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TESTIMONY.

Notice and Grounds of Appeal.

Filed February , 1919.

New Jersey Supreme Court.

RACHEL A. LYNCH, executrix of and trustee under the last will and testament of Rachel A. Cartwright, deceased, *Plaintiff-Appellant,* *vs.* COMMERCIAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant-Respondent.*	*On Appeal to the New Jersey Court of Errors and Appeals.*

To William E. Holmwood, Attorney for Defendant-Respondent:

Take notice, that the plaintiff-appellant appeals from the whole of the judgment entered in this cause to the New Jersey Court of Errors and Appeals, on the following grounds:

1. Because the Supreme Court erred in giving judgment for the defendant and reversing the judgment of the First District Court of Newark, when it should have affirmed the judgment of the District Court.

2. Because the loss and expense of the plaintiff under the policy of insurance sued on was

not on a claim which came within the exception in the policy sued on, which is as follows:

> Exception claims arising by reason of:
>
> (1) Injuries or death caused by any person employed in violation of law while in charge of or operating any elevator, or by any person so employed under the age of sixteen (16) years where no age limit is fixed by law for elevator attendants or by any person otherwise employed in violation of law as to age or under the age of fourteen (14) years where there is no legal restriction as to age of employment."

3. Because the loss and expense of the plaintiff under the policy of insurance sued on was not based on a claim made against the plaintiff which came within the exception set forth in the second ground of appeal, for the reason that the act or the failure to act on the part of the elevator boy was not the proximate cause of the injury for which claim is made.

4 Because the loss and expense of the plaintiff under the policy of insurance sued on was not based on a claim made against the plaintiff which came within the exception set forth in the second ground of appeal, for the reason that the District Court found as a matter of fact, and the defendant is concluded thereby on appeal, that the cause of injury on which the claim arises was not the act of the elevator boy, the person referred to in the exception set forth in the second ground of appeal.

5. Because the Supreme Court erred in holding that the proof of the violation of the provision of the policy in question was to be de-

termined by the finding as to negligence of the elevator boy as a matter of law, when it was determined to the contrary as a matter of fact.

COULT & SMITH,
Attorneys for Rachel A. Lynch, Executrix of and Trustee under the Last Will and Testament of Rachel A. Cartwright, deceased,
Plaintiff-Appellant.

Dated, Newark, N. J., Feb. 21, 1919.

Service of the within Notice and Grounds of Appeal is acknowledged this 21st day of February, 1919.

WM. E. HOLMWOOD,
Attorney for Defendant-Respondent.

State of Demand.

Filed October 31, 1917.

First District Court of the City of Newark.

RACHEL A. LYNCH, Executrix of and Trustee under the Last Will and Testament of Rachel A. Cartwright, deceased, *Plaintiff,* *vs.* COMMERCIAL CASUALTY INSURANCE COMPANY, a corporation, *Defendant.*	*On Contract.* *State of Demand.*

The plaintiff, Rachel A. Lynch, executrix of and trustee under the last will and testament of Rachel A. Cartwright, deceased, says that

1. By a policy of insurance No. G P 21853, dated June 27, 1917, made by the defendant in consideration of premiums paid and to be paid to it by the plaintiff, the defendant insured the plaintiff against loss and expense resulting from claims upon the plaintiff for damages on account of bodily injuries received by any person or persons other than an employee of plaintiff while within or upon premises described in said policy as Numbers 306-308 Market street, Newark, New Jersey, to the limit of $5,000 on account of accident resulting in bodily injuries to one person.

State of Demand.

A copy of said policy is hereto attached and made part hereof.

2. At the time of the loss and damage hereinafter mentioned plaintiff was the owner of the aforesaid premises.

3. On or about July 24, 1917, one Joseph M. Haberbush received accidental bodily injuries in and upon said premises.

4. Shortly thereafter, he made claim upon plaintiff for compensation for the damages suffered by him as the result of said injuries.

5. Plaintiff notified defendant of said demand, whereupon defendant refused to pay the damages claimed, or any part thereof, and denied liability under the said policy.

6. On or about September 6, 1917, the said Joseph M. Haberbush commenced an action at law in the New Jersey Supreme Court to recover damages against the defendant by reason of said personal injuries occurring to him as aforesaid.

7. Plaintiff notified defendant of the pendency of said suit, whereupon defendant refused to pay the damages claimed, or any part thereof, and denied liability under the said policy.

8. On or about September 14, 1917, plaintiff and defendant entered into a stipulation in writing, a copy of which is hereto annexed and made part hereof, whereby the defendant herein premitted to plaintiff to settle with the said Joseph M. Haberbush for a sum not to exceed $250.

9. On or about October 15, 1917, plaintiff paid said Joseph M. Haberbush the sum of $250 in settlement of the said suit then pending in the New Jersey Supreme Court wherein the plaintiff herein was the defendant.

