

INDEX.

	PAGE
Transcript of Pleadings for Trial.....	1
Complaint	1
Answer	3
Reply	10
Rejoinder	13
Amended Complaint	14
Amended Answer	17
Reply	24
Opinion	28
Postea	34
Judgment	35
Notice of Appeal	36
Grounds of Appeal	37
Testimony	38
Stipulation	39
Motion for a Direction.....	65

WITNESSES FOR PLAINTIFF.

Jeanne R. Farrell,	
Direct	45
Cross	48
Re-direct	51
Dr. Frank J. Farrell,	
Direct	52
Cross	53

WITNESSES FOR DEFENDANTS.

	PAGE
William Ford,	
Direct	57
Cross	60
Hertha M. Kiss,	
Direct	61
Cross	63

EXHIBITS.

	Admitted at Page	Printed at Page
P-1—Policy	45	67
P-2—Letter dated August 26, 1941..	46	68
P-3—Letter dated August 29, 1941..	46	68
P-4—Letter dated September 10, 1941	46	69
D-1—Premium Book	50	..
D-2—Application	57	..

Transcript of Pleadings for Trial.

New Jersey Supreme Court

MIDDLESEX COUNTY.

FRANK J. FARRELL,
Plaintiff,

vs.

NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY of Phila-
delphia, a corporation,
Defendant,

Cox & Walburg.
Attorneys for
Plaintiff.

Pomerehne,
Laible & Kautz,
Attorneys for
Defendant.

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Summons issued May 12, 1942.

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Complaint.

The plaintiff, Frank J. Farrell, 355 David Street, South Amboy, County of Middlesex, State of New Jersey, for his cause of action says that:

1. On the 25th day of February, 1941, for a consideration, the defendant issued to the plaintiff a certain Accident and Health Policy #933605, by the terms of which the defendant agreed with the plaintiff to pay to the plaintiff the sum of One Hundred (\$100.00) Dollars a month for a period not exceeding twenty-four (24) months, provided that the plaintiff, the insured under the policy, should become disabled by injury and prevented solely by such injury from performing each and every duty pertaining to his business or occupation, and provided further that the said indemnity of One Hundred (\$100.00) Dol-

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Transcript of Pleadings for Trial—Complaint.

lars a month should not be payable for any period during which the plaintiff, the insured under the policy, was not under the care and regularly attended at least once each week by a legally qualified physician or surgeon, nor for more than twenty-four (24) months in the aggregate as a result of any one accident, nor for the first seven (7) days of any period of disability.

2. On or about the 13th day of August, 1941, the plaintiff suffered an accident resulting in injuries at the Carlisle Barracks, United States Army Post in Carlisle, Pennsylvania, as a result of a fall upon a certain stairway at the said Barracks; the said injury sustained by the plaintiff in the said fall caused the plaintiff to be confined to hospitals for various periods of time between the date of August 13, 1941 and the date of this suit, and as a result of the said injuries, the plaintiff has been treated at least once a week since the time of the accident by a legally qualified physician and has undergone a series of operations in order to endeavor to obtain a cure for the injuries which he sustained as a result of the accident.

3. At the time of the accident to the plaintiff on August 13, 1941, the said policy issued by the defendant to the plaintiff was in full force and effect.

4. The plaintiff has demanded of the defendant the payment of the indemnity which the defendant company agreed to pay to the plaintiff, but the defendant refused and continues to refuse to pay the said indemnity in accordance with the terms of its policy.

Transcript of Pleadings for Trial—Answer.

5. The plaintiff has been prevented from performing each and every duty pertaining to his business or occupation from the date of the said accident to the date of this suit, and because of his condition, will be prevented from performing each and every duty pertaining to his business or occupation for a long time in the future. 10

6. On April 20, 1942 there was due from the defendant to the plaintiff the sum of Eight Hundred (\$800.00) Dollars in accordance with the terms of the said policy of insurance.

WHEREFORE, the plaintiff, Frank J. Farrell, demands of the defendant, National Accident and Health Insurance Company, the sum of EIGHT HUNDRED (\$800.00) DOLLARS, together with legal interest thereon and the costs of this action. 20

COX & WALBURG,
Attorneys for Plaintiff.

Filed May 19, 1942.

Answer.

The defendant, a corporation of the State of Pennsylvania, having its home office in the City of Philadelphia, in said State, answering the plaintiff, says: 30

1. Paragraph 1 of the complaint is admitted.

2. As to the statements in the second paragraph of the complaint, defendant has not any knowledge or information thereof sufficient to form a belief and therefore denies the same. 40

Transcript of Pleadings for Trial—Answer.

3. Paragraph 3 of the complaint is denied.
4. Paragraph 4 of the complaint is denied.
5. Paragraph 5 of the complaint is denied.
- 10 6. Paragraph 6 of the complaint is denied.
7. Defendant denies each and every allegation of the complaint not herein otherwise pleaded by admission, by traverse and by confession and avoidance.

FIRST SEPARATE DEFENSE TO THE COMPLAINT

- 20 1. Defendant alleges and contends that it is not liable to the plaintiff under and pursuant to the policy of insurance described in the complaint, because said policy was not in full force and effect, pursuant to the terms, conditions and provisions thereof on the date and at the time of the alleged injury sustained by plaintiff, to wit: August 13, 1941.

- 30 2. Said policy, as alleged in the complaint, had expired and had become null and void prior to the date of said plaintiff's alleged accident and injury.

3. Said policy became and was lapsed between the dates of August 1, 1941 and August 28, 1941, because the plaintiff did not pay the premium in advance as provided by the terms thereof.

- 40 4. Said policy was issued on February 25, 1941 and expired at twelve o'clock midnight on the last day of March, 1941, except that said policy became reinstated and in effect from month to

Transcript of Pleadings for Trial—Answer.

month thereafter provided a month's premium of \$2.10 were paid on the first of each month succeeding March 31, 1941.

5. Said policy further provided that if default be made in the payment of the agreed premium, the subsequent acceptance of a premium by the defendant, or by any of its authorized agents, shall reinstate the policy but only to cover accidental injury thereafter sustained. 10

6. Said policy was continued in force by plaintiff by monthly premium payments up to and including the thirty-first day of July, 1941.

7. Plaintiff did not pay the premium for the month of August, 1941, on or before said first day of August, 1941, nor at any time prior to the 13th day of August, 1941, the alleged date of plaintiff's accident and injury. 20

By reason whereof defendant denies any and all liability to plaintiff in the premises, under said policy of insurance, or otherwise.

SECOND SEPARATE DEFENSE TO THE COMPLAINT.

1. Plaintiff ought not to have or maintain his alleged cause of action against the defendant herein, for that: 30

1. No obligation exists in favor of plaintiff by virtue of said policy of insurance.

2. Defendant has incurred no actionable liability in favor of plaintiff under said policy.

3. The injuries and damages alleged to have been sustained by plaintiff are not cov- 40

Transcript of Pleadings for Trial—Answer.

ered by the terms and conditions of said policy of insurance.

10 4. On the date of said alleged accident and injury to plaintiff, there was no policy of insurance, contract nor other obligation in force and effect between plaintiff and defendant.

5. Said policy lapsed and became inoperative at midnight on the 31st day of July, 1941 and no premium or other consideration had been paid by plaintiff to defendant for reinstatement of said policy thereafter and prior to the date of said alleged accident and sustaining of said injuries by plaintiff.

20 THIRD SEPARATE DEFENSE TO THE COMPLAINT.

1. Defendant is not liable under said policy or its undertaking expressed therein, because the said policy expressly provides that if default be made in the payment of the agreed premium, the subsequent acceptance of a premium by the defendant, or by any of its duly authorized agents, shall reinstate the policy, but only to cover accidental injury thereafter sustained.

30 2. On August 28, 1941, fifteen days after plaintiff sustained his alleged injury, plaintiff remitted to defendant premium for the month of August, 1941 and September, 1941.

3. After plaintiff remitted said premiums and on September 3, 1941, plaintiff, in writing dated August 29, 1941, notified the defendant that he had sustained his alleged injury on August 13, 1941.

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Transcript of Pleadings for Trial—Answer.

4. Defendant had no knowledge or information of plaintiff having been injured on August 13, 1941 until September 3, 1941.

5. Defendant did not waive the default and neglect and failure of plaintiff to keep said policy in force, by payment of the premium required by the terms of said policy, by receiving said August premium on August 28, 1941, without the knowledge or information of plaintiff's injury having occurred on August 13, 1941. 10

6. Defendant repeats the allegations of paragraph 5 of its First Separate Defense to the Complaint.

FOURTH SEPARATE DEFENSE TO THE COMPLAINT

1. Defendant is not liable under said policy or its undertaking expressed therein because the said policy expressly provides that if the insured is disabled by injury or illness for more than thirty days, he or his representative must furnish the company (defendant) every thirty days, or as soon thereafter as may be reasonably possible, with a report in writing from his attending physician or surgeon, fully stating the condition of the insured. 20

2. Said policy further provides that strict compliance on the part of the insured (plaintiff) and beneficiary with all the requirements of said policy is a condition precedent to the recovery thereunder and any failure in this respect shall forfeit to the company (defendant) all right to any indemnity. 30

3. Said policy further provides that said policy was issued in consideration of the statements and 40

Transcript of Pleadings for Trial—Answer.

agreements contained in the application therefor and the payment of premium therein provided.

10 4. Plaintiff failed and neglected to furnish to the defendant any report in writing from his attending physician or surgeon, since the date of his alleged injury, to wit, August 13, 1941.

5. Plaintiff failed and neglected to comply with the requirements and conditions of said policy, as aforesaid.

6. Plaintiff failed and neglected to pay the premium required by the terms of said policy.

20 7. Defendant repeats all the allegations of the First, Second and Third Separate Defenses to the Complaint.

8. Defendant disclaims all liability in the premises alleged by the plaintiff.

FIFTH SEPARATE DEFENSE TO THE COMPLAINT

1. Defendant repeats the allegations of paragraphs 1, 2 and 3 of the First Separate Defense to the Complaint.

30 2. Plaintiff was not insured by defendant on August 13, 1941, in manner and form as alleged by plaintiff in paragraph 3 of the complaint.

3. Defendant is not liable to plaintiff, as alleged in the complaint.

SIXTH SEPARATE DEFENSE TO THE COMPLAINT

40 1. The policy alleged in the complaint provides that it contains the entire contract of insurance, except as it may be modified by the Company's (defendant) classification of risks and premium rates in the event that the insured (plaintiff) is

Transcript of Pleadings for Trial—Answer.

injured after having changed his occupation to one classified by the company (defendant) as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified.

2. Plaintiff, on July 31, 1941, entered the military service of the United States of America, without notice to defendant prior to the date of his alleged injury. 10

3. On and after said date plaintiff became and was a First Lieutenant in the United States Army, stationed in army barracks, in the State of Pennsylvania.

4. Plaintiff changed his occupation to that of a soldier, to wit: an officer in the army of the United States and created a status of occupation more hazardous than that extant prior to July 31, 1941. 20

5. Pursuant to and under the classifications of occupations, and risks specified by the defendant, in force and effect on and after July 31, 1941, the plaintiff was not insurable during his occupational status of soldier in military service.

6. Defendant is exempt from liability or obligation to plaintiff because plaintiff changed his occupation to a risk more hazardous than that stated in said policy without notice to defendant. 30

7. Defendant therefore denies liability in the premises.

POMEREHNE, LAIBLE & KAUTZ,
Attorneys for Defendant.

Filed June 26, 1942.

*Transcript of Pleadings for Trial—Reply.***Reply.**

The plaintiff, by way of reply to the defendant's answer, says that:

10 He denies the allegations contained in the First, Second, Third, Fourth, Fifth and Sixth Separate Defenses to his complaint, and more specifically alleges the following:

AS TO THE FIRST SEPARATE DEFENSE TO COMPLAINT

20 1. The defendant company, instead of exercising the option granted to it in the policy of permitting the policy to lapse and become void, elected to continue the policy in full force and effect, and alleged, through its duly authorized servants and agents, that the plaintiff was indebted to it in the sum of \$2.10 for the premium for the month of August, 1941 in accordance with its election to continue the said policy of insurance.

30 2. Its said duly authorized servants and agents collected the said sum of \$2.10 from the plaintiff for the premium due during the month of August, 1941, and has retained the said premium for the month of August, 1941 down to and including the present date, with full knowledge of the accidental injuries sustained by the said Frank J. Farrell.

AS TO THE SECOND SEPARATE DEFENSE TO COMPLAINT

The plaintiff re-alleges the allegations made as to the First Separate Defense to the complaint, and makes them a part hereof.

Transcript of Pleadings for Trial—Reply.

AS TO THE THIRD SEPARATE DEFENSE TO COMPLAINT

1. The plaintiff admits that he notified the defendant in writing on August 29, 1941 that he had sustained accidental injury on August 13, 1941.

2. He has no knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 4 of this defense. 10

3. The plaintiff re-alleges his allegations as to the First Separate Defense and makes them a part hereof.

AS TO THE FOURTH SEPARATE DEFENSE TO COMPLAINT

The plaintiff has furnished to the defendant all notices and reports required of him by the defendant, and further states that the said defendant notified him on or about September 10, 1941, that the accidental injuries sustained by him were not covered under his said policy of insurance, and has since that date down to the present time taken the position that the said accidental injuries sustained by the plaintiff are not covered by the said policy of insurance. 20

AS TO THE FIFTH SEPARATE DEFENSE TO COMPLAINT 30

The plaintiff re-alleges his allegations as to the Fourth Separate Defense to Complaint and makes them a part hereof.

AS TO THE FIFTH SEPARATE DEFENSE TO COMPLAINT

1. At the time of the alleged accident, the plaintiff was a First Lieutenant, Dental Corps., United States Army, and was at the time of the alleged accident engaged in performing dental work upon 40

Transcript of Pleadings for Trial—Reply.

men in the service of the United States Army at Carlisle Barracks in Carlisle, Pennsylvania.

2. The plaintiff denies that his occupation had changed, or that the work which he was performing was more hazardous, and further denies that he was not insurable, as is alleged by the defendant.

AS TO ALL DEFENSES TO THE COMPLAINT

The plaintiff replying generally to all the defenses to his complaint, says that:

1. The defendant company, prior to the 13th day of August, 1941, by its course of conduct, through its authorized agents and servants, waived its right to lapse the said policy of insurance, by reason of the fact that the said premium was unpaid on August 1, 1941, and elected to consider the premium for the said policy, from and after the 1st of August, 1941 to the date on which it was paid, as a debt due from the plaintiff to the defendant company.

2. The defendant company, pursuant thereto, presented to the plaintiff, his servants or agents, a statement showing the plaintiff to be indebted to the defendant company for the month of August, 1941 in the amount of \$2.10.

3. The plaintiff, upon the demand of the defendant company that he pay this said debt for premium earned upon his policy in accordance with its terms, through his servants, or agents, caused the said sum of \$2.10 to be paid to the defendant company, and the said defendant company credited such payment and has, at all times since, credited such payment to the debt due it for the premium on the said policy for the month of August, 1941.

Transcript of Pleadings for Trial—Rejoinder.

4. The defendant company, with full knowledge of the accidental injuries sustained by the plaintiff on the 13th day of August, 1941, retained, and continues to retain, the said \$2.10 as the premium earned by the said defendant by reason of the fact that its policy of insurance was in effect during the month of August, 1941. 10

The plaintiff joins issue with the defendant on all other matters contained in its answer.

COX & WALBURG,
Attorneys for Plaintiff.

Filed July 9, 1942.

Rejoinder.

20

Defendant, by way of rejoinder, says that:

1. It denies the allegations contained in the Reply of the plaintiff, and joins issue thereon.

POMEREHNE, LAIBLE & KAUTZ,
Attorneys for Defendant.

Filed July 10, 1942.

