that very ambiguous?

MR. JONES: If so, then the assured must suffer—

THE COURT: No, the cases are just the other way. If the company insists upon

that as a forfeiture it must ask for failure of action.

MR. JONES: I urge my motion on those lines of course to protect myself. And while this may have been covered more or less in another way **I also urge it upon the ground that Chambers did not receive or suffer the injuries while engaged in and during the operation of the trade or business described in the Schedule, which are named in the policy, "Manufacturers, dealers and importers of Pickles, table condiments and goods of this description."**

Also upon the further ground that there is no proof of loss of money by the assured.

THE COURT: Mr. Jones, isn't it apparent that the whole of this situation, so far as the transfer of the policy is concerned, deal with conditions before the loss is sustained?

MR. JONES: May I ask that your Honor repeat that?

THE COURT: Isn't it quite apparent, or at least isn't it the fact that the condition of the policy with respect to transfers or assignments have to deal wholly with those assignments that are made before any loss occurs?

MR. JONES: With one certain class of assignment. There is that condition in the policy which provides that should any change be made in the title, if the assured is a corporation, or if a firm or individual, a change of title or of ownership shall in like manner terminate this policy, unless such change is consented to by the com-

pany, by an endorsement thereon, signed by its President, one of its Vice-Presidents or its Secretary." That is not the point that is here.

THE COURT: I understand that is not what you are arguing.

MR. JONES: That is not covered by that, sir. But, of course, I do use that condition I in my answer and as the basis for the ground for my motion, with respect to statements "1" and "3," I think, of the policy, as to the name of the assured and whether or not it is a company, individual or partnership.

Cooley recites innumerable cases on the proposition that there can be no loss until the money is paid. I need not go into the discussion of that situation, but just wish to call your Honor's attention to the fact that the policy was to make whole any loss sustained by the assured. There can be no reimbursements when there is no loss to the assured.

I base my motion also upon the ground that the plaintiff cannot recover if the action is based upon an agreement between Sallie Wittenberg and the Philadelphia Pickling Company, the corporation of November 7th, 1908, as that contract did not in and by its terms assign the policy of insurance or any of the rights of action thereunder.

On the further ground that no parol evidence—inasmuch as that agreement of November 7th, 1908, did not by its terms assign the policy of insurance or any claims thereunder—that no parol evidence

can be produced in this case to show any such alleged assignment.

On the further ground that in this case, even though the Court should hold that there was a right to assign the policy of insurance and that the proofs do sustain such a transfer, that the proofs are absolutely devoid of any statement upon which your Honor can hold that there is any assignment of the cause of action or the claim under the policy.

They are two distinct requirements. I do not waive my position as to the transfer. I say there can be no legal transfer and I say there has been none, and no parol evidence can be introduced as to one. But if there has been that assignment of the policy, there has been no proof in this case that there was an assignment of claim thereunder, and on that point I refer your Honor to two cases which bear me out on that point. In both those cases a bond and mortgage had been assigned and the policy of insurance had been delivered over to the assignee and there had been several of those steps before the loss occurred, but there had been no assignment in writing of the policy of insurance. There had been no assignment in writing of the claim.

THE COURT: Isn't it fairly well settled in this State that the choses in action may be assigned?

MR. JONES: How can your Honor reconcile that particular clause of the Practice Act with those two cases? I am standing on those opinions and the Court says in those cases, even if those assignments upon

the bond and mortgage were legal, there was no assignment of the policy. We stand on all fours with the facts in those cases, even if your Honor recognizes the testimony of Wittenberg.

MR. CARR: If your Honor please, Judge Westcott has a case in the Court of Errors; I am very anxious to have him here in this case. I am afraid one consequence of this long discussion will be that I will lose the services of Judge Westcott. I think there ought to be some—

THE COURT: The rule is an hour; you have taken considerably more than an hour altogether.

MR. JONES: Will your Honor allow me to proceed with my motion?

THE COURT: Yes. Mr. Jones, I understood on Friday the whole matter of grounds of the motion were fully presented so far as the grounds themselves were concerned.

MR. JONES: Your Honor will recall I asked you—

THE COURT: You gave me the specific grounds you relied upon. I thought they were all concluded.

MR. JONES: No, sir.

I also move for a non-suit upon the further ground that the proofs show that more than ninety days had expired between the date of the last payment of forty cents claimed to have been made on account of and in satisfaction of the amounts due on any of the judgments entered in favor of Chambers and the date when the present plaintiff, the Philadelphia Pickling Company, the corporation, was made the plaintiff in this action.

THE COURT: What was the date of that payment?

MR. JONES: April something, 1914; April 27th, and the plaintiff came into this case not earlier than November 16th of this year. Suit was begun under the name of the assured on May 5th, 1914, and referred to in the complaint as the assured, which complaint was served pursuant to statute with the summons.

THE COURT: That is not more than ninety days—

MR. JONES: The present plaintiff came into this case on November 16th; the amendment—

THE COURT: The plaintiff is the same, is it not?

MR. JONES: No, sir. My motion—

THE COURT: Please let me get straight. Has there been a change in the name of this plaintiff?

MR. JONES: Yes. So far as the record shows, the plaintiff is the Philadelphia Pickling Company, a Pennsylvania corporation.

THE COURT: What was it in October 14th?

MR. JONES: Philadelphia Pickling Company, the trade name—was Sallie Wittenberg, as I view it.

THE COURT: Was it described as Sallie Wittenberg, trading as—

MR. JONES: Described as the assured under the policy.

THE COURT: I say in the pleading, in the title?

MR. JONES: No, sir—no one.

THE COURT: Then the first action by Chambers was described in the trade name?

MR. JONES: Merely against the Philadelphia Pickling Company and that the judgment was recognized.

THE COURT: State the other grounds.

MR. JONES: That is all.

MR. CARR: If your Honor please, I am at a little disadvantage here. I cannot reply to all of these numerous objections because I think many of them do not require a reply. I don't want to consume an hour and a half as my friend did. If your Honor would indicate the ones on which you desire a reply I would be glad to reply.

THE COURT: What have you to say to the question of immediate notice?

MR. CARR: Well, that is necessarily a question for the jury. The accident itself occurred—

THE COURT: You mean two days cannot be held by the Court to be—

MR. CARR: No, I don't see how they possibly can. There is a case on that subject in this State, of an insurance company case.

THE COURT: Mentioning that two days?

MR. CARR: No, my recollection was the Court held it was a question for the jury whether immediate notice had been given, when I am sure, two or three days had elapsed.

THE COURT: I have no doubt that is a proper question for the jury to say whether that was a reasonable time or not, unless the defendant comes in and shows that he

was injured by the delay, which, of course, he has not done. The question has arisen on a number of cases in this State, where immediate action is required what that immediate action, within what time it must be made.

The next question is as to service of this paper at the Home Office, and the next one I would like to hear you upon is whether or not there is any judgment contemplated by this policy; that is to say, any judgment of the Court of last resort.

MR. CARR: On the question of forwarding process to the Home Office of the Company, I conceive first that the company, having disclaimed all liability; having definitely defined their position, having said, "We will do nothing with this case", were not entitled thereafter to have process forwarded to them, because the only purpose of forwarding a process was so that the company might have the opportunity, if they desired, of defending the suit, but when they previously said, "We disclaim liability", they said, "We will not defend the suit", and they could not at one and the same time say, "We won't defend that suit but we will require you to send to us a summons in a suit in which we have no interest". Certainly that service, the bringing of that summons to Mr. Sloan—who was the attorney of the company with whom Mr. Wittenberg of the Pickling Company had dealings covering a course of years, that he had brought with him all matters, all claims against the company and had been directed by the company's officers so to do, and the fact that Mr. Felix

was directed by the Philadelphia office of the company to go to Sloan in this matter, and the fact that when they got to Sloan in this matter Sloan had a copy of this letter disclosing liability and handed it to Mr. Wittenberg. Now the Company hasn't any right to trap us; they hadn't any right through their agent in Philadelphia to say, "Take this matter to our attorney, Mr. Sloan" and when we get there find out if Mr. Sloan had been previously advised by the company itself of the existence of this claim and of the company's attitude thereon, that they would not defend it. What more could we have done? What more ought we to have done?

On the question of ninety days' appeal I want to ask my friend, Judge Westcott, to reply to that. That provision of the policy must be read in connection with Condition D. Condition D provides that if suit is brought the process shall be sent to the Home Office of the Company so that the company shall have an opportunity to defend the suit, and the company engages that it, the insurance company will, at its own cost, defend such suits. The suit which it is contemplated shall go to a court of last resort is a suit controlled by the insurance company itself and not by the assured. It becomes the duty, if it goes to a court of last resort, not of the assured to take it there but for the insurance company to take it there. Therefore, we say that the company cannot be held to say "because we did not take it to the court of last resort, because we failed in the performance of our contract, therefore we

are not liable." But I go farther than that and I say that clause cannot mean what it is contended by the insurance company it does mean. I say that no court in this state or any other state would hold that the assured must in every instance take a case to the court of last resort whether he had legal ground or legal justification or not before he could recover. I say that what this clause really means when read in connection with Condition D is this: the insurance company says "We will defend at our own cost any suit which may be instituted against the owner of this policy. When that suit is protected by judgment in the court of first instance we may do one of two things, we may pay off and we may take an appeal to the court of last resort, and if we decide upon the latter course we have no control of this litigation, then you cannot bring suit against us, Mr. Assured, because you really have no further interest in the matter, you cannot bring suit against us until we have had this litigated to the court of last resort." That is what that means, that is what that is put in there for. Evidently that cannot say, "we tried this case in the Supreme Court, we go over the record and we find there is no error in the record, we find the case was properly submitted to the jury and that the jury found in accordance with the facts. The Court in making this ruling has committed no legal error, certainly it cannot hold that we are bound to misuse a process of the Court by taking an unfounded appeal and that it becomes our duty to do so before we can recover against the insurance company, and

as the Attorney General suggests to me, especially in view of the fact that the company has repudiated the whole transaction and would have nothing to do with it. I repeat that if this matter was to go to the court of last resort it was the duty of the insurance company and not the assured to take it there, and that this therefore is a complaint that the assured itself has been guilty of violation of its duty and it sets up its own breach in an attempt to defeat the action.

Something was said about paying and satisfaction. As I read that Condition F of the policy I take it to mean the judgment paid and satisfied of record. If it does not mean satisfaction of record the words "and satisfy" mean nothing.

THE COURT: When was the payment of the substantial balance made, how long before April 27th, was that more than 90 days before the suit was brought?

MR. CARR: I think it was.

THE COURT: I am not specially anxious to know about that. I think the proofs on the case have got to be made. Mr. Jones, I want to ask you one question through both of you. If an insurance company puts in this clause requiring that the judgment of a court of last resort shall be had upon a given litigation before it shall be liable and it repudiates the whole litigation, refuses to have anything to do with it and says it will not carry it there, the assured is then required by a judgment against it, him or her to make the payment, assuming there is no ground of a review. Does not that relieve the assured?

MR. JONES: Not at all, sir. My contention to that is this—

THE COURT: Just a moment. The company under this undertakes to make the defense and is presumably the proper one to make the review by the court of reviews; if it fails in its application, in that regard, is the assured to take up its duty and perform it as a condition?

MR. JONES: Yes, that is, under the interpretation of that contract, notwithstanding our disclaimer of 1907, which was before suit was begun, I still maintain that as the law has been laid down, as these contracts have been construed to be contracts of indemnity and that there can be no recovery for a loss until the money has been paid, each and every step provided in the policy is a step precedent before the loss and each and every one of those conditions must be compiled with and the disclaimer does not act as a waiver.

THE COURT: It is not a question of waiver, it is whether or not you are imposing upon the assured the duty upon the insurance company. Your contention is to carry the case to a point where it is reviewed by a higher court. That is your duty, isn't it?

MR. JONES: Yes, it is our duty——

THE COURT: Assume that you don't do that, are you in position to complain of the other party that he does not take up your duty, and in the case where he fails he has no ground or review?

MR. JONES: If he desires to, he is under contract of insurance, he himself must comply with each of the steps which he contracts, this is a contract—

Denial of Motion for Non-suit.

THE COURT: He does not contract to take that.

MR. JONES: We make it as a condition precedent on his part before he can recover. In the Orr case, you will recall that question was discussed.

THE COURT: Let me see it (Reading case) I don't see any provision in this Orr case that calls for the payment nor for a judgment of a court of last resort.

MR. JONES: You asked me as to the burden upon the plaintiff to show compliance on his part with the conditions precedent.

THE COURT: No, I don't. I am asking you whether or not—how you can shift the burden on the plaintiff here to do something that you contracted to do and would not do.

MR. JONES: I did not understand your question. My position is this, that if we did not assume the defense of a suit, before the assured can recover he must take each of the steps provided for in the conditions in the policy to be assumed by him and one of those is to see that the case is carried to the court of last resort and a judgment thereon rendered and paid by him, the assured, and unless he establishes in his case the proofs to substantiate performance on his part of those conditions then they cannot maintain the action. There are cases on that (Citing cases).

THE COURT: **My impression is that I should not non-suit this case. There are a number of questions in it which are closely debatable, and in the interest of a final disposition of the case I think I should refuse a non-suit and let the verdict of the jury**

and all of these questions be submitted to a court of review, if it is desired to do so.

Exception to defendant.

MR. JONES: Mr. Carr, in your pleadings you have referred to the judgment in the tort action as having been entered, $4091.-01. There was a rebate. Are you willing to stand on your pleadings and admit that was the amount?

MR. CARR: I will stand on what the pleadings say.

MR. JONES: I call your attention to paragraph 5 of the amended complaint. Are you willing to stand on those figures?

MR. CARR: I will stand on anything our pleadings say.

MR. JONES: Is it admitted that the corporation was not organized—

MR. CARR: I am not going to admit anything now.

MR. JONES: I now offer in evidence an exemplified copy of the certificate of incorporation of the Philadelphia Pickling Company, organized under the laws of Pennsylvania, which exemplification is made pursuant to the United States Revised Statutes, I think it is Section 906.

Paper received in evidence and marked Exhibit D-2.

MAURICE W. SLOAN, sworn on behalf of Defendant.

DIRECT EXAMINATION BY MR. JONES:

Q. You are a lawyer by profession? A. Yes.

Q. And you practice where? A. In Philadelphia.

Q. And have been practicing how long? A. Since '92.

Q. What has been the character of your business during that period of time, is it restricted? A. No, general practice of law.

Q. And from 1905 to date where has your office been located? A. Drexel Building, ever since I have been in business.

Q. Do you know where the Philadelphia office of the Maryland Casualty Company is? A. I think it is 324 Walnut Street.

Q. And on the same street on which your office is located? A. No.

Q. Do you know Mr. and Mrs. Wittenberg? A. Yes.

Q. Have you met them or either of them in respect to professional work? A. I have acted as their attorney and also in connection with matters for the Maryland Casualty Company.

Q. Calling your attention to the matter of the accident wherein one Chambers received injuries, did you meet him with respect to that Chambers matter? A. I did, yes.

Q. Will you just tell the Court and jury under what circumstances you first met Mr. Wittenberg? A. The Maryland Casualty Company, for whom I was then attorney, sent me a report that Mr. Wittenberg had sent to the Maryland Casualty Company—I presume he had sent—and I took that report and called on Mr. Wittenberg to find out about the accident.

BY THE COURT:

Q. When was this, Mr. Sloan? A. Some time in October or September, 1907. It was shortly after the accident happened, I don't know the exact date. As soon as they reported it it was sent by the Maryland Casualty Company to my office and I could fix it by a letter that I wrote to the Maryland Casualty Company shortly after my interview with Mr. Wittenberg. The accident happened at Eldora, New Jersey, and I went down to Mr. Wittenberg's office on South Second Street to see what was the nature of the accident, and I had a talk there with Mr. Wittenberg. Then Mr. Wittenberg told me that the accident was caused, as I then understood, by the fall of a pile of stones on Chambers and I knew, I was familiar with the Pickling Company's policy, and I asked Mr. Wittenberg to just tell me the nature of the work that was being done, because it was my business to see not only what the accident was but whether or not it was a case covered by the policy. Mr. Wittenberg told me fully about the accident, as he understood it. He said that they were doing a lot of alteration work there, they had taken out or intended to take out a wall in the center of the building; they intended to lower the cellar floor of the building and cement it and to do that they had to put a new wall under the old foundation so as to make the wall long enough to reach to the new level. He told me all they were going to do and that the work would take about six months, as I understood it. After I had my interview with Mr. Wittenberg I came back to my own office and wrote to the Home Office of the Maryland Casualty Company.

Q. Where has that Home Office been located since 1905? A. Baltimore, always. I have represented them I think—I think I was their first

attorney outside of Baltimore. I wrote a letter to the company telling them exactly what Mr. Wittenberg had said and my recollection of that letter—

MR. CARR: I object to that. If you have got that letter it will speak for itself.

A. I think I told the company clearly all Mr. Wittenberg told me.

MR. CARR: Objected to.

THE COURT: I suppose it might be competent to say that he made a report to the company of what he got from Wittenberg.

BY MR. JONES:

Q. I call your attention to a letter of October 2nd, 1907, and ask you if that is the letter you last referred to? A. Yes, that is the letter.

Q. Now, refreshing your recollection by reading that letter, will you please proceed? A. The letter is the best evidence of what I wrote to the company and I wrote that letter to the company asking them, I think it says in that letter whether they would disclaim or what they wanted me to do.

Q. Now, what subsequently passed between you? A. Subsequently I got a letter from the Maryland Casualty Company enclosing a copy of the letter that they had written to Mr. Wittenberg, in which letter they disclaimed liability, that is, in a letter to Mr. Wittenberg they disclaimed liability and they sent me a copy of that letter, and of course when I got that letter of disclaimer I had no further interest in the case. As far as I was concerned, the case was done.

Q. What became of that copy of the letter which you received from the Home Office of the Maryland Casualty Company? A. I won't state

that I still have it, but when I see a copy of it here—

Q. I show you Exhibit P-5. Is that the copy you refer to? A. Yes, I saw it the other day. That is, I presume, a carbon copy of the letter sent to Mr. Wittenberg.

Q. And that is the copy of the letter you received from the Home Office? A. Yes.

Q. And they handed that to Mr. Felix? A. I do not know that I did, but remember discussing the letter with him. I stated I had—

Q. On about the date it appears? A. I don't remember having done that. I had an interview with Mr. Felix. Shortly after I got that letter Mr. Felix came to my office by himself and said he had come there at the request of Mr. Wittenberg, that the company had disclaimed, and I then went over the matter with Mr. Felix.

Q. Was Mr. Felix a lawyer at that time? A. I don't remember whether he was or a student, either one or the other.

Q. And did you advise Mr. Wittenberg that you were out of the matter? A. Mr. Felix came to me and said as the Maryland Casualty Company would not take the matter up, they had disclaimed liability because it was not covered. Mr. Felix asked me if I could take it up for Mr. Wittenberg as attorney for him. He said I was familiar with that kind of work and asked me if I would take it up and if I did that we might share it, and further said if he brought Mr. Wittenberg to me he being a student and not a member of the bar would I give him a certain portion of my fee?

Q. And what date was that? A. Well, that was some time in October, I should say; some time about the week following the date of the letter I received from the Home Office, whatever the date was.

Q. And did you subsequently— A. After my interview with Mr. Felix, Mr. Felix arranged for Mr. Wittenberg to come to my office. Mr. Felix and I discussed the case. I went over the matter of disclaimer; I remember very distinctly we went into why the company disclaimed and why it was not covered; it was not repair work but was alterations that were not covered, and there was much more alterations than ordinary repairs, and I remember advising Mr. Wittenberg at that time as the work was covering a long period and was not covered by his policy he would have to have a rider attached to his policy to cover that class of work. I believe that was afterwards done.

Q. Whom were you representing at that conversation? A. Neither one. Of course, I am attorney now for the Maryland Casualty Company, but so far as the Chambers case was concerned, they had disclaimed and were no longer advised, and so far as Mr. Wittenberg was concerned, asked me to take up the Chambers case.

Q. And did you advise them that you were not representing the Maryland Casualty Company? A. There is no question about that.

Q. Did you subsequently take a retainer from Mr. Wittenberg? A. I did.

Q. And pursuant to that retainer did you receive a compensation? A. I did.

Q. What was the amount? A. I think it was $100. I think it was $25. a day and—

Q. And did you subsequently allow the law clerk or student to have part of your fee? A. I did.

Q. How was that payment made? A. By check.

Q. Have you that check here in court? A. I have.

Q. Will you produce it? A. (Witness produces check).

MR. JONES: I ask that it be marked in evidence.

(Check above referred to received in evidence and marked Exhibit D-3, 11/23/14.

Q. Pursuant to that retainer, what did you do with respect to retaining counsel in New Jersey? A. That was some time in October of 1907. I then took the matter up with Chambers, went to the hospital, tried to settle with Mr. Chambers.

MR. CARR: I object.

THE COURT: Are these part of the expenses that are included in the payments made by Mr. Carr?

MR. JONES: Yes.

THE COURT: I think counsel is entitled to show what services were rendered.

MR. CARR: He is not answering the question.

Q. (Question repeated: "Pursuant to that retainer, what did you do with respect to retaining counsel in New Jersey?") A. Judge Westcott then represented Mr. Chambers.

MR. CARR: I object, if your Honor please.

BY THE COURT:

Q. The question is what did you do about getting counsel? A. I am undertaking to tell—

Q. Just tell us what you did about getting counsel. A. I had an interview with Judge Westcott.

Q. He was counsel on the case? A. He was counsel on the other side, and I arranged—

Q. You don't mean that, Mr. Sloan. A. I arranged with Mr. Gaskell to represent Mr. Wittenberg, and after I had arranged with Judge Gaskell or before I arranged with Judge Gaskell

I took the matter up with Mr. Wittenberg and asked him if I should and he said I should. I arranged with Judge Gaskell, Mr. Wittenberg wrote to me asking what the fees would be and then I wrote to Judge Gaskell asking what his fees would be and suggested to him what I thought was a proper fee under the circumstances and asking if that was satisfactory. He said it was. He wrote to me and I sent his letter to Mr. Wittenberg, and Mr. Wittenberg wrote back, returning the letter, saying that the fees, as arranged, were satisfactory.

Q. Can you give me the date of the letter which you sent to Mr. Wittenberg? A. I have the letters here, I have all of the originals.

Q. May I see the letters you refer to?

THE COURT: Mr. Jones, is there a claim that these fees were not the proper fees?

MR. JONES: No.

THE COURT: Otherwise, is it of any importance?

MR. JONES: Yes. I am bringing out my facts to show Mr. Sloan was not an agent. I am going to substantiate that with the letters.

THE COURT: Is it necessary to load this record up with all these letters?

MR. JONES: I think it is.

THE COURT: Any dispute about it, Mr. Carr?

MR. CARR: Not the slightest.

THE COURT: Then you need not waste time on these.

MR. JONES: Are you willing to admit Mr. Sloan also engaged Gaskell & Gaskell at the request of Mr. Wittenberg?

MR. CARR: Yes.

MR. JONES: And also Mr. Goldenberg, at the request of Mr. Wittenberg?

MR. CARR: I think the suggestion came from Mr. Sloan as to who should be employed, but Mr. Sloan was acting for the Philadelphia Pickling Company in employing the counsel.

THE COURT: That includes all of the counsel he employed?

THE WITNESS: I think I employed Wilson & Carr. I think I employed them all. I have these letters with all the counsel.

MR. JONES: Are you willing to admit Wilson & Carr and Goldenberg were employed at the suggestion of Mr. Sloan?

MR. CARR: Mr. Felix brought the matter to the office, although I think Mr. Sloan was interested.

Q. Have you any letters dealing with the employment of Wilson-Carr and Sloan as counsel in the case? A. I think I have.

Q. Will you produce them?

THE COURT: I still don't see the relevancy—

MR. JONES: Because Mr. Carr admits that whatever Mr. Sloan did was for the Philadelphia Pickling Company and not for the Insurance Company in these phases of the matter.

MR. CARR: Yes, we admit that.

Q. Did you have any discussion relative to the adjustments of the Chambers' claim? A. With whom?

Q. With anyone? A. With Chambers?

Q. With Chambers or Wittenberg or Judge Westcott? A. I had discussion with Judge Westcott, with Chambers, with Mr.—I think I have discussed with reference to settlement with their

attorney in the case and every party connected with it.

Q. On behalf of whom were those discussions made?

MR. CARR: Objected to.

THE COURT: Oh, I think he may tell.

A. On behalf of Mr. Wittenberg and the Insurance Company was not interested.

Q. And on whose suggestion? A. Mr. Wittenberg's.

Q. And at his request? A. At his request.

Q. And since that time you have always been under an annual retainer from the Philadelphia Pickling Company, have you not? A. Yes, Not now.

Q. Well, up to a short time ago? A. Up until Mr. Felix became a member of the Bar, and I think he was made their counsel

Q. Do you remember Mr. Wittenberg calling at your office with the summons in the tort action which was served or issued April 1st, 1908, and served about the 6th of April? A. I don't recall his calling on me. I recall the paper named by you.

Q. You may just state the conversation which took place relative to the summons. A. I don't recall his calling on me. I think he sent me the papers by mail.

Q. Did he send them with a letter? A. I think he did. I won't be positive. What is the date?

Q. April 1st, 1908, and served about the 6th of April. A. I have no letter.

MR. JONES: I call upon the counsel on the other side to produce copy of letter from Mr. Wittenberg, of the Philadelphia Pickling Company to Mr. Sloan, enclosing summons.

A. Mr. Wittenberg may have called upon me; I don't recall it at all.

MR. CARR: I don't know of such a letter. We will look for it. If it was by letter I would have it here, but I have no copy of any such letter.

Q. Referring to the date of issuance of the summons in the tort case, which was April 1st, 1908, when did your employment, by or on behalf of the Maryland Casualty Company, cease, pertaining to the matters of the Chambers accident? A. I had nothing more to do in the Chambers case for the Maryland Casualty Company after they sent me the copy of letter of disclaimer which they had sent to Mr. Wittenberg, I think October 7th. I am not sure.

Q. October 10th? A. From that time on I had nothing more to do with the matter as far as the Maryland Casualty Company was concerned.

Q. Did you so make known your situation to the Wittenbergs? A. They knew as far as the Maryland Casualty Company, it had disclaimed liability; as far as I was concerned, never wrote them any letter, had no interview with them until this letter.

Q. Relative to the 6th of October, 1907 to April 1st, 1908, when did you first receive a retainer from the Wittenberg's or the Philadelphia Pickling Company relative to the Chambers matter? A. I didn't receive any money.

Q. I don't mean money. I mean when were you retained? A. I was retained in October, latter part of October, 1907.

Q. And from that period on you have represented the Wittenbergs or the Philadelphia Pickling Company alone? A. Yes, in connection with this matter, of course.

Q. You have referred to yourself as an attorney for the Maryland Casualty Company. Please tell us what you mean by that? Are you an agent of the company? A. No, in no sense. I am attorney for them.

Q. Are you their legal adviser, do you mean, or have you power of attorney to act for the Company? A. I mean as legal adviser. I think at that time they paid me $2400 a year to act as their attorney, as I was and am attorney for fifteen other casualty companies and their interest is no different from the Maryland Casualty.

Q. And was that made known to the Wittenbergs, that you were attorney for the Maryland Casualty in 1907? A. He knew I was an attorney for the Maryland Casualty.

Q. He knew? A. He knew I was.

Q. And for other companies? A. I don't know whether he did. Mr. Felix did.

Q. And was it for that reason he came to you? A. Mr. Felix was in my office quite a good deal at that time, I believe he was a student in the office of the man who had an office with me.

MR. JONES: I offer in evidence this letter of October 2nd, 1907.

(Letter referred to received in evidence and marked Exhibit D-3a.)

CROSS EXAMINATION BY MR. WESTCOTT:

MR. WESTCOTT: Where is that affidavit you had marked for identification, P-1?

MR. JONES: We want it. You can offer your own in evidence. The Clerk is here if you want any papers, Mr. Westcott.

MR. WESTCOTT: An affidavit was made by Mr. Louis Wittenberg and wife; it seems to me we are entitled to see that.

THE COURT: Was he examined upon it further than to identify it?

MR. JONES: No, for the purpose of identification.

MR. WESTCOTT: We call for it. We will offer it.

MR. JONES: The clerk is here with the original papers if you wish them.

THE COURT: This is a piece in evidence?

MR. JONES: No, sir; it is marked for identification.

MR. WESTCOTT: That paper made by Louis Wittenberg, and we want it.

THE COURT: It was only marked for identification. Do you produce it?

MR. JONES: No, I do not produce it. I produce such papers I want for my case—

BY MR. WESTCOTT:

Q. You say you represent how many insurance companies? A. Sixteen now.

Q. That is your business, representing insurance companies? A. No.

Q. You represent them? A. My business is general practitioner, as you know. You have been retained by me in other cases.

Q. Don't tell me what I know. I don't know anything, practically when dealing with insurance agents.

MR. JONES: I object to the remarks, as irrelevant.

Q. You represent various companies, don't you? A. Yes.

Q. As a lawyer go in court and defend them? A. Yes, I do.

Q. And you represent the defendant in this case? A. I represent the Maryland Casualty Company.

Q. How many years have you represented it? A. I think since 1908.

Q. Continuously? A. Yes.

Q. And you represented them when you represented Mr. Wittenberg didn't you? A. Yes, but not in that Chambers case.

Q. I haven't asked you for any "nots" or "buts." But you represented the Casualty Company at the same moment you represented Mr. Wittenberg, Sallie Wittenberg and the Philadelphia Pickling Company? A. I was representing the Maryland Casualty Company.

Q. Representing them both at the same time? A. That is true.

Q. Are you familiar with the fact that the ethics of the legal profession closes absolutely the mouth of a lawyer to all confidential communications? A. I am familiar with that, yes.

Q. And then, without any permission at all from your client, Mr. Wittenberg, you come here and disclose everything that he gave you in evidence? A. No, now you are wrong.

Q. Have you done it? A. No.

Q. Did you get permission from him to come here and speak?

MR. JONES: One moment. I ask the right to answer a question of that kind.

THE COURT: You may develope it, Mr. Jones.

MR. WESTCOTT: Pardon me, one second. Mr. Sloan, you are a witness now. You are not representing a casualty company.

MR. JONES: I submit that is not proper.

THE WITNESS: I am not here to be insulted by the Attorney General of New Jersey.

THE COURT: Mr. Jones, it is quite true that these remarks between counsel and wit-

ness are improper, but the witness must understand that his position is that of responding to questions. If he has an explanation to make of any testimony given you may—

THE WITNESS: I desire to make an explanation, if you please.

THE COURT: The court says you won't do it.

Q. I repeat and I want an answer to this question; have you had any permission from Mr. Wittenberg or his wife or the Philadelphia Pickling Company to come here and disclose what occurred between you and them, you being their attorney and they your client? Had you had any such permission? A. I have no such permission.