State of Demand.

10. The costs of the defendant in said suit (the plaintiff in the above entitled action) were taxed by the Clerk of the New Jersey Supreme Court at $18.00, which costs were paid by the plaintiff herein.

Plaintiff demands of the defendant as damages the sum of $268.00 with interest thereon from October 15, 1917, and costs of suit.

COULT & SMITH,
Plaintiff's Attorneys.

(Copy of policy attached.)

To The Within Named Defendant:

Take Notice, That the within named plaintiff demands that you shall file a written specification of defenses on or before the return day named in the summons served upon you if you intend to make any defense to the within action and that you serve a copy thereof on the plaintiff or her attorneys within said time.

COULT & SMITH,
Plaintiff's Attorneys.

Specification of Defenses.

Filed December 5, 1917.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

RACHEL A. LYNCH, Executrix of and Trustee under the Last Will and Testament of Rachel A. Cartwright, deceased, *Plaintiff,* *vs.* COMMERCIAL CASUALTY INSURANCE CO., a corporation, *Defendant.*	*On Contract.* *Specification of Defenses.*

The defendant will urge at trial of above cause, the following defenses:

1. That a policy of insurance set forth in said State of Demand, excepts from operation of said policy, all claims arising by reason of:

Injuries or death caused by any person employed in violation of law while in charge of or operating any elevator, or by any person so employed, under the age of sixteen (16) years where no age limit is fixed by law for elevator attendants, or, by any person otherwise employed in violation of law as to age, or under the age of fourteen (14) years where there is no legal restriction as to age of employment.

2. That the claim of the said Joseph H. Haberbush, set forth in said State of Demand, arose by reason of negligent operation and

maintenance of an elevator upon the premises of said plaintiff, in that said plaintiff employed in charge, control and maintenance of said elevator, an incompetent person, one Ernest Schaub, an infant of the age of fourteen years, contrary to the provisions of said policy and contrary to the statutes of the State of New Jersey, in such case made and provided.

WILLIAM E. HOLMWOOD,
Attorney for Defendant.

Docket Entries of District Court Clerk.

FIRST DISTRICT COURT.
Newark, N. J.

RACHEL A. LYNCH, Executrix of and Trustee under the Last Will and Testament of Rachel A. Lynch, deceased, *Plaintiff*,	*Summons* .....$2.10 *List. fee* ..... 1.50 *Witness fee* ..... 1.50 *Atty's fee* 13.67
vs.	*Total cost* $18.77
COMMERCIAL CASUALTY INSURANCE Co., a corporation, *Defendant.*	COULT & SMITH, *Pltff's Attys.*

A summons in the above stated cause was issued on the thirty-first day of October, 1917, returnable on the eighth day of November, 1917, wherein the plaintiff demands of the defendant the sum of five hundred dollars. The plaintiff filed her state of demand Oct. 31, 1917. Copy of State of Demand served with summons.

The summons was served and returned as follows:

I served the within summons Oct. 31, 1917, on Winant Van Winkle, he being the secretary of said Commercial Casualty Insurance Co., a corp. by reading it to him and giving him a copy thereof.

EDGAR A. HARTDORN,
Sergeant-at-Arms, First Dist. Court.

Docket Entries.

Nov. 8, '17.

This Cause was adjourned to Nov. 22-30, Dec. 6-28, Jan. 10.

Dec. 5, '17.

Specification of defenses filed.

Jan. 10, '18.

The plaintiff and the defendant appearing, the cause was tried and determined at this time.

Marcus Douglas, Ernest Schaub sworn for plaintiff.

Geo. B. Wheaton (steno.) sworn, Mike Stifel sworn for deft

The evidence being closed, the Court reserved decision.

Jan. 31, '18.

The evidence being closed the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of two hundred seventy-three dollars and thirty-six cents' damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of two hundred seventy-three dollars and thirty-six cents' damages with costs.

Feb. 15, '18.

Notice of appeal and appeal bond filed—$1.00.

Docket Entries.

First District Court of the City of Newark, County of Essex and State of New Jersey.

I, Charles R. Baldwin, Clerk of the First District Court of the City of Newark, in the County of Essex and State of New Jersey, do hereby certify that the foregoing transcript is a true copy of the record in the case of Rachel A. Lynch, executrix, *vs.* Commercial Casualty Insurance Company, held in the First District Court of the City of Newark, in the County of Essex and State of New Jersey, as taken from the First District Court Docket #129, Page #59032.

CHARLES R. BALDWIN,
Clerk.

Opening.

FIRST DISTRICT COURT OF THE CITY OF NEWARK.

RACHEL A. LYNCH, Exec. of and Trustee under the Last Will and Testament of Rachel A. Cartwright, deceased, *Plaintiff*, *vs.* COMMERCIAL CASUALTY CO., *Defendant.*	*In Tort.*

Transcript of testimony taken in the above matter, before his Honor, Cecil H. MacMahon, Judge, at the above named Court, on Thursday, January 10th, 1918, at 10 o'clock in the forenoon.