I, the undersigned, Clerk of the Sureme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office. 30

IN TESTIMONY WHEREOF I have set my hand and the seal of said Court at
(Seal) Trenton, this Fifth day of May, A. D. nineteen hundred and Forty-three.

JAMES J. GAVIN, 40
Clerk.

Amended Complaint.

NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY.

10

FRANK J. FARRELL,
Plaintiff,

vs.

NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY of Phila-
delphia, a corporation,
Defendant.

Action at Law.

Amended
Complaint.

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The plaintiff, Frank J. Farrell, 355 David Street, South Amboy, County of Middlesex, State of New Jersey, for his cause of action says that:

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1. On the 25th day of February, 1941, for a consideration, the defendant issued to the plaintiff a certain Accident and Health Policy #933605, by the terms of which the defendant agreed with the plaintiff to pay to the plaintiff the sum of One Hundred (\$100.00) Dollars a month for a period not exceeding twenty-four (24) months, provided that the plaintiff, the insured under the policy, should become disabled by injury and prevented solely by such injury from performing each and every duty pertaining to his business or occupation, and provided further that the said indemnity of One Hundred (\$100.00) Dollars a month should not be payable for any period during which the plaintiff, the insured under the policy, was not under the care and regularly attended at least once each week by a legally qualified physician or

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Amended Complaint.

surgeon, nor for more than twenty-four (24) months in the aggregate as a result of any one accident, nor for the first seven (7) days of any period of disability.

2. Said policy of insurance provided, among other things, as follows: "If the injury effected solely by external, violent and accidental means shall not at once after the accident wholly and continuously disable the insured, but shall thereafter within ninety (90) days totally disable him or shall either at once after the accident or at once after the period of total disability prevent him from performing at least one-fourth of his important daily duties, the Company will pay for the period of such disability, not exceeding six (6) months, at one-half the said accident indemnity rate." 10 20

3. On or about the 13th day of August, 1941, the plaintiff suffered an accident resulting in injuries at the Carlisle Barracks, United States Army Post in Carlisle, Pennsylvania, as a result of a fall upon a certain stairway at the said Barracks; the said injury sustained by the plaintiff in the said fall caused the plaintiff to be confined to hospitals for various periods of time between the date of August 13, 1941 and the date of this suit, and as a result of the said injuries, the plaintiff has been treated at least once a week since the time of the accident by a legally qualified physician and has undergone a series of operations in order to endeavor to obtain a cure for the injuries which he sustained as a result of the accident. 30

4. At the time of the accident to the plaintiff on August 13, 1941, the said policy issued by the defendant to the plaintiff was in full force and effect. 40

Amended Complaint.

5. The plaintiff has demanded of the defendant the payment of the indemnity which the defendant company agreed to pay to the plaintiff, but the defendant refused and continues to refuse to pay the said indemnity in accordance with the terms of its policy.

10 6. The plaintiff was prevented from performing each and every duty pertaining to his business or occupation from the date of the said accident until January 1, 1943 by reason of the aforesaid injuries, and thereafter for the six (6) months immediately subsequent to January 1, 1943 was prevented from performing at least one-fourth of his important daily duties and was from the date of the accident through the month of June, 1943,
20 under the care of various legally qualified physicians and surgeons, being regularly attended by them at least once a week.

7. By reason of the aforementioned premises there is due from the defendant to the plaintiff the sum of One Thousand Nine Hundred and Fifty (\$1,950.00) Dollars in accordance with the terms of the said policy of insurance.

30 WHEREFORE, the plaintiff, Frank J. Farrell, demands of the defendant, National Accident and Health Insurance Company, the sum of One Thousand Nine Hundred and Fifty (\$1,950.00) Dollars, together with legal interest thereon and the costs of this action.

COX AND WALBURG,
Attorneys for Plaintiff.

Amended Answer.

NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY.

FRANK J. FARRELL, Plaintiff, <i>vs.</i> NATIONAL ACCIDENT AND HEALTH INSURANCE COMPANY of Phila- delphia, a corporation, Defendant.	10 Action at Law. Amended Answer.
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The defendant, a corporation of the State of Pennsylvania, having its home office in the City of Philadelphia, in said State, answering the amended complaint in this cause, says: 20

1. Paragraphs 1 and 2 of the amended complaint is admitted.

2. As to the statements in paragraph 3 of the amended complaint, defendant has not any knowledge or information thereof sufficient to form a belief and therefore denies the same.

3. Paragraph 4 of the amended complaint is denied. 30

4. Paragraph 5 of the amended complaint is denied.

5. Paragraph 6 of the amended complaint is denied.

6. Paragraph 7 of the amended complaint is denied. 40

Amended Answer.

7. Defendant denies each and every allegation of the complaint not herein otherwise pleaded by admission, by traverse and by confession and avoidance.

FIRST SEPARATE DEFENSE TO THE AMENDED
COMPLAINT.

10

1. Defendant alleges and contends that it is not liable to the plaintiff under and pursuant to the policy of insurance described in the complaint because said policy was not in full force and effect, pursuant to the terms, conditions and provisions thereof on the date and at the time of the alleged injury sustained by plaintiff, to wit: August 13, 1941.

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2. Said policy, as alleged in the complaint, had expired and had become null and void prior to the date of said plaintiff's alleged accident and injury.

3. Said policy became and was lapsed between the dates of August 1, 1941 and August 28, 1941, because the plaintiff did not pay the premium in advance as provided by the terms thereof.

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4. Said policy was issued on February 25, 1941 and expired at twelve o'clock midnight on the last day of March, 1941, except that said policy became reinstated and in effect from month to month thereafter provided a month's premium of \$2.10 were paid on the first of each month succeeding March 31, 1941.

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5. Said policy further provided that if default be made in the payment of the agreed premium, the subsequent acceptance of a premium by the defendant, or by any of its authorized agents,

Amended Answer.

shall reinstate the policy but only to cover accidental injury thereafter sustained.

6. Said policy was continued in force by plaintiff by monthly premium payments up to and including the thirty-first day of July, 1941.

7. Plaintiff did not pay the premium for the month of August, 1941, on or before said first day of August, 1941, nor at any time prior to the 13th day of August, 1941, the alleged date of plaintiff's accident and injury. 10

By reason whereof defendant denies any and all liability to plaintiff in the premises, under said policy of insurance, or otherwise.

SECOND SEPARATE DEFENSE TO THE AMENDED
COMPLAINT.

20

1. Plaintiff ought not to have or maintain his alleged cause of action against the defendant herein, for that:

1. No obligation exists in favor of plaintiff by virtue of said policy of insurance.

2. Defendant has incurred no actionable liability in favor of plaintiff under said policy.

3. The injuries and damages alleged to have been sustained by plaintiff are not covered by the terms and conditions of said policy of insurance. 30

4. On the date of said alleged accident and injury to plaintiff, there was no policy of insurance, contract nor other obligation in force and effect between plaintiff and defendant.

5. The policy referred to in the amended complaint lapsed and became inoperative at midnight on the 31st day of July, 1941 and no premium or 40

Amended Answer.

other consideration had been paid by plaintiff to defendant for reinstatement of said policy thereafter and prior to the date of said alleged accident and sustaining of said injuries by plaintiff.

10 THIRD SEPARATE DEFENSE TO THE AMENDED
COMPLAINT.

1. Defendant is not liable under said policy or its undertaking expressed therein, because the said policy expressly provides that if default be made in the payment of the agreed premium, the subsequent acceptance of a premium by the defendant, or by any of its duly authorized agents, shall reinstate the policy but only to cover accidental injury thereafter sustained.

20 2. On August 28, 1941, fifteen days after plaintiff sustained his alleged injury, plaintiff remitted to defendant premium for the month of August, 1941 and September, 1941.

3. After plaintiff remitted said premiums and on September 3, 1941, plaintiff, in writing dated August 29, 1941, notified the defendant that he had sustained his alleged injury on August 13, 1941.

30 4. Defendant had no knowledge or information of plaintiff having been injured on August 13, 1941 until September 3, 1941.

5. Defendant did not waive the default and neglect and failure of plaintiff to keep said policy in force, by payment of the premium required by the terms of said policy, by receiving said August premium on August 28, 1941, without the knowledge or information of plaintiff's injury having occurred on August 13, 1941.

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Amended Answer.

6. Defendant repeats the allegations of paragraph 5 of its First Separate Defense to the Amended Complaint.

FOURTH SEPARATE DEFENSE TO THE AMENDED
COMPLAINT.

1. Defendant is not liable under said policy or its undertaking expressed therein because the said policy expressly provides that if the insured is disabled by injury or illness for more than thirty days, he or his representative must furnish the company (defendant) every thirty days, or as soon thereafter as may be reasonably possible, with a report in writing from his attending physician or surgeon fully stating the condition of the insured. 10

2. Said policy further provides that strict compliance on the part of the insured (plaintiff) and beneficiary with all the requirements of said policy is a condition precedent to the recovery thereunder and any failure in this respect shall forfeit to the company (defendant) all right to any indemnity. 20

3. Said policy further provides that said policy was issued in consideration of the statements and agreements contained in the application therefor and the payment of premium therein provided. 30

4. Plaintiff failed and neglected to furnish to the defendant any report in writing from his attending physician or surgeon, since the date of his alleged injury, to wit: August 13, 1941.

5. Plaintiff ever since the date of his alleged injury, to wit: August 13, 1941, failed and neglected to furnish the defendant proof of loss for 40

Amended Answer.

loss of time from disability, as required by paragraph 7 of the standard provisions of said policy.

6. Plaintiff failed and neglected to comply with the requirements and conditions of said policy.

10 7. Plaintiff failed and neglected to pay the premium required by the terms of said policy.

8. Defendant repeats all the allegations of the First, Second and Third Separate Defenses to the Amended Complaint.

9. Defendant disclaims all liability in the premises alleged by the plaintiff.

FIFTH SEPARATE DEFENSE TO THE
AMENDED COMPLAINT.

20 1. Defendant repeats the allegations of paragraphs 1, 2 and 3 of the First Separate Defense to the Amended Complaint.

2. Plaintiff was not insured by defendant on August 13, 1941, in manner and form as alleged by plaintiff in paragraph 3 of the amended complaint.

30 3. Defendant is not liable to plaintiff, as alleged in the amended complaint.

SIXTH SEPARATE DEFENSE TO THE
AMENDED COMPLAINT.

40 1. The policy alleged in the complaint provides that it contains the entire contract of insurance, except as it may be modified by the company's (defendant) classification of risks and premium rates in the event that the insured (plaintiff) is injured after having changed his occupation to one classified by the company (defendant) as

Amended Answer.

more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified.

2. Plaintiff, on July 31, 1941, entered the military service of the United States of America, without notice to defendant prior to the date of his alleged injury. 10

3. On and after said date plaintiff became and was a First Lieutenant in the United States Army, stationed in army barracks, in the State of Pennsylvania.

4. Plaintiff changed his occupation to that of a soldier, to wit: an officer in the army of the United States and created a status of occupation more hazardous than that extant prior to July 31, 1941. 20

5. Pursuant to and under the classifications of occupations, and risks specified by the defendant, in force and effect on and after July 31, 1941, the plaintiff was not insurable during his occupational status of soldier in military service.

6. Defendant is exempt from liability or obligation to plaintiff because plaintiff changed his occupation to a risk more hazardous than that stated in said policy without notice to defendant. 30

7. Defendant therefore denies liability in the premises.

POMEREHNE, LAIBLE & KAUTZ,
Attorneys for Defendant.

Reply.NEW JERSEY SUPREME COURT,
MIDDLESEX COUNTY.

10 FRANK J. FARRELL,
Plaintiff,
vs.

NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY of Phila-
delphia, a corporation,
Defendant.

Action at Law.

Reply.

20 The plaintiff, replying to the amended answer of
the defendant, says that:

AS TO THE FIRST SEPARATE DEFENSE TO THE
AMENDED COMPLAINT.

1. He denies the allegations contained in para-
graphs 1, 2 and 3.

2. He denies the allegations contained in para-
graph 4 and refers to the policy for greater cer-
tainty, and also refers to his affirmative reply
hereafter set forth.

30 3. He denies the allegations contained in para-
graph 5 and refers to the policy for greater cer-
tainty.

4. He admits that the policy was maintained in
force up to and including the 31st day of July,
1941, and further alleges that it was in force on
August 13, 1941, for reasons more specifically set
forth hereafter.

40 5. He denies the allegations contained in para-
graph 7 and refers to the affirmative matter set
forth in his reply hereafter.

*Reply.*AS TO SECOND SEPARATE DEFENSE TO THE
AMENDED COMPLAINT.

He denies the allegations contained in the Second Separate Defense to the Amended Complaint.

AS TO THIRD SEPARATE DEFENSE TO THE
AMENDED COMPLAINT.

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1. He denies the allegations contained in paragraph 1.

2. He admits that the premium was paid on his behalf to the agent of the defendant on August 28, 1941, but refers to the affirmative matter set up hereafter in his reply by way of explanation.

3. The plaintiff admits that in writing dated August 29, 1941, he notified the defendant of his injuries, and has no knowledge as to the date it was received by the defendant.

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4. He has no knowledge or information sufficient to form a belief as to the allegations contained in paragraph 4.

5. He denies the allegations contained in paragraph 5.

6. He repeats his reply to paragraph 5 of the defendant's first separate defense to the amended complaint, and makes it a part hereof.

AS TO FOURTH SEPARATE DEFENSE TO THE
AMENDED COMPLAINT.

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1. He denies the allegations contained in paragraph 1.

2. He denies the allegations contained in paragraph 2 and refers to the policy for greater certainty.

3. He denies the allegations contained in paragraph 3 and refers to the policy for greater certainty.

40

Reply.

4. He denies the allegations contained in paragraphs 5, 6 and 7.

5. He repeats all his replies to the allegations contained in the first, second, and third Separate Defenses to the amended complaint.

10 6. He denies the allegations contained in paragraph 9.

AS TO FIFTH SEPARATE DEFENSE TO THE
AMENDED COMPLAINT.

1. He repeats his replies to the allegations contained in the first, second, and third paragraphs of the First Separate Defense to the Amended Complaint.

20 2. He denies the allegations contained in paragraphs 2 and 3.

AS TO SIXTH SEPARATE DEFENSE TO THE
AMENDED COMPLAINT.

1. He denies the allegations contained in paragraph 1 and refers to the policy for greater certainty.

2. He admits the allegations contained in paragraphs 2 and 3.

3. He denies the allegations contained in paragraphs 4, 5, 6 and 7.

30 By way of reply to the Separate Defenses One to Six, inclusive, the plaintiff says that:

1. The defendant company, prior to the 13th day of August, 1941, by its course of conduct through its authorized agents and servants, waived its right to lapse said policy of insurance by reason of the fact that the said premium was unpaid on August 13, 1941, and it elected in lieu of lapsing said policy to consider the premium for the said policy from and after the first day of
40 August, 1941 to the date on which it was paid as a debt due from the plaintiff to the defendant company.

Reply.

2. The defendant company, pursuant thereto, presented to the plaintiff, his servants or agents, a statement showing the plaintiff to be indebted to the defendant company for the month of August, 1941 in the amount of Two Dollars and Ten (\$2.10) Cents and requesting payment thereof.

10

3. The plaintiff, upon the said demand of the defendant company that he pay this said debt for premium earned upon his policy in accordance with its terms, caused the said sum of Two Dollars and Ten (\$2.10) Cents to be paid to the defendant company, and the said defendant company credited such payment, and has, at all times since, and even after notice of the accident and injuries, credited such payment to the debt due it for the premium on the said policy for the month of August, 1941.

20

4. The defendant company, with full knowledge of the accidental injuries sustained by the plaintiff on the 13th day of August, 1941, retained and continues to retain the said Two Dollars and Ten (\$2.10) Cents as premium earned by the said defendant by reason of the fact that its policy of insurance was in effect during the month of August, 1941.

5. The plaintiff has furnished to the defendant all notices provided for by the defendant up to and including the date upon which the plaintiff was notified by the defendant company that it would not pay the benefits provided to the plaintiff by the said policy of insurance.