THE WITNESS: May I make an explanation?

THE COURT: The court has cautioned you. The court has cautioned you once. If explanation is desired it may be established by counsel.

Q. Did you see an affidavit made by Louis Wittenberg that was offered or marked for identification here on Friday? A. I did not.

Q. You did not prepare that affidavit? A. I don't know what affidavit you refer to. I was here from about two o'clock Thursday afternoon until court adjourned. I don't recall any affidavit being offered in evidence.

Q. Did Louis Wittenberg or his wife tell you what they had done to apprise the Casualty Company, the defendant in this case, about this accident? A. I would say no they did not.

Q. You knew that Louis Wittenberg and his wife were in Philadelphia? A. I did.

Q. And you knew this accident occurred way down in Cape May County? A. Eldora, wherever that is. I haven't authority as to where it is.

Q. Didn't Louis Wittenberg tell you that as soon as you phoned to him about the occurrence of the accident, he got a blank and sent down there to be filled up? A. He did not.

Q. And didn't he tell you that as soon as that blank was filled out it was forwarded to your company? A. He did not.

Q. Did you ask him about it? A. No, I did not.

Q. Why not, when you were representing him? A. For what purpose?

Q. I say why didn't you, when you were representing him? A. Ask him what?

Q. About these things? A. About what, his notice?

Q. About what steps he had taken to notify your company. A. I had never heard the question of his notice questioned.

Q. Until you got here in court, then you were satisfied that he had fully complied with the terms of the insurance contract in notifying the Casualty Company about the accident? A. As far as I was concerned, yes. I never heard it questioned.

Q. As the attorney of the Casualty Company on one hand, you were satisfied that Mr. Louis Wittenberg had given proper notice to the company of this accident, weren't you? A. So far as I was concerned.

Q. Have you the faintest idea whether notice was given or received? A. As a lawyer, I would consider the notice within time.

Q. You were representing Wittenberg, were you? A. Not then, no.

Q. Well, when did you begin to represent him? A. I represented the Wittenbergs after the company disclaimed liability.

Q. Well, you got enough out of Wittenberg, didn't you to satisfy yourself that the company wasn't liable? A. I don't understand that.

Q. Don't you? You satisfied yourself that the company wasn't liable, didn't you? A. I so wrote to the company was so notified Mr. Wittenberg He then asked me to represent him.

Q. Then you began to represent Mr. Wittenberg? A. I did, after I had ceased my connection, so far as Chambers was concerned with the Maryland Casualty Company and after Mr. Wittenberg knew my opinion that the company was not liable, it was not covered by the policy.

Q. Are you ceasing to represent the Casualty Company now on the witness stand? A. I am not representing the Maryland Casualty Company now on the witness stand; I am telling what is true.

Q. And after you went on the witness stand do you represent the Casualty Company? A. I do.

Q. And after you get off the witness stand do you represent the Casualty Company? A. Yes, and so do you.

Q. But as soon as you got on the witness stand you cease to represent the Casalty Company? A. No. but I do cease to represent the Casualty Company with reference to this case. It makes absolutely no difference to me how the case is decided.

Q. You get your pay just the same? A. Not in this case.

Q. You get pay, except this company? A. Why Judge, you represent the Casualty Company the same as I do, and so do Wilson & Carr, in cases. How can you represent an antagonistic interest?

Q. I am not on the witness stand. A. You are

trying to make capital out of something that amounts to nothing.

Q. I am not on the witness stand but you are.

MR. WESTCOTT: I want to say to your honor that I don't represent the Casualty Company. I don't want to be obliged to get on the witness stand and make that statement under oath but I want to deny what this gentleman says. I don't represent the Casualty Company.

Q. Now, you say that you paid Mr. Felix a check.

MR. WESTCOTT: Would you let me have that check?

MR. JONES: Certainly.

Q. This check is dated December 28th, 1908. Now, when was the Philadelphia Pickling Company incorporated? A. I don't remember. You have the record here in evidence.

Q. Look at that and see when the company was incorporated? A. Seventh day of November, 1908.

Q. You incorporated that company, didn't you? A. Yes, I did.

Q. And you charged $100 for doing it, didn't you? A. I think that was the fee; I won't be sure of that.

Q. And did you give Mr. Felix that check on account of that $100? A. I did not.

Q. What did you give it to him on account of? A. His third of my fee in the Chambers case.

Q. When did you get that? A. I think in December, 1908.

Q. What time in December? A. If Mr. Wittenberg has his books here they would say.

Q. What time in December 1908? A. I can tell you.

Q. When did Wittenberg first come to you? A. I should say in October of 1907.

Q. And he had been calling on you then how long before he gave you a retainer? A. Up until December, 1908, or November. If you will let me look up the letter I can tell you exactly.

FURTHER CROSS EXAMINATION BY MR. CARR:

Q. Mr. Sloan, the accident that you have been testifying about occurred over seven years ago, didn't they? A. You mean the accident to Chambers?

Q. And also the interview with Mr. Wittenberg? A. I believe it happened some time in 1907.

Q. And it was early in October that you saw Mr. Wittenberg, you say? A. It was about a week after I got a copy of the letter from Maryland Casualty Company that they had disclaimed liability. I understand that is dated October 10th.

Q. You mean to say that you had not seen Wittenberg before the letter disclaiming liability came in? A. No.

Q. What do you mean by "no"? A. I testified I saw Mr. Wittenberg after the company sent me notice of the accident. Well, after it happened, then I called upon Mr. Wittenberg and interviewed him as to the nature of the work carried on. He then told me what I told you.

Q. Then you made a report to the company? A. I did.

THE COURT: You mean you reported to the company shortly after you saw Mr. Wittenberg?

THE WITNESS: It is in the letter in evidence. I forget the date.

Q. That was shortly after you had seen Wit-

tenberg, wasn't it? A. I should say the next, or probably that very day.

Q. And in that letter you attempted to report what you regarded as all the essential facts, did you? A. No. I told the company that Mr. Wittenberg had said to me—

Q. Just a moment. In your report to the company you attempted to give them all of Mr. Wittenberg's statements that you regarded as essential in this matter, didn't you? A. No.

Q. Do you mean to say when the company had sent this matter to you for investigation and report that in your report to them you suppressed any facts which you regarded as essential? A. I didn't suppress any fact.

Q. Then you put in your report every fact which Mr. Wittenberg had given you which you regarded as essential? A. No, because my conversation with Mr. Wittenberg probably took half an hour and he explained to me in detail exactly what the work was he was doing and summarized it in my letter. I think my letter says something about a cellar floor.

Q. You reported everything that you considered essential that the company should know, in order that the company might determine whether it was liable or not, didn't you? A. I reported enough to let the company base its opinion upon.

Q. Had you any reason for suppressing any fact which Wittenberg reported to you which you thought was essential that the company should know. A. No.

Q. Then you did report everything that Wittenberg said to you which you regarded as essential? A. No, I didn't Mr. Carr; I summarized in my letter what Mr. Wittenberg said.

BY THE COURT:

Q. Do you mean you did or not make the statements to the company of the substance of the matter which Wittenberg had given you? A. Judge I did make—

Q. I suppose you didn't put it in his language, but the substance of it all, was it given to the company? A. Yes, the essential point of the case was given in the letter.

BY MR. CARR:

Q. Now one of those essential facts that Mr. Wittenberg stated to you, according to your testimony to-day, was that they were digging under the celler wall for the purpose of deepening the cellar, was it? A. He said they were—

THE COURT: Just a moment. We will never get through at that rate. If you will repeat the question—

Q. (Question repeated.) A. I don't know as he stated just in those words—

Q. Did he say that at all at that time?

THE COURT: You are a member of the Bar, and an intelligent man. When you get a question that clearly demands of "yes" or "no", please say so.

Q. (Question repeated.) A. You want to know whether he said the cellar wall was being dug deeper? I would say at that first interview, no, sir, he did not tell me that. I think at the first interview Mr. Wittenberg did not fully know the facts.

Q. When you wrote did Mr. Wittenberg, give you additional information, so you wrote the letter of October 2nd? A. He did, yes.

Q. And did you send that on to the company? A. I did not.

THE COURT: I understood the witness to say there were two interviews before he wrote to the company one very soon after the accident, in which Wittenberg said he would get in touch with the parties and find out about it.

THE WITNESS: I went to see Mr. Wittenberg and had an interview with him right after he reported the accident. He then told me how the accident happened and the nature of the work he was doing, and in my opinion as a lawyer I did not think it was covered and I wrote that letter, in which I stated what Mr. Wittenberg said, and if your honor will look at that letter, I particularly said "the facts are not on my own knowledge but what I derived from Mr. Wittenberg." Subsequent to that letter, I had another interview with Mr. Wittenberg, in which he elaborated on the facts.

THE COURT: You had two interviews?

THE WITNESS: I had a number, Judge.

THE COURT: I mean before this letter was written?

THE WITNESS: Yes.

THE COURT: Another one before it?

THE WITNESS: Yes.

THE COURT: I understood you to say that he first saw you shortly after the accident when he didn't have the information.

THE WITNESS: I think your honor misunderstood me. If you did, it certainly is not in accordance with the fact. My recollection is I didn't say it. I think the notes will show.

BY MR. CARR:

Q. Weren't you requested, after the regular accident report had been received on the company's

form to see Wittenberg and ascertain from him the facts in greater detail? A. Than appeared on the form?

Q. Yes. A. Yes.

Q. And so in consequence of that request, you went down and saw him and made a report to the company in your letter of October 2nd, 1907, Exhibit D-3? A. Yes, that is what I said.

Q. And do you mean to say that he didn't then tell you that they were deepening the cellar? A. I say at that time Mr. Wittenberg told me they were deepening the cellar.

Q. Then you had that information before you when you wrote the letter of October 2nd? A. I would say I did, yes.

Q. Won't you tell me how you came to omit that from your report? A. Mr. Carr, I had an interview with Mr. Wittenberg that took, I suppose, an hour. In that interview he told me all the details, the removing of the wall from the center of the building, deepening the cellar to a greater depth, and recementing the entire cellar floor. He told me of the concrete he had there, whatever you call it, cementing, all the detail of the work he was then doing and what he proposed to do and the plans he had to alter the building, but I put in that letter what I thought was the essential feature, so far as the liability was concerned, without going into a long detail of the entire concern.

Q. Then, at that moment you did not consider it an essential feature that the cellar was being deepened and alterations made to the building? A. No, I considered that just as essential as the digging of the cellar or cementing of the cellar, but as I said in my letter, summarized it to alterations and additions and not in the nature of repairs. I think I covered all that the company

wanted me to cover. I think you will find that in their notice to cover.

Q. Suppose you show it to me. A. I don't get one cent out of the case.

Q. Point out to me where you state in your letter that these were alterations going on and not repairs. A. I didn't say that; I said I pointed out enough to show the company what the nature of the work was, and I will read exactly what I wrote on October 2nd, 1907.

MR. CARR: Never mind, Mr. Jones can read that.

Q. You have brought here all of the correspondence you could, by you with the Philadelphia Pickling Company? A. Referring to this matter, I have. I have not hunted for it, Mr. Carr. I picked up on Friday or Thursday night. I was telephoned at my house and requested to bring it to court Friday morning, much to my disgust, and I picked up this envelope and brought them here.

Q. Just please say yes or no. A. I couldn't say that.

THE WITNESS: If the court please, I brought the papers in my files, 1115-1239. I would say that covered all the letters in the matter; that they ought to be on file there.

THE COURT: We want to go on with the examination. Wherever counsel asks you a question that can be answered yes or no, do so. These questions are clearly specific of a yes or no answer.

Q. You did not pay Felix the money until you got it, did you, from Wittenberg? A. I did not.

Q. Was there anything improper in making this payment to Felix? A. None whatever.

Q. All the moneys that were paid you were paid by check, were they not, by the Philadelphia Pickling Company? A. I am not sure about that. Your records would show.

Q. Isn't it a fact that the exact amount paid to you in this case was $54.50, paid on December 9th, 1908? A. No, that is not the fact.

Q. Suppose you tell me when and how the payment of $100 was made to you. A. Well, I could not give you the dates but I know that $25 was paid at one time, $25 another and $50 at another time up to January, 1909. And from then on I think I was paid $25. every three months. In other words, I had an annual retainer of $100 a year to cover all and represent the Philadelphia Pickling Company.

Q. Don't you know this fee for incorporating the company had just come in before December 20th, 1908, fee of $100? A. I don't know when the fee of $100 for incorporating the company came in, but in that Mr. Felix was not interested.

Q. And do you say the exact amount then you received from the Pickling Company for services in this matter was just $100, outside of the incorporation fees? A. I would say it was $150, if I remember.

Q. You were attempting to give him a third? A. I gave him a third at that time.

Q. You were attempting to give him a third of the fee? A. And from January 1st, 1909 I was on an annual retainer.

Q. Weren't you attempting to give him a third of the fee? A. Yes, that is what I did.

Q. Were you attempting to give him a third of the whole fee? A. At that time, yes. Whenever the bargain was made with Felix.

Q. Whenever it was, was it that he was to have one-third of the entire fee? A. That was the

arrangement. One-third of the fee that I had in the Chambers case, he having brought the case to me.

Q. You had not received the fees then, had you, when this bargain was made? A. I had not received anything.

Q. Was Mr. Felix to have one-third of your entire fee? A. That is right.

Q. And your statement now is that instead of giving him one-third of the entire fee, you gave him one-third of $100? A. I gave him one-third of my fee of $100. After January first they asked me to go on an annual retainer and I did nothing for them, for that last six months, and during that period they paid me $50, except what work I did in the Chambers case. I did not think Mr. Felix was entitled to anything out of that.

Q. I still do not understand whether you did or did not get a fee of $150 in the Chambers matter. A. I get a fee of $100 in the Chambers case.

Q. You didn't get a fee of $150 in the Chambers case?

BY THE COURT:

Q. Did you or didn't you? A. Answer yes or no. A. I cannot.

Q. Then say you don't understand it. And you say you cannot answer that yes or no? A. I can say no.

Q. Why didn't you say that long ago? A. It isn't a truthful answer. I never had a court ask me a question quite like that in my life.

Q. Do you understand your position here? You are a witness on the stand? A. I do.

Q. You position is to answer questions in accordance with the questions of the court? A. I appreciate that.

Q. I don't want any other attitude in this case. Now do you say you cannot answer truthfully no?

A. Every question I have answered is truthful.

Q. I mean you say you cannot answer the last question truthfully when you say no? A. When I say no it does not answer the question so it it is sufficient to cover the facts, that is what I would say. I have already explained so. There is no use explaining the second time.

BY MR. CARR:

Q. One other question, Mr. Sloan. Exhibit P-5, being a copy of the Maydwell letter, wasn't that made in your office? A. It was not.

Q. You are positive about that? A. It has been since 1907.

Q. Are you positive about that? A. I would say no it was not. I cannot say whether that is—I know it is an exact copy of a letter that was sent to me by the Maryland Casualty Company. I would say it was a copy of the letter sent to me. It was never made by my request or any of my stenographers in my office, I know.

Q. I show you a letter dated September 11th, 1907, on the letterhead of Maurice W. Sloan, Philadelphia Pickling Company, and ask you whether that came from your office? A. That came from my office, without any doubt.

MR. CARR: I want that marked for identification, for the purpose of comparison.

(Marked Exhibit P-8a for Identification.)

RE-DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Sloan, are you on a retainer or acting as attorney for the Maryland Casualty Company in this particular case? A. I am not.

Q. Have you been acting or been under a retainer with the Maryland Casualty Company with respect to this present case? A. I have not.

Q. Then you have no interest in this case and of what—

MR. CARR: Is this supposed to be re-direct examination? Counsel is now asking leading questions.

Question withdrawn.

Q. What connection or what work have you performed in this case, either directly for me as the attorney for the defendant or indirectly for my benefit in this case, or for the benefit of the Maryland Casualty Company, either directly or indirectly? A. No work whatever.

Q. When did you first have communication, either directly or indirectly with me, if any, either in this matter or any other matter? A. Mr. Jones you I never met in this case or any other case until last Thursday.

Q. What correspondence, if any, have you had from me relative to this matter or any other matter? A. Never any.

Q. When was the first occasion when you personally met me either in this matter or in any other matter? A. I first met you on Friday.

Q. Friday of last week? A. Yes; then you were taking lunch at the Trenton House in one room and I was taking lunch in the other and they asked me if I would not go over and see you.

Q. Do you know, of your own knowledge, whether or not either Mr. Westcott, one of the attorneys opposing me, or Mr. Carr has appeared for the attorney for the Maryland Casualty Company?

MR. CARR: I object to that as irrelevant.

MR. JONES: It was brought out in the case.

Objection sustained.

Q. Please state the privileged communication affecting the plaintiff in this case, or the Witten-

bergs, which you have disclosed during your testimony—

MR. CARR: Objected to.

Objection sustained.

THE COURT: Mr. Jones, if the purpose is to get from the witness an explanation of why he gave information on the stand of the communications between himself and his clients, I think you may do so, but the last question, asking him to disclose all the communications he has had with the plaintiff—

MR. JONES: Those which he had disclosed as a witness.

THE COURT: He has told us those.

MR. JONES: I don't consider that he has.

THE COURT: If he hasn't he is giving those that he has disclosed.

Q. Will you please explain how you came to testify as to the facts concerning which you have testified as a witness in this case?

MR. CARR: Objected to.

THE COURT: Objection sustained. That does not reach the question which the court suggests. If you want him to explain why he gave the testimony here concerning statements made to him by Wittenberg, I think you have a right to do it, they being his clients at the time.

Q. Will you please state how you came to state or give any statements made to you by the Wittenbergs or the Philadelphia Pickling Company? A. Mr. Jones, I didn't give any statements of the Wittenbergs to me or from me to the Wittenbergs, or did I disclose any letter of the Wittenbergs to me or mine to them while I represented the Wittenbergs. My conversation related to

the time prior to that, when I represented the Maryland Casualty Company, and I was very careful of my professional duty as a lawyer and I have not even disclosed to you any of these letters, nor have I talked with you about the case, so that you haven't the faintest idea about what information I have. I think I have as high an idea of professional ethics as any member of this Bar or any other Bar.

Q. Do you know, of your own knowledge, as to whether or not it is a matter of general practice for members of the Bar who appear on behalf of insurance companies to also appear on behalf of general litigants or clients?

MR. CARR: Objected to as immaterial and irrelevant.

THE COURT: He may answer it.

A. I would say that is the practice. I have personal experience of a number of lawyers at the Philadelphia Bar.

Q. Have you any knowledge as to the practice of the members of the Bar of New Jersey?

THE COURT: I suppose we can take general cognizance that members of the Bar are open to all kinds of litigation that comes to them.

Q. Would your answer be yes to that? A. Yes.

Q. Can you name any such members of the Bar of the State of New Jersey?

THE COURT: I think the court will take notice of that.

MR. JONES: So much has been made about that I think I am entitled to bring it out. The innuendo of examining counsel was that of representing both sides at the same time. If your honor don't wish that question pressed—

Question withdrawn.

LOUIS WITTENBERG, recalled, on behalf of the defendant:

DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Wittenberg, you, on behalf of Mrs. Wittenberg, had prior to 1906, taken out numerous policies of insurance, had you not, covering her business affairs? A. Yes.

Q. And you have done so since, and also on behalf of the corporation? A. Yes.

Q. And do you know Mr. Castlebaum, of Philadelphia? A. Yes.

Q. He is a personal friend of yours? A. He is our insurance broker.

Q. And he did your business for you in 1906? A. As far as I can remember, yes.

Q. And in what companies do you now carry insurance?

MR. CARR: Objected to as immaterial and irrelevant.

THE COURT: I don't think that has any bearing now, has it?

No Cross Examination.

WALTER S. HAND, sworn on behalf of defendant:

DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Hand, where do you reside? A. Delmont.

Q. On September 19th, 1907, where were you employed? A. Working for the Philadelphia Pickling Company, at Eldora.

Q. Where were you employed, the Eldora plant? A. I was working at the Eldora plant.

Q. And do you remember when Chambers received his injuries? A. I do.

Q. Won't you tell us just where Chambers was located when at work at the time when he received his injuries? A Well, he was working on the outside of the building; we was undermining the wall.

Q. What do you mean by outside of the building? A. Well, he was building a trench on the outside at the bottom of the old wall.

Q. Relative to the foundation wall where was this trench, on the outside? Was it alongside? A. Yes, it was alongside of the wall.

Q. And how deep was the trench when Chambers received his injuries? A. I should say two feet, two foot and a half.

Q. Had it reached the point where the bottom of the foundation wall touched the earth? A. Just about reached that point.

Q. What about the inside, who was working there? A. I was.

Q. What were you doing on the inside? A. I was undermining the wall.

Q. Was there a trench on the inside? A. Well, not what you might call a trench; we was digging out on a level on the inside.

Q. How far, relative to the corner of the building, was Chambers located? A. You mean how far from the corner?

Q. Yes. A. I cannot say. About four feet, a little more, maybe.

THE COURT: I suppose this is intended to show the nature of the work done?

MR. JONES: Yes.

THE COURT: Mr. Carr, wouldn't the amendment show the whole of the pleadings in this case? I presume that this suit was originally brought in the name of the Philadelphia Pickling Company?

MR. CARR: It was.

THE COURT: That was the intention?

MR. CARR: Yes that was the fact; we were—

THE COURT: I am only asking because I think it is the abiding of the situation.

MR. CARR: I beg your pardon. We were retained by the Philadelphia Pickling Company, the corporation, to prosecute this suit, and the suit was brought on their behalf.

THE COURT: Mr. Jones, go on with your witness.

Q. What was the character of the work which was being done upon or affecting the foundation wall of the building?

MR. CARR: I object to that. I object to to the witness designating the character of the work.

Q. What was the kind of work that was being done?

MR. CARR: Same objection.

THE COURT: Where the question is purely one of determination by jury, I think the witness should simply state facts.

Q. Please state the work which was being done upon or around or near the wall of the building of the Philadelphia Pickling Company? A. We was undermining the old wall, making it deeper and putting in the cellar floor.

Q. How much deeper were you making the foundation wall? A. At that point, about two or two and a half feet.

Q. How much of the entire foundation wall of the building was being made deeper during those operations? A. Well, I cannot say exactly; I don't know.

Q. Well, approximately. A. Sixty feet or more,

Q. Sixty feet on each side or sides? A. Well, I don't know how to answer; I don't know.

Q. There were four sides of the building? A Two sides and one corner.

Q. How much of those sides and how much of the corner was being made deeper? I mean with respect to the foundation wall. A. Probably, the sides were sixty feet; I am not sure of that.

Q. That would be one of the long sides. Was one of the short sides being made deeper too? A. Across the end.

Q. And how many feet in length, about, along that short side? A. Twenty-five, thirty feet.

Q. How about the other two sides, were they being made deeper, too? A. Not at that time.

Q. Were they subsequently made deeper? A. They were, after the canning season.

Q. And how much of each of those sides had their foundation walls made deeper? A. I couldn't say to that; I didn't work on that part.

Q. Did you see any of it being made deeper? A. Yes.

Q. And how much of it did you see made deeper? A. Seventy or seventy-five feet.

Q. On the long side? A. Yes.

Q. And how much on the short side? A. About thirty.

Q. That would make it all told about two hundred feet in length which were made deeper during the course of those operations, is that right?

MR. CARR: Objected to as leading.

THE COURT: It is leading, but I suppose it is mechanical.

Q. Were these walls undermined?

MR. CARR: Objected to as leading.

Q. How were the walls undermined, as you have stated? A. Why, we dug out underneath of the old wall.

Q. And what supports, if any, were then placed under the wall or portions of the wall after they were undermined? A. We placed in stones and ran in cement well into the stone, and cement was placed in.

Q. Was there anything in the line of underpinning? A. There was not.

Q. From where the stone and cement—was that of a mixture? A. It was.

Q. And what did the mixture consist of? A. Sand and cement.

Q. And stone and water? A. Stones and water.

Q. How much of that mixture was placed under the foundation wall which had been undermined—I mean how much in depth? A. You mean how much the depth of the old wall?

Q. No, the new wall. A. Well, I should say we ran from a foot and a half to two feet.

Q. How was that mixture placed under the old wall. A. Well, we put stone in, boarded it on the outside, run the cement in the stones, shored it up like.

Q. And then it was allowed to harden, wasn't it? A. Yes.

Q. And did you work along the entire length of the side of the wall or how did you work? A We put in sections; we would take two of the sections, skip until that got hard—go back to it.

Q. Then would go up a little further. What work was done in the cellar at the same time these operations affecting the foundation wall were carried on? A. They were knocking out another stone wall, worked underneath and knocked it out.

Q. Underneath what? A. The main floor of the building.

Q. Where were those walls located?

MR. CARR: Objected to; Chambers was not injured at this work.

THE COURT: Was this all being done at the same time?

MR. CARR: It was.

THE COURT: It is competent.

Q. Where were those walls located? A. In the center of the floor.

Q. Above the cellar or beneath? A. Beneath.

Q. And what was the length of each of those two walls?

MR. CARR: Objected to. I cannot see the possible relevancy of that. If that other work was an operation it would certainly not relieve the company from an accident related to another cause.

THE COURT: I apprehend the question, Mr. Carr, is whether or not the work Chambers was doing was part of the operations or part of a repair. I think the examination is entirely competent.

Exception to Plaintiff.

Q. What was the length of each of these two walls? A. They was the same length of the building, don't know just what the length of the building was.

Q. Was it over seventy feet? A. I don't know. I never measured it, never heard anyone say.

Q. Do you know whether or not it was over fifty feet? A. I should judge it was.

Q. How deep were those walls? A Same depth outside walls, about four feet.

Q. From the second floor to the cellar, how deep? A. About four feet, I expect.

Q. And what was the thickness of those walls? A. Probably fifteen, sixteen inches.

Q. How much of those walls were torn down during those operations? A. One whole wall was torn down and another torn down in places leaving arches.

Q. How wide were these arches? A. Three or four feet.

Q. How high? A. Same as the wall.

Q. What was done with these stones after forming part of the stone wall after torn down? A. Placed underneath the new wall.

Q. How much of those walls were being torn down the day Chambers was hurt? A. Just one corner where he got hurt.

Q. I mean the walls supporting the cellar. A. About eight feet.

Q. How much earth had been dug from underneath the wall of the foundation where Chambers was hurt? A. Two and a half feet.

Q. What portion of the wall collapsed at the point where Chambers was hurt? A. Right next to the arch.

Q. Was it on each side of the corner? A. One side, side of the building.

Q. What have you to say whether or not there were or were not any openings in the wall near the corner where Chambers was hurt? A. Was no opening at that time.

Q. I mean window. A. There was windows there.

Q. How far from the corner was the window located? A. I should judge four feet.

Q. And where was Chambers at work when he was hurt, relative to that particular window? A. He was about midway, I should think, half way.

Q. Between what? A. Between the window and the end.

Q. As affecting the point where the window was located, what portion of the wall fell down where Chambers was hurt? A. It all fell down on that corner.

Q. What do you mean from the corner to the window? A. From the corner of the window to the corner of the building.

Q. (By the Court.) What length was that? A. I should judge about four, four and a half feet.

By Mr. Jones:

Q. What have you to say as to whether or not the wall which fell down and which had been undermined two or two and a half feet had or had not any underpinning? A. It had no underpinning.

Q. And what have you to say whether there was or was not any portion of the old wall taken down during those operations? A. I don't understand it.

Q. Was any of the old wall taken down or was the wall, a new wall put underneath? A. New wall was put underneath, excepting some of the stone would fall out when we was undermining.

Q. How much would fall out? A. Not very much. There had another kind put out while was working there.

Q. That was after you undermined it? A. Yes.

Q. What have you to say as to whether or not during these operations the old foundation walls,

as you found them before the operations were begun, were or were not raised in height, I mean the walls themselves, were they raised up? A. They was not.

Q. They retained their same position? A. They did.

Q. How many men were at work on this job on the day Chambers was hurt? A. I don't know; six or seven.

Q. How long prior to the day that Chambers was hurt had these operations being running or been continued? A. Well, I had been at work there about four weeks, don't know how much before.

Q. During that period of four weeks how much of the time did you spend on these operations effecting the walls? A. Nearly all the time. Maybe would be there sometimes for an hour or two, and doing something else.

Q. And after the date that Chambers was hurt for how long a period of time did these operations continue? A. Six or seven months.

Q. And how frequently did the operations continue; I mean with respect to the days of the work.

THE COURT: How continuously, you mean?

Q. Yes. A. After they commenced to can goods we worked up there; after that was over we went back in the cellar again.

Q. And for how long a period, all told, did you work on these operations after Chambers was hurt? A. I can't say exactly; I don't remember.

Q. Approximately? A. Seven or eight months. I worked at the Pickle factory.

Q. How much of that time did you spend, after Chambers was hurt, on the operations on the wall and cellar, and so forth? A. I worked

there until it was all done. I don't remember how long that was.

Q. Would you say several days— A. After he was hurt?

Q. Yes. A. Whenever we had nothing to do in the canning factory we worked on the cellar.

Q. How frequently during the course of each week would you so work? A. Sometimes half a day down there and again would not have any.

Q. And how many men would work under the same conditions—how many did the work under similar conditions after Chambers was hurt upon those operations? A. The same as I said before, six or seven.

Q. How did the cement arrive upon the ground for these operations? A. Hauled there by wagons.

Q. In barrels or in bags? A. I think most of it was in bags.

Q. Can you state approximately how many bags of cement were delivered upon the plant for those operations? A. I should judge a car-load anyhow.

Q. What do you mean by a car-load, a railroad car? A. Yes.

Q. Well, in numbers, about how many bags of cement? A. I couldn't say that.

Q. As many as two hundred? A. Oh, yes.

Q. What have you to say as to whether there was or was not gravel carted to the plant for these operations? A. There was.

Q. How much gravel was used, do you know? A. No, I couldn't say.

Q. How was it brought there? A. By teams.

Q. How many teams brought the gravel there?

THE COURT: Cannot we straighten that a little?

A. Several different teams, off and no. Not steady.

Q. About how many wagon-loads of gravel was delivered there, do you know? A. No.

Q. As many as a hundred? A. May have been, I couldn't say.

Q. As many as fifty? A. Yes.

Q. Do you know whether or not any ashes were delivered at that plant? A. There was.

Q. Where did the ashes come from, do you know? A. I don't.

Q. Did they come from the train? A. I should judge that.

Q. By wagons? A. They were.

Q. About how many wagon loads of ashes were brought there? A. I don't know.

Q. As many as fifty? A. I couldn't say.

Q. Are you able to state whether or not during these operations any work was done with respect to the cellar floor? A. They were working in the cellar whenever they didn't have anything to do canning.

Q. I mean these operations, what kind of work did they do in the cellar? A. Undermining the wall and working on the cellar.

Q. I mean with respect to the cellar floor, was that made deeper? A. Yes.

MR. CARR: Objected to.

THE COURT: He has gone all over this.

MR. JONES: He stated the cellar floor and the wall were put on a level.