Appearances:

Coult & Smith, Esqs. (by Mr. Smith), attorneys for plaintiff.

William E. Holmwood, Esq., attorney for defendant.

Mr. Smith. The only question here is that as to the liability of the Insurance Company under this policy, the main defense being that the boy was under sixteen years of age, who operated the elevator. The clause in the policy is as follows: They accept claims arising out of injuries or casualties caused by any person employed and while in charge of or operating any elevator, or by any person so employed under the age of sixteen years, or by any other person under the age of fourteen where there is no restriction as to the age of employment; the boy in this case

being under sixteen years of age. Their contention is this accident was caused by the elevator boy and they are not liable.

I offer in evidence the policy.

(Received in evidence and marked Exhibit P. 1.)

I offer in evidence the stipulation.

(Received in evidence and marked Exhibit P. 2.)

I offer in evidence the release.

(Received in evidence and marked Exhibit P. 3.)

I offer in evidence the check of settlement.

(Received in evidence and marked Exhibit P. 4.)

And also the taxed bill of costs of the defendant on the settlement suit, amounting to $18.00.

(Received in evidence and marked Exhibit P. 5.)

The Court. The plaintiff was the owner of the building?

Mr. Smith. Yes.

The Court. And the defendant, the Insurance Company?

Mr. Smith. Yes. There was an accident in the elevator of that building and the plaintiff has settled the claim for these damages for $250.00. The Insurance Company makes no point of that settlement.

Mr. Holmwood. We waive the condition of that payment.

MARCUS DOUGLAS, sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Smith.

Q Where are you employed? A 306 Market street.

Q And that is owned by Mrs. Lynch? A Yes.

Q And by whom are you employed there? A Kollman, Rauch and Company.

Q They are tenants of the building? A Yes.

Q Were you in that building July 24th, 1917? A Yes.

Q Do you remember an accident happening there that day? A Yes.

Q What time of the day did the accident happen? A Between eight fifteen and eight thirty.

Q At what time, morning or night? A Morning, A. M.

Q And where were you at the time of the accident? A I was having my shoes shined at the bootblack stand. The width of the hallway is four to six feet, and the elevator entrance from the door is about fifteen feet. I was sitting in the bootblack bench, and while sitting there having my shoes shined, Joe who was engaged there, came there and I said, "Wait a minute and I will go up stairs." Prior to that the boy who runs the elevator came from the elevator and looked out of the door to the street, and while he was there Joe came in and I said, "Wait a minute, I will go upstairs with you on the elevator;" and I saw him go in front of the elevator, the door not being visible. I turned away from there and while turned away, the boy passed me, the elevator boy passed me, and I

turned again in not more than a minute or two because I was just about finished, and Joe disappeared.

Q Where was the elevator boy? A I got down from the bench and walked to the elevator, the door open, the boy half way hanging over the floor, down the pit.

Q When you say "boy" who do you mean? A The elevator boy. The elevator came down with Mike the engineer on. He evidently had taken the elevator up thinking the boy was up, or not knowing what the conditions were downstairs.

Q This bootblack stand is really a part of the hallway? A It's the entrance to the building.

Q Was there a light on the elevator? A Yes.

Q And the elevator door faces toward the front or side? A Faces toward Broad street; faces the north.

Q Well, it does not face the street at all; it faces the side of the building? A Yes.

Q So as you go in you can't see the doorway? A No, you can't see the doorway at all.

Q Now, do you know what happened to the boy that was injured? A In the way of injury?

Q No, not what the character of the injuries were; what happened to him where he was? A I pulled him off the floor and stood him up and put him on his feet and he said he was all right except my back was hurt.

Q You say the "boy" every time? A Joe was a man and the boy was the elevator boy.

Q If you call him Haberbush we will understand. A Haberbush was down in the pit.

Marcus Douglas, cross.

Q And the elevator boy, what happened to him? A I pulled him off the floor.

The Court. Where was the elevator boy?

Witness. On the floor, half way over the elevator well.

Q And the man that was injured was down in the pit? So the elevator boy was not in the elevator at all? A No, sir.

Q Do you know whether the tenants were in the habit of operating that elevator? A At times, yes.

Q That was quite a daily occurrence down there? A I personally don't know. I have seen them use it occasionally.

Q The elevator boy was not on after six at night? A Not to my knowledge.

Q And after that time either the tenants themselves operated the elevator or the engineer did? A Yes.

Q How about the morning? A I don't get there until half-past eight; I don't know what time he got there.

Cross examination by Mr. Holmwood.

Q You say the elevator boy left the elevator and you saw him go away from the door? A I didn't see him leave the elevator; I saw him come from the back and go toward the front.

Q You don't know whether the elevator was there or not? A No.