30

GENERAL REPLY.

The plaintiff joins issue with the defendant on all other matters contained in its amended answer.

40

Cox and WALBURG,
Attorneys for Plaintiff.

MIDDLESEX COUNTY.

vs.

Action at Law.
Opinion.

NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY of Phila-
delphia, a corporation,
Defendant,

For the Defendant—POMEREHNE, LAIBLE &
KAUTZ, (HENRY POMEREHNE, Esq. of
counsel)

OLIPHANT—Judge.

This cause came on for trial before the Court, sitting without a jury upon stipulation of the parties on Tuesday, January 16, 1945.

30 The suit was based upon an accident and health policy issued by the defendant to the plaintiff, bearing date February 25, 1941, insuring plaintiff from that date and expiring March 31, 1941 at midnight and continuing the insurance thereafter at a monthly premium of \$2.10, payable in advance.

Plaintiff paid the premium from March 1, 1941 consecutively until and including the month of July, 1941.

Opinion.

On August 27th, plaintiff's wife sent to a general agent of the defendant company, a check for \$4.20 to cover the monthly premiums for August and September, 1941. That check was received by the agent Ford, recorded on the books of the Company and marked in the premium receipt book of the plaintiff as paid on August 28, 1941 for the months of August and September with the annotation "accepted subject to policy provisions." The receipt of the payment by the Company was without any knowledge or notice to it of any prior accident or injury received by the plaintiff. 10

On September 3, 1941, the Ford Agency received a letter dated August 29, 1941, signed by the plaintiff, stating that he had had an accident on August 13, 1941 at Carlisle Barracks, Pennsylvania. He was in the armed forces and had entrusted the payment of his insurance premiums to his wife. 20

It can be seen that the receipt of the premium aforesaid was mailed by or on behalf of the plaintiff fourteen days after the accident and the notice of the accident was not received by the defendant's agent until more than twenty days after the accident.

On September 10, 1941, defendant notified plaintiff by letter as follows: 30

"As your disability began more than 2 weeks before you mailed your premium to our agent, we regret you will not be entitled to indemnity as your policy was not in force due to the non-payment of your August premium."

The premium was sent to the Company on behalf of the plaintiff by his wife following receipt by her of a letter from Ford advising plaintiff of 40

Opinion.

the non-payment and enclosing a stamped envelope for its remittance.

The premium has never been returned to the plaintiff.

The policy in suit contained the following standard provision:

10

“If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the company, or any of its duly authorized agents, shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance.”

20

The plaintiff made his contract with the defendant. The Court will not make a new one for the parties. He knew its provisions or was charged with knowledge thereof.

30

At best from his standpoint, the acceptance of the overdue premium extended his coverage from the date of its receipt on August 28th to October 28th or its receipt and acceptance by the defendant was a privilege granted to him of continuing the policy in force minus the coverage from August 1st to August 28th without the necessity of an application for a new policy and its attendant risks of his being refused future coverage.

I have been unable to discover any case wherein a health and accident policy containing the provisions of the one in suit was declared to cover an insured for the period during which it was lapsed by the later receipt of an overdue premium even when that premium has been retained by the insurer.

40

Plaintiff places much stress on the case of *MacDonald vs. Metropolitan Life Ins. Co.*, 304

Opinion.

Pa. 213; 155 At. Rep. 491, but it does not uphold his position here. Each case must stand on its own particular facts and in that case the Court held that the reinstatement of the policy created a new contract and starts a new period of coverage from the date of the receipt of the overdue premium. In its opinion the Court said "Where a policy provides for reinstatement, but only as to losses subsequently occurring, the Company upon reinstatement of the policy is not liable for a loss occurring while it was suspended. In such cases, no part of the premium paid on reinstatement will be applied to the period during which the policy was not in force unless the agreement of the policy so provides." 32 C. J. 1357. 10

Plaintiff contends that Standard Provision No. 3 has been waived. There can be no waiver where the facts are not known and the retention of the premium is not sufficient in itself to create a waiver, but is only an acceptance within the term of the contract. Its retention cannot in itself be regarded as a waiver, it was to support the insurance for the future. *Weiser vs. Central Business Men's Ass'n.*, 219 S. W. Rep. 102. 20

Appleman in his new work entitled "Insurance Law & Practice" in Vol. 3, p. 684, sec. 2033 says that under the majority ruling, which seems to be the better rule, the receipt of an overdue premium with respect to a policy such as the one in suit reinstates it in prospective only and that such reinstatement is not retroactive to include disability occurring during the default period. *Jones vs. Preferred Accident Ins. Co.*, 286 N. W. 598 is cited. On page 683 he says "Premium payments and acceptance after default reinstate a lapsed policy subject to the conditions attendant upon reinstatement as set out in the policy." 30 40

Opinion.

The rule is well enunciated in *Denton vs. Provident Life & Accident Ins. Co.*, 36 S. W. Rep. 2nd 657. The facts in that case were very similar to the instant one and the policy contained the same provision as to the acceptance of an overdue premium as the one in suit. The Court said "The
10 policy which he has in his possession by its express terms informed him that the subsequent acceptance of a premium by the Company after a default in payment would reinstate the policy but only to cover such sickness as might begin more than ten days after the date of such acceptance. With full knowledge of this condition he sent his check and the receipt he received informed him that it was accepted in accordance with the conditions under which it was sent and of which he
20 knew." The transaction was simply one of reinstatement of a lapsed policy subject to the conditions attendant upon a reinstatement set out in the policy, which appellant knew or of which he was charged with knowledge. In *Matthews vs. Travelers Ins. Co.*, 144 Pac. Rep. 85, it was said "Plaintiff is chargeable with notice of the terms of the policy provision that the payment of a past due premium creates a liability for accidents occurring only after the payment. To the same effect as the decision in *Denton vs. Provident Life & Accident Ins. Co.*, *supra*, is that of *Jennings vs. Travelers Equitable Ins. Co.*, 218 N. W. Rep. 104. As was said in the latter case, the provisions of this policy limiting the effect of its reinstatement by the acceptance of a past due premium is authorized by statute. R. S. 17:38-3. In the absence of such provision the acceptance of past due premiums might constitute such a waiver of the conditions of the policy as to avoid a forfeiture of
30 benefits otherwise accrued.
40

Opinion.

The reasoning of the Court in *Greenwaldt vs. U. S. Health and Accident Ins. Co.*, 102 N. Y. Supp. 157 is very apt in the instant case "This is not the case of an insurance company avoiding its policy, it is an effort to make it liable under conditions which it was agreed should not constitute a liability. The policy was not forfeited. The defendant had a right to name the conditions on which it would accept a renewal of a policy where the insured was in default, and the plaintiff having accepted these conditions and the illness having originated while the policy was not in force, the plaintiff has no reason to complain." 10

In order to recover here, the plaintiff was under a duty to show a new contract creating a liability on the part of the defendant, a liability established by express terms, by implication from circumstances, or by estoppel or waiver. *Gagne vs. Mass. Bonding & Ins. Co.*, 78 N. H., 439. This he has not done. There is no competent and persuasive evidence that the premium for August, 1941 was not paid and accepted in accordance with the terms of the policy and the statute, or that the plaintiff understood otherwise. The receipt book (Ex. D-1) expressly shows it was accepted "subject to policy provisions", and there is no evidence to support the plaintiff's case on the theory of either waiver of the policy provision or estopped by the acts of the defendant. 20 30

The Judgment must be for the defendant and upon presentation of a postea to that effect, same will be signed.

A. DAYTON OLIPHANT,
Judge.

Postea.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10

FRANK J. FARRELL,
Plaintiff,*vs.*NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY of Phila-
delphia, a corporation,
Defendant,

Action at Law.

Postea.

20 This case was tried before Judge A. Dayton
Oliphant, without a jury, by consent of both par-
ties hereto, at the Middlesex Circuit, on January
16, 1945.

After hearing the evidence and counsel for
plaintiff and for defendant, and the Court having
filed a written opinion in the cause, finding for the
defendant against the plaintiff;

30 Wherefore it is adjudged that the defendant
have judgment for no cause of action against the
plaintiff.

A. DAYTON OLIPHANT,
Judge.

Dated: March 8th, 1945.

40

Judgment.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

FRANK J. FARRELL,
Plaintiff,

vs.

NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY of Phila-
delphia, a corporation,
Defendant,

10

Copy of
Judgment
Form.

This case was tried before Judge A. Dayton Oli-
phant, without a jury, by consent of both parties
hereto, at the Middlesex Circuit, on January 16,
1945.

20

After hearing the evidence and counsel for
plaintiff and for defendant, and the Court having
filed a written opinion in the cause, finding for
the defendant against the plaintiff;

Wherefore it is adjudged that the defendant
have judgment for no cause of action against the
plaintiff.

Whereupon it is adjudged that the amended
complaint of the plaintiff be dismissed, and that
the defendant, National Accident and Health In-
surance Company of Philadelphia, a corporation,
do recover of the said plaintiff,
Costs \$51.50 Frank J. Farrell, its costs, which
have been taxed at the sum of
fifty-one dollars and fifty cents.

30

Judgment entered and signed March 10, 1945.

THOMAS J. BROGAN,
Chief Justice.

40

Notice of Appeal.

NEW JERSEY SUPREME COURT.

10	FRANK J. FARRELL, Plaintiff, <i>vs.</i> NATIONAL ACCIDENT AND HEALTH INSURANCE COMPANY of Phila- delphia, a corporation, Defendant,	Action at Law. Notice of Appeal.
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20 *To: Messrs. Pomerehne, Laible & Kautz,*
 Attorneys for Defendant,
 11 Commerce Street,
 Newark, New Jersey

Sirs:

PLEASE TAKE NOTICE that the plaintiff hereby
appeals to the New Jersey Court of Errors and
Appeals in the last resort in all causes from the
whole of the judgment entered in the above en-
titled matter.

30 COX & WALBURG, Esqs.,
 Attorneys for Plaintiff.

Dated: August 28, 1945

40

Grounds of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

FRANK J. FARRELL, Plaintiff-Appellant, <i>vs.</i> NATIONAL ACCIDENT AND HEALTH INSURANCE COMPANY of Phila- delphia, a corporation, Defendant-Appellee,	}	On Appeal from the Supreme Court. Action at Law. Grounds of Appeal.	10
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The following is the Ground of Appeal of the plaintiff-appellant which will be urged for the reversal of the judgment of the New Jersey Supreme Court: 20

The trial judge committed legal error in entering a verdict for the defendant instead of a verdict for the plaintiff.

COX & WALBURG,
Attorneys for Defendant-Appellee.

30

Service of within Grounds of Appeal is hereby acknowledged this 10th day of September, 1945.

POMEREHNE, LAIBLE & KAUTZ.
Attorneys for plaintiff-appellant.

40

Testimony.

NEW JERSEY SUPREME COURT.

COUNTY OF MIDDLESEX.

10

FRANK J. FARRELL,
Plaintiff,

vs.

NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY of Phila-
delphia, a corporation,
Defendant,Action at Law.
Testimony.

20

Before:

HONORABLE A. DAYTON OLIPHANT, Judge,
without a Jury.

At:

New Brunswick, New Jersey, January 16,
1945.

Appearances:

30

Cox and WALBURG, Esquires, by WILLIAM H.
D. Cox, Esquire, Attorneys for the Plain-
tiff.POMEREHNE, LAIBLE and KAUTZ, Esquires, by
HENRY POMEREHNE, Esquire, Attorneys
for the Defendant.

40

Mr. Cox: I was wondering, sir, if I could speak
to Mr. Pomerehne, to see how much we could stip-
ulate to shorten it. There is no use of using wit-
nesses that are not necessary.

Stipulation.

The Court: Very good.

(Counsel confer off the record.)

Mr. Cox: Might I suggest, sir, that I state the facts as I understand them to be agreed upon by both parties, and Mr. Pomerehne may interrupt me if I state anything that is incorrect.

10

The Court: As counsel is about to stipulate, this case is to be tried by the Court without a jury. Your services will not be needed today and you may be excused until tomorrow morning at nine forty-five.

(Jury excused.)

STIPULATION.

Mr. Cox: I would like the record to show the plaintiff and the defendant have agreed upon the following facts:

20

On February 25, 1941, the defendant-company issued to Frank J. Farrell a policy of insurance, numbered 933605, whereby for a fee of five dollars (\$5.00), and a monthly premium of two dollars and ten cents (\$2.10), payable in advance, it insured Doctor Farrell for certain weekly indemnities in the event that injury so incapacitated him that he could not do any of his work as a dentist.

30

The monthly payments were made in advance down to July. They were paid to a Mr. Eutemarks, who called for it the first of each month, for the premium. Mr. Eutemarks called on July 7, 1941, and received the July premium on that date. This delayed payment, however, is not involved in this case.

During the month of July, 1941, Doctor Farrell entered the armed services of the United States

40

Stipulation.

as a dentist. He was a Reserve Officer in the United States Army at the time. He did dental work for the Army, and was assigned to a post at Carlisle, Pennsylvania.

Now before I release the next, Mr. Pomerehne——

10 Mr. Pomerehne: You can ask me off the record.

(Discussion between counsel off the record.)

Mr. Cox: Back on the record.

20 The August premium was not paid on behalf of Doctor Farrell to the defendant until August 28th of 1941. On August 26, 1941, William Ford, the general agent of the defendant, wrote a letter to Doctor Farrell, which was opened by his wife. The letter read:

EXHIBIT P-2.

“Mr. Frank J. Farrell, 355 David Street, South Amboy, New Jersey: Re. Policy No. 933605.

30 “Dear Mr. Farrell: Last week Mr. Eutemark advised us that you would mail your premium for the above numbered policy in the amount of \$2.10 direct to this office. As we have not as yet received same, we are wondering if the matter has escaped your attention.

“We are enclosing herewith a stamped addressed envelope in which you can mail us your remittance.

40 “Thanking you for your past patronage, and trusting we may have the continued opportunity of serving you, I am, very truly yours, William Ford.”

Stipulation.

And under his signature appears the initial "N." That is written on the stationery of the National Accident and Health Insurance Company of Philadelphia.

Immediately upon the receipt of this letter Mrs. Farrell mailed a check in the amount of four dollars and twenty cents (\$4.20) together with the premium receipt book, to the office of Mr. Ford, and the premium receipt book was promptly returned to her with the notation thereon: "August 28, 1941. To apply on month of August, September, four dollars and twenty cents (\$4.20)." It was stamped, "William Ford." with some initials in ink along side of the signature. And under the line appeared the printing: "Accepted subject to policy provisions." 10

This premium has never been returned to the plaintiff. 20

On August 13, 1941, Doctor Farrell fell, slipped on some water, and fell on the stairway, in the Carlisle, Pennsylvania, Barracks, and suffered injuries to his knee. It caused him to be confined to the infirmary. But he did not consider the injury a serious one. He made no mention of it to his wife in talking to her because he did not want her to know he had been hurt and thereby cause her to worry about his physical condition. She did not know, therefore, at the time she sent the premium to the company that he had been injured. The company had no knowledge at the time that it accepted the premium of the accident, and the consequential injury. 30

Mr. Pomerehne: That is a question of fact which the witness should bring out, and be subject to cross examination on.

Mr. Cox: I think that is a matter that should not go into the stipulation, and will ask that you 40

Stipulation.

strike out everything I said from the point that "He made no mention to his wife," and down to the end of what I have just said, and I will start again with this.

10 The company did not have any knowledge of the accident at the time it accepted the premium for the policy.

I assume also that you want proof on that?

Mr. Pomerehne: Yes. But that part I am willing to let stand, that the company did not have any knowledge at the time of accepting the premium.

The Court: Off the record.

(Court and counsel confer off the record)

20 Mr. Cox: The company was informed by a letter, dated August 29, —

Mr. Pomerehne: From Doctor Farrell to the company. Yes.