Q. While the cellar floor was being dug out and brought to a level with the bottom of the outer foundation, what, if any work was done with respect to the surface of the cellar floor?

BY THE COURT:

Q. Did they cement it? A. Yes.

Q. Concreted? A. Yes.

Q. How deep, do you know? A. About six inches.

By Mr. Jones:

Q. With what mixture? A. First cinders put on the bottom, gravel and cement and cement coating of cement and sand.

Q. Was this done at the same time this wall was being worked on? A. Practically the same time. After we got the wall started we commenced up on the floor, kept it up on one side until we got to these walls that were inside of the cellar, when—

Q. When were they removed? A. The same time.

Q. Would you tear those walls down in the inside of the cellar as you would need the stones to make the outer foundation?

Mr Carr: Objected to as leading.

A. About the same time.

Q. Relative to the time the outer foundation was put in, when were the walls in the cellar taken down? A. They commenced that, I guess, about the same time they commenced to put in the new wall.

Q. By that you mean taken down piecemeal? A. Yes.

Q. What was the width of the added foundation wall? A. About eighteen inches, I guess.

By the Court:

Q. What was the old wall? A. About the same.

By Mr. Jones:

Q. What have you to say as to the total length of the trenches on the outside of the building and alongside of the foundation wall, relative to the length of the added foundation wall? A. These trenches on the outside were only dug out the same length that we was putting in the new wall.

Q. And how much in length did the trenches run in feet, relative to the actual number of feet of the added new wall? A. Same length.

Q. While these operations were going on what have you to say as to other operations or other work going on on the outside of the building? A. There was no other work outside of the building that I know of.

Q. I direct your attention to the question of the walk. Was the walk being constructed alongside of the building? A. Not to my knowledge.

Q. What have you to say as to whether or not the old foundation wall being undermined was or was not unsafe?

MR. CARR: Objected to.

Objection sustained.

Q. Do you know whether or not any crushed stone was brought to the plant other than the stone from the piers in the cellar during these operations? A. There was.

Q. Where was that crushed stone brought from to the plant?

MR. CARR: Objected to as immaterial.

THE COURT: I think that is true, Mr. Jones.

MR JONES: I will not press that.

Q. How much crushed stone was brought to the plant during these operations? A. I don't know.

Q. Were they brought there by wagons? A. They was.

Q. About how many wagon loads of crushed stone were brought to the plant? A. I can't say, I don't know.

Q. As many as fifty? A. There might have been that many, and might not.

Q. As many as twenty-five? A. I should judge so.

Q. What is your trade, sir? A. I haven't any trade.

Q. Did you have any at that time? A. I did not.

CROSS EXAMINATION BY MR. CARR:

Q. Don't you remember that they built a concrete bridge there that used up a lot of these ashes that have been talked about? A. A concrete bridge?

Q. Yes; don't you remember it? A. I do.

Q. Do you remember also that they built a coal yard and used cement and crushed stones for the floors of the coal yard? You remember that, don't you? A. I think they did; I am not certain.

Q. And don't you remember they used crushed stone for the concrete walks of the coal yard and for the bridge? A. Yes.

Q. Now, as a matter of fact, when Chambers was hurt they hadn't begun the cellar an inch, had they? A. When Chambers was hurt?

Q. Yes. A. They had.

Q. Had they begun that cellar when Chambers was hurt? A. When Walter Chambers was hurt?

Q. Yes. A. It had been begun; yes, sir. You mean just around where they were digging the trench?

Q. No, I mean had it been begun on the inside? Excavated, had it been? A. Yes, some portions of it.

Q. Tell me how much of it had been excavated? A. I don't know just how many feet. I know where these two walls went in on this side next to the road where Chambers got hurt when we underminded the old wall and shored it up—after that got set we cemented the floor up to that part.

Q. You mean just a little corner? A. I mean the length of the building.

Q. When did you get done cementing the cellar floor? A. We hadn't cemented the floor at the part where Chambers got hurt.

Q. When did you get through cementing the

cellar floor? A. Not until after the canning season.

Q. Wasn't it six or eight months after the accident that the cellar floor was completely cemented? A. Well, I should judge so.

Q. But they were really being so strengthened, these cellar walls, weren't they?

MR. JONES: Objected to as calling for a conclusion.

THE COURT: That is true.

Q. Do you remember testifying in this case down at Cape May Court House? A. I do.

Q. Do you remember testifying as follows: "Q. Had you charge of the strengthening the foundations? A. No, sir; Mr. Fithian had charge of that; I was working under his orders." Do you remember so testifying? A. I do.

Q. That was true, was it? A. That was true.

Q. In the trial at Cape May Court House you didn't say anything about them tearing out the old walls and cementing the cellar or deepening the cellar, did you? A. Not that I remember.

Q. You didn't, did you? A. I don't remember saying anything like that.

Q. You never did testify to that before today, did you? A. Not as I remember; no.

Q. By the way, you were discharged by Wittenberg, weren't you? A. That was long before this time.

Q. You were discharged by him? A. I was discharged by him once.

RE-DIRECT EXAMINATION BY MR. JONES:

Q. When were you discharged by Mr. Wittenberg? A. When he first bought the factory down there—quite a while.

Q. Was that after or before the accident to Chambers? A. Long before that.

Q. Then he hired you again? A. He did—Mr. Henry did.

Q. And then did you leave of your own accord or discharged the second time? A. I left of my own accord.

Q. And where was this concrete bridge located, relative to the wall? A. That was in back.

Q. Same building? A. Same building.

Q. And how large was that concrete bridge? A. About three and a half feet, four feet across.

Q. And how wide was it? A. Well, I should judge three feet, four feet; maybe a little longer.

Q. And how thick was it? A. How thick?

Q. Yes. Well, on top it was pretty thick, it was made of a wall on top, sort of an arch running underneath for the cans to run through.

Q. And that connected this building where Chambers was hurt with what? A. That connected with a new building they built opposite.

Q. And that new building was how wide and how long?

MR. CARR: Objected to.

THE COURT: Being built the same time?

THE WITNESS: No, that was built later.

BY MR. JONES:

Q. How much later was this building built? A. I don't remember whether that was built that Fall or next Spring. It was quite a long while after.

Q. Did the cement or the stone in the piers in the cellar, concerning which you have testified, have anything to do with that new building? A. I don't know; I would not say that.

Q. Do you remember whether or not you were asked at the trial at Cape May as to whether or not the walls were torn down or the cellar deepened? A. I don't remember; it has been so long.

WALTER E. HENRY, a witness sworn on behalf of defendant.

DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Henry, where do you live? A. Swedesboro.

Q. And in 1907, when Chambers was hurt, you were employed by Wittenberg, or Sallie Wittenberg? A. Yes.

Q. And in what capacity? A. Engineer.

Q. What was your trade at that time? A. Engineering.

Q. And a mason? A. No.

BY THE COURT:

Q. Running a steam engine? A. Yes, sir.

BY MR. JONES:

Q. Did you work upon this wall where Chambers was hurt? A. Not at that time.

Q. At any time prior to that when Chambers was hurt? A. No; not prior to that; after that.

Q. How long had you been employed there at the time Chambers was hurt? A. Three or four years.

Q. And how long after Chambers was hurt? A. About five or six years.

Q. And prior to the date Chambers was hurt how long had these operations been going on? A. Probably six weeks.

Q. And for how long a period after he was hurt, the general operations, wall in the cellar? A. Probably six months.

Q. How continuously was that work performed during the period that you have mentioned that it continued before Chambers was hurt? Was it daily? A. No.

Q. How frequently? A. Well, the first month, I could say daily, most every day there was someone on it.

Q. How many would be at work on it? A. Sometimes two, sometimes as many as six.

Q. And after Chambers was hurt how frequently were men placed upon the job? A. After the canning season was over we worked steady.

Q. How long did the canning season last after Chambers was hurt? A. Last of October.

Q. And from the time Chambers was hurt until the last of October how frequently were men placed on that job? A. Some weeks there would not be anybody on there, maybe for a week; and other times they would be nearly all the time.

Q. And after the latter part of October it went on continuously, there were men on there every day for the balance of the period? A. Yes.

Q. What did this work consist of? A. We were underpinning the wall there, making ready to put in a cement floor to keep the water from outside, make the cellar dry.

Q. That is, from underneath the old foundation wall? A. Coming in through the sand; yes.

Q. The cellar had no floor there at that time? A. No.

Q. And as you would dig the trench, anybody— A. Inside and outside of the wall.

Q. What kind of work was done on the inside and outside of the building relative to the wall itself? A. The whole part of it or just about half.

Q. The whole part of it, what did you do? A. On the inside we would dig out a place about two feset wide, put stone in there and pour cement in.

Q. How deep? A. One and a half feet, two feet.

Q. And what was the greatest depth you went? A. I don't think over two feet.

Q. And would you dig alongside of that point where new stone and cement went into it?

MR. CARR: Objected to.

Q. What kind of work did you do on the inside where the added portion was to be placed? A. Dug out.

Q. How would you dig on the inside? A. Well, in order to get to the point underneath the foundation wall, dig right under the wall.

Q. Would you dig under—

MR. CARR: Objected to.

Q. Just describe at what point on the inside of the wall that digging began? A. Wherever we was going, placed this two foot wall, dug out a space.

Q. We will represent this paper as the wall underneath you are going to dig. Now state what work you did relative to this part of the wall. A. We took out the sand—

Q. For how wide a space along side of the wall? A. Just as soon as we got—

Q. Approximately how much? A. Maybe a foot.

Q. And what was done with the wall which was undermined before the cement and stone was placed under it? A. What was done to the wall?

Q. Yes. A. Nothing done to the wall.

Q. What support, if anything, was given to the wall, was there any underpinning? A. After we dug out?

Q. Yes. A. Yes.

BY THE COURT:

Q. What was the character? A. Stone and cement; as fast as we dug out we would put right in.

BY MR. JONES:

Q. You have spoken of the space of two feet. Just tell us how you did that work of adding in

the new foundation? A. We started out, we dug to a space of two feet cut away, put that in and go away about eight or ten feet from that, dug another space of two feet and kept on that so that we would come back after that was hard, come back in between those two—after that was hard then we would go in between the first and second.

Q. Now take the four sides of the building and tell us what length of each of the four sides that this added foundation was placed under the original foundation wall? A. The whole building.

THE COURT: You mean all of the side walls were begun by this man?

MR. JONES: No.

THE COURT: What do you mean then by under the whole building?

MR. JONES: I said nothing about the whole building.

THE COURT: I ask if he means the whole building?

MR. JONES: The question is how much of this new wall that you speak of underneath the old wall covered?

THE WITNESS: One hundred and fifty,—one hundred and sixty feet.

BY MR. JONES:

Q. And was that placed continuously around the sides of the building? A. Yes.

MR. CARR: Objected to as leading.

Q. State whether or not that distance of added foundation wall was continuous? A. Yes, it was continuous.

Q. And the average depth of that distance of the added foundation wall was how much in feet? A. One and a half to two feet.

Q. How many sides of the building was that work done of putting in the added foundation wall? A. Three.

Q. What, if anything, was done in the cellar during the time that you were at work on this added foundation wall? A. While we were working on the wall?

Q. Yes, during that same period? A. While we were working on the wall they tore out one wall that went through that building, an old wall put there for machinery foundation.

BY THE COURT:

Q. Inside of the cellar? A. Yes, sir.

Q. When was that done? A. Done while they were working on the wall.

BY MR. JONES:

Q. Was that taken out at one time or piecemeal? A. Continuous job on that.

Q. Relative to the time that you would need the stone to put in the new foundation, when was that taken down? A. It was taken down before we used the stone.

Q. You would have a supply on hand for this? A. Yes.

Q. How long was that wall which was taken down which ran lengthwise of the cellar? A. About forty feet.

Q. How high? A. I should judge seven feet.

Q. And how thick? A. About eighteen inches.

BY THE COURT:

Q. Did they make any partitions in the cellar floor or not, or was it just as well to hold up a given portion of the building? A. It was a wall which held up a given portion of the building.

Q. Didn't make a compartment itself? A. Three portions of it.

BY MR. JONES:

Q. How would you get to these three compartments divided by these two lengthwise walls in the cellar? A. On either end.

Q. So that it did divide the cellar into three parts? Was there any communication or open space in which the second or the third—

BY THE COURT:

Q. Except at the ends? A. Not until we made them.

Q. Now, with respect to the second wall, how much of that was taken down in length? A. Only portions of it.

Q. How much, all told? A. Ten or twelve feet.

Q. So that communication was then had between the portion which it originally represented sections one and two of the cellar are one wall, was broken down with section three—

MR. CARR: Objected to as leading.

Q. How many feet was taken down of the second wall? A. About twelve feet.

Q. How many of these arches did those twleve feet consist of? A. Three.

Q. That left the cellar with two lengthwise compartments? A. Yes.

Q. What communication could then be had between each of those compartments other than at the ends? A. Those three archways.

Q. What was done with the stone walls so taken down? A. The stone of each?

Q. Yes. A. They were used under the foundation.

Q. And how much cement was used on the foundation walls? A. Oh, about 2 per cent. of what we put in—sixty bags, something like that.

Q. And how much sand? A. About two of sand to one of cement—about one hundred and twenty.

Q. Then your proportions ran two to one—three to one? A. Two to one in the cellar, and about eight to one on stones.

Q. That would make the stone equal if it was in bags; 960 bags stones of the same capacity of the sand or cement?

THE COURT: That you can figure, perhaps, better than he.

Q. What other work was done in the cellar during the time that this additional foundation was being placed? A. Nothing until that was all done.

Q. I mean was any portion of it dug out?

MR. CARR: That is leading.

THE COURT: Yes.

Q. What was done with respect to the dirt in the floor of the cellar while the foundation walls were being deepened? A. Some was used in the walls there.

BY THE COURT:

Q. While this wall was being worked on, what was being done in the cellar besides tearing down these walls,—anything? A. Nothing until the underpinning was done.

Q. Nothing had been done in the cellar at all? A. Not at that end.

Q. I mean to say had anything been done to the floor of the cellar at that time? A. No.

Q. How long after was that done? A. After we finished underpinning the wall we started on the floor.

Q. Right away? A. As soon as we were done underpinning. Along in December, something like that.

Q. Had the ground been excavated in the cellar at all until after you got through with the walls? A. There was some taken out, yes, it had been done some time before. They underpinned the wall previous to that.

Q. This occasion, had there been any digging out of the cellar or deepening of it at the time the wall was worked on and the time Chambers was hurt? A. At that time they wasn't throwing any sand, no.

Q. You say that wasn't begun until after they got through with the walls? A. After we were through.

By Mr. Jones:

Q. What have you to say as to whether or not any of the cellar earth was excavated and used in making the addition to the foundation wall? A. We used the sand for the cellar.

Q. Then you did dig out some of the cellar wall?

Mr. Carr: Objected to.

The Court: You mean to say this sand was being used in this cellar wall?

The Witness: The sand was dug out from under the wall; we used as cement.

The Court: Did you get any sand from the bottom of the cellar itself?

The Witness: We may have used some, yes.

The Court: At that time was there any systematic excavation of the floor of the cellar?

The Witness: No, that was done after the wall was all underpinned.

BY MR. JONES:

Q. When the work was begun on the cellar floor, what was the character of the work done on that floor? A. We put down concrete foundation and a smooth cement.

Q. How was the floor prepared to receive that concrete or cement floor?

MR. CARR: I object to this. Was after the accident.

MR. JONES: It is all part of the same operations. The Judge brought that out.

THE COURT: I think it is competent, Mr. Carr.

Exception to plaintiff.

Q. How was the cellar floor prepared to receive the cement or concrete flooring? A. We levelled it off to about a foot above the bottom of the foundation.

Q. Work was done upon the cellar floor before the concrete foundation was laid with respect to the excavation of sand to prepare it for the concrete flooring?

THE COURT: Do you mean those places they had excavated to about a foot?

MR. JONES: He says he levelled it.

Q. What had been previously dug out when it was levelled off? A. It had been done a couple of years before.

Q. I mean at that time, was any dug out in order to prepare it? A. We used most of the sand on the cellar.

THE COURT: The question is whether or not in excavating on this floor on the bottom of the cellar to prepare it for the floor?

THE WITNESS: Not at that time.

THE COURT: When was that done?

THE WITNESS: A couple of years before that first year I was down there.

THE COURT: Then do you mean that the cement floor that was put down in the cellar was put down on the floor as it then stood, except that it was levelled off?

THE WITNESS: Levelled off, and we got that sand out of that to make the flooring, that made the cement floor about the same level that the sand was. We used sand out of there for that.

Q. Where did the ashes—how much ashes were brought to prepare the foundation for the cellar floor? A. I don't know how much; it came down there in cheese boxes and barrels.

Q. What was done with the original foundation wall as it stood before these operations were begun, relative to the raising or altering of the old foundation walls themselves. I mean without the addition of—

MR. CARR: Objected to. I suppose this is what this witness has been testifying to for the last fifteen or twenty minutes.

MR. JONES: I want to know whether or not that original wall was raised—

THE COURT: There is no doubt about that. All of the witnesses have testified no. The important question here is how much was this cellar deepened by this change—was it made any deeper or did it stand on the same level as before.

MR. JONES: That depends whether you mean whether you mean original or—

Q. I am speaking of the time this work was being done, at just about the time Chambers was hurt and after the cellar wall was completed, did

it make the cellar deeper from the top of the floor or not? A. I should say not.

Q. What effect did the taking away of those piers or walls inside of the cellar have upon the amount of space which could be used in the cellar for storage or any other purpose?

MR. CARR: Objected to.

THE COURT: Isn't that a matter of calculation? Taking the walls they will leave room?

Q. When these walls were taken down what, if anything, was placed in the cellar to support the floor above? A. Why, wooden posts.

Q. How many of such wooden posts? A. I couldn't tell you now.

Q. As many as a dozen? A. One out of every eight feet.

Q. And how large were these wooden posts? A. They would be 12 by 9 inches.

BY THE COURT:

Q. As I understand you the things that were done here, were altering of this foundation wall at the bottom; secondly, putting a floor in the cellar? A. After that was done, yes, sir.

Q. And three, the taking of these two walls, one whole one and part of another? A. That wall came down about the same time we were doing the underpinning.

Q. Those were the three things done about this time about this building? A. Yes.

Q. Was that all that was done? A. About that time, yes, sir. That took us all winter after Chambers was hurt.

Q. How soon after you got the wall finished did you start in on this question of the floor? A. Right away, in January we started on the floor—December or January.

By Mr. Jones:

Q. What was the position of the original floor of the cellar before these operations in which Chambers was hurt were begun, relative to the bottom of the foundation wall as it then stood before these operations were begun? A. I don't know; I didn't see the original cellar.

Q. I mean with respect as they stood before the operations were begun in which Chambers was hurt? A. About the same level.

Q. Now, then, what was the relative position of that cellar before, relative to the bottom of the new or added foundation wall after the operations were completed? A. Why, I guess it run nine inches to a foot.

Q. Above? A. The foundation, you mean?

Q. Yes. A. That we underpinned?

Q. Yes, what was the position of that cellar floor, relative to the time of the new added wall that you put in under the foundation? A. About a foot above the bottom.

Q. So that that did make the cellar floor—

Mr. Carr: Objected to as leading.

The Court: This, you say, was about a foot higher than the bottom of the old wall?

The Witness: Bottom of the old wall?

The Court: Yes, the bottom of the cellar before any work was done, was how high above the bottom of the old wall?

The Witness: It was below the old wall.

The Court: And then afterwards you say it was how much above the bottom of the new wall?

The Witness: About a foot. Was added about two feet.

THE COURT: It was a foot below before and a foot above afterward.

THE WITNESS: Yes.

THE COURT: And the change was made in the wall?

THE WITNESS: Yes.

BY MR. JONES:

Q. Do I understand you to tell Judge Lloyd that the original cellar floor was a foot below the bottom of the old foundation wall? A. Below the old foundation wall?

Q. Yes, before the beginning of the operations when Chambers was hurt? A. Below the original foundation?

Q. No. I want to know where that floor—Don't go back three years before Chambers was hurt, but just four, five or six weeks, the beginning of these operations, and state how far above or below the bottom of the foundation wall as it then stood, the position that cellar floor occupied? A. About even then.

Q. And after these operations were completed what was the position of that cellar floor relative to the bottom of the new or added foundation wall? A. About a foot above level.

BY THE COURT:

Q. Then how is the difference in the excavation made up, where the wall was made deeper? A. Difference in the excavation.

Q. Yes, how was the difference on the floor made up? A. We used the sand out of that, that year back—I don't know—we used the sand in the wall and in the floor of the cellar.

Q. You put a concrete floor there, didn't you? A. Yes.

Q. And how much did that raise the floor from

the old level? A. The floor was six inches thick. Four inches foundation and two-inch topping.

By Mr. Jones:

Q. Did I understand you to say that the cellar floor then came about a foot above the bottom of the foundation of the added wall? A. Yes.

By the Court:

Q. Then didn't you get lots more room in the cellar than you had before? A. Made it about the same.

Q. I don't understand how you put that concrete on if you did not do any excavating? A. The same sand was used in the floor and used in the wall.

By Mr. Jones:

Q. Where was Chambers' position at the time he was hurt? A. I didn't see him.

The Court: Is there any possible dispute on that subject? That witness has testified he was in that trench. He does not have to be here to establish that fact. All of them agreed he was in this trench, and the wall fell on him.

Mr. Jones: Except Mr. Wittenberg, and he said there was no trench on the outside. That was Whilden who testified there was a trench.

The Court: The real question, I think, here is on the question of the character of the change, of the work done.

Cross Examination by Mr. Carr:

Q. You remember Mr. Wittenberg consulting with you about a year before with regard to these walls? A. Yes, he talked of them before.

Q. Now, what did he consult you about? A. Well, we had laid tile in the floor, the cellar was always wet, always water in the cellar; we had laid tile in there to drain it off; that didn't seem to do it. The men drove posts outside to stop it and that didn't do it, so we concluded to underpin the foundation and put a cement floor in.

Q. Now, did you observe the condition of the foundation wall before these changes were made? A. Yes, the foundation wall had been underpinned two or three years before that, and it was a bad job, because it settled and cracked.

Q. The wall had settled and cracked? A. Yes, sir.

Q. Was there any settling observable in the floor above,—was it noticeable? A. Noticeable in the floor and in the building. The rafters—where they had come apart, one side down lower than the other. What caused that, the first underpinning only went half way under the wall.

Q. The building settled did it? A. Yes.

Q. Did you carry a good deal of weight down there on that building? A. We did that year we put on an awful lot of pickles and catsup.

Q. And was it then that the building settled and caused it to crack with that load on it?

THE COURT: He has already answered that it was before that.

A. I don't know just whether it was that caused it to settle or not.

Q. But the cracks were there? A. Yes, the cracks were there.

Q. And was that the reason the repairs were being made, do you know?

MR. JONES: Objected to.

THE COURT: Yes, he is not to express

opinions. He may tell us what the conditions were, of course, but I understand him to tell us that.

Q. How long had you been around this factory? A. Before this day?

Q. Yes. A. Why, I was there one year and then I went to Philadelphia, back and forth between the factory in Philadelphia.

Q. Do you know whether the walls gave any appearance of being dangerous?

MR. JONES: Objected to as calling for a conclusion.

THE COURT: I suppose he could tell us.

A. I don't know as I would call them dangerous, no.

Q. I understood you to say that about 165 feet of all in all had been changed. Is that so? A. Yes.

Q. About how much? The building was 200 feet long and then there was an "L" 60 by 35 feet. A. That would not be one-quarter of it.

Q. Not one-quarter of the wall was changed? A. No.

Q. And the net result of the changes to the cellar floor was that the same level existed after the floor had been cemented as existed before, practically the same level? A. About the same level.

Q. Therefore about the same head room in the cellar? A. Yes.

RE-DIRECT EXAMINATION BY MR. JONES:

Q. What was done to these cracked sections of the wall that you referred to? A. What was done to the cracked sections?

Q. Yes. A. Why, the cracks were the length of the wall where the first underpinning was done.

Part of that when we went to put up in this new underpinning would fall out, but that place we would put in new stone.

Q. Did the fact that that piece was cracked require two or two and a half feet of foundation?

MR. CARR: Objected to. The witness is not an expert. I think it is objectionable for another reason.

A. One and a half feet to two feet—

MR. CARR: Objected to. The witness is not called upon to express an opinion.

Objection sustained.

Exception to Defendant.

Q. One foot to two of which was being performed upon the top line of the original foundation wall after the operations were completed—

MR. CARR: Objected to. This was not brought out on cross-examination.

Q. —by the adding of the additional foundation wall?

THE COURT: I should say there is no suggestion in the top of the wall.

MR. JONES: I know there wasn't myself, but this witness has said that the floors and the rafters afterwards came apart. I want to show that foundation wall was not raised so that the rafters and floors above which were said to have come apart—

MR. CARR: Nothing said about that.

THE COURT: There is no testimony whatever in this case to show anything whatever was done to the top of the cellar wall.

Q. What effect did the work upon the foundation walls have upon the floors or rafters above?

MR. CARR: Objected to as not Re-Direct examination.

THE COURT: He may answer that.

MR. JONES: I will withdraw that question.

DANIEL CHAMBERS, a witness sworn on behalf of Defendant:

DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Chambers, where do you live? A. Eldora.

Q. And were you employed by the Philadelphia Pickling Company or Sallie Wittenberg at the time Chambers was hurt? A. I was.

Q. Where were you working at that time? A. Upper floor.

Q. And had you been working upon these foundation walls or cellar at any time before Chambers was hurt? A. No, sir.

Q. Were you working upon those foundation walls after Chambers was hurt? A. No, not on the cellar floor.

Q. When did you work on the cellar floor?

BY THE COURT:

Q. Before or after Chambers was hurt? A. After.

BY MR. JONES:

Q. Do you know how long after? A. That winter some time.

Q. Do you know whether or not any work was done upon the cellar floor before Chambers was hurt? A. I don't remember.

Q. What was the effect upon the height of the cellar floor, relative to the bottom of the new

foundation wall after the operations had been completed?

THE COURT: Couldn't you make that, "how much deeper was the cellar floor, if any, after the operations were completed?"

A. A foot or so, maybe.

Q. On the average? A. Yes.

Q. And that is from the top, overhead, to the top of the concrete facing? A. From the floor over head.

Q. You mean there was about a foot on an average more space to stand up in? A. Yes.

Q. Do you know how many bags of cement had been delivered there before Chambers was hurt? A. No, sir.

Q. Approximately? A. No, sir.

Q. Did you do any work upon tearing down this cellar wall? A. In the wall running through the cellar later on.

Q. What was done with the stone out of that wall? A. Some of it lays around the yard yet.

Q. Any of it used upon the foundation wall? A. I believe some was turned out some time.

Q. From time to time? A. At the same time they was doing the foundation.

Q. Do you know the length of the wall that was undermined and added to the length on the sides? I mean how much in length all along.

THE COURT: 150 to 160 feet, the testimony is. Any question about that, Mr. Carr?

MR. CARR: No, sir; I think it was about one-third to a quarter of the structure so affected.

THE COURT: The last witness said less than a quarter.

BY MR. JONES:

Q. Do you know whether or not the entire width of the short side or the entire length of the short side of the wall was undermined and the foundation wall under it? A. Across the end of the building?

Q. Yes. A. Yes.

CROSS EXAMINATION BY MR. CARR:

THE COURT: Mr. Jones, is it your theory that this underpinning was not done for the purpose of strengthening the wall at all but for making more room in the cellar?

MR. JONES: I claim, sir, that by making the addition there was more headway in the cellar.

THE COURT: You are as bad as Mr. Sloan.

MR. JONES: I am protecting my client's interests. I am under a pressure and I cannot think as quickly as you. I suppose that as a matter of fact when they do add to a wall they are likely to strengthen it, but I don't think that is material in this case.

THE COURT: No, I am asking you whether the contention here is, the purpose was not to repair or strengthen the wall but to provide additional cellar room. Is that your theory?

MR. JONES: My contention is that the result of this work which I claim is not an ordinary repair within the terms of the policy, the depth of the foundation wall was made to the extent of one and a half feet—

THE COURT: But what I am getting at is whether your theory is and the idea of the

defense that this was simply an incidental to any strengthening of the wall, or whether it was an object sought by the assured.

MR. JONES: My theory is this, that if those walls needed repairing and that such repairing might come within the terms of the policy, which I do not concede; that then it was not necessary or essential that the foundation wall should have an addition in its depth to a point averaging one and a half to two and a half feet, as was done in this case.

THE COURT: What is your theory the object was?

MR. JONES: I haven't any theory as to that. I don't think it is essential or material. As a matter of law, I say if they were permitted under the terms of that policy to repair certain portions of that wall, which I do not concede—that that permission would not permit them to make an addition, but I do say—

THE COURT: The position would be very different if in enlarging a room it is necessary to strengthen the foundations in the walls. That would be necessary to the alterations and very properly could not be repaired because it would be an improvement of some sort. I want to get your idea—Is it your idea that this work that was done, on this foundation wall, was done not for the purpose of strengthening the wall or repairing it but for the purpose of making larger room in the cellar?

MR. JONES: I don't think that I should at this time, until the case is completed, waive any argument that I may have to press as a result of the testimony.

THE COURT: It makes a great difference as to the materiality of the case.

MR. JONES: I may have to shape my argument according to the testimony which is developed. I think in fairness to my client —

THE COURT: You see it depends a great deal upon whether the testimony is admissible, and it might be that the court would have to exclude a lot of testimony.

BY MR. CARR:

Q. Was it in December you started to work in the cellar? A. No, I don't think so. I don't think it was before the next Spring. I don't say.

Q. Give me the best you can. A. I went there, I think, I quit in November, maybe, of that year.

Q. When you quit in November you hadn't done any work in the cellar? A. I may have done a little on the floor that winter.

Q. Do you know whether you did or did not? A. I couldn't say.

Q. And then you went back some time in the Spring to work in the cellar? A. I think so.

Q. What? A. Yes.

Q. What time, April, May, or when? A. I don't—

Q. Was it cold weather there when you went back to work? Do the best you can. A. I wore boots, and—

BY THE COURT:

Q. Why did you have to wear boots? A. Cold and damp.

BY MR. CARR:

Q. Was it probably as early as March, the following year? Was it April, or when? A. I couldn't remember; it is too long ago.

Q. But at any rate, the weather was cold, was it? A. Must have been toward Spring anyway, when you were working in the factory? Up until November when you went away did you have any work that called you in the cellar? A. I do not know.

Q. The work was all upstairs, wasn't it? A. That is where I worked, yes.

Q. And you didn't get a chance really to see the cellar until the following Spring? A. Oh, yes, I went down there continuously.