Q Is there a staircase there? A Yes.

Q Where is the stairs with reference to the elevator? A Right next to the elevator.

Q Can you tell whether he came from the stairs or the elevator, the way he came out? A No, sir; he may have come from either one.

Q And he passed you again going back? A Yes.

Q Was that after Joe Haberbush passed? A Yes.

Q How long after? A Couple of minutes.

Q Did you hear anything? A Not a sound, not a sound.

ERNEST SCHAUB, without being sworn, testified as follows on behalf of the plaintiff:

Direct examination by Mr. Smith.

Q Did you run the elevator down in 306 Market street last July? A Yes, sir.

Q Do you remember the time that Joe Haberbush was injured down there? A Yes.

Q Were you the elevator boy at that time? A Yes, sir.

Q And what time of the day was it? A Well, it was after eight o'clock, I know.

Q In the morning? A Yes, sir.

Q Will you describe just how he hurt himself? A Well, I just come down from taking somebody up from the top floor and when I came down somebody rang the bell, and when I came down it was Joe, and just as I opened the door, it was him, and over there Mr. Douglas, he was getting his shoes shined and he said, "Wait a minute, I will go up with you," and I took a look out to see who was there and by that time the elevator went up and when it came down I saw Joe step in.

Q You stepped out of the elevator and saw Douglas at the bootblack stand? A Yes.

Q And do you know whether he stepped out of the elevator and looked to see if the elevator was going up? A No, it was stopped.

Q It was stopped when you stepped out? A Yes.

Q And did you walk forward? A I was not more than one foot away from it.

Q You stepped one foot away from it? A Yes.

Q And Haberbush was standing waiting for the elevator? A Yes; I don't know; I don't want to say whether he was waiting for the elevator or not.

Q You stepped out toward the door? A Toward the front door. I mean in that direction, do you know?

Q Well, you stepped out in the hallway? A No more than one foot away from the door.

Q You say you went out of the elevator? A Yes.

Q And you went in the hallway? A Yes.

Q And Haberbush stepped by you? A Yes.

Q And then when you turned to go in the elevator, what did you find? A I didn't see anything there; it was dark.

Q The elevator was gone? A Yes, and so was Joe.

Q Where was Haberbush? A He was down then.

The Court. Down where?

Witness. In the basement.

Q Do you know whether Haberbush had ever run this elevator before? A No, I never see it.

Q I mean at any other day or time had Haberbush ever run this elevator? A No, sir.

Q Had any other people besides yourself run this elevator? A Yes, always somebody pulling it up and down.

The Court. What kind of an elevator was this, freight or passenger?

Witness. Passenger.

Q What kind of a building was this, office building or factory building? A Factory building.

Q Was there a light in the elevator? A Yes.

Q Where was the engineer? A He was upstairs on the second floor; I don't know where he was; he was fixing something, or doing something.

Q What did the engineer do after the accident? A After, he came down with the elevator; I seen him, and I told him to stop, and I told him to come down there, there was a fellow hurt.

Q Who was on the elevator? A I don't know whether the fellow had been or not.

Q How long was it between the time Haberbush fell down and the engineer came down? A He was coming down just a minute after.

Q Do you know whether you had stopped the elevator so it would not move itself at the time you got out? A It would not move itself.

Q You had stopped it completely? A Yes.

Q It was not moving at all when you stopped it? A No.

Ernest Schaub, cross.

Cross examination by Mr. Holmwood.

Q The elevator is operated by rope or handle? A Just a cable.

Q You pull it? A Yes.

Q And when you came down before the accident did you see the engineer anywhere? A No, sir.

Q You do not know what floor he was on? A No, sir.

Q How many stories are there? A Five.

Q And when you got to the first floor you stopped your elevator? A Yes.

Q And got out? A Yes.

Q Did you have any passengers coming down? A No, sir.

Q And when you got out, you left the elevator door open, is that right? A Yes, sir.

Q And you went toward the front hall? A No, I did not do any walking at all.

Q Did you see a man who was having his shoes shined? A Yes.

Q Didn't you have to walk out of the elevator to see him? A No; you just put your head out and you can see him.

Q You saw Joe, the fellow that was hurt when you came down? A Sure, I saw him.

Q Where was he, down there in the hall? A Yes, he was standing there, waiting for me to take him up.

Q Did he say anything to you? A Said "Good Morning," or something of that kind.

Q And was it at that time somebody hollered, "Wait a minute for me, I am coming right away." A Yes, sir.

Q And you walked out to see who was there? A I did not walk out; I looked around.

Ernest Schaub, cross.

Q Did you hear anything? A Heard him walking.

Q Did you hear him fall? A No; I can't hear him fall.

Q When did you discover that he had fallen? A When I seen he was not there; it was dark—

Q When you went back to the elevator, Joe was not there and the elevator was not there? A No, sir.

Q Was the elevator in sight anywhere? A No, sir.