Mr. Cox: By a letter dated August 29, 1941, written from the Station Hospital, to the National Accident and Health Insurance Company, 242-244 South Eighth Street, Philadelphia, Pennsylvania.

Doctor Farrell wrote as follows:

EXHIBIT P-3.

30 "Dear Sirs: I injured my knee in a fall here in Camp and have been a patient in the Station Hospital here since August 13, 1941. My policy number is 933605, and my home address is 355 David Street, South Amboy, New Jersey.

"Hoping to hear from you on this matter soon, Very truly yours, Frank J. Farrell."

40 On September 10, 1941, the defendant insurance company wrote the following letter, on their stationery; which reads as follows:

Stipulation.

EXHIBIT P-4.

"Claim number 187539. Doctor Frank J. Farrell, Medical Field Service School, Carlisle Barracks, Carlisle, Pennsylvania.

"Policy number 933605.

"Dear Doctor: We have received your letter advising that you injured your knee and have been a patient at the station hospital since August 13th. We have also been advised by our agent that you mailed your August and September premiums to him on August 28th, or fifteen days after you became disabled.

10

"Under the policy you hold premiums are due in advance on the first day of each month and must be paid either to the home office of the company or to an authorized agent. If a premium is not paid when due the policy becomes lapsed and the subsequent acceptance of an overdue premium will reinstate the policy, but only to cover accidental injuries thereafter sustained and sickness beginning more than ten days after such acceptance. As your disability began more than two weeks before you mailed your premium to our agent we regret you will not be entitled to indemnity as your policy was not in force due to the non-payment of your August premium.

20

30

"We trust this explanation is entirely clear and satisfactory to you."

And it was signed, "Yours very truly," and I cannot read the man's signature.

Mr. Pomerehne: It is an adjuster.

Mr. Cox: It was signed by an adjuster.

40

Stipulation.

Then I understand that it can be further stipulated that upon the receipt of the premium on August 28th the company applied the premium to the month of August and September.

Mr. Pomerehne: Conditionally.

10 Mr. Cox: Well, on his book it shows the entry for the month of August and September. That is right. And you may strike out what I have just said, and I will put it this way.

The company's book, which is kept by the agent, Mr. William Ford, shows on page 254. the following: There is a rubber stamp. "August 28th, 1941." And over in the left margin is the number 933605. And in the left margin, immediately below there is a number, 50616— No. I am sorry. strike out that last number.

20 In the margin. beginning at the margin appears 933605. Immediately to the right of that appears the name Frank Farrell. and immediately over in the further right-hand column is the sum \$4.20."

Now the company has never returned the four dollars and twenty cents (\$4.20) to Doctor Farrell, and retains it at the present time.

It is also stipulated between the parties as a result of the accident. which the defendant says is within the terms of his policy, if it is responsible for its policy—

30 I am sorry.

(Court and counsel confer)

The Court: Strike that out. And say, "It is further stipulated, if it is determined that the defendant is liable under the policy that the accident was within the terms of the policy."

Mr. Cox: That is right, sir.

40 The Court: "And that the sum due is Nineteen Hundred and Fifty Dollars (\$1950)."

Jeanne R. Farrell, for Plaintiff—Direct.

Mr. Cox: Together with interest from the date it became due.

Now if your Honor pleases, there is just one or two points I would like to offer testimony on to supplement that, and I would like to call Mrs. Farrell, please.

10

JEANNE R. FARRELL, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. Cox:

Q. Mrs. Farrell, you are the wife of Doctor Frank Farrell? A. Yes.

Q. And you were his wife in the month of July and August and September of 1941? A. Yes.

20

Q. And during the latter part of July your husband entered the United States Army? A. Yes.

Q. And left home, did he not? A. Yes.

Q. And was stationed in Carlisle Barracks, in Pennsylvania? A. Yes.

Mr. Cox: Will you please keep your voice up?

The Witness: Yes.

30

Q. Now, on about August 27th you received a letter from Mr. William Ford, did you not? A. Yes.

Mr. Cox: If your Honor pleases, at this time I would like to offer these exhibits and have them received in evidence.

This is the policy, I offer that as plaintiff's exhibit P-1.

(Policy as described above received in evidence and marked Exhibit P-1.)

40

Jeanne R. Farrell, for Plaintiff—Direct.

Mr. Cox: I offer the company's letter of August 26, 1941.

(Letter described received in evidence and marked Exhibit P-2.)

10 Mr. Cox: And I offer Dr. Farrel's letter of August 29, 1941.

(Letter described received in evidence and marked Exhibit P-3.)

Mr. Cox: And the company's letter of September 10, 1941.

(Letter described received in evidence and marked Exhibit P-4.)

20 Q. After receiving the letter of August 26th you sent a check for four dollars and twenty cents (\$4.20) to the company, did you not? A. Yes.

Q. And up to the time you sent—

The Court: What date was the check sent?

Q. Do you have that check with you?

30 The Court: I think you said August.

Q. After getting the letter of August 26th you sent the check for four dollars and twenty cents to the company? A. Yes. I think if you look on the letter as to that date I think I sent it the next day.

Mr. Cox: August 27th.

40 Q. The premium was two dollars and ten cents (\$2.10) was it not? A. Yes.

Jeanne R. Farrell, for Plaintiff—Direct.

Q. And you paid, in paying four dollars and twenty cents you were sending two months' premiums? A. Yes.

Q. And at the time that you sent this check to the company did you know whether or not your husband had been injured? A. No.

Q. Did you know anything about his injury at that time? A. No. 10

Q. Had you talked to him or had he written to you since he left? A. Yes.

Q. And you talked to him how? A. By telephone.

Q. And had he mentioned his injury to you at that time? A. No.

Q. And why did you send two months' premiums at that time? A. I figured that in a short time the next month would be due, so I didn't want the same thing to happen. 20

Q. In other words, you thought the September premium would be due in a short time, so you sent August and September? A. That's right.

Q. And did anyone representing himself as from the defendant company call to see you during September—the latter part of September? A. I think it was September, yes. Yes. 30

Q. And did he immediately discuss premiums with you at that time? A. Yes.

Q. What did he ask you for at that time? A. The next month, the October.

Q. The October premium? A. Yes.

Q. That was the latter part of September? A. Yes.

Q. In your conversations with your husband, you say that his injury had not been mentioned to you at all? A. No. 40

Jeanne R. Farrell, for Plaintiff—Cross.

Mr. Cox: I am not going to ask her about the early part of August, what she did, because I understand that is not material to the issue. If your Honor wants it at a subsequent time she could be recalled as to her side of it.

10

Cross examine.

Cross examination by Mr. Pomerehne:

Q. Mrs. Farrell, did you know that Doctor Farrell wrote a letter to the company, dated August 29th, telling them he had been injured? A. No.

Q. Have you any knowledge whether or not the Doctor ever did notify the company of his injury? A. No.

20

Q. Did he ever tell you? A. Since then.

Q. When did he tell you that? A. I think it was on his first leave home.

Q. When was that? A. I wouldn't know, sir.

The Court: Can you give us the month, September, October or November?

The Witness: I think it was in December; the month of December.

30

Q. During all the time intervening between the date when you sent the four dollars and twenty cents in and the month of December, you did not know about his injury? A. Yes, I knew of his injury.

Q. I am trying to find out when you first learned of it? A. When he was transferred from Carlisle Barracks to the other Hospital.

Mr. Cox: The Walter Reid Hospital?

40

The Witness: The Walter Reid Hospital, in Washington, D. C. I was notified then by the government that he was to be

Jeanne R. Farrell, for Plaintiff—Cross.

transferred due to an injury he received in Carlisle Barracks.

Q. Was that the first intimation you had that the Doctor had been injured? A. That is the first time.

Q. Had you called to see the Doctor while he was in the Barracks in Carlisle? A. At first when he went down. 10

Q. When he was there? A. The first day he went down.

Q. Do you remember the date? The date he went to the Carlisle Hospital. A. The hospital?

Q. Yes. A. No.

Q. The Doctor entered the Army on what date? A. I think the 31st.

Q. Of what month? A. July. 20

Q. Of July? A. Yes.

Q. And you have not seen him then until, when did you say? A. Christmas time when he came home.

Q. And you learned of his injury, you stated, when he changed from the Carlisle Hospital? A. Yes.

Q. To another hospital? A. To Washington.

Q. Did you see him at that time? A. Yes.

Q. Did you speak to him anything about the policy? A. No. 30

Q. Did he give any intimation to you or impart any knowledge to you, that he had sent a letter to the company, stating he was injured? A. No.

Q. Did you notify him that you had sent the premiums in? A. That was— Yes, I did.

Q. When you sent the check in—was it by check? And by the way, was that sent to Mr. Ford? A. Yes.

Q. With the premium book? A. Yes. 40

Jeanne R. Farrell, for Plaintiff—Cross.

Mr. Pomerehne: Have we the premium book here?

Mr. Cox: Yes, sir.

Q. Who signed that check? A. My Uncle.

Q. Your Uncle signed the check? A. Yes.

10 Q. On whose account was it drawn? A. My Uncle's.

Q. Let me ask you this. Assuming that the Doctor sent the letter in to the company, dated August 29, 1941, stating he had been injured, where at that time was the policy? A. I beg your pardon?

20 Q. When the Doctor notified the company on August the 29th, the letter dated August 29th, that he had been injured and notified the company under the policy number 933605, where was the policy at that time? A. In Doctor Farrell's office.

Q. Where? A. Broadway, South Amboy.

Q. Is that where you live? A. No. We live on David Street.

Q. Is this the premium book (showing witness book)? A. Yes.

Q. Is that the same that you sent with the check? A. Yes.

30 Q. And which was returned to you? A. Yes.

Mr. Pomerehne: I would like it marked for identification.

Mr. Cox: You may put it in evidence.

Mr. Pomerehne: I will ask that it be received in evidence.

The Court: It may be marked Exhibit D-1.

40 (Premium book described above received in evidence and marked Exhibit D-1)

Jeanne R. Farrell, for Plaintiff—Re-direct.

Q. Mrs. Farrell, do you know who paid this July premium? A. Doctor Farrell.

Q. Himself? A. Yes.

Q. You know that of your own knowledge? A. Yes.

Q. Was that by check? A. I don't know.

Q. Or by cash? A. I don't know. 10

Mr. Pomerehne: That is all.

Re-direct examination by Mr. Cox:

Mr. Cox: Just one or two questions.

Q. When the Doctor left, another Dentist took over his practice, did he not? A. Yes.

Q. And used his office? A. Yes.

Q. And if I understand you correctly you say 20
you went down with the Doctor to Carlisle, that was on July 31, when he first went down? A. Yes, sir.

Q. And the next time you saw him you went down to Carlisle just before he was transferred?

The Court: No, he came home around Christmas time.

Q. Around Christmas time, and you had not seen him in between those two times? A. Yes, I 30
saw him, but I couldn't tell you when it was.

Mr. Cox: I think the Doctor knows when that was. That is all from this witness.

Doctor Farrell.

Dr. Frank J. Farrell, Plaintiff—Direct.

DR. FRANK J. FARRELL, called as a witness in his own behalf, being duly sworn, testifies as follows:

Direct examination by Mr. Cox:

10 Q. Doctor Farrell, you are the plaintiff, in this case, and a policyholder of the defendant company, are you not? A. Yes, sir.

Q. On July 31st of 1941, you were called into the Army, is that correct? A. That is right, sir.

Q. You held a reserve commission in the Army? A. That is right, I held a commission in the officers reserve.

20 Q. And you went to Carlisle, Pennsylvania, and you suffered an accident in the Barracks there on August the 13th of 1941, did you not? A. That's right, sir.

Q. And did you tell your wife about the injury which you had received immediately? A. No, sir.

Q. And did you in the beginning think that the injury was a serious one? A. No, sir.

30 Q. And did you inform your wife of the injury at any time before you wrote that letter of August 29th to the Insurance Company, notifying them of the accident? A. No, sir. It was on that date that I received notice from the Commanding Officer in the camp, that I was going to be shipped to the Walter Reid Hospital for further treatment. And obviously I knew I was in for a lengthy treatment and I sent that letter to the company.

Q. Did you know at the time you wrote that letter on August 29th, that the premium on the policy had not been paid until August 28th? A. No, sir.

40 Q. Now when was the date when you were actually sent to the Walter Reid Hospital? A. October the 9th.

Dr. Frank J. Farrell, Plaintiff—Cross.

Q. And during the latter part of September, of 1941, did anyone from the defendant company call to see you at Carlisle? A. I believe it was either the last of September or the first of October.

Q. Was there any discussion with him or did he bring up the subject matter of the premium for October? A. Yes, sir. He wanted me to carry 10 on the policy. Carry it on and pay for it.

Q. Did he ask for the October premium at that time? A. Yes, sir.

Q. And you did not pay it? A. No, sir.

Q. I was going to ask you when was it you saw your wife next, after July 31st, when she went down with you? A. When was the next time I saw her?

Q. Yes. A. I believe it was around the last part or the middle part of October that I could 20 see people at Walter Reid.

Q. When you could see people at the Walter Reid you saw her, and then you came home in December? A. Yes, I had a leave in December.

Mr. Cox: That is all. Cross examine.

Cross examination by Mr. Pomerehne:

Q. Doctor Farrell, this policy that is now being sued on, was that in your office in Perth Amboy? 30

A. In South Amboy, yes, sir.

Q. And did you have anything with you in Carlisle in the nature of a receipt book? A. No, sir.

Q. Anything else that bore the number of the policy? A. I had taken the premium numbers of all the policies at the time the government had said if you could not carry on the insurance program it could be carried over and they were all 40 registered.

Dr. Frank J. Farrell, Plaintiff—Cross.

Q. That is where you had the number? A. That's right, sir.

The Court: Who came to see you from the company, do you know, Doctor Farrell?

10 The Witness: No, sir. I don't know the name of the fellow at the time. He was a tall gentleman.

The Court: All right, if you do not know his name.

The Witness: I didn't know the name of this gentleman until this morning.

He came down there later.

Mr. Pomerehne: That is all.

Mr. Cox: That is all, Doctor.

20 Mr. Pomerehne: Just one other question if the Court will permit me.

The Court: Certainly.

(Witness resumes the witness stand)

Cross examination continued:

Q. Did you read the policy, Doctor? A. Did I read it?

Q. Yes. A. No, sir.

Q. Did you ever read it at all? A. No, sir.

30 Q. Do you know that the policy has the provision that the person who is insured is required to notify the company every thirty days with a written report by his physician if he was under a Doctor's care? A. No, sir.

Q. Were you under a Doctor's care all the time you were in Carlisle Hospital? A. Yes, sir.

40 Mr. Cox: I think you have gotten into something that is not an issue in this case. Once an insurance company disclaims under a policy you don't have to follow out

Dr. Frank J. Farrell, Plaintiff—Cross.

the policy. Thereafter they say you are not covered you have to report this thing to us.

Mr. Pomerehne: If the Court please, the policy provides thirty days notice, reports by the physician every thirty days of the man's condition in the case, which is a condition precedent to recovering on the policy if it is good. 10

The Court: I will let it stand.

Q. Did you know the policy contained such a provision? A. No, sir.

Mr. Cox: I object to that as immaterial. When they once say the policy does not cover you they cannot say you must do that. 20

The Court: I get your point, Mr. Cox, but I will let the record stand.

Mr. Cox: Yes, sir.

Q. I will ask you this question. Did you send us a report, in to the company, signed by the physician who had you in charge at any time after the accident? A. No, sir, I was never asked about it.

Q. Do you remember, Doctor, when you applied for this policy? A. No, sir, I do not off-hand. 30

Q. I ask you to look at that paper and I ask you if—as to the last signature on the bottom there—whose it is (showing witness paper)? A. Mine, sir.

Q. This is the application for the policy in suit. Read it. A. (Witness looking at paper) Yes, sir.

Q. Did you read that before you signed it? A. No, sir. 40

Dr. Frank J. Farrell, Plaintiff—Cross.