Q. What would you do down there? A. I would go down, look around and see what they were doing.

Q. You had no work that called you down there? A. No, sir.

Q. Had no occasion really to notice the heighth of the cellar? A. Noticed very accurately.

Q. You don't know now what the height of the cellar was when you first went down? A. When I first went to work there?

Q. Yes. A. I know it was so low you had to crawl along to get under.

Q. I am speaking of the period, 1907, before the Chambers accident. Did you remember what the heighth of the cellar was? A. Might have been five feet. I am sure I couldn't straighten up in it.

Q. Well, do you know what it was? A. I could give you just exactly what it was.

Q. Then did you know—were you able to carry that in your mind, so that four or six months later you were able to tell what changes were made? A. You could tell if changes were made.

Q. You couldn't tell how much? A. Not exactly.

Q. You don't pretend to remember today, after six or seven years what those changes were, do you? A. What do you mean?

Q. You are not able to remember six months after you went back to work? A. Not at that time.

Q. But are you able to remember within inches what the floor was additional? A. No.

Q. You don't remember exactly about that? A. I remember I couldn't stand up straight in it and know that I can now.

RE-DIRECT EXAMINATION BY MR. JONES:

Q. And how tall are you, Mr. Chambers? A. About six feet.

Q. And how much were you compelled to stoop before these operations were made? A. I don't know; hold my head down—

Q. And after the operations were made what space, if any, was there from the top of your head to the top of the celler floor? A. I couldn't say what space—I could clear it all right.

Q. Do you know what use they put this cellar floor to after operations were completed? A. Put pickle barrels down there, tomato pulp.

Q. How much pickle barrels and tomato pulp did they keep in the cellar at one time?

MR. CARR: Objected to as not re-direct examination.

THE COURT: I think he may answer.

Q. After the operations were completed. A. I couldn't say how many barrels, several barrels, dill pickles kept down there.

Q. What would you say was about the lowest number they kept there at any one time? A. They kept them—shipped them off, Mr. Wittenberg sent them up to Philadelphia.

Q. Was is the greatest number you would say you have seen there as a conservative estimate, or your best estimation, after the operations were completed?

MR. CARR: Objected to as not re-direct examination.

Objection sustained.

Exception to defendant.

A. About fifty.

BY THE COURT:

Q. Full or empty barrels? A. Full of dill pickles.

Q. What is dill pickle? Were they merchandise for market? A. Yes.

Q. Was anything kept in there before? A. Yes, put barrels and pickles and pulp in there.

Q. Same purposes you mean? A. Yes.

FURTHER RE-DIRECT EXAMINATION BY MR. JONES:

Q. What was the effect upon the pickles and pulp put in the cellar before the operations were completed, if you know?

MR. CARR: Objected to. Certainly is not re-direct examination, and the witness don't know.

THE COURT: Is it of any consequence, Mr. Jones?

MR. JONES: Oh, yes. I want to know whether certain things took place which did not take place after?

THE COURT: Well, if you observed. Was there any difference in the conditions of the goods themselves before and after this change?

THE WITNESS: May not in the goods but the barrels. Hoops would last better, not rust.

Q. What effect did the operations have upon the facilities for keeping quanities in the cellar?

MR. CARR: Objected to as not re-idrect examination.

THE COURT: I think the counsel may make him his own witness. It is new ground apparently.

Q. (Former question repeated as follows: "What effect did the operations have upon the facilities for keeping quantities in the cellar?") A. It would hold more.

Q. What effect did the new operations, by the placement of a new cellar floor—what effect did the laying of the new cellar floor have upon the dampness which you say existed before the—

THE COURT: He said it had effect on the hoops.

MR. JONES: I want to know about the dampness in the cellar he testified about.

Q. Was it warm and dry afterward? A. Not in the winter time. It was dryer than what it was.

Q. Was it warm in summertime?

MR. CARR: I object to that.

THE COURT: He may answer it.

A. Cooler down there than it was upstairs.

Q. Was it warmer in winter time after the operations than it had been in winter time before the operations? A. Yes.

BY THE COURT:

Q. Was there heat down there? A. No, sir.

RE-CROSS EXAMINATION BY MR. CARR:

Q. You were a day laborer on that job, weren't you? A. Yes.

JESSE WARWICK, witness produced on behalf of the defendant:

DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Warwick, where do you live? A. Eldora.

Q. And during September, at the time Mr. Chambers was hurt, where were you employed? A. Philadelphia Pickling Company.

Q. Where were you working? A. In the cellar.

Q. What part of the cellar? A. Tearing down walls in the cellar.

Q. How far away from the point where Chambers was working? A. Oh, not far, ten or fifteen feet.

Q. Addressing your mind to the question of the cellar floor, what effect, if any, did the operations which were carried on there have upon the cellar floor as to whether or not it was raised or lowered?

BY THE COURT:

Q. Was the cellar floor raised or lowered? A. Lowered.

BY MR. JONES:

Q. How much of it was lowered? A. Not so far.

Q. How much, along the length of the building and width? A. Oh, a foot or so.

Q. In depth, and how much in length of the building? A. I should judge fifty or sixty feet.

Q. In length, and how much across, the full length of the building? A. I don't know whether it was or not.

Q. What effect did the operations in altering the cellar floor as you have—you also tore down those walls which ran lengthwise? A. In the cellar, yes.

Q. What effect did tearing down those walls and the making of the arches in the other walls and the altering of the cellar have upon the capacity of the cellar to hold merchandise?

MR. CARR: Objected to.

THE COURT: I suppose its cubic face would be possible.

MR. JONES: I won't press that.

Q. What have you to say as to whether or not the number of barrels of pickles and so forth stored in the cellar after the operations were completed—

THE COURT: No, nothing about it.

A. Never worked there after he was hurt, in the cellar.

Q. Did you ever go down in the cellar after he was hurt? A. Not so much in that end of it.

BY THE COURT:

Q. How did you come by the knowledge of it? A. I was down in there but not to work.

BY MR. JONES:

Q. What is your height, please? A. About five feet, ten, I suppose.

Q. And did you have any difficulty in standing in the cellar before the operations were begun? A. When we worked in there I couldn't stand up there.

Q. And after operations were completed? A. I could walk in there very well.

Q. Any clearance over your head? A. Just a trifle.

CROSS EXAMINATION BY MR. CARR:

Q. You saw the foundation walls were cracked before these operations were made, did you? A. Yes, sir.

Q. And you saw the building was settled on that end? A. No, sir.

Q. But you did notice the walls were cracked? A. Yes, sir.

EDWARD CRAMER, a witness produced on behalf of defendant:

DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Cramer, where did you work relative to Chambers at the time he was hurt? A. Down in the cellar, knocking out the piers.

Q. And how far away from him? A. About fifteen, twenty feet.

Q. And had you been in that cellar before these operations began? A. Not very much.

Q. Had you been in at all? A. That morning?

Q. I mean before the work was begun? A. No.

Q. How long had you been on the job? A. About four weeks, but I hadn't been in the cellar much.

Q. Were you in the cellar after the work was done? A. Not to work.

Q. Do you know whether or not the cellar floor was lowered as a result of these operations? A. Somewhat.

Q. About how much? A. I couldn't say.

Q. As much as a foot? A. I should say so.

Q. Had you observed the quantities of pickles and so forth kept there before the operations begun? A. I have, yes.

Q. What would you say as to whether or not there were more pickles kept in the cellar after the operations than before? A. I think there were.

Q. Do you know anything about the effect of the conditions of the cellar upon the pickles before the operations and the effect of the cellar upon the pickles after?

MR. CARR: Objected to.

CROSS EXAMINATION BY MR. CARR:

Q. Do you remember seeing the cracks in the foundation walls? A. Yes, I saw cracks.

LOUIS D. SMITH, a witness produced on behalf of defendant.

DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Smith, have you made calculations of interest for me, based upon the amount of interest on $4091.01 from January 5th, 1909 to March 12th, 1913, at 6%? A. I have.

MR. CARR: I object. That is a whole matter of calculation. Counsel can make that as well as the witness.

MR. JONES: My object is to show by this testimony—

THE COURT: I suppose it is, if it is the fact—you don't have to have the witness figure anything—that is a whole matter of calculation—no witness can answer that. It isn't a matter of expert accountant or anything of that sort.

MR. JONES: I offer to show by this witness the calculations.

THE COURT: If you want to go on, go ahead.

Q. The amount of interest on the sum of $4,091.01 from January 5th, 1909, to March 12th, 1913, on the amount of $4091.01? A. I have.

Q. And on the regulation banking basis, on 6% for that period of time? A. It depends on what basis you are asking for.

Q. Six per cent. a year. A. I have figured it.

Q. What does that interest amount to? A. On the basis shown here, it is based upon the actual number of days. The number of days, 1526, at 6% per annum, makes a total amount of interest $1026.23.

"Amount due on Judgment	$4091.01
Int. Jan 5/09 to Mch. 12/13, 1526 days at 6% per annum	1026.23
	$5117.24
Mch. 12/13, payment on account	1300.00
Mch. 12/13, Balance due	$3817.24
Int. on $3817.24, Mch. 12/13 to Apr. 14/13 (2nd payment on account) 33 days at 6%	20.71
Amt. due Apr. 14/13	3837.95
Apr. 14/13, payment on account	1000.00
Balance due	$2837.95
Int. on $2837.95 Apr. 14/13 to June 16/13 (3rd payment on account) 63 days at 6%	29.39
Amt. due June 16/13	$2867.34
June 16/13, payment on account	1000.00
Balance due	$1867.34
Int. on $1867.34, June 16/13 to July 11/13 (4th payment on account) 25 days at 6%	7.67

Amt. due July 11/13	$1875.01
July 11/13, payment on account	500.00
Balance due	$1375.01
Int. on $1375.01, July 11/13 to Aug. 9/13 (5th payment on account) 29 days at 6%	6.58
Amt. due August 9/13	$1381.59
Aug. 9/13, payment on account	500.00
Balance due	$ 881.59
Int. on $881.59, Aug. 9/13 to Oct. 31/13 (6th payment on account) 83 days at 6%	12.03
Amt. due Oct. 31/13	$893.62
Oct. 31/13, payment on account	1205.09
Excess payment	$311.47"

Q. Are the figures which you have just given represented on the paper which you now have in your hands? A. They are.

MR. JONES: I ask that it be marked in evidence.

MR. CARR: I object to that.

Objection sustained.

Q. Now, for your other set of figures.

MR. CARR: I object to these, on the whole testimony of figures. It is figures counsel can make and the court.

MR. JONES: I am going to show by this set of figures, starting with the amount of the tort judgment and calculating the first payment testified to in this case, deducting interest from the amount of payment, leaves a certain sum, which I contend should be applied to the principal. Chambers was entitled to interest down to the date of the first payment. When the first

payment was made, $1300, you could not deduct that from the principal alone.

THE COURT: Placed as against the principal?

MR. JONES: I have done all that in this calculation. I think it comes out practically the same.

THE COURT: Do they come out differently these different times?

MR. JONES: No. My calculations are not based on the same proposition. I have taken in another schedule, if your Honor wants to know. I have another statement by which I am willing to show the amount of interest from the date of the entry of that judgment right down to the payment of forty cents.

THE COURT: Are you prepared to stand on what the witness has set as the interest and calculations he has made?

MR. JONES: Yes.

THE COURT: What is the object of going any further?

MR. JONES: If it is the correct basis—It is the correct basis.

MR. CARR: I object to any more.

Q. However, on January 5th, 1909, there was an amount due on a judgment $4091.01 and that payments thereon, on account thereof were made. A. March 12th, 1913, $1300.

Q. Have you calculated the interest on the amount of that judgment down to the payment of the first item on account, and then deducted the amount of interest from that payment, carrying the balance as a credit against the amount $4,091.01, and so on down with each successive payment down to October 31st, 1913? A. I have.

Q. What result do your figures show?

MR. CARR: I object. These are mere matters of calculations and the witness cannot testify to—

THE COURT: Are you an accountant?

THE WITNESS: Not an expert accountant.

Q. What is your business? A. I am Assistant of the Philadelphia Division of the Maryland Casualty Company.

Q. And were in their Cashier's Department a number of years? A. In the Auditing Department.

Q. And are entirely familiar with figures? A. Yes.

MR. CARR: It is not a matter that calls for expert services.

THE COURT: I don't see, Mr. Jones, that the proofs in the case in that respect, call for any expert testimony.

MR. JONES: I don't suppose it calls for expert testimony, but I offer to prove by this witness, and in answer to this question that an excess payment had been made on account of the tort judgment of over $300. I offer to show by this witness that there is this excess payment.

THE COURT: He may answer it.

(Exception to plaintiff.)

Q. With what result? A. Excess payment on October 31st, 1913, of $310.35.

Q. At Mr. Carr's suggestion I will ask this question. Assuming that a judgment was entered on January 5th, 1909, for $4091.01. Have you calculated the amount of interest which would be due on that amount from January 5th, 1909, to April 22nd, 1914, and deducted therefrom the amount of interest which would be due on the payments on account referred to in previous questions to

April 22nd, 1914—and then deducted the aggregate amount of such interest from the principal and interest items on said principal due April 22nd, 1914, and then deducted the total amount of payments above referred to in previous questions, with an additional item of 40 cents on April 22nd, 1914? A. Yes.

Q. And with what result? A. Shows an excess payment of $393.88.

Q. On April 27th, 1914? A. Yes.

CROSS EXAMINATION BY MR. CARR:

Q. You calculate two other ways, didn't you? A. I don't know how many.

Q. You made five calculations? A. Four or five.

Q. And got four or five different answers? A. According to the amount of payments, and so forth.

Q. Give me that payment No. 4? A. I couldn't tell you which that one was.

Q. (By the Court:) There are two others. What results did you get in those? A. I don't know which ones you refer to.

At this point, the court adjourned to Friday, November 27th, 1914, at 10:20 o'clock in the forenoon.

FRIDAY, NOVEMBER 27TH, 1914.

CASE RESUMED.

APPEARANCES AS BEFORE NOTED.

LOUIS D. SMITH, resumed the stand.

FURTHER CROSS EXAMINATION BY MR. CARR:

Q. Mr. Smith, you testified the other day that you had made three calculations of interest and that you had obtained three different results. I understand that you made two other calculations. Is that so? A. I believe so; I am not sure.

Q. Well, will you make yourself sure, please. A. (Witness produces papers.)

Q. Did you make five calculations of interest? A. Yes.

Q. The result in each case was different? A. Each case.

Q. Now, you stated the following results when you were last upon the stand, an over payment of $311.47, one of $310.35, the other $393.88. Now, let me have the other two answers, please. A. You mean in full detail?

Q. No, just the amount of overpayment. A. Here is one for an excess of $393.43.

Q. $393.43? A. Yes. That was for a period up to April 27th, 1914.

Q. What is your other? A. Excess payment on October 31st, 1913, $351.39. I find another one, Mr. Carr, also an additional—

Q. Are all these interest payments computed to the same date or different dates, or what? A. On different dates. There is some of them up to October 31st, 1913, one to April 27th, all on account of the paying of that 40 cent item, that is the only difference.

Q. You get a different result each time, do you? A. Yes.

Q. And each result is correct, is it? A. Yes, sir.

RE-DIRECT EXAMINATION BY MR. JONES:

Q. April 27th of what year do you refer to? A. April 27th, 1914.

BY THE COURT:

Q. I want to ask one question: All of these calculations are made on the basis of $4091.01 being the first Judgment with costs, is that not so? A. Yes.

Q. You have made no calculations whatever on the basis of the second judgment, have you? A. No.

BY MR. JONES:

Q. State how your figures in these various calculations attain different results in dollars and cents, taking up the first account showing the excess of $311.47? A. That time was figured on the actual number of days instead of figuring on the basis of the bank year of 360 days.

Q. Now take No. 2, showing the balance, and to what date was the No. 1? A. That was to October 31st, 1913.

Q. Now take No. 2, showing excess of $310.35. What was the basis of that statement? A. That was on the basis of the first payment of $1300 instead of $1100.

Q. These are all on the basis of the payment of $1300, are they not? A. Yes.

Q. Now, then, what was the basis upon which the excess of $310.35 was arrived at? A. I figured that not on the number of days but on 360 days for the calendar year.

Q. Now, referring back to statement No. 1, that statement shows that as each payment was made interest was calculated on the full payments down to the date of that payment, that is the last payment deducted, and the interest calcu-

lated thereafter in each successive balance, is that not so? A. Yes.

Q. Now, let me see statement No. 2, please, and statement No. 2 is based, starting with the amount of judgment and then calculating interest from the date of the entry of the judgment to the date of the payment and deducting in each case—

MR. CARR: Just a moment. I think I shall object to these questions as leading.

THE COURT: Why not let the witness answer your first question.

Q. How was the excess, as shown by your figures $310.35 arrived at? State in detail, please. A. The total amount of debt and costs was figured at $4091.01. Payment of $1300 was made on March 12th, 1913. From this amount of $1300 I deducted interest on $4091.01 from January 5th, 1909, to March 12th, 1913.

Q. That is the date of the payment? A. Yes, a period of four years, 2 months and seven days, at 6% interest, of $1027.53. That makes the net credit on judgment of $272.47.

Q. That is, you mean net credit, deducting the amount of interest from the amount of payment? A. Yes.

Q. Now, proceed. A. Making a balance credited on balance of principal of judgment of $3818.54. On April 14th, 1913, $1000 was paid on account. From this $1000 I deducted interest on $3818.54 from March 12th, 1913, to April 14th, 1913.

Q. That means, as I understand, the balance being the amount of the first payment you deducted and down to the date of the second payment? A. Yes; a period of one month and two days at 6%, interest of $20.36, making the balance credited on the judgment of $979.64, which makes a balance due April 14th, 1913, of $2838.90. On June 16th, 1913, a third payment was made of

$1000. Deducting interest on $2838.90 for this next period, from April 14th, 1913, to June 16th, 1913, a period of two months and two days at 6%, interest of $29.34, makes balance credited to principal of judgment of $970.66. This makes a balance due on June 16th, 1913, of $1868.24. On July 11th, 1913, payment of $500 was made. Deducting interest on $1868.24 from June 16th, 1913, the third payment, to July 11th, 1913, period of 25 days at 6%, interest of $7.78, makes a balance credited on judgment of $492.22. This makes a balance due on July 11th, 1913, of $1,376.02. On August 9th, 1913, payment on account of $500, deducting interest on $1376.02 from July 11th, 1913, date of the previous payment, to August 9th, 1913, 29 days at 6%, interest of $6.65. Balance credited on the judgment of $493.35. This makes a balance due on August 9th, 1913, of $882.67. On October 31st, 1913, payment of $1,205.09 was made. Deduct from this amount of interest on $882.67 from August 9th, 1913, to October 31st, 1913, period of two months, and 22 days, interest $12.07, makes a balance credited to the judgment $1193.02, which makes an excess payment on October 31st, 1913 of $310.35.

Q. Now take up your statement showing the excess payment of $393.88.

THE COURT: Which one of these different statements do you stand on?

MR. JONES: I stand on each and every one of them. I don't know which one the court may consider. I have given the benefit of every conceivable method.

THE COURT: Which do you stand on, the highest or the lowest?

MR. JONES: Any one that the court compels me to stand on.

THE COURT: I am trying to get at the

necessity of going all over this account.

MR. JONES: I don't know which one in law might be construed as the one I should stand on.

THE COURT: You are offering it as evidence not as a matter of law?

MR. JONES: Yes, sir; because I don't know whether you—

THE COURT: Are you content with the lowest excess?

MR. JONES: So far as the results are concerned.

THE COURT: Are you content so far as reducing this claim to the lowest excess?

MR. JONES: Yes, as far as dollars and cents is concerned.

THE COURT: Why is it necessary to go into all—

MR. JONES: Because the method of calculation may be considered as the wrong—

THE COURT: But if you are—

MR. JONES: I have not shown that I have adopted what the court might hold to be the legal method, so I am adducing my proof.

THE COURT: Is it offered in reduction of the plaintiff's claim?

MR. JONES: No, sir; as an absolute bar, and the defense to that condition precedent which requires the suit to be brought within ninety days after a judgment against the assured has been paid and satisfied.

THE COURT: Where is there any such provision?

MR. JONES: Condition D, I think it is. Condition F.

THE COURT: What does that say?

MR. JONES: (Reading from policy), and provides that no action shall lie against

the company to recover for any loss under this policy unless it shall be brought by the assured for loss actually sustained and paid in money by the assured in satisfaction of a judgment after trial of the issue.

THE COURT: Where is there any ninety days?

MR. JONES: "Unless such action is brought within ninety days after such judgment by the court of last resort."

THE COURT: "Has been so paid and satisfied."

MR. JONES: Have you had any such judgment by the court of last resort here? So far as the tort action is concerned, I contend that there was none, but if there—

THE COURT: Assume that there is not. Has the second provision any application?

(After argument.)

THE COURT: Why is it necessary?

MR. JONES: Because the court may hold that I have not presented the correct basis of my figures and I offer to prove that by five or six different methods.

THE COURT: You have done that.

MR. JONES: He has not explained what his methods are.

THE COURT: That is what I am trying to save, if necessary, and at the same time get an illustration of the meaning of this provision.

Q. Now, sir, turning to your third schedule of figures, will you please state the basis upon which that excess was arrived?

MR. CARR: Can't he state the basis without the detail?

MR. JONES: It won't take a moment, Mr. Carr.

A. I can take this more or less as a summary, I think. In this case the debt and costs remained the same, $4091.01. Then there is added to the amount of the judgment interest from January 5th, 1909, to April 27th, 1914, which is the date of the final payment of 40 cents, making a total amount of interest of $1302.62, which makes the total amount due under this judgment, with interest, of $5393.63.

Q. Was that calculated by years, months and days or by days? A. That was calculated by days.

Q. That is the judgment on the full amount from the day of its entry down to the payment of 40 cents? A. Yes, then there is a list of—

BY THE COURT:

Q. And have you added the credits and interest on them and deducted? A. Yes. They leave $393.88 excess.

BY MR. JONES:

Q. Now, take the figures upon which you arrived at the excess payment of $393.43 and state the basis as to how they were arrived at? A. The same as in the previous case, with the exception that we have figured on the banking rate of interest, 360 days in the calendar year.

Q. In other words, you based it on years, months and days instead of the actual number of days? A. That makes an excess over the actual amount due of $393.43.

Q. April 27th, 1914? A. Yes.

Q. Take the next set of payments, showing excess of $351.39, and state how you arrived at those figures? A. This is for a period of from January 5th, 1909 to October 31st, 1913, calculating final payment in April, 1914.

Q. Wasn't it October 31st, 1913, without any

deduction? A. No, this is years, months and days.

Q. What was the total amount due on principal and interest without any deductions on January 5th, 1909, to October 31st, 1913? A. $5274.68.

Q. From which was deducted— A. Interest on installment payments $120.98.

Q. Based on period of what? A. Based on days, on various amounts of interest.

Q. By days or months and days? A. Months and days.

Q. In any of these interest calculations did the interest items for the various periods exceed the amount of the actual interest payment on account? A. Only in case of the final payment.

Q. Did the interest ever exceed the amount, the interest between the periods exceed the amount of payment made on account? A. No, in no instance. I didn't give the excess payment— $351.39.

RE-CROSS EXAMINATION BY MR. CARR:

Q. Where do you get the figures $5393.63 and the excess $393.88? On statement 3, your interest is less than $1000 on the whole transaction, isn't it? A. No. On what basis do you mean?

Q. Basis No. 3, if that is the one you have there. A. You mean deducting the interest of installment payments?

Q. I want to know what was the total amount of interest accrued?

MR. JONES: I object to that as immaterial.
Objection overruled.
(Exception to defendant.)

A. Interest from January 5th, 1909, to April 27th, 1914, that what you mean—

Q. No— A. —is $1302.62.

Q. That is what your total amount of debt and costs, and that you computed on $4091.01? A. Yes.

Q. At 6%? A. Yes, at 6%.

Q. Four years and two months, did you make the period? A. No, I made it the actual number of days. That was figured on the actual number of days.

Q. Had four years and two months elapsed when the first payment was made? It had, hadn't it? A. Yes.

Q. If the whole thing had been paid on that date, 28% on the whole would have accrued?

THE COURT: 25, isn't is, Mr. Carr?

Q. 25% would have accrued? A. Yes.

RE-RE-DIRECT EXAMINATION BY MR. JONES:

Q. And 25% of $4000, of course, is only $1000, isn't it?

BY THE COURT:

Q. Did you allow that in your calculation, $1,000 interest at the end of four years and two months? A. I allowed more than that. I allower $1302.62 interest.

MR. JONES: May I see the transcript, Mr. Carr, please?

THE COURT: That would be very near another year's interest, wouldn't it? How did you do that?

THE WITNESS: I haven't got my rough draft here. I merely took—

THE COURT: Wouldn't it follow that four years and two months would be $1000?

THE WITNESS: Roughly, yes. This is figured on the actual number of days.

Q. To that date—is it taken? A. Up to April 27th.

Q. Six months more, that makes 28%. A. It is more than four years and two months. It is nearer four years and four months.

Q. I asked you if you based that on four years and two months? You stated $1302.62. This is for a longer period, you get that? A. Yes.

THE COURT: This must be strictly re-direct examination.

MR. JONES: Yes.

Q. Will you please tell us what the amount of interest would be on $8, from January 5th, 1909, to October 31st, 1913?

MR. CARR: Objected to as not re-examination. I don't recall anything that opens the door.

MR. JONES: I will recall him again, Mr. Carr.

THE COURT: No you won't.

Objection overruled.

MR. JONES: I want to draw your attention to this—

THE COURT: Is it something you forgot?

MR. JONES: Yes.

THE COURT: Why didn't you say so?

MR. JONES: I think it comes in with Mr. Carr's question.

THE COURT: Perhaps it is shorter to let him tell.

BY MR. JONES:

Q. Will you calculate the amount of interest on $8 from January 5th, 1913, to October 1st, 1913? A. On what basis?

Q. Six per cent. for the number of days.

MR. CARR: I object to this as not re-direct examination.

THE COURT: I don't know what counsel is attempting to do, but he wants to get it in. He says it is a matter he overlooked. I think you will have to finish your examination. Besides, if you can do it as well as the witness can you can do it at your leisure.

Q. What would be five year's interest at 6% on $8? A. $2.40.

MR. JONES: I would like now to offer the statements of figures of the witness so that the jury can have those figures before them on the consideration of the basis as to payment.

MR CARR: Objected to.

THE COURT: On what theory, Mr. Jones? What theory do you expect to put the part of the evidence before the jury in written form and part verbal forward?

MR. JONES: On the theory that the witness said he made these figures.

THE COURT: Haven't you any other way of explaining?

MR. JONES: I think in this kind of a case it is quite important where there are a number of figures, where there are these different basis—

THE COURT: I think all that the witness has said must go before the jury in its entirety in conjunction with what he said about the figures, and it would be highly improper, I think, to send out with the jury a part of that testimony and not the rest of the testimony in the case.

(Objection sustained.)

(Exception to defendant.)

MR. JONES: May I ask the court if he would like to see the transcript and the amended complaint?

Request to Add Dates of Filing to Amended Pleadings.

MR. CARR: Would it not be well for your Honor to mark the amended complaint and the amended answer as filed as of the time preceding the actual trial of this case so that the record may speak for itself in that particular?

THE COURT: Well, it is dated November 16th, Mr. Carr.

MR. CARR: Hasn't your Honor the amended pleadings? The date on the face of the order permitting the amendments—there does not seem to be any date on, and may the amended answer likewise be marked by your Honor?

THE COURT: My recollection is that I made the order on the day when we began the trial of this case.

MR. CARR: Yes, the order was made on that day. The date ought to be made to conform with the actual time.

THE COURT: The order is dated 16th in the face of the order and I think the amended complaint should be marked fully.

THE COURT: The only question is, I don't think I have any right to receive an amendment to a Supreme Court issue until the trial— If you want that date inserted the paper may be filed as of that date, but the amendment lies as of that date after the case had been moved.

MR. CARR: I think perhaps it had better be marked filed as of the date this trial began.

THE COURT: That is the 20th.

MR. CARR: And the answer should likewise be marked filed as of that date, to show that the pleadings had been complete.

THE COURT: I want you to get distinctly

Request to Add Dates of Filing to Amended Pleadings.

in your mind that I have no right to—

MR. CARR: I think the minutes show this application was made at the time the trial was moved and the court allowed it. Isn't that all in the records of the case and isn't this the paper you are filing in pursuance?

THE COURT: Yes, the actual trial began on Friday, the 20th.

MR. JONES: I offer in evidence the notice of application for leave to amend the complaint, served by Messrs. Wilson & Carr upon me on November 12th, 1914.

MR. CARR: Objected to. The pleadings do not have to be offered in evidence, nor the notice filed in the other's behalf.

THE COURT: I think counsel may not be bound to have the judgment of the court on the propriety of my order.

MR. JONES: I may say that that is the first notice I had from my opponent that the plaintiff was a corporation.

MR. CARR: I object to that, if your Honor please. If counsel wants to testify, he may.

THE COURT: Strike it from the record.

MR. JONES: Your Honor will recall you asked Mr. Carr if he had notified me and your Honor had Mr. Carr's statement.

THE COURT: I asked him whether or not this was filed in the suit originally, on behalf of the corporation as distinguished by its name, of the name originally.

MR. JONES: And you also asked, "Had you advised the attorney of the plaintiff?" He answered, "Yes." At that time I stated to the court that I could not of course take that statement and your Honor then addressed to me—

THE COURT: If it is objected to I can only receive testimony in some form of legal proof.

MR. JONES: Very well, sir.

Notice of application to amend received in evidence and marked D-4.

DEFENDANT RESTS.

WALTER E. HENRY, recalled by the plaintiff in rebuttal.

DIRECT EXAMINATION BY MR. CARR:

Q. Mr. Henry, will you say whether or not there was sufficient room in the cellar for a man to stand erect before the cellar was cemented? A. Yes, there was, from 1903 until before the accident, two or three years before.

Q. In 1903, what significance has that date? A. 1902, 1903 we dug the cellar out probably two feet and the wall was underpinned at that time about one foot.

Q. Before the cellar was dug out in 1903 could a man stand erect? A. Yes.

Q. Before it was dug out in 1903 could a man stand erect, my question is? A. No. At one end, not the middle of the cellar.

Q. You knew Daniel Chambers? A. Yes.

Q. Was the cellar of sufficient depth before the cementing operations for Daniel Chambers to stand erect? A. Before which one?

Q. There is only one.

MR. JONES: I object to that as indefinite.

Objection overruled.

(Exception to defendant.)

MR. JONES: Also on the ground it is not rebuttal, and immaterial.

A. For two or three years before that it was.

(No cross examination.)

LOUIS WITTENBERG, recalled by the plaintiff in rebuttal.

DIRECT EXAMINATION BY MR. CARR:

Q. Mr. Wittenberg, where is Eldora, with reference to Philadelphia? A. About fifty-five, sixty miles.

Q. How long does it take to go there and back? A. It always took me a day.

Q. Takes a day? A. To go and come.

Q. When you first heard of this accident,—when did you first hear of this Chambers accident? A. In the forenoon when it happened, on Thursday.