Q Was the cable moving? A I looked up and I see it was on the second floor.

Q And then did you look down and see Joe? A Can't see him; it's too dark.

Q Did you get down and look over the edge of the doorway to see him? A I looked down with my two eyes that way.

Q Did the man who was having his shoes shined see you? A He grabbed me like that. (Indicating.)

Q Well, did the elevator come down again? A Yes, it was just coming down.

Q Was anyone in it when it got down? A Yes, the engineer.

Q He was in the elevator? A Yes.

Q Did he get off of it? A First floor. I told him to stop; that's why he got off.

Q Is there anyone else to run the elevator during the day if you are away or wanted to go away for a few minutes? A If I ain't there to run it, Mike will run it for me.

Q The engineer? A Yes.

Q And the people that come in and out, the employees that work in the building, do they run the elevator? A Sometimes. There is always somebody using it. Sometime pulling it

down and they pull the door open and pull it up.

Q You are in charge of the elevator? A Yes.

Q Did anybody tell you not to allow anybody to use the elevator? A Well, I did not see who was using it and I could not tell who was using it.

The Court. When did this accident happen?

Mr. Smith. July 24th, 1917.

The Court. And the witness 15 years old now?

Witness. No, sir.

The Court. How old are you?

Witness. I am 14. January 22nd I will be 15.

Mr. Smith. That is our case, your Honor.

The Court. Where is this exception to the first paragraph that is intended there?

Mr. Smith. I think that can be reduced to this: "That they are not liable for claims arising for injuries caused by an elevator boy while in charge of or operating an elevator."

MIKE STEEFEL, sworn on behalf of the defendant, testified as follows:

Direct examination by Mr. Holmwood.

Q Mr. Steefel, you are the engineer of this building owned by Mrs. Lynch on Market street? A Yes.

Q And you were engineer on the 24th of July, the day of this accident? A Yes.

Q Do you remember the accident to Joe Haberbush? A Yes.

Q Remember the day he was hurt? A Yes.

Q Did you operate the elevator that day? A Operate it?

Q Yes. A I told the kid to come on with me to the second floor, and the kid went up with me and he left the door open, and I looked downstairs and rang the bell and nobody answered it and I see the car was coming up; somebody was pulling it up from the fifth and I stopped the car. I don't know what was downstairs; and the door was opened and shut and I stopped the car and nobody answered who was pulling it, so I started to come downstairs, and he said, "Mike, stop; there's somebody fell down." I stopped the car and this agent, he grabbed me off and pulled me out of the car.

Q You mean Douglas? A Douglas, yes. So I ran downstairs and picked the man up.

Q Did you at the time that the man fell down the elevator, did you operate that elevator or pull it up from the first to the second floor? A No.

Q Did you pull the elevator up? A No.

Q Do you know who did? A I know somebody from the fifth, from Jack Shalheiler—

Q Do you know who it was? A No.

Q That's the name of the tenant? A Yes.

Q Who called your attention to the fact that somebody was hurt? A Brother Douglas.

Q How did he call to you? A He says, "Don't come down with the car, as man fell down the pit."

Q What did you do? A I stopped the car up there and Mr. Douglas grabbed me off and I jumped to the first floor, and I ran downstairs.

Q Where did you get on the car? A The car came up to the second floor.

Q Was she stopped at the second floor? A If I did not stop it, the car would be going up to the roof.

Q The car was going up without anyone in it? A Yes.

Q How were you able to get it? A The kid left the door open at the second floor.

Q And that's how you stopped it? A Yes.

Q How does that elevator move, slowly? A Yes.

Mr. Holmwood. We rest.

The Court. I will reserve decision at this time and give it next Tuesday.

Mr. Smith moved judgment in favor of his client.

Mr. Holmwood moved judgment in favor of his client.

I do hereby certify on this 10th day of January, 1918, the foregoing transcript of proceedings and testimony in the state of the case to be used on appeal.

CECIL H. MacMAHON,
Judge of the First District Court
of the City of Newark.

Exhibit P. 1.

EXHIBIT P. 1.

COMMERCIAL CASUALTY INSURANCE COMPANY.

NEWARK, NEW JERSEY.

(Herein called the Company.)

GENERAL PUBLIC LIABILITY POLICY.

IN CONSIDERATION of the premium herein provided, and of the statements in the Warranties herein, the Company

DOES HEREBY AGREE TO INDEMNIFY

the Assured described herein, within the amounts as expressed herein, AGAINST LOSS AND EXPENSE RESULTING FROM CLAIMS UPON THE ASSURED FOR DAMAGES on account of bodily injuries, including death accidentally suffered, by any person or persons, other than to the employee of the Assured, while within or upon the premises described in said Warranties (or the premises adjacent thereto) and by reason of the business as described and conducted at the locations named therein (including ordinary repairs of the premises and elevator plant, and the renewal of existing mechanical equipment), except claims arising by reason of:

(1) Injuries or death caused by any person employed in violation of law while in charge of or operating any elevator, or by any person so employed under the age of sixteen (16) years where no age limit is fixed by law for elevator attendants or by any person otherwise employed in violation of law as to age or under the age of fourteen (14) years where there is

Exhibit P. 1.

no legal restriction as to age of employment.