Q. You did not? A. No, sir.

Q. Are you in the habit of signing documents and papers without finding out what they are all about? A. No, but I am in the habit of signing insurance vouchers without reading it all.

10 Q. Did you know what this was when you signed it? A. Yes, sir.

Q. What is it? A. An application for insurance.

Q. And you are telling the Court now that you did not read this and know what was in it? A. I looked over it enough and you can see it has been filled out by Mr. Utemarks, and the questions were put to me.

20 Q. I am not asking that question. I am asking you whether you read that part and were familiar with it when you signed it? A. No, sir.

Q. After you got your policy did you look at it at all? A. Yes, I glanced at it.

Q. Did you look at the back part of it? A. (Witness looking at paper) Yes, I might have.

Q. You are not sure? A. No, I am not sure.

30 Q. Did you see this part on the application, which states that you will pay the monthly premium of two dollars and ten cents, in advance without notice? And the answer there is Yes. Is that your answer (indicating)? A. That is my answer probably, it is not my writing.

Mr. Pomerehne: No, I don't say it is.

I offer this application to be received in evidence.

Mr. Cox: That is all in the original policy.

40 Mr. Pomerehne: In the original policy his name is typed, this is signed, and that is the best evidence.

William Ford, for Defendant—Direct.

Mr. Cox: Mr. Pomerehne assures me this is the same as the one that appears typewritten. I am not going to object to it and will let it go in to evidence. Doctor Farrell has not read it but I will take a chance on it.

(Application as described received in evidence and marked Exhibit D-2.) 10

Mr. Pomerehne: That is all.

Mr. Cox: That is all.

I think that is the plaintiff's case. I am trying to recall what I just stated to the stenographer but I think I covered it.

That is our case, sir.

Mr. Pomerehne: I will call Mr. Ford. 20

WILLIAM FORD, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct examination by Mr. Pomerehne:

Q. Mr. Ford, in what capacity were you a representative of the National Accident and Health Insurance Company in August, 1941? A. General agent. 30

Q. For what district? A. For Essex County and vicinity. My contract called for and that means anywhere in the state that I may care to operate.

Q. Anywhere in the state? A. That's right.

Q. Now Mr. Eutemarks has been spoken about here, has he been employed by the company or by you? A. Well, under present day rulings he was employed by himself. He was an agent; 40

William Ford, for Defendant—Direct.

under the laws of New Jersey he was an agent and not an employee of mine.

The Court: You say under present day rulings. How about in August, of 1941.

10 Q. In August, 1941? A. He was still in business for himself. He was purely a commission man under my supervision.

Q. I show you a letter that you wrote, is that your signature, on Exhibit P-2 (showing witness paper)? A. It is not.

Q. That is not? A. That is not my signature.

Q. Was it signed by someone in your office? A. It was.

20 Q. It came from your office? A. That came from my office but it is not my signature.

Q. All right. I show you receipt book here of the National Accident and Health Insurance Company, Frank J. Farrell, 355 David Street, South Amboy, Exhibit D-1, and show you the various entries in there, from February, 1941, to August 28th, 1941; did you receive those payments personally, do you know (showing witness book)? A. No, I did not.

30 Q. Did you receive the one of August 28th personally? A. I did not.

Q. Who did, can you tell from that? A. Yes. Do you wish me to mention the name?

Q. Is she here? A. Yes. Miss Newhouse. That was her name at that time.

Q. Did you ever see this letter before, that is Exhibit P-3 (showing witness paper)? A. I did.

The Court: Is that the one from the Doctor?

40 Mr. Pomerehene: Yes, sir, the one from the Doctor.

William Ford, for Defendant—Direct.

Q. I notice on this particular letter, two red stamps, one dated September 3, 1941, and another September the 6th, 1941, encircled by pencil marks; can you tell me what those stamps are; if they originated in your office? (Indicating on paper). A. This one here is from our office, September 3d, that is our stamp, although the letter is addressed to the Philadelphia office, it came first to my office. And then was relayed to Philadelphia. 10

Q. How do you know it was relayed to Philadelphia? A. I wrote a letter and I have a copy of it.

Q. Is there anything in this particular letter here, by stamp or otherwise, which refreshes your memory on that point? 20

Mr. Cox: If the Court please, I make no issue on the fact that he got it September 3d, and relayed it to the company in Philadelphia right away.

Mr. Pomerehne: That is what I wanted to prove.

Mr. Cox: I will stipulate that.

Q. This one stamp, September 6th, is not your stamp (indicating on paper)? A. It is not. 30

Q. Can you refer quickly to that entry there of August? A. That is the one right there (witness indicating in book).

Q. In whose handwriting is it, if you know? A. Miss Newhouse's handwriting.

Q. Is she here? A. Yes.

Q. Did you have any occasion to know about the actual receipt of that money; that four dollars and twenty cents? A. At the time it was received? 40

William Ford, for Defendant—Cross.

Q. Yes. A. Not necessarily, no.

Q. Did you at any time know about the receipt of that money from the book? A. Not until the claim was presented.

Q. Did you have any knowledge of Doctor Farrell's injury, prior to the date of his letter, 10 August 29th, 1941? A. None whatsoever.

Mr. Cox: I think we stipulated that.

Mr. Pomerehne: I wanted to be sure about that.

Mr. Cox: All right.

Mr. Pomerehne: Cross examine.

Cross examination by Mr. Cox:

Q. Mr. Ford, when you received the check for 20 four dollars and twenty cents you deducted your commission and remitted it to the Philadelphia office? A. That is our procedure.

Q. And you remitted it to the Philadelphia office as Doctor Farrell's premium for August and September? A. That is correct I presume.

Q. And did you go down to Doctor Farrell's house during September and ask for the October premium? A. Not then or at any other time. I 30 have never been to his house.

Q. You did not have a dog with you? A. I have never owned a dog since I have resided in New Jersey.

Q. The other fellow had a dog. Do you know who that may be? A. I do not.

Q. I see. And I suppose you notified the company in Philadelphia at the time you sent the premium for August and September down, that the premium had reached you August 28th? A. 40 I did in the due course of remitting it.

Hertha M. Kiss, for Defendant—Direct.

Q. In other words, when you would send a letter out you would send a check and then list in your letter— A. I wouldn't send any letter. We never sent letters in reporting under general agency.

Q. You did ultimately advise them that the August premium was paid by Doctor Farrell on August 28th? A. In the regular course of business— 10

Q. When? A. In the monthly report. We submit it twelve times a year; once a month.

Q. At the end of each month? A. About the twenty-fifth of each month.

Q. The twenty-fifth of each month? A. A Sunday or a Saturday may alter the date slightly or a holiday. 20

Mr. Cox: That is all.

Mr. Pomerehne: That is all.

HERTHA M. KISS, called as a witness on behalf of the defendant, being duly sworn testifies as follows:

Direct examination by Mr. Pomerehne: 30

Q. Mrs. Kiss, were you employed by Mr. Ford in August, 1941? A. That is correct.

Q. And sometime prior thereto? A. Yes.

Q. And what was your routine of service there in the office? A. As bookkeeper and occasional secretarial work.

Q. Who made the reports out of receipts and remittances to the home company? A. Both Mr. Ford and I. 40

Hertha M. Kiss, for Defendant—Direct.

Q. I show you Exhibit D-1, which is the Receipt Book, and ask you to look at the last entry on that, and I ask you if you know who made it (showing witness book)? A. I did.

Q. And is the stamp there— A. That's right.

10 Q. William Ford, and you put that stamp on letters? A. I did.

Q. And following the stamp is what? A. My initials.

Q. Now it is dated August 28th, 1941, would you say that is the date on which the remittance was received? A. Yes.

Q. Do you recall whether anything accompanied that remittance? A. No, I do not.

20 Q. Now the one previous to that entry, July the 7th, 1941, for two dollars and ten cents, it has a pencil mark there, do you know who that is? (Showing witness book) A. No, I don't.

Q. Did you ever see that letter before, and I am referring to Exhibit P-2 (showing witness paper)? A. Yes, sir.

Q. Do you know who wrote the name William Ford on the bottom? (Indicating) A. I did.

30 Q. Do you know what the occasion was for writing that letter? A. It has been a custom that if a policy has not been paid, if the policyholder has not paid, to send a letter out to retain the policy.

Q. And that letter is dated? A. August 26th, 1941.

Q. At that time had you or had you not received the remittance in the receipt book? A. No.

Q. Which is Exhibit D-1. Now do you remember seeing this letter, Exhibit P-3 (showing witness paper)? A. No, I never saw that.

40 Q. You never saw that letter? A. No.

Hertha M. Kiss, for Defendant—Cross.

Q. Did you ever have any knowledge of the fact that Doctor Farrell had been injured? A. Well, I had heard it mentioned.

Q. Do you know when that was? A. No.

Q. Do you know whether it was before or after this premium was received? A. After.

Q. You are sure about that? A. Yes, I am positive. 10

Mr. Pomerehne: Cross examine.

Cross examination by Mr. Cox:

Q. You wrote in this letter reference to two dollars and ten cents, that was the premium for August of 1941? A. That's right.

Q. That's right. And you wanted that premium paid? A. That's right. 20

Q. And when the check came in you entered on the receipt card two dollars and ten cents for the month of August and two dollars and ten cents for the month of September, is that right? A. That is right.

Q. And that is the receipt card which you sent back to Doctor Farrell's home? A. That's right.

Q. And I suppose you made a similar entry on the records of the company in your office? A. That is correct. 30

Q. Showing that the premium for August and September was paid on August the 28th? A. Right.

Q. That is correct? A. That is correct.

Q. And was that information subsequently sent to Philadelphia, to the home office in Philadelphia? A. To the best of my knowledge it was.

Q. I see. And is a letter such as this customarily written by you with the knowledge of Mr. Ford and with his approval? A. It is a form letter we sent out. 40

Hertha M. Kiss, for Defendant—Cross.

Q. You didn't get the idea yourself, it was given to you by Mr. Ford to write out this type of form letter? A. If a policy is overdue, yes.

Q. If the policy is overdue you then write out this letter? A. That's right.

10 Q. In other words, what I am getting at is this. You did not initiate this idea yourself? A. No.

Q. It was an office practice to send out letters of this type if the policy was overdue? A. That's right.

Mr. Cox: That is all.

The Court: That is all, Mrs. Kiss, thank you.

Mr. Pomerehne: I was wondering, there is one point I am not clear about, Mr. Cox.

20 (Discussion of counsel off the record)

Mr. Cox: I didn't put that in the stipulation because I was not sure at the time when it was received. I am perfectly willing to stipulate with you, Mr. Pomerehne, that on September 3, 1941, this letter came to the attention of Mr. Ford, the general agent of the Company in Newark, and was stamped September 3, 1941, in his office, and September 6, 1941, in the Philadelphia office, is that correct?

30

Mr. Pomerehne: That is correct.

We rest.

The Court: Well, now, Mr. Pomerehne, will you need the further testimony you spoke of?

(Discussion off the record)

Mr. Pomerehne: We rest as it is.

40

The Court: You say you have a brief, or what might be taken for a brief?

Motion for a Direction.

Mr. Pomerehne: Yes.

I move, if your Honor please, at this time for a direction upon the cases that support that request to charge.

The Court: I do not expect to decide this matter now. I am going to take the opportunity to read your cases and letters and examine the trial memorandum that Mr. Cox has handed me and if counsel, in view of the testimony which has been taken today, desire to submit anything further to me they may do so. 10

Mr. Cox: There is only one suggestion that I would like to make, and that is this: This is being tried before your Honor and not before a jury, so might I call your Honor's attention to the back of this premium card, which is not a part of the policy, but which contains their interpretation of the policy. 20

The policy itself is rather explicit. All provisions of the contract are contained in this policy. And I think under the decisions it provides wherever the contract contains the entire contract whatever they may think, the legal effect on it would have no bearing. 30

I would like to limit my admission of that or my consent to it going into evidence to what is on its face, which is what is pertinent to the case.

Mr. Pomerehne: And not to the back. That is perfectly agreeable. That is proper.

The Court: Yes.

Exhibit P-1.

(Opposite )

This Policy Provides Indemnity for Loss of Life, Limb, Sight or Time by Accidental Means, and for Loss of Time by Sickness, as Herein Limited and Provided.



INCORPORATED BY THE STATE OF PENNSYLVANIA
HOME OFFICE, PHILADELPHIA, PA.

(HEREINAFTER CALLED THE COMPANY)

HEREBY INSURES

Mr. FRANK J. FARRELL in

Class A of the Company, as a Dentist,

and promises to pay to him or his beneficiary, Jeane Farrell, wife

indemnity for loss resulting from accident or sickness, all to the extent hereinafter provided.

The date of this policy is February 25th, 1941, it expires at 12 o'clock, midnight, on the last day of March 1941, the policy fee for its issue is \$ 5.00, the Monthly Premium is \$ 2.10, payable in advance, and its indemnities are a Principal Sum of -----ONE THOUSAND-----

Dollars, an Accident Indemnity at the rate of -----ONE HUNDRED----- Dollars per month, and a Sickness Indemnity at the rate of -----ONE HUNDRED-----

Dollars per month, but the Company will pay only one-half of these several indemnities, as hereinafter promised, for any loss resulting from injury sustained or sickness contracted prior to the payment of the premium required for the first three months insurance hereunder.

The insurance given by this policy is against (1) loss of life (suicide, sane or insane, not included), limb, limbs, sight or time resulting exclusively from a bodily injury which is effected during the life of this policy solely by external, violent and purely accidental means and which causes at once and continuously after the accident total inability on the part of the Insured to engage in any labor or occupation; and (2) loss of time resulting from bodily sickness which is contracted and begins after this policy has been maintained in force for not less than thirty days from its date. The word "injury" or "sickness" wherever hereinafter used shall mean the body injury or sickness above described.

PART I. SPECIFIC INDEMNITY

If within ninety days from the date of the accident any one of the following losses shall result to the Insured solely from such injury, the Company will pay:

For Loss of Life.....	The Principal Sum
For Loss of Both Eyes.....	The Principal Sum
For Loss of Both Hands.....	The Principal Sum
For Loss of Both Feet.....	The Principal Sum
For Loss of One Hand and One Foot.....	The Principal Sum
For Loss of One Eye and One Foot.....	The Principal Sum
For Loss of One Eye and One Hand.....	The Principal Sum
For Loss of Either Hand.....	One-Half the Principal Sum
For Loss of Either Foot.....	One-Half the Principal Sum
For Loss of Either Eye.....	One-Third the Principal Sum

Loss as above used with reference to hand or foot means complete severance at or above the wrist or ankle and as used with reference to the eye or eyes means the irrecoverable loss of the entire sight thereof. If indemnity becomes payable under the provisions of this Part no other indemnity provided in this policy will be paid.