Q. And then what did you do? A. I went the next morning.

Q. Where were you when you heard of it? A. Philadelphia office.

Q. And you went down to Eldora the next day? A. Yes.

Q. As soon as—when you got back what did you do with regard to notifying the company? A. I wrote them a letter.

Q. That is the letter of September 21st, which is in evidence? A. The first letter; yes.

Q. Then when did you next hear from the company about the matter, if at all?

MR. JONES: Objected to as not rebuttal.

THE COURT: I think this has all been gone over.

MR. CARR: If, your Honor please, no. I think it is a matter which I did omit in my main case. I did not understand then that it was seriously challenged that immediate notice had been given. I simply want to show the extent this man was the real plaintiff, when he heard of the accident he went to Eldora, that a day was consumed in—

THE COURT: Do you contend, in view of Mr. Sloan's statement, that this was not in compliance with the policy?

MR. JONES: So far as the time is concerned, I do not, sir, as to that notice.

Q. Do you know Mr. Sloan of the Philadelphia Bar? A. Yes.

Q. Do you remember having a talk with him shortly after the accident? A. No, sir, I had no talk with him.

Q. Did you have any talk with him at all about this matter in the early part of October, 1907?

MR. JONES: Objected to as not rebuttal.

THE COURT: Mr. Sloan was on the stand and he made certain statements. I don't know what this is for. Seems to have bearing on that conversation.

Q. (Former question repeated: "Did you have any talk with him at all about this matter in the early part of October, 1907?" A. Not when it happened.

Q. I don't mean just when it happened, about that time. A. Much later we had a talk.

Q. When was it?

MR. JONES: Objected to. Same objection.

THE COURT: He may answer.

(Exception to defendant.)

A. Oh, four or six weeks later.

Q. Mr. Sloan testified that he saw you some time early in October, 1907, and that you said to him, among other things, that alterations were being made in the building. Did you make such a statement? A. No, sir.

Q. Mr. Wittenberg, before the cellar was ce-

mented was it or was it not possible for a man to stand erect in the cellar? A. Yes, sir.

Q. And how long had it been possible for a man to stand erect in the cellar before the Chambers accident? A. About two years before.

BY THE COURT:

Q. How tall a man could stand up? A. I could hardly reach the ceiling.

Q. Well, could Mr. Chambers? A. Oh, yes, he could stand up after the first alteration was made, two or three years before that.

BY MR. CARR:

Q. From that time on was it possible for a man about the heighth of Mr. Chambers to stand erect? A. Yes.

Q. And was there any room above his head?

MR. JONES: Objected to as leading.

THE COURT: It is leading.

Q. How much room was there above his head? A. I should judge about three or four inches.

(No cross examination.)

HARRY FELIX, recalled in rebuttal on behalf of the plaintiff.

DIRECT EXAMINATION BY MR. CARR:

Q. Mr. Felix, when were you admitted to the Bar in Pennsylvania? A. 1906, October.

Q. Do you know Mr. Sloan? A. I do.

Q. Did he ever pay you one-third or any part of the counsel fees in the Chambers matter? A. Never at any time.

Q. Did he ever pay you any money at all? A. He paid me $33.33, one-third of the one-hundred-dollar fee that he got for incorporating the Philadelphia Pickling Company.

CROSS EXAMINATION BY MR. JONES:

Q. When were you admitted to the Bar? A. October, 1906.

Q. In Pennsylvania? A. In Pennsylvania.

JOHN W. WESTCOTT, sworn on behalf of plaintiff, in rebuttal:

DIRECT EXAMINATION BY MR. CARR:

Q. Judge Westcott, you are counsel in this case, are you? A. This case on trial? Yes.

Q. And represent the Philadelphia Pickling Company? A. Yes.

Q. You are also the Attorney General of the State? A. I believe so.

Q. And were you counsel for Chambers in the suit against the Philadelphia Pickling Company? A. Yes.

Q. And the moneys that were paid on account of that judgment or the moneys that were paid for that judgment were paid to you, were they not? A. Yes.

Q. Do you know to which judgment they were applied?

MR. JONES: I object as not rebuttal. We have gone over that in Mr. Carr's testimony, Mr. Felix's testimony and Mr. Wittenberg's. Absolutely no question about it.

THE COURT: On the application of the moneys?

MR. JONES: I object, then, on the ground it is immaterial and irrelevant.

Objection overruled.

(Exception to defendant.)

A. Applied to the tort judgment.

Q. The tort or the contract judgment? A. I suppose in strict law, both. There was a tort judgment which was the foundation of the contract judgment. The tort judgment eventually was absorbed in the contract judgment.

MR. JONES: I object as calling for a conclusion, and ask it be stricken out.

THE COURT: I suppose that is a legal conclusion.

Q. But that was your notion of it, that the one judgment was absorbed in the other?

MR. JONES: Objected to as immaterial, irrelevant and incompetent. It is calling for a legal conclusion.

MR. CARR: The question of the application of moneys is generally upon the state of mind of the person who receives them.

THE COURT: I am inclined to hold that this question of limitation does not arise in this case.

Q. Judge Westcott, it has been testified by an accountant that the amount due your client upon these judgments was overpaid, the accountant getting at different results as to the amount of overpayment. What have you to say whether you overpaid the account?

MR. JONES: Objected to as introducing in its scope a statement which is not based upon the testimony in the case; also, I object to the question on the ground that it is immaterial what Mr. Westcott's notion as to whether or not his client was overpaid.

THE COURT: Isn't it of some consequence here whether the insurance company is called upon to pay more than it ought?

MR. JONES: My notion is that if there has been sufficient paid to meet what may be legally due, that is all we are interested in. Gratuitous payments are irrelevant in this case.

MR. CARR: That is just what the question is directed to.

MR. JONES: Then it is a matter of calculation.

THE COURT: Why didn't it occur to you that that is a whole matter of calculation when you put your last witness on the stand?

MR. JONES: I had that in mind, but it isn't everybody that can talk of interest right off the reel.

THE COURT: I assume the question is predicated on fact. I haven't had pointed out to me what that was. What is it?

MR. CARR: The question was as follows: "Judge Westcott, it has been testified by an accountant that the amount due your client upon these judgments was overpaid, the accountant getting at different results as to the amount of overpayment. What have you to say whether you overpaid the account?" I wish to call your Honor's attention to this, then—

MR. JONES: That Mr. Smith, who was the only man who testified on behalf of the defendant, has not testified that the amount paid to Mr. Westcott was the same which overpaid Mr. Westcott's client. We only proved that the amount paid was in excess of what was legally due on the tort judgment. It is conceded by everybody that there was more due on the contract judgment. Mr. Carr testifies to that situation, Mr. Felix and Mr. Westcott. There is no question but more was due on the contract.

THE COURT: Can't you gentlemen agree as to what the equivalent should be on the amount due on the tort judgment?

I may say this as to the judgment: the best thought I could give to the subject, I don't see on what theory the plaintiff here can recover for litigation between the assured and the assured's assignee; that is a matter entirely between the two parties to that action.

MR. JONES: Yes. Well, the difference is very likely because the basis of the contract judgment was the judgment in tort with what interest had accrued up to that time, and, of course, there is a slight compounding of interest caused by that fact. I am inclined to waive any difference there may be, if that is seriously insisted upon, and am rather inclined to make my mind correspond with your Honor's in that respect.

THE COURT: If you will state which one it stands on?

MR. JONES: I will stand on the lowest, sir, if that is agreeable. I will stand on the one setting $310.35.

Now as to the equivalent, I am willing that that sum, whatever it was—

THE COURT: That is the lowest of the figures, $310.35?

MR. JONES: Yes, October 31st, $310.35, and on April 27th, 1914, I will take the lowest, which is $351.39.

THE COURT: Were there two amounts?

MR. JONES: We have given you calculations for excess payments on October 31st, 1913, and also for excess payments —

THE COURT: Can't you agree exactly on what the amount properly paid on the tort judgment was and calculate the interest from that time?

MR. CARR: Yes, I am willing to take any

one of these five results. I cannot concede that all are correct but willing to take any one and concede that is correct, and deduct from that amount the amount paid Judge Westcott and say that then is the correct amount for which the defendant should be liable.

MR. JONES: I am not going to say that at all.

THE COURT: Mr. Jones, counsel does not ask you to agree to a verdict for that.

MR. JONES: If a verdict is rendered it should be for such a sum drawn—

THE COURT: I meant that to be a statement of the amount of claim, so far as the judgment itself is concerned.

MR. JONES: I will take any one of those figures and agree that on October 31st the figures represented in one—

THE COURT: Counsel for the defendant states that he is willing to accept the amount of excess payment as having been made on account of the amount due on the judgment of Chambers against the Philadelphia Pickling Company, not the corporation, on October 31st, 1913, or on April 27th, 1914, was $310.35.

MR. JONES: In excess of the amount legally due and owing on that judgment in the tort action.

THE COURT: I am trying to get at a figure which you gentlemen agree, if there is any verdict, the judgment should be for. That would easily be ascertained by taking the judgment as it originally was, adding interest, and crediting with payments made on that. This last witness seems to have done that. Doesn't that definitely fix the

amount? Won't you agree to avoid any confusion on that?

MR. JONES: No.

THE COURT: All right.

Q. (Former question repeated.) What have you to say whether you overpaid the account? A. It was not overpaid a penny.

CROSS EXAMINATION BY MR. JONES:

Q. You have in mind, of course, the amount which was due on the contract judgment as well as— A. I have in mind the amount, whatever it was, we were entitled to as the ultimate expression of the law.

Q. And you considered, of course, that you were entitled to the full amount of the judgment in the contract action, did you not? A. Whatever the record shows that we were entitled to, we were required to be paid, and that was paid, no penny more, no penny less.

MR. JONES: I ask that the answer be stricken out.

THE COURT: And that was the basis of statement just now, that you have not been overpaid?

THE WITNESS: Yes.

THE COURT: That covers it, does it not?

MR. JONES: No, sir. He has not answered my question yet.

THE COURT: The witness says that he took the amount the law awarded him, got as the final expression of the law.

MR. JONES: The law awarded, not what the contract policy—

THE WITNESS: It would take me a week to answer that question.

Q. You figured that you were entitled to all that the law awarded you or Chambers under the contract action, did you not, Mr. Westcott? A. I should have to reply the same to answer that question.

Q. Suppose I allow you to recall by an examination of the two transcripts of those two judgments.

MR. CARR: I object to that. I don't think the witness should be required to read transcripts of these proceedings.

THE COURT: Judge Westcott, what I understand you to mean is that the money that you got paid both of these judgments in full and no more?

THE WITNESS: That is exactly it, and I would not satisfy the judgment until I got the last penny.

MR. JONES: I object to that, and ask that it be stricken out.

THE COURT: I think that is competent, unless—

Q. Calling your attention to the transcript, Judge, in the contract action, you calculated that the amount you were entitled to was the amount of the judgment rendered in that action, together with the costs and interest? A. I cannot answer that question. I don't know what I went through, it has been some time ago, and if my life depended upon it I could not give the details.

Q. As counsel for Chambers you also appeared in those claims of property matters, didn't you? A. I represented Chambers from the beginning to the end, whatever happened I was in it.

Q. And also the certiorari proceedings, did you not? A. If there were, I had to.

Q. And those claims of property were made on

behalf of the corporation, were they not, and also the certiorari proceedings? A. My recollection is the records will show.

MR. JONES: Will you agree to that, Mr. Carr?

MR. CARR: I will agree to anything.

Q. Do you recall claims of property being made, Mr. Westcott, in the Chambers suit? A. I recall the fact.

Q. And do you recall who made those claims of property?

MR. CARR: Objected to as not proper cross examination.

THE COURT: It might be proper.

Exception to plaintiff.

A. My best recollection was that it was the Philadelphia Pickling Company.

Q. The corporation, was it not? A. I presume so. I don't recollect distinctly about it.

Q. And the certiorari proceedings were also taken on behalf of the corporation, were they not? A. I presume so.

MR. CARR: I wish to withdraw any offer that I may have made offering to accept Mr. Jones' figures as the basis of over-payment. The offer was made simply for the purpose of giving the jury a definite figure, not because we didn't feel that the proofs did not warrant our claims.

THE COURT: There is no other provision of limitation, is there, Mr. Jones, in the policy than the one calling attention to—

MR. JONES: As to ninety days.

THE COURT: Any provision within which suit must be brought?

MR. JONES: That is the only one I can recall. I think that is all.

MR. CARR: I have had made a copy of the agreement between Sallie Wittenberg and the Philadelphia Pickling Company from the printed record, it being suggested that that course was practicable. I would like to substitute that copy in lieu of the book.

THE COURT: It may be received, and marked in evidence.

Marked.

MR. JONES: I don't know whether there is any doubt existing as to the claims of property. If there is any question in your Honor's mind I would like to call Mr. Carr to prove that the proof of claims of property and certiorari proceedings were instituted on behalf of the corporation.

THE COURT: The record itself speaks of that.

MR. JONES: Mr. Carr has testified as to the amount of services rendered in those matters, and I think in view of your Honor's statement it may be better to clear it up. Will your Honor allow me to call Mr. Carr for that purpose?

THE COURT: I won't shove your case off. Mr. Carr may take the stand.

HARVEY F. CARR, resumes the stand.

DIRECT EXAMINATION BY MR. JONES:

Q. Mr. Carr, during your previous examination you testified with respect to services and disbursements expended and incurred in the claims of property and certiorari proceedings. Do you remember on whose behalf the claims of property were made and the certiorari proceedings to the Supreme Court were taken?

THE WITNESS: As attorney for the plaintiff I object upon the ground that the record is the best evidence.

THE COURT: I think that is a proper matter.

(Exception to plaintiff.)

A. The claims of property and certiorari proceedings were instituted by the corporation.

(No cross examination.)

MR. JONES: May I at this time ask your Honor to make a ruling as your Honor said you would for me at a previous session, as to the relevancy of the proof in the case on the question of the expenses pertaining to the matters of the claims of property, also the certiorari proceedings, and as to the question of the limitation of $5000, as to whether or not—

THE COURT: This verdict is for less than $5000, isn't it.

MR. JONES: Your Honor will recall you said there were some questions in your mind you wanted to consider and that you would take the testimony and arrive at a conclusion later. You said you would note me an exception on the record then.

THE COURT: I am asking you whether the second question arises that as to the amount —if there is more than $4000?

MR. JONES: You mean what the Court said to Mr. Carr a while ago, that "I should not be inclined to allow claims arising from litigation between the corporation and the assured?

THE COURT: I mean the corporation and the claimants.

MR. JONES: So that the amounts expended in defense of that suit are not to be considered?

THE COURT: Yes. Does it reduce it to below $5000?

MR. JONES: And the same ruling as to the claim of property and certiorari?

THE COURT: I think the same as to claims of property, certainly. What was the certiorari on?

MR. JONES: The verdict of the jury on claims of property were certioraried to the Supreme Court.

THE COURT: Oh, yes. It looks to me as though this case was boiled down to the judgment expenses incident to that. Does that amount to $5000?

MR. JONES: I don't think it does.

THE COURT: Does that question become academic?

MR. JONES: It may possibly come to a little more than that. The amount paid on October 31st was $5505—

THE COURT: Included a lot of interest, didn't it?

MR. JONES: Yes. My theory of that question is this: While Chambers was entitled to the interest upon what may have

been due to him, this corporation, if it is entitled to recover on that judgment is not entitled to recover any interest until it has paid; that it had had the use of the money; it is not entitled to the interest which it has to pay, because if it fails in paying up it is only entitled to interest from the time it makes payment.

THE COURT: There is no proof as to what those calculations should amount to.

MR. JONES: I am speaking about the loss itself, to compensation, that it should be a loss not exceeding $5,000. That means loss for injuries and not as to interest.

MR. JONES: I cannot tell you that amount.

THE COURT: If a judgment was for $4,000 it would be within the policy, or $4900.00.

MR. JONES: Yes. Then does your honor hold that they are not entitled to interest merely the amount of $4091.

THE COURT: Oh, no. I am speaking of your liability for the loss on the assumption that you paid it when you had to pay it. If you don't do it, what happens?

MR. JONES: I see. We are to dispose of the case on the amount of the judgment in the tort action. Is that your honor's theory?

THE COURT: That is what I had in mind substantially—unless there were some other items that ought properly to come in.

MR. JONES: I now move for a direction of a verdict upon each of the grounds upon which the motion for non-suit was made, which are hereby repeated.

I also move for a direction of a verdict

upon the ground that the amended complaint nor the evidence in the case established a cause of action in favor of the present plaintiff against the defendant.

Also upon the ground that there is no evidence in the case which would warrant the jury to return or from which the jury could find a verdict in favor of the plaintiff.

Upon the ground also that there is no evidence in the case from which the jury can find that the assured forwarded to the Company's own Home Office any summons or processes that had been served upon it.

Upon the further ground that at the time Chambers received his injuries the assured was not engaged in making ordinary repairs within the meaning of the policy.

Upon the further ground that the proofs show Chambers received his injury while engaged in connection with making additions to or alterations in or construction of a building or structure or plant or in connection with the wrecking or demolition of a building, structure or plant, or a part thereof, within the terms of the provisions of the policy of insurance.

Upon the further ground that the proofs show that this action was brought more than ninety days after the judgment in the suit of Chambers against the Philadelphia Pickling Company, the trade name, and the tort judgment had been fully paid and satisfied.

On the further ground that the proofs show that more than ninety days had expired from the date when the Chambers judgment had been paid and satisfied and

the present plaintiff became the plaintiff in this action.

I may say as to that, my calculations were that from October 31st, 1913, to November 16th, 1914, it would be 381 days, and of course to November 20th or 21st, 385 days. If I may take the date of the payment of April 27th, 1914, forty cents, I calculate that from April 27th, 1914, to November 16th, 1914, would be 203 days, or if I am to take November 20th, 1914, as the date, it would make it 207 days.

Upon the further grounds—I base my motion—that there is lack of proof of the entry of the judgment by Chambers against Sallie Wittenberg, who was the employer of Chambers at the time he suffered his injuries.

THE COURT: Mr. Carr, should it not appear in this case that the Philadelphia Pickling Company, the corporation, was the one that brought this action in some way more directly than it does?

MR. CARR: Yes, may I take the stand in that behalf? I dislike doing it, but I am afraid I should.

HARVEY F. CARR resumes the stand.

In the absence of counsel's acceptance of the statement of counsel on it, I think it is important that the record show. I am the attorney of the Philadelphia Pickling Company, a corporation of Pennsylvania. As such attorney I instituted the present suit. I was not retained by Sallie Wittenberg and do not know her in this matter.

MR. JONES: Objected to on the ground it is a continuation of rebuttal or whatever it may be termed.

THE COURT: It is all in now.

MR. JONES: I ask that the testimony of this witness be stricken out. The witness is not being interrogated.

THE COURT: You knew perfectly what the witness was going to say.

MR. JONES: I did not, not as to that.

THE COURT: What is it you want stricken out?

MR. JONES: With respect that he was not retained by Sallie Wittenberg or the Philadelphia Pickling Company, the trade name. And also that this suit was brought in the name of the corporation.

THE COURT: Motion denied.

(Exception to defendant.)

CROSS EXAMINATION BY MR. JONES:

Q. The complaint was prepared by you? A. In my office. Not by me individually.

Q. And you recall forwarding to me a copy of the notice of motion for leave to apply for the amended complaint?

MR. WESTCOTT: Objected to as not cross examination.

THE COURT: I think it is proper.

A. It was forwarded by my office, although not by me personally.

Q. Did you sign the letter? A. I don't think I did; it is probably signed by a rubber stamp.

Q. Do you remember when you sent me the amended complaint form of amended complaint and notice of application? A. No, I do not. It was sent by mail.

Q. Have you with you the original notice of application? A. I think so.

Q. Will you be kind enough to refer to it and see if I didn't give you an admission of service? A. Notice of which?

Q. Notice of application to file the amended complaint. You received from me an admission of service of the notice of application for leave to amend the complaint. A. The paper which you hold in your hand, I think.

Q. Bearing date November 12th, 1914, did you not? A. Yes.

Q. And you say your office or you caused it to be forwarded to me by mail under date of November 11th? A. Yes.

Q. Your letter to me of November 11th, 1914, was the only letter or correspondence you had had with me since the time of the beginning of the suit, when I inquired for an extension of time to prepare my answer, was it not? A. I really don't know. The correspondence was handled by Mr. Carroll from my office; I find he handled the entire correspondence.

Q. Could you refer to that, to what was the last preceding communication? A. Yes, by referring to the file. I find this, bearing date September 24th, 1914—July 9th, 1914, June 17th, 1914.

THE COURT: Mr. Carr, when this Philadelphia Pickling Company's name was used in this suit was it intended as a Philadelphia corporation or not?

MR. CARR: As the corporation, yes.

MR. JONES: Your Honor, doesn't the paper speak for itself?

THE COURT: No; it seems there are two names—of the same name.

MR. JONES: But you must not draw your conclusions by the examination of the summons?

THE COURT: Not where the—I think the Court should be satisfied on that point, that in reality the litigation is one that is continuous. Tell me whether or not the substitution of claim as presented here by this amended declaration or complaint was what was contemplated the suit was brought for?

MR. CARR: I submit the original complaint would show that we did not, your Honor, and should the Court be governed by that, I submit it was.

THE COURT: Not in an application of this kind. The Court would not permit an entirely new suit to be brought under the guise of an old litigation if it was done for such purpose, but where it is bona fide, the Court will always—

(Exception to defendant.)

Q. Mr. Carr, the letter of June 17th, 1914, merely referred to the answer which was prepared to the original complaint, did it not? A. Yes.

Q. And the next letter I had from you was of July 8th, enclosing a copy of a reply to my answer? A. Yes.

Q. And to which I replied on July 9th, acknowledging receipt and expressing my thanks? A. Yes.

Q. And the next letter you had from me prior to my receipt of your letter of November 11th was dated September 24th, is that not so? A. Yes.

Q. In which I discussed how Judge Lloyd might call the calendar and how we should get ready for trial? A. Yes.

Q. And the only communication or statements that were received by me was the next one of November 11th, enclosing the notice of application for leave to amend and other papers? A. Yes, November 12.

Q. I mean the one from you to me was under date of November 11th? A. Yes.

Q. Prior to November 11th, 1914, you had no communication with me in which you called my atttention to the fact that the Philadelphia Pickling Company was a corporation? A. No, in my mind—

MR. JONES: I ask the answer be restricted.

MR. CARR: I will have to examine myself.

A. Certain interrogatories were served within about a week of the commencement of the term here—

THE COURT: You are coming back to the stand without apprising counsel in any way of what you are going to testify to. I thing he ought to have an opportunity to do both.

MR. JONES: You were going to say that I served you with interrogatories on November 6th and that I received your answer to them the latter part of November.

MR. CARR: Yes, and I proposed adding to that now, the interrogatories were brought to my attention by Mr. Carroll, who had the preparation of the papers;

upon reading them I saw at once that this was an action by the corporation and that the proceedings should be amended to correspond to that fact.

RE-DIRECT EXAMINATION BY MR. CARR:

Q. Did you receive interrogatories from Mr. Jones' office about a week before the opening of the Mercer Term? A. I did.

Q. Were those interrogatories brought to your attention in your office?

MR. JONES: I object to that as immaterial, and as not having any bearing upon the defendant, as to what happened in Mr. Carr's office.

THE COURT: I think it is competent.

Objection overruled.

(Exception to defendant.)

A. They were.

Q. By whom?

MR. JONES: Objected to as irrelevant, incompetent and not binding upon the defendant.

Objection overruled.

(Exception to defendant.)

A. By Mr. Carroll.

Q. Who is Mr. Carroll? A. An attorney at law who had charge of the actual preparation of the papers in this case.

Q. Did you examine the interrogatories?

MR. JONES: Same objection as preceding questions, irrelevant, incompetent and immaterial and not binding upon the defendant.

Objection overruled.

(Exception to defendant.)

A. Yes.

Q. What effect did the interrogatories have upon your examination of the pleadings in the case?

MR. JONES: Object to that as irrelevant, incompetent, and immaterial, and not binding upon the defendant.

THE COURT: Mr. Jones, as bearing upon any fact before the jury, it is totally irrelevant, and the jury has nothing to do with these questions. I think counsel has the right to show the good faith on the amendment, that it was not an amendment changing the cause of action but that the cause of action was contemplated from the start.

MR. JONES: I submit even as to that—

THE COURT: And in order, I have assumed this in my ruling and permitting the amendment as counsel stated. Where it is controverted I think it ought to appear on the record the same as upon which the Court acted in allowing the amendment.

MR. JONES: You will remember I specifically mentioned that it was brought in the trade name and there was a substitution of one plaintiff for another.

THE COURT: Counsel disclaims that. It is photographed upon the record, that fact, and explaining, I suppose, why the pleadings were in the form they were. I think he may go on.

Exception to defendant.

A. I immediately saw that the pleadings did not accurately set forth the facts, in that throughout the pleadings the word "assured" was used to describe the Philadelphia Pickling Company, the corporation, and I at once directed that that ap-

plication be made to amend the pleadings and a copy of the proposed amendment was at once forwarded to Mr. Jones. The purpose of the amendment was to make—

MR. JONES: I object to that. It speaks for itself.

THE COURT: I suppose the record will show what the amendment contains.

MR. CARR: That is all.

(Mr. Jones asked for a transcript in this case from the Clerk.)

RE-CROSS EXAMINATION BY MR. JONES:

Q. In Paragraph one of the complaint as originally prepared and served, did not it recite that the defendant executed and delivered to the plaintiff a certain policy of insurance? A. Yes.

Q. And in Paragraph two of the original complaint did it not recite that while the policy was in force there was employed by the plaintiff at the Pickling factory one, Walter Chambers? A. Yes.

Q. And does not paragraph three of the original complaint recite that "while said policy was in force, September 19th, 1907, (etc., reading from complaint)—while employed? A. Yes.

THE COURT: Is this for the purpose of showing the difference between the two?

MR. JONES: Yes.

THE COURT: Then offer it in evidence.

MR. JONES: I will offer in evidence as the original complaint.

PLAINTIFF RESTS IN REBUTTAL.

THE COURT: I am inclined to hold, with respect to Provision F, I think it is, that the ninety days has no application. If counsel want to waive that I will submit this case to the jury on the other question. If not, I will submit it on the question as it strikes my mind.

MR. CARR: We feel that the ninety days has no application, if your honor please.

THE COURT: The reason I do that is that they come from the court rather than counsel—I don't want to impose the court's view on counsel unless they are ready to adopt it.

MR. JONES: My view, sir, is the ninety-day provision is in order in this case.

THE COURT: I asked counsel on the other side whether they wanted to waive the construction the court put upon this contract that the ninety-days had no application.

At this point, Court took a recess of one hour, until 1:15 o'clock in the afternoon.

AFTER RECESS:

STIPULATION:

It is admitted by counsel in this case that the amount of the judgment entered in the suit of Chambers v. Philadelphia Pickling Company, the tort action, was $4091.01; that the accumulated interests from the date of the entry of such judgment, which was January 5th, 1909, to October 31st, 1913, was $1103.73.

It is further agreed between counsel that the expenses paid by the Philadelphia

Denial of Motion to Direct Verdict.

Pickling Company, the trade name, in defending the suit brought against it by Walter Chambers, amounted to $360.

It is agreed between the counsel that the interest calculations on the sum of $4091.01 from October 31st, 1913, to date amounts to $265.

That the interest from April 27th, 1914 to date on $4091.01 amounts to $143.20.

That if plaintiff is entitled to receive the interest paid to Chambers on account of the judgment in the tort action of $4091.01, the amount of interest, plus the amount of such judgment on April 27th, 1914 to October 31st, 1913, aggregate more than $5000.

Those admissions are made for the convenience of the court in charging the Jury as to figures and without waiver of legal rights.

Motion for direction of a verdict by Defendant's counsel denied.

Exception to Defendant.

Judge Westcott summed up for Plaintiff;

Mr. Jones summed up for defendant.

Adjourned until Monday, November 30th, 1914, at 10:20 o'clock in the forenoon.

Plaintiff's Requests to Charge.

The plaintiff submitted the following requests to charge:

SPECIAL REQUESTS TO CHARGE.

The plaintiff respectfully requests that the jury be charged as follows:

1. It is for you to say whether or not the work of strengthening the foundations of the plaintiff's factory in which Chambers was engaged when the accident occurred constituted ordinary repairs within the meaning of the policy.

2. If you find from all the circumstances that Chambers was engaged in a work of ordinary repairs when injured, you must find for the plaintiff.

3. If you find that the work being done upon the foundation walls at the time of the accident, was necessary, in order to put the building in a safe condition for use by the assured in the prosecution of its business as described in the policy, and that it did not involve substantial change in the physical structure of the building, such work constituted ordinary repairs within the meaning of the policy, even though you should find that an incidental result of the work was to deepen to some extent the cellar.

4. If you find that Chambers was injured while engaged in the work of ordinary repairs, within the meaning of the policy then the plaintiff as assignee of the assured is entitled to recover not only the amount paid by it in satisfaction of the Chambers judgment, viz., $5,305.49, with interest, but also all costs and expenses of the plaintiff, including attorneys' fees in the defense of the Chambers suit, made necessary by the

failure of the Maryland Casualty Company to defend such suits.

The following requests were submitted by the Defendant's attorney:

1. The burden of proof is upon the Plaintiff, to entitle it to recover, to affirmatively show that it and the Assured have complied with all of the conditions precedent set out in the policy of insurance, by it or the assured to be performed, to maintain this action, the performance of which the defendant specified in its answer, it intended to contest. If the plaintiff fails to so affirmatively prove, the verdict must be for the Defendant.

2. If you find that Walter Chambers did not receive his injuries while he or the assured (his employer) were engaged in making ordinary repairs, within the meaning of the policy of insurance, the plaintiff cannot recover in this action and your verdict must be for the defendant.

3. The fact that Walter Chambers recovered a judgment against the assured, his employer, does not form the basis in and by itself, of the right of the Plaintiff in this action to recover against the Defendant in this action.

4. If you find that the injuries to the said Walter Chambers on September 19, 1907, while an employe of the Assured, were caused by any person, including Walter Chambers,

"In connection with the making of additions to, or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or plant or any part thereof,"

within the meaning of such terms, as used in the policy of insurance, your verdict must be for the defendant.

5. The defendant did not agree to indemnify the assured for damages on account of the loss from liability for injuries to or caused by Walter Chambers if he at the time he was injured was engaged in mason or building work.

6. If you find that upon the occurrence of the accident, wherein Walter Chambers received his injuries, the assured did not give immediate written notice thereof, together with the fullest information obtainable at the time to the Company's Home Office or the Company's authorized agent, the plaintiff cannot recover in this action and your verdict must be for the defendant.

7. If you find that the assured did not give immediate written notice with full particulars to the Company's Home Office or to the Company's authorized agent, when the claim was made on account of the accident wherein Walter Chambers received his injuries, the plaintiff cannot recover and the verdict must be for the defendant.