(2) Injuries or death to any person caused by any draught or driving animal or vehicle.

(3) The making of additions to or the alteration or extraordinary repair of the the premises or elevator plant, or the operation or use of any elevator while additions to, or the alteration or extraordinary repair of the elevator plant are in process, unless a written permit describing the work to be undertaken is granted by the Company.

(4) Liability of others assumed by the Assured.

Subject to all agreements and conditions herein, claims are covered whenever arising, on account of accidents or alleged accidents occurring within the policy period stated herein.

THIS INSURANCE IS SUBJECT TO THE FOLLOWING CONDITIONS:

Reporting Accidents and Claims.

A. Upon the occurrence of an accident covered by this Policy, the Assured shall give immediate written notice thereof, with the fullest information obtainable at the time, to the Company or its duly authorized agent. If a claim is made on account of such accident, the Assured shall give like notice thereof with full particulars. The Assured shall at all times render to the Company all co-operation and assistance in the Assured's power.

Exhibit P. 1.

Report and Defense of Suits.

B. If suit is brought against the Assured to enforce a claim for damages covered by this Policy, the Assured shall immediately forward to the Company every summons or other process as soon as the same shall have been served on the Assured, and the Company will, at its own cost, defend such suit in the name and on behalf of the Assured.

Co-operation of Assured—Expense.

C. The Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals; but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at the Assured's own cost, without the written consent of the Company previously given, except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident.

Assured's Right of Recovery.

D. No action shall lie against the Company to recover for any loss or expense under this Policy unless it shall be brought by the Assured for loss or expense actually sustained and paid in money by the Assured after actual trial of the issue, nor unless such action is brought within two years after payment of such loss or expense.

Subrogation or Rights.

E. In case of payment of loss or expense under this Policy, the Company shall be subro-

gated, to the amount of such payment, to the Assured's rights of recovery against others for such loss or expense, and the Assured shall execute all papers required and shall co-operate with the Company to secure such rights.

Concurrent Insurance.

F. If the Assured carry a policy of another insurer, against any loss or expense covered by this policy, the Assured shall not recover from the Company a larger proportion of the entire loss or expense than the amount hereby insured bears to the total amount of valid and collectible insurance applicable thereto.

Change of Interest.

G. No assignment of interest under this policy shall be valid, unless the written consent of the Company is endorsed herein, signed by its President, a Vice-President, Secretary or Treasurer.

Basis of Premium.

H. The premium for this policy is calculated upon:

(1) The entire floor area and street frontage of the premises described in the Warranties herein.

(2) The number and kind of elevators described in said Warranties, if any.

Inspection.

J. The Company shall be permitted at all reasonable times to inspect the premises and elevators of the Assured, and the Company or any of its duly authorized representatives may suspend this insurance in so far as it applies

Exhibit P. 1.

to elevators until any defects or dangerous conditions found are remedied to the satisfaction of the Company. Notice of such suspension and the reason therefor, and of the reinstatement of the insurance, must be in writing. For the period of such suspension the Company will allow a pro rata return premium.

Cancelation.

K. This policy may be canceled at any time by either of the parties hereto upon written notice to the other party stating when thereafter cancelation shall be effective. The date of cancelation shall then be the end of the policy period. If such cancelation is at the request of the Assured, the earned premium shall be calculated at short rates in accordance with the table printed herein. In any event where cancelation is at the request of the Assured, the Company shall retain not less than the minimum premium stated in said Warranties. Notice of cancelation mailed to the address of the Assured stated in said Warranties shall be a sufficient notice, and the check of the Company similarly mailed a sufficient tender of any unearned premium.

Alterations in Policy.

L. No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto and signed by the President, a Vice-President, Secretary or Treasurer of the Company; nor shall notice of any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. Upon the acceptance of this Policy the Assured agrees that its terms embody all

Exhibit P. 1.

agreements then existing between the Assured and the Company or any of its agents relating to the insurance described herein.

Authorized Agents.

M. No person shall be deemed an agent of the Company, unless such person is authorized in writing as such agent by the President, a Vice-President, Secretary or Treasurer of the Company.

Limits of Indemnity.

N. The Company's liability for loss on account of an accident resulting in bodily injuries or death to one person is limited to Five Thousand Dollars ($5,000); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident resulting in bodily injuries or death to more than one person is limited to Ten Thousand Dollars ($10,000). The Company will, however, as provided in Conditions B and C herein, pay the expense of litigation in addition to the sum herein limited and will also pay all costs taxed against the Assured in any legal proceeding defended by the Company, and interest accruing after entry of judgment upon such part thereof as shall not be in excess of the limits of the Company's liability herein expressed.