COPY OF APPLICATION

I hereby apply to the National Accident and Health Insurance Company of Philadelphia, for a policy to be based upon my answers to the following questions:—

- Full Name? Frank J. Farrell Color? White Sex? Male
- Age, nearest birthday? 32 years. When and where born? South Amboy, N. J.
on the 2nd day of March, 1 909 Weight? 185 lbs Height? 5 ft. 9 in.
- Residence and P. O. address? No. 355 David St. City or Village South Amboy State N. J.
- What are your occupations? Dentist { Classified by the } A
(Name them all) { Company as? }
- What are your duties in above occupations? Dentist
- Employer? self Your wages or income? \$3600 per year
- What is your employer's business? Dentistry-office practice
- Who desired as beneficiary? (Full name) Jeane Farrell Relationship? Wife
- Have you ever been insured in this Company? NO if so, under what Policy No. When lapsed?
- Are you insured in any other company, association or society paying accident or sick benefits? NO (Name of company, association or society, and amount carried in each must be stated.)
- If during the life of this policy you take other insurance do you agree to at once report the same to this Company? YES
- Has any application for health, accident or life insurance ever made by you been declined, or any such policy of insurance cancelled or renewal for insurance of any kind refused by any company, association or society? Rejected for life ins. by Met. Life Ins. Co.
- Are your habits of life correct and temperate and are you in sound condition mentally and physically? YES Is your hearing or vision impaired and have you any infirmity, deformity or defect? NO Have you ever had fits of any kind, vertigo, hernia, paralysis, tuberculosis or any form of heart trouble or kidney disease? NO Have you in contemplation any special journey or hazardous undertaking? NO
- Have you been disabled by either accident or illness, or received medical or surgical attention during the last ten years? YES
If so, when, for what and duration?
In 1938 for Pain in right flank--white cells in urine lasting
(State month and year) (State cause of disability) (State duration)
In for over night, created up with treatment lasting
In for lasting
In for lasting
- Do you understand and agree that the right to recovery under any policy which may be issued upon the basis of this application shall be barred in the event that any of the foregoing statements, material either to the acceptance of the risk or to the hazard assumed by the Company, is false, or in the event that any one of the foregoing statements is false and made with intent to deceive; that the insurance hereby applied for will not be in force until the delivery of the policy to you while you are in good health and free from all injury and that the Company is not bound by any knowledge of or statements made by or to any agent unless written hereon, and that you will pay the Monthly premium of 2.10 Dollar in advance without notice? Answer Yes
27 January 1941 Signed Frank J. Farrell

Dated this 27 day of January 1941 Signed Frank J. Farrell

NOTICE

Premiums are DUE IN ADVANCE as stipulated in the policy and must be paid either to the Home Office of the Company or to an authorized agent.

In case of death by accident or disability by accident or illness, WRITTEN NOTICE thereof containing particulars should be given IMMEDIATELY to the Company at Philadelphia, Pa. Give policy number when writing the Company.

ACME DISABILITY POLICY

N? 933605

This Policy Provides Indemnity for Loss of Life, Limb, Sight or Time by Accidental Means, and for Loss of Time by Sickness, as Herein Limited and Provided.

National Accident and Health Insurance Company
OF PHILADELPHIA

HOME OFFICE
242-44 SOUTH EIGHTH STREET
PHILADELPHIA

STANDARD PROVISIONS

Issued to
FRANK J. FARRELL

SOUTH AMBOY N. J.

Form P-57-3-EM-12-3-B.

WILLIAM FORD, MANAGER
NORTHERN NEW JERSEY OFFICE
11 COMMERCE ST., NEWARK, N. J.
PHONES: EXT. 2-1371-1372

This Policy does not cover the first week of disability from accident or sickness, unless otherwise provided by rider.

Exhibit P-2

Mr. Frank J. Farrell, 355 David Street, South Amboy, New Jersey: He Policy No. 933605.

Dear Mr. Farrell:

Last week Mr. Kautman advised us that you would mail your premium for the above numbered policy in the amount of \$3.10 direct to the office. As we have not yet received your money, we are hoping if the matter has escaped your attention, a check enclosing herewith a stamped addressed envelope in which you can mail us your money.

Thanking you for your past patronage, and trusting we may have the continued opportunity of serving you, we are at your disposal at all times. I am, Sir, very truly yours, William H. Brown, 355 David Street, South Amboy, New Jersey.

Exhibit P-3

Dear Sir:

I injured my knee in a fall here in Camp and have been a patient in the Station Hospital here since August 13, 1941. My policy number is 933605, and my home address is 355 David Street, South Amboy, New Jersey.

Hoping to hear from you on this matter soon,

Very truly yours,

FRANK J. FARRELL

Exhibit P-2.

Mr. Frank J. Farrell,
355 David Street,
South Amboy, New Jersey:
Re. Policy No. 933605.

10 Dear Mr. Farrell:

Last week Mr. Eutemark advised us that you would mail your premium for the above numbered policy in the amount of \$2.10 direct to this office. As we have not as yet received same, we are wondering if the matter has escaped your attention.

We are enclosing herewith a stamped addressed envelope in which you can mail us your remittance.

20 Thanking you for your past patronage, and trusting we may have the continued opportunity of serving you,

I am,
very truly yours,
WILLIAM FORD.
N.

Exhibit P-3.

30 Dear Sirs:

I injured my knee in a fall here in Camp and have been a patient in the Station Hospital here since August 13, 1941. My policy number is 933605, and my home address is 355 David Street, South Amboy, New Jersey.

Hoping to hear from you on this matter soon,

Very truly yours,

40

FRANK J. FARRELL.

Exhibit P-4.

Claim number 187539.
Doctor Frank J. Farrell,
Medical Field Service School,
Carlisle Barracks,
Carlisle, Pennsylvania.
Policy number 933605.

Dear Doctor:

We have received your letter advising that you injured your knee and have been a patient at the station hospital since August 13th. We have also been advised by our agent that you mailed your August and September premiums to him on August 28th, or fifteen days after you became disabled.

Under the policy you hold premiums are due in advance on the first day of each month and must be paid either to the home office of the company or to an authorized agent. If a premium is not paid when due the policy becomes lapsed and the subsequent acceptance of an overdue premium will reinstate the policy, but only to cover accidental injuries thereafter sustained and sickness beginning more than ten days after such acceptance. As your disability began more than two weeks before you mailed your premium to our agent we regret you will not be entitled to indemnity as your policy was not in force due to the non-payment of your August premium.

We trust this explanation is entirely clear and satisfactory to you.

Yours very truly,

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Exhibit P-4
2-P Exhibits

Claim number 187538
Doctor Frank J. Farrell, M.D.
Medical Field Service School, 1000
Carlisle Barracks, Carlisle, Pennsylvania
Policy number 833605

10

Dear Doctor:
We have received your letter of August 13th, 1941, regarding the fact that you mailed your August and September premiums to him on August 28th, or fifteen days after you became disabled.

20

Under the policy you hold, premiums are due in advance on the first day of each month and must be paid either to the home office of the company or to an authorized agent. If a premium is not paid when the policy becomes lapsed and the subsequent acceptance of an overdue premium will reinstate the policy, but only to cover accidental injuries thereafter sustained and sickness beginning more than ten days after such acceptance. As your disability began more than two weeks before you mailed your premium to our agent we regret you will not be entitled to reinstatement as your policy was not in force due to the non-payment of your August premium. A good explanation of this explanation is entirely clear and satisfactory to you.

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Yours very truly,
J. Edgar Hoover

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Amended Grounds of Appeal.**NEW JERSEY COURT OF ERRORS
AND APPEALS.**

FRANK J. FARRELL, Plaintiff-Appellant, <i>vs.</i> NATIONAL ACCIDENT AND HEALTH INSURANCE COMPANY OF PHILA- DELPHIA, a corporation, Defendant-Appellee.	On Appeal from 10 New Jersey Supreme Court. Action at Law. Amended Grounds of Appeal.
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The following are the grounds of appeal of the plaintiff-appellant which will be urged for the reversal of the judgment of the New Jersey Supreme Court: 20

The trial judge committed legal error:

A. In holding that the policy of insurance issued by the defendant to the plaintiff was not in force on August 13, 1941, and

B. In holding that the defendant did not waive its right to disclaim coverage under the said policy of insurance. 30

COX & WALBURG,
Attorneys for Plaintiff-Appellant.

Service of the within Amended Grounds of Appeal is acknowledged this 6th day of February, 1946.

POMERHENE, LAIBLE & KAUTZ,
Attorneys for Defendant-Appellee. 40

1948 FEB 11

Amended Grounds of Appeal

NEW JERSEY COURT OF ERRORS
AND APPEALS

10	On appeal from New Jersey Superior Court dated at Law January Grounds of Appeal	Plaintiff-Appellant Frank J. Farnham National Assurance and Liability Insurance Company of New Jersey a corporation Defendant-Appellee
----	---	---

The following are the grounds of appeal of the
plaintiff-appellant which will be argued for the re-
versal of the judgment of the New Jersey Su-
preme Court.

The trial judge committed legal errors:
A. In holding that the policy of insurance
issued by the defendant to the plaintiff was
not in force on August 12, 1941, and
B. In holding that the defendant did not
owe the plaintiff the right to disclaim coverage under
the said policy of insurance.

Cos. & W. L. L. Co.
Attorneys for Plaintiff-Appellant

Notice of the within Amended Grounds of Ap-
peal is acknowledged this 6th day of February,
1948.
Powerhouse, Evans & Kline
Attorneys for Defendant-Appellee

New Jersey Court of Errors and Appeals

FRANK J. FARRELL,
Plaintiff-Appellant,

vs.

NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY OF PHILA-
DELPHIA, a corporation,
Defendant-Appellee.

On Appeal from
New Jersey
Supreme Court,

Middlesex
County.

Sat Below:
A. Dayton
Oliphant, C. C. J.

BRIEF OF DEFENDANT-APPELLEE.

This cause came on for trial before the Honorable A. Dayton Oliphant, Circuit Court Judge, sitting without a jury, on Tuesday, January 16, 1945.

The suit was based upon an accident and health policy issued by the appellee to the appellant, bearing date February 25, 1941, insuring appellant from February 25, 1941 and expiring on March 31, 1941, at midnight, and continuing the insurance at a monthly premium of \$2.10 payable in advance, reference being respectfully made to the policy now in evidence (Ex. P-1, S. C., p. 67).

Appellant caused to be paid premiums of \$2.10 from March 1, 1941 consecutively until and including the month of July, 1941.

On August 27th, appellant's wife sent to William Ford, of 11 Commerce Street, Newark, N. J., an agent of appellee company, a check for \$4.20 to cover the monthly premiums for August and September, 1941. Said check, as the testimony shows, was received by said Ford, Agent, and recorded as for August and September, 1941, without any

knowledge or notice to the appellee company of any prior accident or injury received by the appellant whatsoever.

On September 3, 1941, the said Ford Agency at Newark, N. J., received a letter (marked in evidence) (S. C., p. 42, ll. 20-40; Ex. P-3, p. 68) dated August 29, 1941 signed by the appellant, stating that the appellant had an accident on August 13, 1941 at Carlisle Barracks, Pennsylvania (S. C., p. 42, ll. 30-37).

Said letter was addressed to National Accident and Health Insurance Company, 242-244 South 8th Street, Philadelphia, Penna. but was mailed to and received by William Ford, its agent, at 11 Commerce Street, Newark, N. J.

Both premiums of \$4.20 aforesaid were mailed by the appellant 14 days after the accident, and the notice of said accident, although dated August 29, 1941, was not received by the appellee's agent until September 3, 1941, more than 20 days after said accident.

At the time and prior to the date of the accident August 13, 1941, no premium had been paid for the month of August; no notice of the accident had been given by appellant to the appellee until after the appellant had caused a check for \$4.20 to be mailed by his wife to the agent, Ford, at Newark, and by the latter received on August 28, 1941.

On September 10, 1941 appellee, by letter, (in evidence) notified appellant that premiums for August and September, 1941 had been mailed on August 28, 1941, or 15 days after he had become disabled, and that (S. C., p. 43, ll. 1-35):

“as your disability began more than 2 weeks before you mailed your premium to our agent,

we regret you will not be entitled to indemnity as your policy was not in force due to the non-payment of your August premium."

Both parties at close of case moved for a direction of verdict.

ARGUMENT.

POINT I.

The policy in suit, Standard Provisions Number 3, provides:

"If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the company, or any of its duly authorized agents, shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

The testimony and evidence before the Court is that the monthly premiums were paid in advance up to and including the month of July, 1941.

Appellant claims the date of his injury as August 13, 1941. Up to that date no August premium had been paid. Not until August 28, 1941 was a premium remitted to the appellant's agent's office in Newark, N. J. Up to that time no notice was given to the appellee, or any of its authorized agents, of appellant's injury occurring on August 13, 1941. On August 28, 1941, two months premiums were sent by appellant's wife from Perth Amboy, N. J. to appellee's agents at Newark, N. J.. On the following day and after said premiums had been sent to appellee, the appellant by letter dated August 29, 1941 at Carlisle, Pa., sent notice of his accident, addressed to the

appellee's home office in Philadelphia, but mailed to its agent in Newark, N. J., where it was received September 3, 1941.

Appellee at no time before September 3, 1941 had any knowledge by notice or otherwise of the appellant's accident which occurred on August 13, 1941.

The appellee at no time after said accident on August 13, 1941 had any knowledge thereof until after appellant had remitted a premium, some 15 days after said accident and not until September 3, 1941, more than 20 days after the accident, did appellee receive for the first time notice of said accident.

Appellee contends that the premium for the month of August, 1941 having been paid after the date of the accident, and accepted by the appellee, without the appellee having received notice of the accident prior to the payment of the two months premium—that the policy was not in force on the date of the accident, and appellant cannot recover under the policy for his injury, because Standard Provision No. 3 of the policy specifically provides (and is an essential and governing feature of the contract) that if default be made in the payment of the premium, the subsequent acceptance of a premium shall reinstate the policy but only to cover accidental injury thereafter sustained.

From the facts in evidence, the policy was not in force on August 13, 1941, the accident date, because no premium had been paid for the month of August 1941 on or prior to the date of accident. Even if the defendant had been given notice of the accident and with knowledge thereof had received and accepted a premium, the defendant would not be held liable for injury of appellant which occurred before the premium had been re-

mitted, under provisions of Standard Provisions No. 3 of the policy, which is an excerpt of our statute (hereinafter cited), which provides, that if default be made in payment of premium, subsequent acceptance of a premium shall reinstate the policy but only to cover accidental injury thereafter sustained.

There is also in evidence a form letter dated August 26, 1941, sent to the appellant, by Mrs. Kiss, appellee's witness, calling for payment of premium, but sent without the knowledge of appellant's accident on August 13, 1941 (S. C., p. 40, ll. 25-40; Ex. P-2, S. C., p. 68, ll. 1-25).

In his application for the policy, the original of which is in evidence (S. C., Ex. P-1, pp. 66-67), the plaintiff-appellant over his signature agreed to pay the monthly premiums in advance without notice. Notice on outside cover of the policy provides for payment in advance at either the Home Office, or to an authorized agent.

Mr. Farrell, the appellant on cross examination testified that he did not furnish the defendant every thirty days with a written report from his attending physician fully stating appellant's condition (S. C., p. 55, ll. 1-30), as provided by Part 1X. Miscellaneous provisions of the policy, said section also providing that strict compliance on the part of the Insured and beneficiary with all the requirements of the policy is a condition precedent to recovery and any failure in this respect shall forfeit to the company all right to any indemnity. The amended complaint in suit, paragraphs three and six, alleges that appellant was under the care of physicians from August 13, 1941 through June, 1943.

It is respectfully submitted that Section 1X of Miscellaneous provisions aforesaid applies not

only to payment of premiums but likewise to notice of condition of injury and disability, to fulfill which the appellant defaulted in both instances.

POINT II.

Grounds of Appeal.

The grounds of appeal, S. C., page 37, state:

The trial Judge committed legal error in entering a verdict for the defendant instead of a verdict for the plaintiff.

In *Theriault vs. Anzelmo*, 119 N. J. L. 10 Syll. 1 it is stated,

“Grounds of appeal which merely allege a general error, or which do not point out, or challenge any judicial action as legal error, will not be considered by the Court.”

It is respectfully submitted that the said grounds of appeal are not specific, do not detail nor specify the alleged legal error, as indicated under the above cited case.

Memorandum of Law.

Acceptance of a past due premium after loss without knowledge of the loss does not revive a previously forfeited policy. 32 C. J. 1351.

The exercise by the company of its right to accept a premium after it becomes due under a provision in the contract expressly stipulating as to the effect of such an acceptance does not, in itself, waive a forfeiture of provision against liability during suspension. 32 C. J. 1351.

It is essential that the company shall have had knowledge or notice of that which it is held to be

estopped from insisting upon or to have waived. 32 C. J. 1321.

Insured must exercise diligence in paying premiums when due. 32 C. J. 1195.