8. If you find that the assured did not immediately forward to the Company's (defendant's) Home Office every summons or other process, in the suit brought by Chambers against his employer, the assured, as soon as the same had been served upon it, the plaintiff cannot recover in this action and your verdict must be for the defendant.

9. If you find that the plaintiff or the assured did not immediately forward to the Company's (Defendant's) Home Office every summons or other process in the suits

brought by Chambers against the Philadelphia Pickling Company (the Pennsylvania Corporation) as soon as the same had been served upon said corporation, the plaintiff cannot recover in this action and your verdict must be for the defendant.

10. If you find that the assured did voluntarily assume any liability, in the action brought by Chambers against his employer, the assured, or if the assured, without the written consent of the defendant company previously given, did incur any expense, except at his own cost other than providing at the time of the accident for such immediate surgical relief as was imperative, or interfered in any legal proceedings brought by said Chambers there can be no recovery in this action against this Defendant for such liability so voluntarily assumed or for such expense incurred, or arising by reason of such interference with such legal proceedings, other than the expense of providing at the time of the accident for such immediate surgical relief as was imperative.

11. If you find that the plaintiff or the assured did voluntarily assume any liability in the action brought by Chambers against the Philadelphia Pickling Company (the Pennsylvania Corporation) the plaintiff in this suit or if the plaintiff or the assurred without the written consent of the defendant company previously given did incur any expense, except at his own cost, other than providing at the time of the accident for such immediate surgical relief as was imperative, or interfered in any legal proceedings brought by said Chambers there

can be no recovery in this action against this defendant for such liability so voluntarily assumed or for such expense incurred, or arising by reason of such interference with such legal proceedings, other than the expense for providing at the time of the accident for such immediate surgical relief as was imperative.

12. That there can be no recovery in this action by the Philadelphia Pickling Company, a corporation organized under the Laws of the State or Commonwealth of Pennsylvania.

13. That the plaintiff, the Philadelphia Pickling Company, a corporation organized and existing under the laws of the State or Commonwealth of Pennsylvania, was not the assured in the policy of insurance issued by the defendant and upon which this action is based, and therefore it cannot recover in this action and your verdict must be for the Defendant company.

14. There can be no recovery against the defendant company to recover for any loss under the policy, except for loss actually sustained and paid in money by the assured, (which was not the Pennsylvania corporation, the plaintiff in this action) in satisfaction of a judgment after trial of the issue.

15. There can be no recovery against the defendant company to recover for any loss under the policy, except for loss actually sustained and paid in money by the assured, the Philadelphia Pickling Company (which was not the Pennsylvania Corporation, the Plaintiff in this action,) in satisfaction of a judgment after trial of the issue by a Court of Last Resort.

Defendant's Requests to Charge.

16. There can be no recovery against the defendant company, to recover for any loss under the policy unless this action shall have been brought by the assured (which was not the Pennsylvania Corporation, the plaintiff in this action) for loss actually sustained and paid in money by the assured (which was not the Pennsylvania Corporation) in satisfaction of a judgment after trial of the issue; nor unless this action was brought within ninety (90) days after such judgment by a court of last resort, against the assured (which was not the Pennsylvania Corporation) has been so paid and satisfied.

17. That on January 5th, 1909, the date of the entry of the Judgment in the action of Walter Chambers against the assured, the Philadelphia Pickling Company, which was not the plaintiff in this action, the court of last resort in the State of New Jersey was the New Jersey Court of Errors and Appeals and, therefore there can be no recovery by the plaintiff in this action and your verdict must be for the defendant, as such judgment was entered in the Supreme Court.

18. That no judgment was entered by a court of last resort in the action brought by Walter Chambers against his employer, the assured and therefore there can be no recovery by the plaintiff in this action and your verdict must be for the defendant.

19. As the Philadelphia Pickling Company, the assured, (the employer of Chambers) did not prosecute the Rule to Show Cause (obtained by it in October, 1908) why a new trial should not be granted in

the action brought by Walter Chambers against the said Philadelphia Pickling Company, the employer of the said Walter Chambers, (which was not the Pennsylvania Corporation, the plaintiff) and the said Rule to Show Cause was dismissed by a rule filed and entered in the Supreme Court on February 16, 1909, for the reason that that the said Philadelphia Pickling Company, the said assured and employer of Chambers, had failed to prosecute its said rule to show cause, the judgment entered on January 5, 1909, in the action by Chambers against the Philadephia Pickling Company the employer (which was not the plaintiff in this action) was not a judgment entered by a court of last resort in said action, and therefore there can be no recovery by the plaintiff in this action, and your verdict must be for the deefndant.

20. This action was not begun or brought within 90 days after the judgment entered in the New Jersey Supreme Court on January 5, 1909, in favor of Walter Chambers and against the assured had been paid and satisfied, and therefore there can be no recovery against the defendant in this action, and your verdict must be for the defendant.

21. The Claims of the Plaintiff and the Assured have been forfeited, by reason of non-performance by the plaintiff or the assured of one or more of the conditions precedent set out in the policy of insurance by it to be performed to maintain this action, the performance of which the defendant specified in its answer, it intended to contest, and therefore there can be no recovery by the plaintiff in this action, and your verdict must be for the defendant.

22. If you find that at the time of the issuance of the policy of insurance by the defendant, the name of the assured was not the "Philadelphia Pickling Company," your verdict must be for the defendant.

23. If you find that at the time of the issuance of the policy of insurance the assured was not a "company," your verdict must be for the defendant.

24. There can be no recovery in this action for the amounts expended in satisfaction of the Judgment or Judgments entered in the action of Walter Chambers against the plaintiff in this action, Philadelphia Pickling Company, the Pennsylvania Corporation.

25. If you find a verdict in favor of the plaintiff such verdict must not exceed the sum of $5000, as the defendant's liability, if any, under the policy of insurance, cannot exceed the amount paid in satisfaction of the judgment entered in the first action brought by Walter Chambers against the Philadelphia Pickling Company, (which was not the Pennsylvania Corporation) and such amount, under the terms of the Policy, is subject to a maximum of $5000.

26. The defendant's liability, if any, under the terms and conditions of the policy of insurance is limited to the sum of $5000. and therefore if you find in favor of the Plaintiff, the amount of your verdict must not exceed the sum of $5000.

27. If you find that Walter Chambers did not suffer his injuries, "in and during the operation of the trade or business described in the Schedule" attached to and forming part of the policy of insurance, which are

therein set out as follows: Manufacturers, Dealers, and Importers of pickles, table condiments and goods of this description" or in operations carried on usual to the kind of trade or business described in the policy, your verdict must be for the defendant.

28. If you find that Walter Chambers did not suffer his injuries "in and during the operation of the trade or business described in the Schedule" attached to and forming part of the policy of insurance, which are therein set out as follows: Manufacturers, dealers and importers of pickles, table condiments and goods of this description," your verdict must be for the defendant.

29. The policy of insurance was one of indemnity which did not in its terms compel the defendant company to pay a judgment when the liability is established, but only to reimburse, the assured for the loss sustained. It was to reimburse, or make whole, the assurred against loss on account of such liability as was covered by the policy. There can be no reimbursement when there has been no loss by the assured. If therefore you find that the assured did not sustain any loss your verdict must be for the defendant.

30. The jury cannot find from the evidence that the defendant in this case waived any of the conditions precedent in the policy to be performed by the assured, to entitle it to begin this action, as no such waiver was pleaded by the plaintiff in its pleadings in this action.

31. The jury cannot find from the evidence in this case that the defendant did waive the condition of the policy of insurance requiring the assured to immediately forward to the defendant company's Home

Office every summons or other process as soon as the same had been served upon it; as no such waiver was pleaded by the plaintiff in its pleadings in this action.

32. The agreement in writing, between Sallie Wittenberg and Philadelphia Pickling Company (the Pennsylvania Corporation) dated November 7, 1908, did not by its terms assign the policy of insurance, upon which this action is based, or any of the rights of action thereunder, and the plaintiff therefore cannot recover in this action, and your verdict must be for the defendant.

33. As the agreement in writing between Sallie Wittenberg and Philadelphia Pickling Company (the Pennsylvania Corporation) dated November 7, 1908, did not by its terms assign the policy of insurance, upon which this action is based, or any of the rights of action thereunder, no parol evidence of any assignment of such policy or any of the rights of action thereunder can be interposed or considered in this action, and you are not to consider any such parol evidence.

34. As there is no proof in this case of an assignment by the Philadelphia Pickling Company (the Assured) to the Philadelphia Pickling Company (the Pennsylvania Corporation) (The Plaintiff in this action) of any rights of action of the assured against the defendant, under the policy of insurance, the plaintiff cannot recover and your verdict must be for the defendant.

35. There can be no recovery by the plaintiff of the moneys expended by it in defending the suit brought by Chambers against it.

36. There can be no recovery by the plaintiff of any moneys expended in defending the suit brought by Chambers against the Philadelphia Pickling Company, the assured.

37. The plaintiff cannot recover interest on the moneys expended by it in defending the suits brought against it.

10 38. The plaintiff cannot recover from the defendant any interest on the amount of the judgment obtained by Chambers until the judgment had been paid.

39. Payment of money by the Philadelphia Pickling Company (the Pennsylvania Corporation) in satisfaction of the judgment entered against it by Chambers was not a payment of money by the assured in satis-
20 faction of the judgment entered in favor of Chambers against the assured.

40. The contract between the defendant and the assured was a personal contract and was not assignable and therefore the plaintiff cannot recover in this case.

41. The injuries to Walter Chambers on September 19, 1907, while an employe of the Assured, were caused by a person.

"in connection with the making of addi-
30 tions to or alterations in or the construction of a building or structure or plant or in connection with the wrecking or demolition of a building or structure or plant or a part thereof."

within the meaning of such terms as used in the policy of insurance and therefore the plaintiff cannot recover in this action and your verdict must be for the defendant.

42. The amount of the principal of the amount of the judgment obtained by Cham-
40 bers against the Philadelphia Pickling Company, the Assured, (which was not the

Pennsylvania Corporation), on which Chambers was entitled to interest was reduced as each payment was made to him on account of such judgment if each such payment was in excess of the sum due as interest to the date of payment.

43. If you find that the total amount of the payments made, on account of the Chambers Judgments, to and including the payment of October 31, 1913, were sufficient to pay the amount of the judgment obtained by Chambers against his employer, the Philadelphia Pickling Company, the Assured, (which was not the Pennsylvania Corporation) together with the accrued interest on such judgment, your verdict must be for the defendant, as more than 90 days had expired between the date of the payment of October 31, 1913 and the date of the beginning of this action.

44. With the payment made on October 31, 1913, sufficient moneys had been paid on account of the judgment obtained by Walter Chambers against his employer, Philadelphia Pickling Company, the assured, (which was not the Pennsylvania Corporation) to pay the amount due on the principal of the judgment together with all of the accrued interest thereon due to that date, and the verdict must therefore be for the defendant, as more than 90 days had expired between October 31, 1913, and the date of the beginning of this action.

45. If you find that the total amount of the payments made on account of the Chambers judgment against the plaintiff to and including the payment of October 31, 1913, were sufficient to pay the amount due on

the principal of that judgment there can be no recovery by the plaintiff in this action and your verdict must be for the defendant.

46. There can be no recovery by the plaintiff in this action, as more than 90 days had expired between the date of the last payment of 40 cents, claimed to have been made in April, 1914, on account of and in satisfaction of the amounts due on any of the judgments entered in favor of Chambers, and November 16, 1914, the date when the present plaintiff, the Philadelphia Pickling Company, the Pennsylvania Corporation, was made the plaintiff in this action.

47. As no part of the judgments obtained by Chambers against the Philadelphia Pickling Company (the Pennsylvania Corporation) was for damages on account of bodily injuries received or suffered by Chambers while in the employ of the Assured mentioned in the policy of insurance upon which this action is based, the plaintiff cannot recover in this action and the verdict must be for the defendant.

48. The judgment obtained by Chambers against the Philadelphia Pickling Company (The Pennsylvania corporation) was based upon a contract in writing entered into between Sallie Wittenberg and the said Philadelphia Pickling Company, a corporation, for a contract liability, and not for personal injuries received or suffered by Chambers, while in the employ of the assured mentioned in the policy of insurance upon which this action is based and therefore the plaintiff cannot recover in this action and the verdict must be for the defendant.

Defendant's Requests to Charge.

49. The injuries to Walter Chambers on September 19, 1907 while an employe of the assured were caused by a person,

"in connection with the making of additions to a building or structure or plant,"

within the meaning of such terms as used in in the policy of insurance and therefore the plaintiff cannot recover in this action and your verdict must be for the defendant.

50. The injuries to Walter Chambers, on September 19, 1907, while an employe of the assured, were caused by a person,

"in connection with the making of alterations in a building or structure or plant"

within the meaning of such terms as used in the policy of insurance and therefore the plaintiff cannot recover in this action and your verdict must be for the defendant.

51. The injuries to Walter Chambers on September 19, 1907, while an employe of the assured were caused by a person,

"in connection with the wrecking or demolition of a building or structure or plant or a part thereof,"

within the meaning of such terms as used in the policy of insurance and therefore the plaintiff cannot recover in this action and your verdict must be for the defendant.

52. As the plaintiff did not prove in this action that the compensation of the witness Chris Wilden was included in the estimate set forth in the Schedule of the policy of insurance, the plaintiff cannot recover in this action and your verdict must be for the defendant.

53. As the plaintiff did not prove in this action that the compensation of the witness W. Hand was included in the estimate set forth in the Schedule of the policy of in-

surance, the plaintiff cannot recover in this action and your verdict must be for the defendant.

54. As the plaintiff did not prove in this action that the assured did not carry a policy of another insurer, whether valid or not, against a loss covered by the policy of insurance in this action, the plaintiff cannot recover in this action and your verdict must be for the defendant.

55. If you find that the risk of the defendant was increased by the work being done by the assured at the time Chambers received his injuries, and that such work was not contemplated by the terms of the policy, the plaintiff cannot recover in this action and your verdict must be for the defendant.

56. The plaintiff cannot recover from defendant, the expenditures made by it on account of the legal proceedings involving its claims of its property levied upon by execution or certiorari proceedings taken affecting the said claims of property.

57. If you find that the total amount of the payments made on account of the Chambers judgments, to and including the payment of October 31, 1913, were sufficient to pay the amount of the judgment obtained by Chambers against the Philadelphia Pickling Company (the Pennsylvania Corporation) the plaintiff in this action, together with the accured interest on such Judgment, your verdict must be for the defendant as more than 90 days had expired between the date of the payment of October 31, 1913, and May 5, 1914, the date of the beginning of this action.

58. As the proofs in this action show that the plaintiff had, on October 31, 1913, made payments on account of the judgments obtained by Chambers against the Philadelphia Pickling Company (the Pennsylvania Corporation) the plaintiff in this action, sufficient in amount to pay the full amount due upon said Judgment to October 31, 1913, there can be no recovery by the plaintiff in this action, as more than 90 days had expired between the date of the payment of October 31, 1913, and May 5, 1914, the date of the beginning of this action, and your verdict must therefore be for the defendant.

59. There can be no recovery by the plaintiff of the moneys paid by it in payment of the judgment obtained by Chambers against it, for the reason that the amounts due on such judgment were all paid by the payment made by the plaintiff on October 31, 1913, and more than 90 days have expired between October 31, 1913 and May 5, 1914, the date of the beginning of this action.

60. Adding to the depth or to the extent of the interior accommodations of a building is an alteration of a building within the terms and provisions of the policy of insurance in this case.

MONDAY, NOVEMBER 30, 1914.

CASE RESUMED.

THE COURT: Do the pleadings show any waiver in the case?

MR. CARR: I don't think they do. I would like to amend by pleading letter of disclaimer signed by Mr. Maydwell, dated, October 10th.

MR. JONES: I cannot consent to that at this time. I made that a basis for my motion for a non-suit; It was then before the court, before the minds of counsel. I have made it also as a basis for my motion to direct a verdict; I have also included it in my requests to charge which have been handed to the court, and it does not strike me that at this late hour—

THE COURT: Hasn't the whole case been tried upon a complete basis of all the transactions between these parties? Do you want to add anything if I should allow the amendment?

MR. JONES: I don't know at this time. My mind is not clear on that question. I presumed the case was closed.

THE COURT: That is true so far as the testimony is concerned, but the case has been, to my mind, very fully tried upon even this aspect, that is to say, if on a view to the pleadings as to the conduct of the parties—

MR. JONES: I recall distinctly in the beginning of this case I called to your honor's attention and counsels' attention—

THE COURT: Is there anything you want to add to what is already testified, if I should allow the amendment? How long do you want to think about it?

MR. JONES: I cannot answer that now. I certainly could not at this time—I would

want to see the record in the case—I could not at this time give any answer to your honor's inquiry.

THE COURT: I am inclined to think, Mr. Jones, the question of waiver becomes quite important in this case, and if an amendment is asked for I should be inclined to allow it, and I should also be inclined to give you time to bring your case to meet it if you want to. I think the case ought to be tried out in all its aspects.

MR. JONES: My clients, as you know, are at a distance.

THE COURT: You know you can tell me whether you can get ready, say whether you want some other day.

MR. JONES: I couldn't get ready in that short space of time.

THE COURT: If you want to I will give you until Wednesday to get ready with any additional testimony.

MR. JONES: I could not get ready—

THE COURT: Do you want to?

MR. JONES: I would rather stand on the record of the case as it now stands.

THE COURT: The amendment will be allowed, and an exception will be noted for the Defendant.

Exception to Defendant.

Charge.

THE COURT (Lloyd, C. J.) :—The case to which you have been listening is based upon an insurance policy issued by the defendant company to a title called the Philadelphia Pickling Company. The nature of the insurance is to indemnify that entity—whatever it might be—against loss by reason of the payment of any judgments obtained against them, more fully enumerated in the policy, for damages sustained by certain employes when under certain conditions they are injured.

This policy was issued to the Philadelphia Pickling Company. At that time, which was November 25th, 1906, the Philadelphia Pickling Company was composed of Sallie Wittenberg. That was the trade name under which she was operating.

Among the answers of Sallie Wittenberg, or the Pickling Company, as you may choose to call it, contained in a Schedule of statements, in answer to Statement number three, to the question, "State whether individual, co-partnership, corporation, receiver or other trustee," the answer is, "Company." That provision is made one of the conditions, the truth of which is warranted by the assured.

Later on, in 1907, September 19th, Walter Chambers, an employe of Sallie Wittenberg, was injured and a suit was brought against the Philadelphia Pickling Company, she being at that time that company, for the injuries which he had sustained, and the suit resulted in a judgment against that trade name and including Sallie Wittenberg as the owner and operator. Later on a corporation was formed which was called the Philadelphia Pickling Company; the same name, but it became a corporation instead of a trade name for Sallie Wittenberg. And it is claimed by the plaintiff that under a verbal transfer made

by Sallie Wittenberg to the Pickling Company, and after the injuries to Chambers had occurred, this policy was transferred to the Pickling Company and that the Pickling Company then became entitled to all of the benefits and subject to all the risks and liabilities incident to the policy.

The proceeding against the Philadelphia Pickling Company, the trade name, was subsequently proceeded in against the Philadelphia Pickling Company, the corporation, by Chambers, the plaintiff in the original case, and he finally got judgment, having already obtained judgment against Sallie Wittenberg or against the Philadelphia Pickling Company, the trade name of Sallie Wittenberg; he later obtained a judgment. Under the nature of the transfers to the Pickling Company, the corporation. The corporation was then obliged to pay and it is this payment which the Pickling Company is now seeking to recover at your hands from the Insurance Company, upon the theory that it is the owner by assignment of the policy and entitled to the benefits under it. Of course, it takes it subject to all the burdens and all the conditions which are in the policy.

The defendant's answer to the plaintiff's claim takes a manifold form. Pleadings have been filed to set up a failure on the part of the plaintiff and the assured to perform a series of conditions which are mentioned in this policy and set forth, and also the statement that I have already read in your hearing as to the answer of the word "Company" being a truthful one.

These defenses, and the requests to charge based on them and on the evidence, are extremely voluminous and perhaps they will exhaust you to hear them pretty nearly as much as it will the court to deal with them. The defendant has asked the court to give you so many requests that

they pretty nearly amount to a charge in themselves of considerable magnitude. If I charged them all, and even those that I am called on to charge you, perhaps will save me the trouble of making any other general charge to you.

The plaintiff has also requested me to answer some requests. The first is on the part of the plaintiff:

> It is for you to say whether or not the work of strengthening the foundations of the plaintiff's factory in which Chambers was engaged when the accident occurred constituted ordinary repairs within the meaning of the policy.

That I charge you.

The defendant has asked me to charge you certain requests and I will deal with them as expeditiously as I can.

> 1. The burden of proof is upon the plaintiff, to entitle it to recover, to affirmatively show that it and the assured have complied with all of the conditions precedent set out in the policy of insurance, by it or the assured to be performed, to maintain this action, the performance of which the defendant specified in its answer, it intended to contest. If the plaintiff fails to so affirmatively prove, the verdict must be for the defendant.

That is true, unless such conditions or any of them are waived by the defendant.

> 2. If you find that Walter Chambers did not receive his injuries while he or the assured (his employer) were engaged in making ordinary repairs, within the meaning of the policy of insurance, the plaintiff cannot recover in this action and your verdict must be for the defendant.
>
> 3. The fact that Walter Chambers recovered a judgment against the assured, his employer, does not form the basis in and by

itself, of the right of the plaintiff in this action to recover against the defendant in this action.

4. If you find that the injuries to the said Walter Chambers on September 19, 1907, while an employe of the assured, were caused by any person, including Walter Chambers, "in connection with the making of additions to, or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or plant or any part thereof," within the meaning of such terms, as used in the policy of insurance, your verdict must be for the defendant.

6. If you find that upon the occurrence of the accident, wherein Walter Chambers received his injuries, the assured did not give immediate written notice thereof, together with the fullest information obtainable at the time to the Company's Home Office or the Company's authorized agent, the plaintiff cannot recover in this action and your verdict must be for the defendant.

10. If you find that the Assured did voluntarily assume any liability, in the action brought by Chambers against his employer, the assured, or if the assured, without the written consent of the defendant company previously given, did incur any expense, except at his own cost, other than providing at the time of the accident for such immediate surgical relief as was imperative, or interfered in any legal proceedings brought by said Chambers, there can be no recovery in this action against this defendant for such liability so voluntarily assumed or for such expense incurred, or arising by reason of such interference with such legal proceedings, other than the expense for providing at the time of the accident for such immediate surgical relief as was imperative.

23. If you find that at the time of the issuance of the policy of insurance the assured

was not a "Company", your verdict must be for the defendant."

That word "Company" may mean many things. The request of the insurance company is to tell whether it was an individual, co-partnership, corporation, receiver or other trustee. To my mind the word "company" does not mean anything very definitely, but it is for you to say whether or not there was any misrepresentation in the use of that word. If it was, then it is a forfeiture of the policy.

27. If you find that Walter Chambers did not suffer his injuries "in and during the operation of the trade or business described in the Schedule" attached to and forming part of the policy of insurance, which are therein set out as follows: "Manufacturers, dealers and importers of pickles, table condiments and goods of this description" or in operations carried on usual to the kind of trade or business described in the policy, your verdict must be for the defendant.

28. If you find that Walter Chambers did not suffer his injuries "in and during the operation of the trade or business described in the Schedule" attached to and forming part of the policy of insurance, which are therein set out as follows: "Manufacturers, dealers and importers of pickles, table condiments and goods of this description," your verdict must be for the defendant."

35. There can be no recovery by the plaintiff of the moneys expended by it in defending the suit brought by Chambers against it."

I don't understand thirty-six. Did the corporation pay any expenses of the suit against the original defendant?

MR. JONES: My purpose is this, that the suit is brought by the corporation, not by the assured; therefore, I maintain the corporation did not expend—

Charge.

THE COURT: The assured, of course, could not have any claim for expenses against the Philadelphia Pickling Company, the corporation.

MR. JONES: I say there can be no recovery by the plaintiff, which is a corporation, for any moneys paid by it—

THE COURT: You don't mean expenses paid by it. You mean expenses paid by anybody?

MR. JONES: By anybody, by the trade name, if it did spend the money.

THE COURT: Mr. Jones, all of these requests are covered by that stipulation, are they not?

MR. JONES: No, sir. The only ones that could possibly be covered, in my mind, are 35; possibly 37; possibly 47; possibly 48.

> "55. If you find that the risk of the defendant was increased by the work being done by the assured at the time Chambers received his injuries, and that such work was not contemplated by the terms of the policy, the plaintiff cannot recover in this action and your verdict must be for the defendant.
>
> 56. The plaintiff cannot recover from the defendant the expenditures made by it on account of the legal proceedings involving its claim of its property levied upon by execution or certiorari proceedings taken affecting the said claims of property.
>
> 60. Adding to the depth or to the extent of the interior accommodations of a building is an alteration of a building within the terms and provisions of the policy of insurance in this suit."

I take that to be that that would be true, that the change of the accommodations of the interior part of the building, but if this was simply the strengthening of a wall, I should think you would have no difficulty in finding that that was ordin-

ary repairs within the meaning of this policy, although the question is entirely for you.

On the question of the damages which you should award the plaintiff, if you conclude it is entitled to recover, counsel on both sides have entered into certain stipulations as to amounts, and they are intended to be available upon any review of this case, if an alternate sum should be found to be the correct one. One or two alternates should be found to be correct. For the purpose of this case, the court is of opinion that the recovery cannot be beyond five thousand dollars, plus the expenses of defending the first suit by the Pickling Company, the trade name; and plus also the interest from the time when the judgment was actually paid and satisfied. Counsel have agreed as to what these amounts are. The policy is for $5000; there is an agreement on the part of the defendant company to defend the action. In this case, it disclaimed liability, declined to defend, therefore the Court thinks this part of the claim, the items of original expenses in defending is a matter properly to allow the plaintiff, if entitled to recover. And, second, interest from the time when the payment was finally made and the judgment satisfied.

Under these figures and under a little reflection which the court has been giving to what the items are, I think the items of expense in defending the action would be very proper if this action were brought by the assured, Sallie Wittenberg, but it is not brought by her, and I don't recall any evidence in the case that transfers of claim in any wise to the present plaintiff, so that that item of $360 would have to come out and all that you allow would be the amount of the judgment in the first instance, with the interest that the money bears from the time when that

judgment was paid, and for your convenience counsel have agreed that those figures amount to $4356.01.

MR. CARR: I desire to except to the court's refusal to charge requests numbers two, three and four, requests to charge on behalf of the plaintiff.

I also desire to except to the charging of the third, fourth, sixth, tenth, twenty-third, twenty-seventh, twenty-eighth, thirty-fifth, fifty-fifth, fifty-sixth and sixtieth requests of the Defendant to charge.

I also desire to except to the charge that no interest is recoverable by the plaintiff except from the date of the last payment made by the plaintiff in satisfaction of the tort judgment, the plaintiff's theory being that interest on the amount of the judgment and costs, to wit. $4091.01 is recoverable down to the date of payment of the judgment and down to the beginning of this suit, the amount actually paid in satisfaction of the judgment being in excess of that amount.

Exception to Plaintiff.

MR. JONES: I wish to take exception to that part of the charge of the court wherein the court stated the time of the issuance of the policy in the trade name and while it was in force a certain suit was brought by Chambers:

I also wish to except to that part of the court's charge, more particularly to that part dealing with the question wherein the court used the following phrase, referring to Sallie Wittenberg: "She being at that time the company."

I also except to that part of the court's charge wherein after discussing the question of the alleged transfer of the policy to the corporation the court charged that the Pickling Company then

became entitled to all of the benefits under the policy.

THE COURT: My recollection is I said it was "claimed by the plaintiff." If not, I so charge it now.

MR. JONES: Also to that part of the court's charge wherein the court stated it was for the jury to say whether the work of strengthening then being done at the time Chambers was injured was work on the foundation walls constituting ordinary repairs within the meaning of the policy.

I also except to that part of the court's charge wherein the court stated that in discussing the meaning of the word "company," used the following words: "Company may mean many things; to my mind it does not mean anything in this case."

THE COURT: That I could not have meant. To my mind very little, or something of that sort.

MR. JONES: I also take exception to the court's statement regarding the Defendant's request to charge Number One.

I also except to the court's charge of defendant's request No. 1, on the ground that it was not charged as requested.

I also except to the refusal of the court to charge the following requests of the defendant:

Numbers 5, 8, 9, 12, 13 to 22 inclusive; 24, 25, 26, 29 to 34 inclusive; 36 to 54 inclusive; 55 and also 57, 58 and 59.

I also except to the refusal of the court to charge defendant's request to charge No. 60 as the court was requested to charge.

I also except to the court's charge of the defendant's request to charge No. 60 as the same was charged by the court.

Exception to Defendant.

Verdict,

The Jury found a verdict in favor of the Plaintiff and against the Defendant, and assessed the damages at the sum of Four Thousand Three Hundred and Fifty Six and 01/100 ($4356.01) Dollars.

Exhibit P-1.

"THIS AGREEMENT made the seventh day of November, A. D. 1908, by and between SALLIE WITTENBERG, trading as Philadelphia Pickling Company, of Philadelphia, party of the first part, and the PHILADELPHIA PICKLING COMPANY, a corporation chartered under and by virtue of the laws of the State of Pennsylvania, hereinafter called the Company, party of the second part.

"WHEREAS, the said Sallie Wittenberg is the owner of the stock, good will and fixtures of the business now carried on by her at Number 262 South Second Street, in the City of Philadelphia, and has agreed to sell all the stock, good will and fixtures of the said business, including all factories in New Jersey or elsewhere, and,

"WHEREAS, at a meeting of the stockholders of the Philadelphia Pickling Company the board of directors were authorized to enter into an agreement to purchase the said stock, good will and fixtures of the said business from the said Sallie Wittenberg, and,

"WHEREAS, at a meeting of the board of directors of the said Company the directors of the said Company valued the said stock, good will and fixtures of the said business at fifty thousand dollars and by resolution duly passed, authorized and empowered the president to enter into an agreement with the said Sallie Wittenberg whereby the Company would purchase the said stock, good will and fixtures for the price or sum of fifty thousand dollars:

"NOW, THIS AGREEMENT WITNESSETH, that the said Sallie Wittenberg, in consideration of the sum of fifty thousand dollars, five thousand dollars having been paid this day in cash to her, the receipt whereof she does hereby acknowledge, and the balance thereof, namely, forty-five thousand

dollars, by the transfer to her of 450 shares of the capital stock of the Company at par, the receipt whereof she does also hereby acknowledge, does hereby assign, transfer, convey and set over unto the said Philadelphia Pickling Company all stock, good will and fixtures, including all book accounts due or to become due as set forth in the annexed schedule marked Exhibit A of the business now carried on by her under the name of the Philadelphia Pickling Company at Number 262 South Second Street and elsewhere in the City of Philadelphia, together with all factories and plants owned or operated by her in connection with the said business, and the said Sallie Wittenberg further agrees to execute any and all papers, agreements, writings and deeds which may be necessary to assign, transfer, grant and convey to the Philadelphia Pickling Company a proper title of, in and to the stock and fixtures, together with any real estate owned by her in connection with the said business.