Policy Period.

O. The policy period shall be twelve months, beginning on the Twenty-second day of June, 1917, at Noon and ending on the Twenty-second day of June, 1918, at Noon, standard time at the location of the business described in the Warranties herein.

Exhibit P. 1.

Warranties.

P. The Warranties herein, numbered 1 to 14 inclusive, are hereby made a part of this contract, and are acknowledged and warranted by the Assured to be true upon the acceptance of this Policy, except such as are declared to be matters of estimate only.

WARRANTIES.

1. Name of Assured: *Rachel A. Lynch, executrix and Trustee under the will of Rachel A. Cartwright, Deceased.*

2. Address of Assured: *#306-308 Market St., Newark, Essex Co., New Jersey.*

3. The Assured is: *Estate.*

4. The interest of the Assured in the premises and elevators is that of: *Owner.*

5. The part of the premises occupied by the Assured is: *Basement and Part second floor.*

6. Location of insured premises by street and number, Town and State.
#306-308 Market Street, Newark, New Jersey.

Description of business and use to which premises are put.
Mercantile & Manufacturing purposes and stores and offices.

7. The places where the elevators are located, the number, the number of landings and the kind of elevators at each location are as follows:—

Street No. and name of Building where elevator is located.	Location in building	No. of elevators
#306-308 Market St., Newark, New Jersey.	Center	1
	Freight	1

Exhibit P. 1.

Kind	Maker and Power used.	Number of landings
Passenger	Electric	7
Freight	Electric	7

8. The premium for this Policy is Seventy-Seven and 50/100 Dollars, (77.50) due and payable June 22nd, 1917.

9. Neither the premises or the elevators are in process of construction, or are undergoing repairs, except as follows:—No exceptions.

10. There is no hoist, elevator, esculator or moving platform, except dumb waiters, at any location designated, which is not disclosed herein except as follows:—no exceptions.

11. No Company has declined this risk or canceled Liability Insurance of the Assured during the past year, except as follows:—No exceptions.

12. No dynamite, nitroglycerine or explosive powder is made, sold, kept or used in the business described herein, except as follows: No exceptions.

13. Inspection reports and other notices and correspondence are to be mailed to the Assured at the address given herein, or to
at

If to the latter, it is by request of the Assured who acknowledges such person as his proper agent for this purpose.

14. The minimum premium for this Policy shall be Ten and 00/100 Dollars, ($10.00).

In Witness Whereof, the Commercial Casualty Insurance Company of Newark, New Jersey, has caused these presents to be signed by its President and Secretary, but the same

Exhibit P. 1.

shall not be binding upon the Company unless countersigned by an authorized agent of the Company.

W. VAN WINKLE
Secretary.

C. W. FEIGENSPAN
President.

Countersigned at Newark, New Jersey this 27th day of June 1917.

H. G. KANKEL
Asst. Supt. City Dept.

STIPULATION entered into between RACHEL A. LYNCH, Executrix of and Trustee under the Last Will and Testament of Rachel A. Cartwright, deceased, hereinafter called the Assured, and COMMERCIAL CASUALTY INSURANCE COMPANY, hereinafter called the Company.

WITNESSETH:

That Whereas the Company has issued to the Assured a general public liability policy No. GP21853 with reference to premises Numbers 306-308 Market Street, Newark, New Jersey, for a period of twelve months beginning June 22, 1917 at noon and ending June 22, 1918, at noon: And

Whereas said policy contains the following provisions:

Co-operation of Assured—Expense

C. The Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals; but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or

Exhibit P. 1.

in any legal proceeding, or incur any expense, or settle any claim, except at the Assured's own cost, without the written consent of the Company previously given, except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident.

Assured's Right of Recovery.

D. No action shall lie against the Company to recover for any loss or expense under this Policy unless it shall be brought by the Assured for loss or expense actually sustained and paid in money by the Assured after actual trial of the issue, nor unless such action is brought within two years after payment of such loss or expense.

And Whereas claim has been made against the Assured by one Joseph H. Haberbush by reason of an injury claimed to have been sustained by him on July 27, 1917, on the premises covered by said policy, and said Haberbush has commenced suit in the New Jersey Supreme Court against the Assured to recover damages claimed to have been suffered by him by reason of said injury:

And Whereas claim has been made by the Assured against the Company under said policy by reason of said claim of said Haberbush:

And Whereas the said Company has denied liability under its said policy for any injury for and on acount of said claim so made by Haberbush:

And Whereas the parties hereto desire to stipulate that the Assured may settle said claim, if she so desires, without the necessity of having

Exhibit P. 1.

said suit prosecuted to final judgment, without waiving her claim against the Company by reason of said settlement:

NOW, THEREFORE, it is stipulated by and between the parties hereto as follows:

1. That the Assured may, if she so desires, settle with Joseph M. Haberbush for injuries claimed to have been sustained by him on July 27, 1917, on the premises 306-308 Market Street, Newark, New Jersey, provided the amount paid to said Haberbush under said settlement does not exceed the sum of two hundred and fifty dollars ($250).