(Note) The policy in suit (page 1) specifically provides for payment of premium monthly in advance. The last page of policy contains notice that premiums are due in advance either to the Home Office of the company or to an authorized agent. The address of the Home Office, and also of William Ford, Manager of Northern New Jersey Office of the company. The premium of August 27, 1941 was sent from Perth Amboy by plaintiff's wife to the Newark Office, and the letter of the plaintiff of August 29, 1941 directed to the Home Office in Philadelphia, was sent by plaintiff and received at the Newark Office on September 3, 1941.

Where the company, after a loss, first obtains knowledge of a breach of a condition precedent which prevents the risk of the policy from attaching, a waiver or estoppel cannot be predicted upon the retention of the premium. Where a loss has occurred before the company acquires knowledge of the ground of forfeiture, the retention by the company of the unearned portion of the premium is not inconsistent with or claim of forfeiture of the policy. 32 C. J. 1352.

Waiver must be by one in possession of full knowledge of the actual facts and with an interest to waiver.

Decker vs. Sexton, 43 N. Y. S. 167-171;

Wienke vs. Smith, 176 Pa. 42-44.

Waiver is essentially a matter of intention and cannot arise out of acts done in ignorance of material facts. *Freedman vs. Fire Ass'n. of Phila.*, 168 Pa. 429, 32 C. J. 39-40.

Lloyd vs. Massachusetts Accident Co., 125 ^{N.J.} Eq. 320. Syllabus (2) The fact that the defendant, in this State, and other states, departed from its adopted custom of giving notice of premiums due upon policies similar to the complainants', upon which premiums were not paid and policies lapsed, standing alone, does not justify a determination of reinstatement of the complainant's policy. The rights of the parties, under the policy, are no greater than its terms explicitly state.

Page 321:

"Shortly before February 14, 1936 the complainant received from the defendant a notice of a premium due on said date, which directed payment to be made at the defendant's home office in Boston, Massachusetts. The complainant forwarded the premium as directed. On February 14, 1937 a premium became due under the terms of the policy; no notice thereof was given to the complainant by the defendant. On March 15, 1937 the complainant tendered payment of the premium due on February 14, 1937. The defendant refused to accept it and advised him the policy had been cancelled because of non-payment of the premium on its due date. The complainant thereupon filed a bill of complaint through which he seeks the reinstatement of the policy and a restraint against its cancellation."

At page 322:

"In *Thompson vs. Knickerbocker Life Insurance Co.*, 104 U. S. 52, the insured failed to pay his premium as a result of a serious illness. The policy lapsed and after the death of the insured, tender was made but refused. Suit was instituted and decedent's representative charged that the insurance company failed to notify the insured as to the due date of the premium payment, and alleged that on previous occasions the company sent notices, and thereby created a custom and usage which insured relied upon."

The Court held:

“There is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due—the reason why the insurance company gives notice to its members is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility in giving it. The duty of the assured to pay at the day is the same, whether notice be given out or not.”

Page 322:

“But a habit or usage of the company to give notice to the insured of the amount of the annual interest and the time of payment has been set up and relied on by the appellee as showing the understanding of the company and those connected with it.”

Page 323:

“But in order to make the contention good, it must be shown that there was an obligation on the part of the company to give notice and that its giving such notice was a condition precedent to the right of the company to receive the interest on the premium note, according to the contract of insurance and we think it clear that there is nothing in the habit or usage relied on that could impose such a duty upon the company with such consequence of failure to perform it, as that contended by the appellee.”

Page 323:

“The contract of insurance between the parties hereto does not provide that the defendant give the insured notice of the due date of its premium; nor does it appear that there is a statute in this State which makes provision for such notice.”

At page 324:

“The rights of the parties, under the policy, are no greater than its terms explicitly state. The complainant’s policy is devoid of any provisions requiring the defendant to give notice of premiums due; and it expressly states that it shall be renewable, only after the premiums be paid, on or before the due date.”

John Hancock Mutual Life Insurance Co. vs. Hefner, 134 E. 336: page 336—

The receipt by an insurance company of a premium on a life insurance policy after the due date of such premium, is not unconditional nor a waiver of forfeiture of the policy, if the company promptly notifies the insured that as a condition to waiver or forfeiture he must execute and return to the company a form of application for reinstatement, which accompanies the notice.

Page 339—the Court said:

“I conclude that complainant by receiving and retaining the payment of past due premium did not, under the circumstances here present, waive the right to declare the policy forfeited. Citing *N. Y. Life Insurance Co. vs. Weiss*, 133 Eq. 375.”

Eisenberger vs. North American Accident Ins. Co., 11 N. J. Misc. Rep. 217 (165 Atl. 295) (Supreme Court)—

“This suit is on a policy of accident insurance. The original policy date bore date October 4, 1927, to run until October 4, 1928. By the tenth ‘general provision’ it was provided that ‘this policy with the consent of the company may be renewed for the same premium and for the period of time provided herein, by payment in advance of the premium herein mentioned.’ The third ‘standard

provision' reads: 'If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the company or by any of its duly authorized agents shall reinstate the policy, but only to cover loss resulting from accidental injury thereafter sustained.'

The policy term expired October 4, 1928. No new premium was then paid. But on October 22nd the insured paid a new premium and the agent issued a receipt on the company's blank 'continuing in force Policy No. 5233458 to the 22d day of October, 1929 at twelve o'clock noon, subject to all the conditions and agreements in the original policy.' The receipt is dated October 22nd, 1928.

This suit is founded on an accident which occurred on October 12, 1929 and the defense made was in substance that the payment of October, 1928 related back to October 4th so that the policy year had expired on October 4th, 1929 and there was no insurance in force on the 12th. But we think this point without substance.

No such contract is evidenced by the receipt, which expressly extends the policy term to October 22nd. The stub sent to the company gives its date October 22nd, 1929 as its 'due date' and while not so explicit as the receipt, put the company on notice of a premium for a year accepted as due on October 22 and not on October 4."

Revised Statutes of New Jersey, 1937, Volume 1. Part 4-Health and Accident Insurance, Chapter 38 (17:38-3) C3 page 166, provides:

"If default be made in the payment of the agreed premium for this policy the subsequent acceptance of a premium by the insurer or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

This provision is stated and contained in the policy in suit, under Standard Provisions Part 3, Exhibit P-1, S. C., page 67.

Winter vs. Metropolitan Life Insurance Co., 123 N. J. L. 568. Page 570:

"It does not matter that, by the contract, the policy 'shall be voidable by the company;' a formal declaration of invalidity by the insurer before suit, in the exercise of this right, is not a condition precedent to the interposition of this defense. There is no distinction of substance in this regard, between a provision making a policy 'voidable' for breach of condition and one clothing the insurer with authority, in such event, to 'declare the policy void.' In the circumstances here presented, the insurer is not, as maintained by plaintiff, obliged under the former clause 'to take some action to declare the policy void upon breach of condition, and to tender return of premiums, otherwise the company will be deemed to have considered the policy as valid and effective, and to have waived any breach of condition,' while under no such obligation in virtue of the latter stipulation. The reservation of the right to 'declare' a policy 'void', without more renders it voidable. There is nothing to suggest waiver or estoppel. The acceptance of premiums after knowledge of the breach would have presented a different situation."

Part IX Miscellaneous Provisions of the policy in suit, provides:

"Strict compliance on the part of the Insured and beneficiary with all the requirements of this policy is a condition precedent to recovery hereunder and any failure in this respect shall forfeit to the company all right to any indemnity. This policy is issued in consideration of the statements and agreements contained in the application therefor and the payment of premiums as therein provided."

Standard Provision 2 of the policy provides:

"No agent has authority to change this policy or waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the company and such approval be endorsed hereon."

Summary.

It is respectfully submitted that:

1. Pursuant to the policy terms no premium had been paid by the appellant for the month of August, at or prior to the date of his accident, which occurred on August 13, 1941.
2. Appellant caused to be mailed to the appellee two months premiums on or about August 27, 1941, which premiums were not received by the appellee until August 28, 1941.
3. Appellant by letter dated August 29, 1941 notified appellee that he had been injured on August 13, 1941, which notification was not received by the appellee until September 3, 1941.
4. Appellant was not covered nor in benefit under the terms of the policy between August 1, 1941 and September 3, 1941.
5. The policy provides for payment of a monthly premium in advance.
6. Premiums were mailed to appellee by appellant after appellant's injury and received by appellee without appellee having any notice or knowledge of appellant's prior injury.

Respectfully submitted,

POMEREHNE, LAIBLE & KAUTZ,
Attorneys for Appellee.

By HENRY POMEREHNE,
Of Counsel.

Oral Argument by HENRY POMEREHNE.

Standard Provision 3 of the policy provided that no agent has authority to change this policy or waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the company and such approval be endorsed hereon.

Summary.

It is respectfully submitted that the appellant to the policy terms no premium had been paid by the appellant for the month of August or prior to the date of his accident which occurred on August 13, 1941.

2. Appellant caused to be mailed to the appellee two months premiums on or about August 27, 1941, which premiums were not received by the appellee until August 28, 1941.

3. Appellant by letter dated August 29, 1941 notified appellee that he had been injured on August 13, 1941, which notification was not received by the appellee until September 3, 1941.

4. Appellant was not covered nor in benefit under the terms of the policy between August 1, 1941 and September 3, 1941.

5. The policy provides for payment of a monthly premium in advance.

6. Premiums were mailed to appellee by appellant after appellee's injury and received by appellee without appellee having any notice or knowledge of appellant's prior injury.

Respectfully submitted,
Attorneys for Appellee,
By Henry Pomeroy,
Of Counsel.

Oral Argument by Henry Pomeroy.

5 FEB T. 1946

Filed by leave of Court

Addenda to Point II. Appellee's brief, page 6, to the Amended Grounds of Appeal filed by the appellant, pursuant to permission of the Court.

New Jersey Court of Errors and Appeals

FRANK J. FARRELL,
Plaintiff-Appellant,

vs.

NATIONAL ACCIDENT AND HEALTH
INSURANCE COMPANY OF PHILA-
DELPHIA, a corporation,
Defendant-Appellee.

On Appeal from
New Jersey
Supreme Court.
Action at Law.

A.

The appellee respectfully submits that the trial judge found as fact, stated in the Opinion (S. C., p. 33, l. 20), as follows:

"There is no competent and persuasive evidence that the premium for August, 1941 was not paid and accepted in accordance with the terms of the policy and the Statute or that the plaintiff understood otherwise.

The receipt book (Ex. D-1) expressly shows it was accepted 'subject to policy provisions', and there is no evidence to support the plaintiff's case on the theory of either waiver of the policy provision or estopped by the acts of the defendant" (S. C., p. 33, ll. 20 to 32).

B.

As to Amendment B, the Standard Provision 2 of the policy in suit provides:

"No agent has authority to change this policy or waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the company and such approval endorsed hereon" (Appellee's brief, p. 12).

Address to Point II, Appellant's brief, page 8 to the Amended Grounds of Appeal filed by the appellant pursuant to permission of the Court.

New Jersey Court of Errors and Appeals

On appeal from
New Jersey
Superior Court
Action at Law

Plaintiff-Appellant,
FRANK J. PARRELL,
vs.
Defendant-Appellee,
NATIONAL ASSURANCE AND HAZARD
LIABILITIES COMPANY OF NEW JERSEY,
a corporation.

The appellee respectfully submits that the trial judge's ruling as set forth in the opinion (S. C. 12, 120) is as follows:

"There is no competent and persuasive evidence that the provision for August, 1941 was not paid and accepted in accordance with the terms of the policy and the Statute or that the plaintiff was defrauded or otherwise injured. The receipt book (S. C. 12, 120) expressly shows it was accepted 'subject to policy provisions' and there is no evidence to support the plaintiff's claim on the theory of either waiver of the policy provision or estoppel by the acts of the defendant" (S. C. 12, 120 to 121).

As to Amendment B, the Standard Provision 2 of the policy is not provided:

No agent has authority to change the policy or waive any of its provisions. No change in this policy shall be valid unless approved by an executive officer of the company and such approval endorsed hereon" (Appellant's brief, p. 12).

New Jersey Court of Errors and Appeals

FRANK J. FARRELL, Plaintiff-Appellant, <i>vs.</i> NATIONAL ACCIDENT AND HEALTH INSURANCE COMPANY OF PHILA- DELPHIA, a corporation, Defendant-Appellee.	}	Action at Law. On Appeal from New Jersey Supreme Court, Middlesex County. Sat Below: A. Dayton Oliphant, <i>C. C. J.</i>
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BRIEF OF PLAINTIFF-APPELLANT.

Statement of Facts.

On February 25, 1941, the appellee company issued to the appellant, Frank J. Farrell, a dentist, in South Amboy, New Jersey, its policy of insurance No. 933605 whereby, for a fee of \$5.00 and a monthly premium of \$2.10 payable in advance, it insured Dr. Farrell for a certain weekly indemnity in the event of an incapacitating, accidental injury (S. C., p. 67).

The important provisions of the policy in this case are two in number. The first provision of the policy reads as follows:

“Strict compliance on the part of the Insured and beneficiary with all the requirements of this policy is a condition precedent to recovery hereunder and any failure in this respect shall forfeit to the Company all right to any indemnity.”

And again:

“3. If default be made in the payment of the agreed premium for this policy, the sub-

sequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

The monthly payments were made in advance each month until August, 1941, to a Mr. Eutermarks, a representative of the appellee company who called upon the appellant for the premium (S. C., p. 39, ll. 20-30).

During the month of July, 1941, Dr. Farrell entered the Armed Service of the United States and was assigned to do dental work in the Army at a Post in Carlisle, Pennsylvania (S. C., p. 39, ll. 39-40, p. 40, ll. 1-7).

Before leaving home Dr. Farrell left money with his wife to pay household and other expenses including the premium upon the policy in question.

She expected Mr. Eutermarks to call for the premium as he had done in the past, but he did not call on or before the first of August, 1941, as had been his custom. When he did not call, she immediately tried to locate him, but without success.

The policies were not in her possession and she did not know, therefore, how to make the payment of the premium except to Mr. Eutermarks whom she could not locate.

On August 26, 1941, William Ford, the general agent of the appellee, wrote a letter to Dr. Farrell addressed to him in South Amboy. The letter read:

"Last week Mr. Eutermarks advised us that you would mail your premium for the above numbered policy in the amount of \$2.10

direct to this office. As we have not as yet received same we are wondering if the matter has escaped your attention.

"We are enclosing herewith stamped addressed envelope in which you can mail us your remittance.

"Thanking you for your past patronage and trusting we may have the continued opportunity of serving you, I am

Very truly yours,

William Ford."

(Exhibit P-2, S. C., pp. 46, 68.)

Mr. Eutermarks had not called upon the appellant, nor upon any members of his family for the August premium so that the first paragraph of the letter was not based upon any contact by Mr. Eutermarks with the appellant or his family.

Immediately upon receipt of this letter, Mrs. Farrell mailed a check in the amount of \$4.20, together with the premium receipt book to the office of Mr. Ford, and the premium receipt book was promptly returned to her with the notation that the sum of money had been accepted as premium for the policy for the months of August and September, 1941 (S. C., p. 41, ll. 8-20). During the latter part of September, a representative of the company called upon the appellant and requested payment of the premium for October, 1941 (S. C., p. 47, ll. 25-38; p. 53, ll. 4-15).

On August 13, 1941, Dr. Farrell slipped in some water in a hallway in the barracks at Carlisle, Pennsylvania, and fell down a stairway suffering injuries to his knee (S. C., p. 41, ll. 20-30). While the injury caused him to be confined to the infirmary at the Post, he did not in the beginning consider it a serious one, and made no mention of it to his wife when he wrote to her or talked to her

over the telephone. She knew nothing of this injury on August 27, 1941, when she sent the check for two months' premium which the Company applied to the months of August and September, 1941 (S. C., p. 47, ll. 7-18; p. 52, ll. 20-34).