"In consideration of the above agreement on the part of the said Sallie Wittenberg the Company agrees hereby to purchase the stock, good will, fixtures, plant and real estate belonging to the said business for the price or sum of fifty thousand dollars, to be paid in the manner hereinabove set forth, and the Company further agrees to pay any and all debts due by the said Sallie Wittenberg, trading as Philadelphia Pickling Company, as shown by the books of the Company on the first day of November, A. D. 1908, as set forth in the annexed schedule marked Exhibit B, together with any and all claims for damages or otherwise arising from the operation of the business by the said Salle Wittenberg, including any claim now existing or hereafter to be made by Walter Chambers, suit for which has already been brought in the State of New Jersey.

Exhibit P-1.

"The Company further agrees to fulfill all contracts entered into by the said Sallie Wittenberg, trading as Philadelphia Pickling Company.

"IN WITNESS WHEREOF the said Sallie Wittenberg has hereunto set her hand and seal and the said Philadelphia Pickling Company has hereunto caused the hand of its president, together with the corporate seal duly attested by the signature of its secretary, to be hereunto affixed the day and year first above written."

(Corporate Seal.) S. WITTENBERG, (L.S.)
PHILADELPHIA PICKLING COMPANY,
S. WITTENBERG,
President.
CHARLES BRECHER,
Secretary.

Witnesses:
MORRIS W. SLOAN,
HARRY FELIX.

Exhibit P-2.

No. A—108978 PREMIUM $30.00

MARYLAND CASUALTY COMPANY OF BALTIMORE.

MANUFACTURERS' EMPLOYERS' LIABILITY POLICY.

(Seal.)

IN CONSIDERATION of Thirty and 00/100 Dollars ($30.00) estimated premium and the statements hereinafter set forth in the Schedule of Statements, which statements the Assured makes and warrants to be true by the acceptance of this Policy, except the statements concerning the number of employes and their compensation, which are estimated, the MARYLAND CASUALTY COMPANY, hereinafter called the Company, HEREBY AGREES TO INDEMNIFY PHILADELPHIA PICKLING COMPANY, of Philadelphia, County of Philadelphia, State of Pennsylvania, hereinafter called the Assured, for a period of twelve months, beginning on the twenty-fifth day of November 1906, noon, and ending on the twenty-fifth day of November, 1907, noon, standard time at the place where this Policy has been countersigned, *AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries or death accidentally suffered while this Policy is in force, by any employe or employes of the Assured, while within the factory, shop or yard described in the Schedule or upon the sidewalk or other ways immediately adjacent thereto provided for the use of such employes or the public, in and during the operation of the trade or business described in the Schedule, including, however, drivers and drivers' helpers mentioned in the Schedule when on duty in the vicinity of the locations designated in the Schedule,* subject to the following conditions:

Exhibit P-2.

CONDITION A. The Company's liability for loss from an accident resulting in bodily injuries to or in the death of one person is limited to FIVE THOUSAND AND 00/100 DOLLARS ($5000.00), and, subject to the same limit for each person, the Company's total liability for loss from any one accident resulting in bodily injuries to or in the death of more than one person is limited to TEN THOUSAND AND 00/100 DOLLARS ($10,000.00).

CONDITION B. This Policy does not cover loss from liability for injuries or death to or caused by—(1) Any person unless his compensation is included in the estimate set forth in the Schedule (provided that this exclusion shall not apply to loss from liability for injuries or death (*a*) caused by the Assured hmself if an individual, nor if a firm by any member thereof, nor if a corporation by its President, Vice President, Secretary or Treasurer, provided such officer is not managing or superintending at the works; or (*b*) caused to or by drivers of teams for which the Assured carries concurrent Teams insurance in this Company): (2) Any child employed by the Assured contrary to law or any child employed under fourteen (14) years of age where no statute restricts the age of employment: (3) Any convict: (4) Any person in connection with the making of additions to or alterations in or the construction of any building or structure or plant or in connection with the wrecking or demolition of any building or structure or plant or any part thereof. Ordinary repairs when made by employes of the Assured whose compensation is included in the estimate set forth in the Schedule are permitted.

CONDITION C. Upon the occurrence of an accident the Assured shall give immediate written

Exhibit P-2.

notice thereof, with the fullest information obtainable at the time, to the Company's Home Office or to the Company's authorized agent. If a claim is made on account of such accident the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in his power.

CONDITION D. If thereafter any suit is brought against the Assured to enforce a claim for damages on account of an accident covered by this Policy, the Assured shall immediately forward to the Company's Home Office every summons or other process as soon as the same shall have been served on him, and the Company will, at its own cost, defend such suit in the name and on behalf of the Assured unless the Company shall elect to settle the same or to pay the Assured the indemnity provided for in Condition A hereof.

CONDITION E. The Assured shall not voluntarily assume any liability, nor shall the Assured, without the written consent of the Company previously given, incur any expense or settle any claim, except at his own cost, or interfere in any negotiation for settlement or in any legal proceeding; *except that the Assured may provide* AT THE TIME OF THE ACCIDENT *such immediate surgical relief as is imperative.* Whenever requested by the Company, the Assured shall aid in securing information and evidence and the attendance of witnesses and in effecting settlements and in prosecuting appeals.

CONDITION F. No action shall lie against the Company to recover for any loss under this Policy unless it shall be brought by the Assured for loss actually sustained and paid in money by the Assured in satisfaction of a judgment after trial of the issue; nor unless such action is brought within

ninety (90) days after such judgment, by a court of last resort, against the Assured has been so paid and satisfied. The Company does not prejudice by this condition any defenses to such action it may be entitled to make under this Policy.

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

CONDITION H. If the Assured carry a Policy of another insurer, whether valid or not, against a loss covered by this Policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance.

CONDITION I. If the business of the Assured is placed in the hands of a receiver, assignee or trustee, whether by the voluntary act of the Assured or otherwise, this Policy shall immediately terminate, but such termination shall not affect the liability of the Company as to any accidents theretofore occurring. If the Assured is a corporation, a change of title, or if a firm or individual, a change of title or of ownership shall in like manner terminate this Policy, unless such change is consented to by the Company, by an endorsement hereon, signed by its President, one of its Vice-Presidents or its Secretary.

CONDITION J. The premium is based on the entire compensation whether for salaries, wages, piecework, overtime or allowances earned by the employes of the Assured during the period of this Policy; whenever employes are compensated, in whole or in part, by store certificates, board, mer-

chandise, credits, or any other substitute for cash, the amount of compensation covered by such substitutes shall be included in the entire compensation on which the premium is based. If such entire compensation exceeds the sum set forth in the Schedule, the Assured shall immediately pay the Company the additional premium earned; if such compensation is less than the sum set forth in the Schedule, the Company will return the unearned premium, when determined; but the Company shall retain not less than Twenty-two and 50/100 Dollars ($22.50), it being agreed that this sum shall be the minimum earned premium.

CONDITION K. This Policy may be cancelled by the Company at any time by written notice to the Assured stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company, the Company shall be entitled to the earned premium, *pro rata,* when determined. If cancelled by the Assured, unless the Assured has retired from business, the Company shall be entitled to the earned premium calculated at short rates in accordance with the table printed hereon. In either case the earned premium shall be computed on the compensation for the year as indicated by the actual compensation earned by the employees of the Assured during the time the Policy shall have been in force. In any case the minimum earned premium stated in Condition J shall be retained by the Company. The Company's check mailed to the address of the Assured as given herein shall be a sufficient tender, but no return premium shall be payable until a statement of the actual compensation earned by the employes of the Assured during the period the Policy was in force shall have been furnished to the Company by the Assured.

Exhibit P-2.

CONDITION L. Any of the Company's authorized inspectors shall have the right and opportunity whenever the Company so desires to inspect the plant, works, machinery and appliances of the Assured; and the Company or any of its inspectors may suspend this insurance so far as any boiler or elevator is concerned because of any defect or dangerous condition found in the same. Notice of such suspension and the reason therefor and of the reinstatement of the insurance must be in writing.

CONDITION M. Any of the Company's authorized Auditors shall have the right and opportunity whenever the Company so desires, to examine the books and records of the Assured as respects compensation earned by the employes of the Assured, and the Assured shall render reasonable assistance; but the Company waives no right by failing to make such examination. The Assured shall, whenever the Company so requests, furnish the Company with a written statement of the amount of compensation earned by his employes during any part of the period of the Policy, and at the end of the period of the Policy the Assured shall furnish the Company with such statement covering the full period of the Policy. The rendering of any estimate or statement or any settlement shall not bar the examination herein provided for nor the Company's right to additional premiums.

CONDITION N. No erasure or change appearing on the face of this Policy as originally printed and no change or waiver of any of its terms or conditions or statements shall be valid unless endorsed hereon and signed by the President, one of the Vice-Presidents or the Secretary of the Company. Notice to or knowledge by any Agent or any other person shall not be held to waive any of the terms, conditions, or statements hereof

Exhibit P-2.

CONDITION O. No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by the President, one of the Vice-Presidents or the Secretary of the Company:

SCHEDULE OF STATEMENTS:

STATEMENT 1. Name of Assured: Philadelphia Pickling Company.

STATEMENT 2. Address of Assured: 262-4 So. Second St., Phila., Pa.
(State street, town, county and state where where Head Office is located.)

STATEMENT 3. The Assured is: Company.
(State whether individual, co-partnership, corporation, receiver or other trustee.)

STATEMENT 4. The places where the factories, shops and yards are located, the kind of trade or business carried on at each such location, and the estimated number of employes, and the estimated compensation of employes at each such location, are as follows:

Exhibit P-2.

Kind of Trade or Business.	Locations of Each Factory, Shop and Yard.	Estimated Average Number of Employes.	Estimated Compensation For Period of Policy.	Premium Rate per $100 of Compensation.	Estimated Amount of Premium.
Manufacturers, dealers and importers of pickles, table condiments and goods of this description.	262-264-265 So. Second St., Phila., Pa., Salem, Eldora, N. J., and elsewhere in service of the assured.		$15,000	20¢	$30.00
Employes in connection with hand-fed cutting, embossing, pressing, punching and stamping machines at all the locations designated above.					

The estimated compensation includes that of all persons employed whether compensated by salary, wages, for piecework, overtime or allowances and whether paid in cash, in whole or in part, in board, store certificates, merchandise, credits, or any other substitute for cash, at the above locations, for the purposes of the trade or business described herein to whom compensation of any nature is paid, including CLERICAL FORCE and DRIVERS, except as follows: Drivers are excluded.

STATEMENT 5. The total number of hand-fed cutting, embossing, pressing, punching and stamping machines at all the locations mentioned above, whether in use or not, is as follows:

(State number and kind of each.)

STATEMENT 6. The operations carried on are those usual to the kind of trade or business described herein.

STATEMENT 7. There are no steam power boilers on the premises, except as follows: Several boilers.

Exhibit P-2.

STATEMENT 8. There are no passenger or freight or other elevators on the premises, except as follows: Several elevators and hoists.

STATEMENT 9. No power is used, except as follows: Steam and as usual to trade.

STATEMENT 10. No chemicals are used, except as follows: As usual to trade.

STATEMENT 11. No explosives are used, except as follows: As usual to trade.

STATEMENT 12. The following insurances are now carried:

Employers' Liability, $..... Name of Co. .....

Boiler, $..... Name of Co.: Hartford.

Public Liability, $10,000. Name of Co. ..... This Co.

Elevator, $..... Name of Co. .... This Co.

Workmen's Collective, $10,000. Name of Co. This Co.

Teams, $..... Name of Co. Phila. Casualty Co.

STATEMENT 13. Valid insurance in amounts not less than stated above will be carried during the period of this Policy.

STATEMENT 14. No Company has cancelled or refused to issue Liability, Elevator or Boiler Insurance to the Assured during the past three years, except as follows: No.

STATEMENT 15. No Company has insured this risk during the past two years, except as follows: This Company.

Exhibit P-2.

STATEMENT 16. The entire compensation earned by all employes during the year ending December 31 last, was $ .....

STATEMENT 17. The minimum premium for this Policy is $22.50.

IN WITNESS WHEREOF, the MARYLAND CASUALTY COMPANY has caused this Policy to be signed by its President and Secretary, at BALTIMORE, MARYLAND, but the same shall not be binding upon the Company unless countersigned by a duly authorized representative of the Company.

JAS. F. MITCHELL, Secretary.

JNO. T. STONE, President.

Countersigned at Philadelphia, Pa., this 13th day of November, 1906.

JNO. W. DONOHUE, General Agent.

TABLE OF SHORT RATES.

Showing Per Cent. of Premium Earned.

Months since issue of Policy	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17
Policy issued for 1 year	20	30	40	50	60	70	75	80	85	90	95	100					
Policy issued for 2 years	13	20	25	30	35	40	45	50	55	60	65	70	73	75	78	80	83
Policy issued for 3 years	10	15	20	23	27	30	33	37	40	43	47	50	53	57	60	63	67

	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36
	85	88	90	93	95	98	100												
	70	72	73	75	77	78	80	82	83	85	87	88	90	92	93	95	97	98	100

Exhibit P.-2.

For Value Received ..... hereby transfer, assign and set over unto .....
.....
and ..... assigns, all ..... right, title and interest in this Policy of Insurance, and all benefit and advantages to be derived therefrom.

Witness ..... hand and seal this .....
..... day of ....., 190....

Sealed and delivered in presence of

.....

MARYLAND CASUALTY COMPANY consents that the interest of the Assured in the within Policy may be assigned to the said purchaser, subject nevertheless to all terms and conditions therein mentioned and referred to.

Baltimore, Md., ..., 190 .

.....
Secretary.

ENDORSED
MANUFACTURERS' EMPLOYERS' LIABILITY POLICY.

No. A108978,
MARYLAND CASUALTY COMPANY.

(Seal.)
Issued to

PHILADELPHIA PICKLING CO.

Philadelphia, Pa.
PREMIUM $30.00.
Expires November 25th, 1907.

Please Read Your Policy.

Carefully note Condition requiring immediate notice of every Accident.

Exhibit P-3.

Philadelphia, Pa., 9/21/07.

The Maryland Casualty Co.,
311 Walnut St.,
Philadelphia, Pa.

Gentlemen:

Enclosed herewith find report of accident to Walter Chambers, at our Eldora factory. We have not much confidence in the physician who examined this young man, and would suggest that you send one of your physicians to our factory to examine him. Please communicate with us on the subject as our Mr. Wittenberg goes down to the factory very frequently and might arrange to go down with your physician.

Give this your attention, and oblige,

Yours respectfully,

PHILADELPHIA PICKLING CO.

L. Wittenberg, Manager.

B/R.

1 enc.

(Written by L. W.) We sent our Doctor and he arranged to bring him here to the Jefferson Hospital, to-day.

Exhibit P-4.

Philadelphia, Pa., 9/24/07.

The Maryland Casualty Co.,
311 Walnut St.,
Philadelphia, Pa.

Gentlemen:

Enclosed herewith find report of the accident to Walter Chambers at our Eldora factory. This is the report about which we wrote you on the 21st inst.

Yours respectfully,
PHILADELPHIA PICKLING CO.
L. Wittenberg, Manager.

B/R.
1 enc.

Exhibit P-5.

REPORT OF ACCIDENT TO AN EMPLOYEE.

Of Phila. Pickling Co.

Of ..... Street. City, Eldora.
(Give full address.)

State, New Jersey.

Business, Manufacturing Food Products.

If accident is fatal or involves serious injury, Telegraph or Telephone immediately to employer's office, also when an inquest is to be held.

1. INJURED PERSON'S NAME? Walter Chambers.
2. About how old? 18.
3. Weekly wages? $9.
4. Occupation? General work.
5. Married or Single? Single.
6. Address? ..... Street.
7. City or Town? Eldora.
8. State of New Jersey.
9. In whose service? Phila. Pickling Company.
10. General duties .....
11. How long Employed prior to accident? 3 weeks.
12. How long engaged on this job? 3 weeks.
13. Had he done similar work prior to this employment? .....
14. Was the injured person familiar or not with the work engaged in or the machinery being operated at the time of the accident?
(State extent of experience so far as known.)
.....
15. Was he in full charge of the machine to extent he could start or stop it at will?
16. Was the machine sound and in good working order at the time of accident?
17. Nature and extent of injury? Unknown.
(If hand or arm, which one.)
18. Probable period of disablement? Indefinite.

Exhibit P.-5.

19. Was injured person engaged in his regular occupation at the time of the accident?
(If not, explain fully under No. 31.)

20. Name and address of Surgeon, if any, who attended him? Dr. J. Butcher, Heislerville, N. J.

21. Taken home or to hospital? Home. If to hospital state name and location? From home on 9/22 to Jefferson Hospital, Phila., Pa.

22. Has the person returned to work? .....
If so, when? .....

23. Did the injured employee ever give notice of any defect in ways, works or apparatus connected with accident; and if so, was such defect remedied? .....

24 Did the injured person know of the defect?
.....

25. Did the injured person make any statement after the accident as to its cause, or admitting his own carelessness; and if so, what did he say, and who heard it? .....
(Give names and addresses.)

Date of notice: Sept. 22, 1907.

THE ACCIDENT.

26. Date? Sept. 19, 1907. Hour? 9:30 A. M. Place? Phila. Pickling Co. City? Eldora. State? New Jersey.

27. What light was there at time and place of accident? Daylight. S. E. cor. of Factory.

28. Name and address of foreman in charge? Samuel Fithian, Eldora, N. J.

29. Where was foreman at time of accident, and what was he doing? Other part of factory.

30. Names and addresses of all persons who witnessed the accident, or who claim to have witnessed it, or who would probably know anything about it? S. Corson, Delmont,

Exhibit P-5.

N. J.; W. L. Hand, Delmont, N. J.; E. S. Creamer, Eldora, N. J.; S. Whilden, Delmont, N. J.; J. Warwick, Delmont, N. J.; Leonore Bennett, Eldora, N. J.

31. Was accident due to want of ordinary care on part of injured person, or to negligence of any other person; if so, of whom?
(Give name and address.)

.....

32. Narrate below how accident happened, its cause, etc., and illustrate by any marked rough sketch which you think will enable the cause of the accident to be easily understood.

Chris Whilden, Walter Hand and Walter Chambers were preparing for cementing part of floor in the cellar. Mr. Samuel Fithian, the foreman, was at the cellar 15 minutes before the accident and everything was all right. Shortly after part of a wall gave way and fell upon Walter Chambers, injuring him. Doctor was sent for and the injured taking (sic) home.

Notice made out by Samuel Fithian. Position with employer, Foreman.

Business address: Eldora, Street, City.....
State: N. J.

Exhibit P-5a.

C. 19457 J—
Assured: Phila. Pickling Co.
Injured: Chambers Oct. 10th, 1907.
Philadelphia Pickling Co.,
Eldora, N. J.

Gentlemen:

After careful thought and consideration of the circumstances and facts, as we have them, surrounding the above captioned accident, we are of the opinion that the same is not covered, and shall, therefore have to disclaim liability. As you know, your policy, according to the application, applies only to the following, viz.: "Manufacturers, dealers and importers of pickles, table condiments and goods of this description." Repair work and construction work are entirely irrelevant to and not incident with the terms of the policy, as they could not be classed as ordinary repairs. We must therefore disclaim liability.

Trusting you will have no future trouble as the result of this accident, we beg to remain,

Yours very truly,
CHARLES W. MAYDWELL,
Manager Claim Division.

B/CDE

Exhibit P-6.

List of Payments Made by Assured (Tradename) and Plaintiff Corporation.

1908.			
April 18th	Dr. Hirsch	$ 25.00	Check of Tradename.
Sept. 26th	M. W. Sloan, Atty.	25.00	
" "	Gaskill & Gaskill	50.00	
Oct. 2nd	Expense to Cape May	11.00	
Nov. 10th	Gaskill & Gaskill	50.00	Check of Tradename.
" "	" " "	36.00	
Dec. 9th	M. W. Sloan	54.50	
1909.			
Feb. 11th	C. L. Goldenberg	100.00	Check of Plaintiff Corporation.
Mar. 30th	Exp. to Atlantic City	9.00	
April 6th	H. F. Carr	70.00	Check of Plaintiff Corporation.
" 8th	Expense to Cape May	7.50	
May 4th	Wilson, Carr & Stackhouse	50.00	Check of Plaintiff Corporation.
June 2nd	" " " "	50.00	
July 6th	" " " "	28.00	
" "	" " " "	30.00	
" 8th	Expense to Cape May	4.00	
" 15th	Wilson, Carr & Stackhouse	62.75	
1910.			
Feb. 22nd	Wilson & Carr	75.00	
Dec. 5th	" " "	75.00	
1911.			
Jan. 23rd	" " "	50.00	
April 28th	" " "	50.00	Check of Plaintiff Corporation.
July 10th	" " "	42.02	
Dec. 15th	H. Felix	10.25	
1912.			
Jan. 2nd	Wilson & Carr	91.05	
" 24th	" " "	11.00	
Feb. 13th	H. Felix	4.35	
" 29th	Huntzinger	31.20	
April 2nd	"	6.76	
July 11th	Wilson & Carr	46.44	Check of Plaintiff Corporation.
" 11th	" " "	4.00	
" 31st	" " "	100.00	
" 29th	Mileage, H. Felix	5.98	
Aug. 9th	Expense, H. Felix	3.50	
" 23rd	Wilson & Carr	163.60	
Oct. 21st	Expense to Delmont	6.00	
" 29th	Witnesses	3.75	
" 29th	Expense to Trenton	11.84	
Nov. 1st	R. R. fares and carfare	7.80	
" 1st	Chris. Hand	2.00	
Dec. 16th	Expense, Saml. Bishop	1.25	
1913			
Mar. 12th	Payments for Judgments	1,300.00	Check of Plaintiff Corporation, dated March 12, 1913, to order of Louis Wittenberg for $1100, endorsed by Louis Wittenberg and Felix, and check of Harry Felix, dated March 12, 1913, to order of Wilson & Carr for $1300 and endorsed by Wilson & Carr to Wescott & Wescott for Walter Chamber. (See p. 118.)
Apr. 14th	" " "	1,000.00	Check of Plaintiff Corporation.
June 16th	" " "	1,000.00	
July 11th	" " "	500.00	
Aug. 9th	" " "	500.00	
Oct. 14th	Wilson & Carr	48.40	
" 31st	Payment for Judgments.	1,205.09	
Nov. 1st	Wilson & Carr	100.00	Check of Plaintiff Corporation.
Dec. 22nd	" " "	53.60	
1914.			
Feb. 23rd	" " "	50.00	
Apr. 22nd	To satisfy Judgments	.40	Check of Harry Felix.
		$7,223.03	

Exhibit P-7.

Summons & Narr.—In Tort.

(Filed, April 7, 1908.)

NEW JERSEY, ss.:

(Seal.) The State of New Jersey to our Sheriff of our County of Cape May, GREETING:

We command you to summon The Philadelphia Pickling Company, to be and appear before the Supreme Court of the State of New Jersey, to be held at Trenton, in and for said State, on the fifteenth day of April, inst. to answer unto Walter Chambers, by his next friend, Margaret Whilden, of a plea of an action in tort; wherein the plaintiff claims damage in the sum of ten thousand dollars, and have you then and there this writ.

WITNESS, HONORABLE WILLIAM S. GUMMERE, Chief Justice at Trenton aforesaid, the first day of April, A. D., one thousand nine hundred and eight.

WILLIAM RIKER, JR.,
Clerk.

JOHN W. WESCOTT,
Attorney.

New Jersey Supreme Court, of the fifteenth day of April, one thousand nine hundred and eight.

CAPE MAY COUNTY, SS :

The Philadelphia Pickling Company, the defendant in this suit, was summoned to answer unto Walter Chambers, by his next friend, Margaret Whilden, the plaintiff therein, in a plea of an action in tort; and thereupon the said plaintiff by his next friend, and by John W. Wescott, his attorney, complains for that whereas, heretofore,

Exhibit P-7.

to wit, on or about the nineteenth day of September, one thousand nine hundred and seven, the plaintiff, then under age, was employed by the defendant as a helper in its factory at Eldora, in the County of Cape May, to wit, at Cape May Court House, in said County; that, while so employed, the defendant directed the plaintiff to go on the outside of the foundation of the defendant's factory to dig next to and along side the foundations thereof, which directions the plaintiff obeyed; that it was then the duty of the defendant to direct the plaintiff to dig as aforesaid, in a place reasonably safe and free from danger; that the defendant disregarded its duty in this behalf and carelessly and negligently had the place, in which the plaintiff was sent to dig as aforesaid, without the plaintiff's knowledge or fault, in such a condition of danger and insecurity, that, while the plaintiff was digging as aforesaid, said foundations caved in and fell upon the plaintiff, and thereby permanently injured and disabled the plaintiff and caused him to suffer great pain of body and mind and left him thereby in such condition that the plaintiff is permanently injured and will permanently suffer great pain of body and mind and will be permanently incapacitated to pursue all vocation whatsoever, to his damage ten thousand dollars.

And also, for that whereas, heretofore, to wit, at the time and place aforesaid the defendant negligently and carelessly had the foundations of its factory where the plaintiff was working under contract with the defendant, in such condition that said foundations were likely to fall and injure the plaintiff; that the defendant knew that the plaintiff had no knowledge whatsoever of the condition of said foundations; yet the defendant, although it was in duty bound not to expose the

Exhibit P-7.

plaintiff to unreasonable danger and not to place him near said foundations, disregarded its duty in this respect and ordered the plaintiff to dig next to and under said foundations and thereby negligently and carelessly exposed him to great danger of life and limb, without having warned him or informed him in anywise of the danger to which the defendant had so negligently exposed the plaintiff; that, while the plaintiff was digging next to and under said foundations, without any fault on his part, and because of the negligent and careless exposure by the defendant of the plaintiff as aforesaid, the foundations to said building gave way and fell upon the plaintiff, and thereby caused him to suffer great pain of body and mind and will cause him to suffer great pain of body and mind, and thereby permanently injured and incapacitated the plaintiff from pursuing his usual vocations, and caused him to expend large sums of money in his efforts to effect a cure of the injuries caused as aforesaid, to the plaintiff's damage, ten thousand dollars, wherefore he brings his suit, etc.

JOHN W. WESCOTT,
Attorney of Plaintiff.

TAKE NOTICE, that unless you appear and plead or demur to the within declaration, within 20 days after the service of a copy thereof upon you, judgment by default will be entered against you, according to the statute in such case made and provided.

JOHN W. WESCOTT,
Attorney for Plaintiff.

Exhibit P-7.

STATE OF NEW JERSEY,
County of Cape May, } ss.:

Personally appeared before me Robert R. Corson, by John K. Sparks, who being sworn, upon his oath deposeth and saith that he is the Deputy Sheriff of the County of Cape May, State of New Jersey, and that as such Deputy Sheriff he served the annexed Service made on the Phila. Pickling Co. through their agent Walter Henry on the third day of April, A. D., 1908, by showing him the original and leaving with him a copy thereof.

ROBERT R. CORSON,
Sheriff.
By John K. Sparks
Deputy Sheriff.

Sworn and subscribed before me this sixth day of April, A. D., 1908.

Jno. Sayre,
Deputy County Clerk.

Exhibit P-7.

Plea.

(Filed, Apr. 20, 1908.)

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS, by his next friend, MARGARET WHILDEN,

vs.

PHILADELPHIA PICKLING COMPANY.

In Tort. Plea.

And the said defendant the Philadelphia Pickling Company by Gaskill & Gaskill, its attorneys, comes and defends the wrong and injury when, etc., and says that it is not guilty of the several supposed grievances above laid to its charge, nor of any or of either of them, nor of any part thereof, and of this the said defendant puts itself upon the country, etc.

GASKILL & GASKILL,
Attorneys of Defendant.

STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss.:

LOUIS WITTENBERG, of full age, being duly sworn saith that he, this deponent, is the manager and for this purpose the agent of the Philadelphia Pickling Company, the defendant in above entitled cause; that the above plea is not intended for the purpose of delay but that he this deponent verily believes that the said defendant has a just and legal defense to the above entitled action of the plaintiff on the merits of the case.

LOUIS WITTENBERG.

Sworn and subscribed at Philadelphia, Pa., this eighteenth day of April, A. D., 1908, before me

Joseph H. Sundheim,
Notary Public,
Commission expires January 28, 1911.

Exhibit P-7.

Postea.

Afterwards, to wit, on the thirtieth day of September, one thousand nine hundred and eight, at a Circuit Court holden at Cape May Court House, in and for the County of Cape May, before the Honorable Allen B. Endicott, Judge of the Circuit Court of the County of Cape May, by consent of the parties the issue within named having been sent by the Honorable Thomas W. Trenchard, Justice of the Supreme Court, holding the Circuit Court for the County of Cape May, to be tried in the Circuit Court of the County, of the County of Cape May, before the Judge of the Circuit Court holding the same, according to the form of the statute in such named and provided, comes as well the within named plaintiff as the within named defendant, by their respective attorneys within mentioned, and the jurors of the jury, whereof mention is within made being summoned, also come, whom to speak the truth of the matters within contained, being chosen, tried and sworn, upon their oaths say that the defendant, the Philadelphia Pickling Company, is guilty in manner and form as the plaintiff has in his declaration complained against it, and they assess the damages of the said plaintiff, Walter Chambers, by his next friend, Margaret Whilden, on occasion thereof over and above his costs and charges by him about this suit in his behalf expended at Four Thousand Dollars, and for those costs and charges the sum of six cents.

ALLEN B. ENDICOTT,
C. C. J.

Exhibit P-7.

Rule to Show Cause.

(Filed, October 3, 1908.)

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS, by his next friend, MARGARET WHILDEN, *vs.* PHILADELPHIA PICKLING COMPANY.	In Tort. Rule to Show Cause.

Application having been made to me within six days after the trial of the above stated cause on behalf of the defendant Philadelphia Pickling Company, and good cause being shown therefor,—

It is on this fifth day of October, one thousand nine hundred and eight, ordered that a rule to show cause why a new trial should not be granted be and the same is hereby allowed said defendant.

ALLEN B. ENDICOTT,
Judge of the Circuit Court sitting for the Justice of the Supreme Court holding the Circuit.

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS, by next friend, *vs.* PHILADELPHIA PICKLING COMPANY.	In Tort. On Postea.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against defendant for the sum of Four thousand dollars besides costs to be taxed.

Entered, January 5, 1909, on motion of

JOHN W. WESCOTT,..
Atty.

Exhibit P-7.

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS, by next friend, MARGARET WHILDEN, *vs.* PHILADELPHIA PICKLING COMPANY.	In Tort. On Postea.

John W. Wescott, attorney.