The appellant did not know that the premium had not been paid at the time that the accident occurred (S. C., p. 52, ll. 34-37).

When toward the latter part of August it appeared that the injury was developing to serious proportions, the appellant, who still did not know that the premium had not been paid until August 27th, wrote a letter to the defendant company notifying the company of the accident, the injury and his disability (S. C., p. 52, ll. 34-37; p. 68, Exhibit P-3).

The company wrote a letter in reply in which it stated in effect that inasmuch as the August and September premiums had not been received by it until August 28th, or fifteen days after the accident, that under the terms of the policy of insurance the appellant had no right of recovery under the policy (S. C., p. 41, p. 69, Exhibit P-4).

The appellee, however, retained the premium which it had applied to the months of August and September after learning about the accident and still retains the premium which it still applies to those two months (S. C., p. 63, ll. 12-38).

The case was tried before Circuit Court Judge A. Dayton Oliphant sitting without a jury, and most of the facts were stipulated by counsel for the respective parties. Some testimony was taken, but it in no way varied the stipulated facts.

As a part of the stipulation it was stipulated by the appellee company that if Dr. Farrell was entitled to recovery under the above facts, he was en-

titled to recover the sum of \$1,950.00, together with interest thereon from the date that each installment payment became due (S. C., p. 44, ll. 35-40; p. 45, ll. 4-10).

ARGUMENT.

POINT I.

The trial Judge committed legal error in entering a verdict for the defendant instead of a verdict for the plaintiff.

The crux of this case, and the fact which distinguishes it from all other reported cases which we have been able to find, is that the appellee company applied the premium when paid to the entire month of August and the month of September. In other words, the appellee company charged the appellant a full month's premium of \$2.10 for the month of August, 1941. This it had no legal right to do unless it gave the appellant the full benefit of the policy for the full month of August, 1941, for a policy of insurance of this type earns no premium during the period that it is lapsed. *MacDonald vs. Metropolitan Life Insurance Co.*, 304 Pa. 213; 155 Atl. 491. *Eisenberger vs. North American Accident Ins. Co.*, 11 N. J. Misc. 217; 165 Atl. 295.

It is the contention of the appellant that the facts in this case cannot be construed other than that the appellee company waived the failure of the appellant to strictly comply with the terms of the policy. If it did not elect to consider the policy as continuing in force from the first of August to the 28th of August as was indicated by the letter of Mr. Ford and by the application of the premium

to the full month of August, 1941, then it elected to reinstate the policy as of August 1, 1941, instead of August 28, 1941. There are no other alternatives possible under the facts, and in either event, the appellee would be obligated to the appellant for the benefits under this policy.

If the appellee elected to keep the policy in force and to consider the premium as a debt due to it by the appellant, as was indicated by Mr. Ford's letter, then it is unquestionably obligated to pay the appellant the benefits provided by the policy.

While it is true that the policy provided that a condition precedent to recovery under the policy was the strict compliance therewith, the appellee company had the right to and could waive such strict compliance with the policy, for an insurance company can waive any provision of its policy, if it elects to do so. 29 American Jurisprudence 652, par. 856.

American Jurisprudence sets forth the law in this section as follows:

"It is well settled that the insurer's acceptance of a premium after the time when it should have been paid is a waiver of the forfeiture which might have been enforced because such premium was not paid when due."

American Jurisprudence cites the case of *Cradock vs. Fidelity Life Assn.*, 285 N. W. 169; 125 A. L. R. 1261. In that case the Iowa Supreme Court said with reference to a similar policy:

"The plaintiff contends that the provisions of a policy and by-laws of a fraternal insurance association that a policy shall lapse and no benefits be payable under it if premiums are not timely paid, without any action being taken by the association to suspend the in-

sured or to forfeit the policy, are for the benefit of the association and may be waived by it. There can be no question about this theory, nor that an insurance association may waive provisions of its policies and by-laws which provide that for failure to timely pay dues the policy shall lapse without any action. The company may waive these provisions of the policy, and also on violation of terms of a policy the acceptance of further premiums will constitute a waiver * * * .”

The appellee company, therefore, could waive the failure of the appellant to strictly comply with the terms of the policy in the payment of his premium. This it did through its agent, Ford, in demanding the premium for the month of August and applying it to the entire month of August when it received the premium.

It is true that Ford's letter did not specifically state that the premium was for the entire month of August, but the action of Ford upon the receipt of the premium when taken together with the letter indicates that the \$2.10 requested by Ford was the premium for the entire month of August.

Inasmuch as Ford had the right to waive the strict compliance with the provisions of the policy, and inasmuch as the Company ratified Ford's action by their subsequent correspondence and by their continued retention of the premium for the entire month of August, it is apparent that the appellee company never considered the policy as lapsed because of the failure to pay the premium on time, but considered it as continuing in full force and effect.

But assuming that the company had considered the policy as lapsed because of the failure of the appellant to pay his premium on time, the appellee company is in no better position under the facts in this particular case.

The company, which by the way is a Pennsylvania corporation, earned no premium during the period that it considered this policy as lapsed. *MacDonald vs. Metropolitan Life Insurance Co.*, 304 Pa. 213; 155 Atl. 491; *Eisenberger vs. North American Acc. Ins. Co.*, 11 N. J. Misc. 217; 165 Atl. 295.

If it considered the policy as lapsed, then by accepting the premium, it would reinstate the policy.

As was said in the case of *MacDonald vs. Metropolitan Life Insurance Co.*, *supra*:

“Where, as here, it is optional with the company whether or not to reinstate an expired policy, the act of so doing constitutes a new contract and starts a new period of coverage.”

This decision cited *International Life Ins. Co. vs. Mowbray*, 22 F. 2d 952; and *Equitable Life Assur. Soc. vs. McElroy*, 83 F. 631, quoting from the latter case as follows:

“After it (a policy) has ceased to be in force, because of nonpayment of the premium, an agreement for a reinstatement of the policy is a new contract.”

The *MacDonald vs. Metropolitan Life Insurance Co.* case also cited the case of *Wastun vs. Lincoln Nat. Life Ins. Co. of Ft. Wayne, Ind.*, 12 F. 2d 422,425; and *Travelers' Protective Ass'n. vs. Ziegler*, 250 S. W. 1115. The Pennsylvania Court, after citing these cases, then went on to say:

“In the absence of an express agreement to the contrary, premiums will be so applied as to give the insured the protection for which he pays. ‘A construction which gives insured

insurance for a less period of time than that covered by the premium which he has paid should not be adopted'. 32 C. J. 1165.

“ ‘Where a policy provides for reinstatement, but only as to losses subsequently occurring, the company upon reinstatement of the policy is not liable for a loss occurring while it was suspended. In such case no part of the premium paid on reinstatement will be applied to the period during which the policy was not in force unless the agreement of the parties so provides.’ ” 32 C. J. 1357.

The last sentence above quoted is the sentence which is applicable to the facts in this case. It provides that no part of the premium shall be applied to the period during which the policy was not in force unless the parties agree thereto.

In other words, the insured and the insurance company may by mutual agreement reinstate the policy as of an earlier date than that on which the premium is paid and accepted by the company.

In this case the appellee insurance company, by crediting the premium to the entire month of August and the month of September, assuming that the policy was considered as lapsed, offered to reinstate the policy as of August 1st, the appellant by his subsequent action agreed to the reinstatement of the policy as of that date.

If the appellee contends that the policy became lapsed as of the first of August, no other interpretation can be put upon its action and the action of the appellant.

Of course, if it reinstated the policy as of August 1st, it then had a policy in force at the time that the accident occurred which caused the disabling injury to Dr. Farrell.

It is true that the insurance company did not know at the time that it reinstated the policy as

of August 1st that Dr. Farrell had been injured. Not knowing of the accident at the time that it accepted the premium for the period beginning August 1st on, it was at liberty upon discovering that the accident had occurred to do one of three things:

- A. Return the amount of money representing the premium from August 1st to August 28th.
- B. Notify the appellant that because of the accident it was giving him coverage from August 28th to October 28th, or
- C. Continue to retain the premium for that period of time and cover the accident.

It chose this latter course, for it still retained the premium and still applied it to the months from August 1st to October 1st.

This Court dealt with such a situation in the case of *Kozloski vs. The Prudential Insurance Company of America*, 95 N. J. L. 101. This Court said (103):

“It may be conceded, as is argued by counsel, that the proofs in the case conclusively show that the payments made on and after the death of respondent’s decedent were received in ignorance of the fact of that death. But in this situation the company had the option when it learned what the real situation was, of returning the premiums so received and declaring the policy void, or it might, if it saw fit, waive that right and retain the premiums which were received by it. By following the latter course it elected to keep the policies in force. And this is so, notwithstanding that the company did not formally notify the representative of the insured how it had exercised its option. Its action expressed its intention as fully and completely as could have been done by verbal or written statement. That is to say, it could not de-

clare the policy to be void, and at the same time retain moneys paid to it on account of the insured, and to which it had no legal right, except upon the theory that the policy was in full force and virtue. This is the underlying principle upon which the decision in *Melick vs. Metropolitan Life Insurance Co.*, 84 N. J. L. 437; affirmed 85 N. J. L. 727, is rested."

We, therefore, submit that the appellee company either on August 1st, 1941, elected to consider the policy as continuing in force from the first of August to the date of the receipt of the premium by it and to consider the premium as a debt due by the appellant to it thereby waiving strict compliance with the terms of the policy, or upon receipt of the premium on August 28th, it elected to consider that the appellant was indebted to it for the premium for the period of August 1st to August 28th, and to thereby reinstate the policy as of August 1st and to give the appellant coverage from that date forward.

Under either of these situations, the company nullified the portion of its policy which read:

"If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the company, or any of its duly authorized agents, shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

To hold otherwise would mean that the appellant received no benefit under the policy during the period of August 1st to August 28th for which period of time he paid a premium.

The policy itself may be searched in vain for any benefit which would have accrued to him by

reason of the payment of the premium if he were not covered for accidental injury and illness.

Nor can the Court make a new contract for the parties. It cannot read into the policy provisions which are not there.

This the trial judge attempted to do by stating:

“At best from his standpoint, the acceptance of the overdue premium extended his coverage from the date of its receipt on August 28th to October 28th or its receipt and acceptance by the defendant was a privilege granted to him of continuing the policy in force minus the coverage from August 1st to August 28th without the necessity of an application for a new policy and its attendant risks of his being refused future coverage.”

The effect of this language of the trial judge was to insert a provision in the policy to the effect that in the event of a default in the payment of the premium, the premium still continued to be earned by the policy without any benefit to the insured other than the assurance that when the premium was paid the policy would be reinstated without further application by himself. No such provision is in the policy, nor can the Court by inference write such a provision into the policy, for that would be making a better contract for the appellee company than it made for itself.

The trial judge in commenting upon *MacDonald* vs. *Metropolitan Life Ins. Co.*, *supra*, relied upon the language in the decision that the late payment of premium reinstated the policy as of the date of the receipt of the overdue premium. He failed to realize the effect of the sentence of the decision which he quotes:

“In such cases, no part of the premium paid on reinstatement will be applied to the

period during which the policy was not in force unless the agreement of the parties so provides."

In quoting that sentence, he wrote it:

"unless the agreement of the policy" instead of the "agreement of the parties so provides."

The general tenor of the trial judge's opinion in this case is to the effect that an insurance company by the terms of its policy of insurance can set forth the conditions upon which it will reinstate a lapsed policy. There is no question that this is true. But it is equally true that the insurance company can waive any provision which it has in its policy for its protection which the appellee company did by its acts in this case.

The trial judge in his opinion pointed out that the premium receipt card (Exhibit D-1 which has been lost and it is, therefore, not printed in the State of Case) contained the printed statement directly under the line on which a notation was made of the acceptance of the \$4.20 as premium for the months of August and September:

"accepted subject to the policy provisions."

The trial judge stated in this respect (S. C., p. 33, ll. 25 to 33):

"There is no competent and persuasive evidence that the premium for August, 1941 was not paid and accepted in accordance with the terms of the policy and the statute, or that the plaintiff understood otherwise. The receipt book (Ex. D-1) expressly shows it was accepted 'subject to policy provisions', and there is no evidence to support the plaintiff's case on the theory of either waiver of the policy provision or estopped by the acts of the defendant."

The evidence in the case is quite to the contrary, and as a matter of fact there is no evidence in the case to support the Judge's conclusion that the premium was accepted subject to the policy provisions.

If the premium had been accepted subject to the policy provisions, it would mean that there was no insurance in force between August 1st and August 28th and that no premium was earned during that period of time. But the Company did not accept the premium on that basis, or subject to the policy provisions. It accepted the full premium for the period from August 1st to August 28th, and thereby charged the appellant money for the policy for that period of time.

Such an act on the part of the defendant Company is consistent with only one conclusion: that it intended to give the appellant insurance for the full period of August 1st to August 28th.

The testimony of the appellant and his wife is entirely to the effect that they considered that the policy was in effect at the time that the accident occurred. Mrs. Farrell testified that she sent two months' premium because the September premium would be due in such a few days that she wanted to pay the premium for both months (S. C., p. 47, ll. 19 to 27), and, of course, the appellant considered the policy as in force for he filed his claim and never withdrew it.

The trial Judge in his opinion further states (S. C., p. 31, l. 20):

"There can be no waiver where the facts are not known and the retention of the premium is not sufficient in itself to create a waiver, but is only an acceptance within the term of the contract. Its retention cannot in itself be regarded as a waiver, it was to

support the insurance for the future. *Weiser vs. Central Business Men's Ass'n.*, 219 S. W. 102."

It is not the contention of the appellant that the mere acceptance of the premium for the period of August 1st to August 28th without notice of the accident precluded the appellee from taking proper steps upon discovery of the accident to protect itself. It could have offered to return the premium, or in the alternative, make the premium apply to the period of August 28th to October 28th. It did neither, but with full knowledge of the situation continued to hold the premium and to credit the appellant on its books with this premium for the full month of August and the full month of September. Under such circumstances the same situation was presented as was presented in the case of *Kozloski vs. The Prudential Insurance Company of America*, 95 N. J. L. 101. We have quoted from this case heretofore in this brief and have shown its application to these facts.

Conclusion.

In conclusion, the appellant paid a premium for the period of time from August 1st to August 28, 1941, during which time the accident occurred.

The appellant paid it at the option of the appellee, for it was the appellee who made the charge for that period. It was the appellee which, through its actions, notified the appellant that he was indebted to the company for the premium for that period of time. It was the appellee company which chose to consider that the policy was in force and earned a premium during that period of time.

Under such circumstances the appellee, having elected to give the appellant coverage under its policy, is obligated to pay the appellant the sum of money provided for by the policy, together with interest on each installment from the date which it became due.

Respectfully submitted,

COX & WALBURG,
Attorneys for the Appellant.

By WILLIAM H. D. COX,
Of Counsel.

Conclusion

In conclusion, the appellant paid a premium for the period of time from August 1st to August 28, 1944 during which time the accident occurred. The appellant paid it at the option of the appellee for it was the appellee who made the choice for that period. It was the appellee which through its actions, notified the appellant that he was indebted to the company for the premium for that period of time. It was the appellee company which chose to consider that the policy was in force and entered a premium during that period of time. It was a deliberate act on the part of the appellee.

INDEX

	PAGE
Summons	1
Complaint	2
Amended Answer	4
Postea on Direction of Verdict	7
Judgment	8
Notice of Appeal and Grounds of Appeal	9
Testimony	11
PLAINTIFF'S TESTIMONY:	
William Ridgway—Direct	12
Edwin E. Tombleson—Direct	15
Cross	20
Re-direct	23
Defendant's Motion for Directed Verdict	25
Plaintiff's Motion for Directed Verdict	26
Direction of Verdict	27
Stenographer's Certificate	29

Under such circumstances the appellee, having elected to give the appellant coverage under its policy, is obligated to pay the appellant the sum of money provided for by the policy, together with interest on each installment from the date which it became due.

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