Judgment entered this fifth day of January, A. D., nineteen hundred and nine, for the sum of four thousand dollars damages and ninety-seven dollars and seventy-eight cents costs.

$4,000.00
97.78

$4,097.78

WM. S. GUMMERE,
C. J.

Notice.

(Filed, Feb. 16, 1909.)

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS, by his next friend, MARGARET WHILDEN, *vs.* PHILADELPHIA PICKLING COMPANY.	In Tort. Notice.

PLEASE TAKE NOTICE that I shall move the Supreme Court, at the Court House in the City of Trenton, on Tuesday, the sixteenth day of February, inst., at ten o'clock, in the forenoon of said

Exhibit P-7.

day, or as soon thereafter as counsel can be heard thereon, to dismiss the rule to show cause heretofore allowed the defendant, for want of prosecution.

Dated, February 11th, 1909.

To Philadelphia Pickling Company.

JOHN W. WESCOTT,
Attorney for Plaintiff.

Rule Dismissing Rule to Show Cause.

(Filed, Feb. 16, 1909.)

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS, by, etc., *Plaintiff,* *vs.* PHILADELPHIA PICKLING CO., *Defendant.*	In Tort. Rule.

Defendant having failed to prosecute its rule in the above stated cause and due notice of this motion having been given to the defendant:

It is on motion of John W. Wescott, attorney for plaintiff, ordered that the rule to show cause heretofore allowed in this cause be and the same is hereby dismissed.

Dated, Feby. 16, 1909.

STATE OF NEW JERSEY, }
County of Camden, } ss.:

RICHARD W. CRONECKER, being duly sworn according to law on his oath says, that he served a copy of the above notice on the Philadelphia

Exhibit P-7.

Pickling Company, on the eleventh day of February, nineteen hundred and nine, by giving said copy to Louis Whittenberg, the person in charge of the office of the Company, 262 South Second Street, Philadelphia, Pa., and making the contents thereof known to him.

RICHARD W. CRONECKER.

Sworn to and subscribed this thirteenth day of February, 1909, before me,

Orville P. De Witt,
Commissioner of Deeds of N. J.

(Filed, Mar. 3, 1913.)

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS,

vs.

PHILADELPHIA PICKLING CO.

Argued February Term, 1913. Decided March 7, 1913.

Application for rule to show cause.

For the motion, Gilbert Collins.

Contra, John W. Wescott.

Before Justices Garrison, Swayze and Minturn.

Per Curiam.

The application is denied and the rules heretofore allowed are discharged, with costs.

To the Clerk of the Supreme Court of the State of New Jersey.

Exhibit P-7.

Warrant to Satisfy Judgment.

(Filed, Apr. 29, 1914.)

WHEREAS, WALTER CHAMBERS, heretofore, to wit, on the fifth day of January, in the year of our Lord, one thousand nine hundred and nine, obtained final judgment in the Supreme Court of New Jersey, against Philadelphia Pickling Company, for four thousand dollars, damages, and ninety-nine dollars and one cent, costs as by the record thereof may appear;

And Whereas, said Walter Chambers has received satisfaction for the same; these are, therefore, to desire and authorize you to enter an acknowledgment of satisfaction upon the record of the said judgment, and for your so doing this shall be your sufficient warrant and discharge in that behalf.

IN WITNESS WHEREOF, I, John W. Wescott, attorney of record for the said Walter Chambers, have hereunto set my hand and affixed my seal, the twenty-eighth day of April, in the year of our Lord one thousand nine hundred and fourteen.

JOHN W. WESCOTT (Seal).

Signed, sealed and delivered in the presence of }
F. D. Weaver.

STATE OF NEW JERSEY, }
Camden County, } ss.:

BE IT REMEMBERED, that on this twenty-eighth day of April, in the year one thousand nine hundred and fourteen, before me, a Master in Chancery of New Jersey, personally appeared John W. Wescott, who, I am satisfied, is the person named in and who executed the foregoing instrument,

and having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

F. D. WEAVER,
M. C. C. of N. J.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the pleadings, postea, rule for judgment and judgment final, notice, order, opinion; and also the warrant for satisfaction of said judgment in above stated cause as the same remain on file and of record in my office.

IN TESTIMONY WHEREOF I have hereunto set my hand and the seal of said Court at Trenton, this twelfth day of November, A. D., nineteen hundred and fourteen.

WM. C. GEBHARDT,
Clerk.

(Seal.)

Exhibit P-8.

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS, by his next friend, MARGARET WHILDIN,

vs.

PHILADELPHIA PICKLING COMPANY.

On Contract.
On Postea.
John W. Wescott, Attorney.

As yet of the fourth day of May, A. D. one thousand nine hundred and nine.

Witness:

WILLIAM S. GUMMERE, Esquire,
Chief Justice.

William Riker, Jr., clerk.

CAPE MAY COUNTY, ss.:

The Philadelphia Pickling Company, a corporation doing business in the State of New Jersey, was summoned to answer unto Walter Chambers, by his next friend, Margaret Whildin, the plaintiff therein, in a plea of an action on contract; and thereupon the plaintiff, by his next friend and by John W. Wescott, his attorney, complains for that whereas heretofore, to wit, on or about the nineteenth day of September, nineteen hundred and seven, Sallie Whittenberg, was engaged in business at Eldora, in said County, and carried the same on under the name and style and designation of Philadelphia Pickling Company;

that she there and then employed the said Walter Chambers, to work for her in and about her factory at said Eldora; that, while so working, by the negligence of the said Sallie Whittenberg, said Walter Chambers was injured; that afterwards

said Walter Chambers brought suit against said Philadelphia Pickling Company, in the Supreme Court of New Jersey, that said Sallie Whittenberg defended the same and that said Walter Chambers procured, in said suit, a judgment for four thousand dollars against the said Philadelphia Pickling Company, which judgment remains in whole unpaid; that afterwards, to wit, on or about the seventh day of September, nineteen hundred and eight, the said Sallie Whittenberg, her husband Louis, and Maurice Sloan presented a certificate to the Governor of the State of Pennsylvania and obtained a charter incorporating said Philadelphia Pickling Company, which corporation subsequently obtained permission to do business in the State of New Jersey, and have since done business in said State, at Eldora, as had been done theretofore; that, on or about the seventh day of November, nineteen hundred and eight, the said Sallie Whittenberg, trading as the Philadelphia Pickling Company, entered into an agreement, under seal, with the Philadelphia Pickling Company, incorporated as aforesaid, copy of which is attached to this declaration and forms a part thereof, by which the said Philadelphia Pickling Company, incorporated as aforesaid, interalia, for valuable consideration, agreed to pay "any claim now existing or hereafter to be made by Walter Chambers, suit for which has already been brought in the State of New Jersey," and that the said Sallie Whittenberg, in consideration of the above and other considerations, conveyed and sold to the said Philadelphia Pickling Company, incorporated as aforesaid, all the real and personal property belonging to her and used by her, at said Eldora or elsewhere, at the time said Walter Chambers was injured as aforesaid and all real and personal property acquired by

her between then and the seventh day of November, nineteen hundred and eight, that the said Philadelphia Pickling Company, incorporated as aforesaid, has refused and still does refuse to pay said claim or judgment of said Walter Chambers, obtained as aforesaid, whereby a right of action has accrued to him in the sum of eight thousand dollars.

And also for that whereas the said defendant, to wit: on the second day of April, nineteen hundred and nine, to wit, at Cape May Court House, in the County of Cape May aforesaid and within the jurisdiction of this Court, became indebted to the said plaintiff in the sum of eight thousand dollars, for the price and value of goods sold and delivered by the plaintiff to the defendant, at its request; and in the like sum of money for the price and value of goods bargained and sold by the plaintiff to the defendant at its request; and in the like sum of money for the price and value of work done, and materials for the same provided by the plaintiff for the defendant at its request; and in the like sum of money for money lent by the plaintiff to the defendant at its request; and in the like sum of money for money had and received by the defendant for the use of the plaintiff; and in the like sum of money for money paid by the plaintiff for the use of defendant at its request; and in the like sum of money for interest due from the defendant to the plaintiff for the plaintiff having forborne moneys due from the defendant to the plaintiff at the defendant's request, for a long time then elapsed; and in the like sum of money for money found to be due from the defendant to the plaintiff on an account then and there stated between them; and the defendant afterwards (to wit) on the day and year last aforesaid, in the County aforesaid, in considera-

tion of the premises, respectively promised to pay the said several last mentioned moneys respectively to the plaintiff on request; yet the defendant disregarded its promises, and has not paid any of the said moneys, or any part thereof; to the plaintiff's damage eight thousand dollars, and thereupon he brings his suit, etc.

The following is a bill of particulars of the plaintiff's demand.

Philadelphia Pickling Company,
To Walter Chambers, Dr.

1909.
Jan. 5th,

To Judgment in the New Jersey Supreme Court	$4000.00
Costs of Court	99.01

Judgment will be claimed for four thousand and ninety-nine dollars and one cent, with interest from the fifth day of January, nineteen hundred and nine, besides costs of suit to be taxed.

"This Agreement made the seventh day of November, A. D., 1908, by and between Sallie Whittenberg, trading as Philadelphia Pickling Company, of Philadelphia, party of the first part, and the Philadelphia Pickling Company, a corporation chartered under and by virtue of the laws of the State of Pennsylvania, hereinafter called the company party of the second part.

"WHEREAS, the said Sallie Whittenberg is the owner of the stock, good will and fixtures of the business now carried on by her at Number 262 South Second Street in the City of Philadelphia, and has agreed to sell all the stock, good will and fixtures of the said business, including all factories in New Jersey or elsewhere, and

"WHEREAS, at a meeting of the stockholders of the Philadelphia Pickling Company the Board of

Exhibit P-8.

Directors were authorized to enter into an agreement to purchase the said stock, good will and fixtures of the said business from the said Sallie Whittenberg, and

"WHEREAS, at a meeting of the Board of Directors of the said Company the directors of the said Company valued the said stock, good will and fixtures of the said business at fifty thousand dollars and by resolution duly passed, authorized and empowered the president to enter into an agreement with the said Sallie Whittenberg whereby the company would purchase the said stock, good will and fixtures for the price or sum of fifty thousand dollars.

"NOW THIS AGREEMENT WITNESSETH, that the said Sallie Whittenberg, in consideration of the sum of fifty thousand dollars, five thousand dollars having been paid this day in cash to her, the receipt whereof she does hereby acknowledge, and the balance thereof, namely, forty-five thousand dollars by the transfer to her of 450 shares of the capital stock of the company at par, the receipt whereof she does also hereby acknowledge, does hereby assign, transfer, convey and set over unto the said Philadelphia Pickling Company all stock, good will and fixtures, including all books, accounts due or to become due as set forth in the annexed schedule marked Exhibit A of the business now carried on by her under the name of the Philadelphia Pickling Company at Number 262 South Second Street and elsewhere in the City of Philadelphia, together with all factories and plants owned or operated by her in connection with the said business and the said Sallie Whittenberg further agrees to execute any and all papers, agreements, writings and deeds which may be necessary to assign, transfer, grant and convey to the Philadelphia Pickling Company a proper title of,

in and to the stock and fixtures, together with any real estate owned by her in connection with the said business.

"In consideration of the above agreement on the part of the said Sallie Whittenberg the company agrees hereby to purchase the stock, good will, fixtures, plant and real estate belonging to the said business for the price or sum of fifty thousand dollars to be paid in the manner hereinabove set forth, and the company further agrees to pay any and all debts due by the said Sallie Whittenberg, trading as Philadelphia Pickling Company, as shown by the books of the company on the first day of November, A. D., 1908, as set forth in the annexed schedule marked Exhibit B, together with any and all claims for damages or otherwise arising from the operation of the business by the said Sallie Whittenberg, including any claim now existing or hereafter to be made by Walter Chambers, suit for which has already been brought in the State of New Jersey.

"The company further agrees to fulfill all contracts entered into by the said Sallie Whittenberg, trading as Philadelphia Pickling Company.

"In Witness Whereof the said Sallie Whittenberg has hereunto set her hand and seal and the said Philadelphia Pickling Company has hereunto caused the hand of its president, together with the corporate seal duly attested by the signature of its secretary to be hereunto affixed the day and year first above written."

(Corporate Seal.)

S. Whittenberg, (L. S.),

Philadelphia Pickling Company,

S. Whittenberg,
President.

Chas. Brecher,
Secretary.

Exhibit P-8.

(Witnesses:)
Morris W. Sloan,
Harry Felix.

And the said defendant, by Wilson, Carr and Stackhouse, its attorneys, comes and defends the wrong and injury, when, etc., and says as to the common counts in the declaration of the plaintiff above set forth, that it did not undertake and promise in manner or form as the said plaintiff hath in his declaration above alleged, and of this it puts itself upon the country, etc.

Therefore let a jury thereupon come before our Chief Justice or some other Justice of the Supreme Court of the State of New Jersey, at a Circuit Court to be holden at Cape May Court House, in and for the County of Cape May, on the second Tuesday of December, A. D., nineteen hundred and eleven, by whom, etc., and the same day is given to the parties there, etc.

And now at this day, to wit: the nineteenth day of December, A. D. nineteen hundred and eleven, before our said Supreme Court at Trenton comes the said plaintiff by his attorney aforesaid, and the Justice before whom, etc., having first sent hither his record had before him in these words, to wit:

Afterwards, to wit, on the twelfth day of December, nineteen hundred and eleven, at a Circuit Court, holden at Cape May Court House, in and for the County of Cape May before his Honor, Clarence L. Cole, Judge of the Circuit Court for the County of Cape May, to whom the above stated cause had been referred for

Exhibit P-8.

trial by the Honorable Samuel Kalisch, Justice of the Supreme Court, assigned to the Cape May Circuit, according to the form of the statute in such case made and provided, comes as well the said plaintiff as the said defendant; by their respective attorneys within mentioned, and the jurors of the jury, between the parties aforesaid in the plea aforesaid being summoned, also come, who, to speak the truth of the matters and things within contained, being chosen, tried and sworn, say upon their oath that the said defendant, the Philadelphia Pickling Company, did undertake and promise in manner and form as the said plaintiff, Walter Chambers, hath in said declaration alleged; and they assess the damages of the said plaintiff, by reason of not performing said promises and undertakings, over and above the costs and charges by him about his suit, in this behalf expended, at the sum of four thousand eight hundred and sixty five dollars and fifty two cents, and for those costs and charges, six cents.

Therefore, it is considered that the said plaintiff do recover against the said defendant his said damages by the jury in form aforesaid found to four thousand eight hundred and sixty-five dollars and fifty two cents (less a rebate of forty nine dollars and forty seven cents) and also eighty four dollars and sixteen cents for his costs and charges aforesaid, by the Court now here adjudged to the said plaintiff and with his assent, which said damages (less said rebate) costs and charges in the whole amount to forty nine hundred dollars and twenty one cents.

Judgment signed this nineteenth day of December, A. D, nineteen hundred and eleven.

WM. S. GUMMERE,
C. J.

Exhibit P-8.

Order on Affirmance of Judgment.

(Filed, July 17, 1912.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

June Term, 1912.

Between

WALTER CHAMBERS, by his next friend, etc.

Defendant-in-Error,

vs.

PHILADELPHIA PICKLING COMPANY,

Plaintiff-in-Error.

In Error to Supreme Court. Order on Affirmance of Judgment.

This cause having been duly argued at the February Term, 1912, of this court by Harvey F. Carr, of counsel for the plaintiff in error, and John W. Wescott, of counsel for the defendant-in-error, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court;

It is thereupon on this twentieth day of June, in the year of our Lord one thousand nine hundred and twelve ordered and adjudged that the judgment of the Supreme Court, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said Court.

On motion of

WESCOTT & WESCOTT,
Attorneys of Defendant-in-Error.

Endorsed:

"Filed Jul. 5, 1912.
David S. Crater, Clerk."

Exhibit P-8.

STATE OF NEW JERSEY.

DEPARTMENT OF STATE.

I, DAVID S. CRATER, Secretary of State of the State of New Jersey, and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true copy of Order on Affirmance of Judgment.

Between: Walter Chambers, by his next friend, etc., Defendant-in-Error, vs. Philadelphia Pickling Company, Plaintiff-inError, as the same is taken from and compared with the original filed Jul. 5, 1912, and now remaining on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the (Seal.) Official Seal of said Court at Trenton, this fifth day of July, A. D., 1912.

DAVID S. CRATER,
Secretary of State.

Exhibit P-8.

(Filed, Mar. 3, 1913.)

NEW JERSEY SUPREME COURT.

WALTER L. CHAMBERS,

vs.

PHILADELPHIA PICKLING CO.

Argued Feby. Term, 1913. Decided March 7, 1913.

Application for Rule to Show Cause.

For the Motion, Gilbert Collins,

Contra, John W. Wescott.

Before Justices Garrison, Swayze and Minturn.

Per Curiam:

The application is denied and the rules heretofore allowed are discharged, with costs.

(Filed, Mar. 6, 1912.)

NEW JERSEY SUPREME COURT.

WALTER CHAMBERS,

vs.

PHILADELPHIA PICKLING COMPANY,

On Contract.
On Motion for Rule to show cause.
Rule Denying Motion.

The defendant's application for a rule to show cause having come on to be heard before the Court, and the Court having heard the arguments of respective counsel and duly considered the same —

It is ordered that said application for said rule to show cause be and the same is hereby denied, with costs; it is further ordered that the rules heretofore allowed be and the same are hereby discharged.

Exhibit P-8.

Entered March 6, 1913.
On motion of
JOHN W. WESCOTT, Atty.

Warrant for Satisfaction of Judgment.

(Filed, Apr. 29, 1914.)

To the Clerk of the Supreme Court of
The State of New Jersey.

Whereas, Walter Chambers, heretofore, to wit, on the nineteenth day of December, in the Year of our Lord, one thousand nine hundred and eleven, obtained final judgment in the Supreme Court of the State of New Jersey, against Philadelphia Pickling Company, for forty eight hundred and sixteen dollars and five cents damages and eighty-four dollars and sixteen costs as by the record thereof may appear;

And Whereas, said judgment was duly assigned to John W. Wescott, and whereas said John W. Wescott, has received satisfaction for the same; these are, therefore, to desire and authorize you to enter an acknowledgement of satisfaction upon the record of the said judgment, and for your so doing this shall be your sufficient warrant and discharge in that behalf.

In Witness Whereof, I, JOHN W. WESCOTT, as signee as aforesaid, have hereunto set my hand and affixed my seal, the twenty-eighth day of April, in the year of our Lord one thousand nine hundred and fourteen.

JOHN W. WESCOTT,
Assignee.
(Seal.)

Signed, sealed and delivered
in the presence of
F. D. Weaver.

Exhibit P-8.

STATE OF NEW JERSEY, }
Camden County. } ss.:

Be it remembered, that on this twenty-eighth day of April, in the year one thousand nine hundred and fourteen, before me, a Master in Chancery of New Jersey, personally appeared John W. Wescott, who, I am satisfied, is the person named in and who executed the foregoing instrument, and having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

F. D. WEAVER,
M. C. C. of N. J.

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in above stated cause, with the order of the Court of Errors and Appeals affirming said judgment, opinion and order; and also of the Warrant for satisfaction of said judgment.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the seal of said Court at Trenton, this twelfth day of November, A. D. nineteen hundred and fourteen.

WM. C. GEBHARDT,
Clerk.

Exhibit D-2.

COMMONWEALTH OF PENNSYLVANIA.

OFFICE OF THE SECRETARY OF THE COMMONWEALTH.

CERTIFICATE.

To All to whom these Presents shall come, GREETING:

I DO HEREBY CERTIFY, That the following and hereunto attached is a full, true and correct copy of Certificate of Incorporation of and Letters Patent issued to the PHILADELPHIA PICKLING COMPANY as the same appear of record in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Secretary's office to be affixed at Harrisburg, this Second day of November, A. D. 1914.

WM. HERTZLER,
Deputy Secretary of the Commonwealth.

(Seal of the Secretary of
the Commonwealth
Pennsylvania.)

Exhibit D.-2.

To the Governor of the Commonwealth of Pennsylvania:

Sir:

In compliance with the requirements of an Act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the 29th day of April, A. D. 1874, and the several supplements thereto, the undersigned, all of whom are citizens of Pennsylvania, having associated themselves together for the purpose hereinafter specified, and desiring that they may be incorporated, and that letters patent may issue to them and their successors according to law, do hereby certify:

1st. The name of the proposed corporation is PHILADELPHIA PICKLING COMPANY.

2nd. Said corporation is formed for the purpose of the preparation, manufacture and sale of table condiments, canned goods, preserves, food products and other merchandise of like nature and description.

3rd. The business of said corporation is to be transacted in Philadelphia, Pennsylvania.

4th. Said corporation is to exist for the term of ninety-nine years.

5th. The names and residences of the subscribers and the number of shares subscribed by each, are as follows:

Name.	Residence.	No. of Shares.
Louis Wittenberg	264 South Second Street, Phila.	1
Sallie Wittenberg	264 South Second Street, Phila.	498
Maurice W. Sloan	1007 St. Bernard Street, Phila.	1

6th. The number of directors of said corporation is fixed three and the names and residences of the directors who are chosen directors for the first year are as follows:

Exhibit D.-2.

Name.	Residence.
Louis Wittenberg	264 South Second Street, Philadelphia.
Sallie Wittenberg	264 South Second Street, Philadelphia.
Maurice W. Sloan	1007 South St. Bernard Street, Philadelphia.

7th. The amount of the capital stock of said corporation is $50,000.00, divided into five hundred shares of the par value of $100.00, and $5,000.00, being ten per centum of the capital stock, has been paid in cash to the Treasurer of said corporation, whose name and residence are: Louis Wittenberg, 264 South Second Street, Philadelphia.

LOUIS WITTENBERG, (Seal.) ..... (Seal.)
SALLIE WITTENBERG, (Seal.) ..... (Seal.)
MAURICE W. SLOAN. (Seal.) ..... (Seal.)

STATE OF PENNSYLVANIA, }
County of Philadelphia. } ss.:

Before me, a notary public in and for the county aforesaid, personally came the above named, Louis Wittenberg and Sallie Wittenberg, who in due form of law acknowledged the foregoing instrument to be their act and deed for the purpose therein specified.

Witness my hand and seal of office, the ninth day of October, A. D. 1908.

(Seal.)

ELLEN R. KRONENBERGER,
Notary Public.

Commission expires January 21, 1911.

I hereby certify that I am not a stockholder, director or clerk in the corporation for which I hereby act as notary public.

Exhibit D.-2.

STATE OF PENNSYLVANIA, }
County of Philadelphia. } ss.:

Personally appeared before me, this ninth day of October, A. D. 1908, Louis Wittenberg and Sallie Wittenberg, who being duly sworn, according to law, depose and say that the statements contained in the foregoing instrument are true.

LOUIS WITTENBERG,
SALLIE WITTENBERG,
MAURICE W. SLOAN.

Sworn and subscribed before me }
the day and year aforesaid. }

Ellen R. Kronenberger,
Notary Public.

Commission expires January 21, 1911.

I hereby certify that I am not a stockholder, director or clerk in the corporation for which I hereby act as notary public.

(Seal.)

(Endorsed.)

CERTIFICATE OF INCORPORATION OF

.....

.....

.....

EXECUTIVE CHAMBER.

Harrisburg, Nov. 7, 1908.

To the Secretary of the Commonwealth:

Having examined the within application and found it to be in proper form, and within the purposes of the class of corporations specified in Section 2 of the Act, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved April 29th, A. D. 1874, and the several supplements thereto, I hereby ap-

prove the same, and direct that letters patent issue according to law.

EDWIN S. STUART,
Governor.

SECRETARY'S OFFICE.

Pennsylvania, ss.:

Enrolled in Charter Book No. 108, page 45.

Witness my hand and seal of office, at Harrisburg, this 7th day of November, A. D. 1908.

(Seal)

LOUIS E. BEITLER,
Dep'y Secretary of the Commonwealth.

TYPEWRITTEN LIST OF SIGNATURES.

NOTE.

The Letters Patent fee on this application will be $30.00.

The bonus will be one-third of one per cent. of the Authorized Capital Stock.

A typewritten list of all signatures must be placed in Blank Space above.

All fees and bonus must be paid in cash, by money order, certified check or bank draft.

Exhibit D.-2.

IN THE NAME AND BY AUTHORITY OF THE COMMONWEALTH OF PENNSYLVANIA.
EXECUTIVE DEPARTMENT.

To All to whom these Presents shall come, GREETING:

WHEREAS, In and by an act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An Act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, Anno Domini one thousand eight hundred and seventy-four, and the supplements thereto, the Governor of this Commonwealth is authorized and required to issue Letters Patent to all corporations formed under the provisions of said acts embraced within the second class named therein.

AND WHEREAS, The stipulations and conditions in said act of the General Assembly and the supplements thereto have been fully complied with by PHILADELPHIA PICKLING COMPANY,

THEREFORE, KNOW YE, That under authority of the Constitution and Laws of said Commonwealth in such cases made and provided, I do by these Presents, which I have caused to be made Patent and sealed with the Great Seal of the State, create, erect and incorporate the subscribers to the stock of said corporation, their associates and successors, and also those who may thereafter become subscribers or holders of the stock of the said corporations, into a body politic and corporate in deed and in law, by the name chosen and hereinbefore specified, who shall have succession for the term of ninety-nine years, and shall be invested with and have and enjoy all the powers, privileges and franchises incident to a corporation and be subject to all the duties, requirements and restrictions specified and enjoined in and by the

said acts of General Assembly and all other laws of this Commonwealth.

Given under my hand and the Great Seal of the State, at the City of Harrisburg, this seventh day of November, in the year of our Lord one thousand nine hundred and eight and of the Commonwealth the one hundred and thirty-third.

By the Governor.

EDWIN S. STUART.

ROBERT MCAFEE,
Secretary of the Commonwealth.

(Seal.)

OFFICE OF THE
SECRETARY OF THE COMMONWEALTH OF
PENNSYLVANIA.

Harrisburg, Nov. 2, 1914.

PENNSYLVANIA, SS.:

I, ROBERT MCAFEE, Secretary of the Commonweath of Pennsylvania, having the custody of the Great Seal of Pennsylvania, DO HEREBY CERTIFY, that the attestation or certificate hereunto attached is in due form and made by the proper officer, and that Wm. Hertzler, whose name is subscribed thereto, was at the time of subscribing the same DEPUTY SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA, duly Appointed and Commissioned, and full faith and credit are due and ought to be given to his official acts accordingly; that the records and proofs hereinbefore certified and exemplified are in the custody of, and are kept pursuant to the laws of this Commonwealth by said officer, who authenticates the same.

IN TESTIMONY WHEREOF, I have hereunto set

Exhibit D-3.

my hand and caused the Great Seal of the State to be affixed, the day and year above written.

ROBERT MCAFEE,
Secretary of the Commonwealth.

(Seal of the State of Pennsylvania.)

Exhibit D-3.

No. 6384 Philadelphia, December 28, 1908.

THE LAND TITLE AND TRUST COMPANY.

Pay to the order of HARRY FELIX Thirty-three and 33/100 Dollars.

$33.33/100. MAURICE W. SLOAN.

Payable through the Philadelphia Clearing House.

ENDORSEMENTS.

For deposit only. HARRY FELIX. (Stamped) Received payment Jan. 11, 1909. 18. Through the Clearing House.

MAURICE W. SLOAN,
Attorney at Law,
639 Drexel Building.

(Printed on side of check.)

Exhibit D-3a.

Maurice W. Sloan.
Aloysius Jones, Both telephones.
Samuel A. Guldin.

Law Offices of

MAURICE WORRELL SLOAN,

639 Drexel Building,
Fifth and Chestnuts Streets,
Philadelphia.

No. 19457J October, 2, 1907.
Assured Pickling Company
Injured W. Chambers

Mr. C. W. Maydwell, Mgr., Claim Division,
Maryland Casualty Company, Baltimore, Md.
Dear Sir:

The above case would appear to be not covered by the policy. The Assured have a number of men working for them at Eldora. When the canning department is slack, the assured get their men to do other work, such as putting on a tin roof, painting the roof, and general carpentry work around the building; and on this particular day, September 19th, the injured, together with other men, was preparing to cement the floor of the cellar of the assured's building. A pile of stones which were taken from the cellar and piled near the cellar, fell on the injured, who was working alongside of it shoveling sand out of the cellar.

The case is apparently one of no liability. Of course, I get my facts from the assured, not having gone to Eldora to make a personal investigation. If the facts are as he says, it would seem to me first to be more than ordinary repairs, and second that the man was not at work in the class of work specified in the policy. Before taking any action in the matter I would ask you to advise

me whether you consider the case covered, also whether you desire to have me go to Eldora to make an investigation.

Yours respectfully,

MAURICE W. SLOAN.

Exhibit D-4.

(See Notice of application for leave to amend complaint printed at page 18.)

Exhibit D-5.

(See original Complaint in this action, printed at page 2.)

Notice of Application for Rule to Show Cause and Reasons.

(Filed February 4, 1915.)

NEW JERSEY SUPREME COURT.

PHILADELPHIA PICKLING COMPANY,
Plaintiff,
versus
MARYLAND CASUALTY COMPANY,
Defendant.

Action at Law. Notice of Application for Rule to Show Cause why Verdict Should Not be Set Aside and New Trial Granted and Reasons.

SIRS:

PLEASE TAKE NOTICE, that I shall, on the third Tuesday of February, 1915, next, at the State House, in Trenton, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, move the Supreme Court for a Rule to Show Cause why the verdict rendered in favor of the plaintiff in the above entitled action should not be set aside and a new trial ordered.

The defendant writes down the following gorunds or Reasons upon which it rests its application or Motion for said Rule to Show Cause why the Verdict should not be set aside and a New Trial Granted, in the above entitled action, viz.:—

1. The Verdict was against the evidence.

2. The Verdict was against the clear weight of the evidence.

3. The Verdict was against the charge of the Court.

4. The Verdict was contrary to law.

5. Incompetent and immaterial evidence was admitted on behalf of the Plaintiff against the objection of the Defendant.

Notice of Application for Rule to Show Cause and Reasons.

6. The Defendant's motion for non-suit should have been directed in favor of the Defendant, for one or more of the Reasons alleged in behalf thereof at the trial of the cause.

7. The Verdict should have been directed in favor of the Defendant, for one or more of the Reasons alleged in behalf thereof at the trial of the cause.

8. There was error in the refusal of the Trial Judge to charge certain Requests to Charge made by the Defendant.

9. Error was committed by the Trial Judge in refusing to permit the Defendant to introduce certain evidence.

10. The Trial Judge committed error in admitting the filing of the Amended Complaint in the action over the objection of the Defendant.

11. The Trial Judge committed error in allowing after the close of the case an amendment to the Plaintiff's pleadings, over the objection of the defendant.

12. There was error in the charge in divers particulars.

Yours respectfully,

RICHARD F. JONES,
Attorney of Defendant.

To

MESSRS. WILSON AND CARR,
Attorneys for Plaintiff.