2. That in any action brought by the Assured against the Company under the policy hereinbefore mentioned to recover the amount so paid to the said Haberbush from the Company, said Company will not set up as a defense the fact that the amount so paid to Haberbush was paid in settlement before judgment.

3. It is further stipulated that any such settlement so made with Joseph M. Haberbush by the Assured shall have the same force and effect as a judgment for the amount of the settlement in said action so brought by Haberbush against the Assured.

The Company hereby waives the foregoing recited provisions of its policy which excuse it from liability for payment to the Assured under its policy of any sum paid for damages claimed to have been suffered by the Assured, for which the Company is liable, until after actual trial of the issue.

IN WITNESS WHEREOF the parties hereto have caused these presents to be duly signed, this

Exhibit P. 2.

14th day of Sept., one thousand nine hundred and seventeen.

COMMERCIAL CASUALTY INSURANCE CO.

J. HORACE SHALE
Treasurer.

As to Rachel A. Lynch,
Executrix and Trustee.
WILFRED H. JAYNE JR.

RACHEL A. LYNCH
Executrix and Trustee.

EXHIBIT P. 2.

STIPULATION.

STIPULATION entered into between RACHEL A. LYNCH, Executrix of and Trustee under the Last Will and Testament of Rachel A. Cartwright, deceased, hereinafter called the Assured, and COMMERCIAL CASUALTY INSURANCE COMPANY, hereinafter called the Company,

WITNESSETH:

That Whereas the Company has issued to the Assured a general public liability policy No. GP21853 with reference to premises Numbers 306-308 Market street, Newark, New Jersey, for a period of twelve months beginning June 22, 1917, at noon and ending June 22, 1918, at noon; And

Whereas said policy contains the following provisions:

Co-operation of Assured—Expense.

C. The Assured, whenever requested by the Company, shall aid in effecting settle-

Exhibit P. 2.

ments, securing information and evidence, the attendance of witnesses and in prosecuting appeals; but the Assured shall not voluntarily assume any liability or interfere in any negotiations for settlement or in any legal proceeding, or incur any expense, or settle any claim, except at the Assured's own cost, without the written consent of the Company previously given, except that the Assured may provide at the Company's expense such immediate surgical relief as is imperative at the time of the accident.

Assured's Right of Recovery.

D. No action shall lie against the Company to recover for any loss or expense under this Policy unless it shall be brought by the Assured for loss or expense actually sustained and paid in money by the Assure after actual trial of the issue, nor unless such action is brought within two years after payment of such loss or expense.

And Whereas claim has been made against the Assured by one Joseph M. Haberbush by reason of an injury claimed to have been sustained by him on July 27, 1917, on the premises covered by said policy, and said Haberbush has commenced suit in the New Jersey Supreme Court against the Assured to recover damages claimd to have been suffered by him by reason of said injury;

And Whereas claim has been made by the Assured against the Company under said policy by reason of said claim of said Haberbush;

And Whereas the said Company has denied liability under its said policy for any injury for and

Exhibit P. 2.

on account of said claim so made by Haberbush;

And Whereas the parties hereto desire to stipulate that the Assured may settle said claim, if she so desires, without the neecssity of having said suit prosecuted to final judgment, without waiving her claim against the Company by reason of said settlement;

Now, THEREFORE, it is stipulated by and between the parties hereto as follows:

1. That the Assured may, if she so desires, settle with Joseph M. Haberbush for injuries claimed to have been sustained by him on July 27, 1917, on the premises, 306-308 Market street, Newark, New Jersey, provided the amount paid to said Haberbush under said settlement does not exceed the sum of two hundred and fifty dollars ($250).

2. That in any action brought by the Assured against the Company under the policy hereinbefore mentioned, to recover the amount so paid to the said Haberbush from the Company, said Company will not set up as a defense the fact that the amount so paid to Haberbush was paid in settelment before judgment.

3. It is further stipulated that any such settlement so made with Joseph M. Haberbush by the Assured shall have the same force and effect as a judgment for the amount of the settlement in said action so brought by Haberbush against the Assured.

4. The Company hereby waives the foregoing recited provisions of its policy which excuse it from liability for payment to the Assured under its policy of any sum paid for damages claimed to have been suffered by the

Exhibits P. 3 and P. 4.

Assured, for which the Company is liable, until after actual trial of the issue.

In Witness Whereof the parties hereto have caused these presents to be duly signed, this fourteenth day of September, one thousand nine hundred and seventeen.

COMMERCIAL CASUALTY INSURANCE CO.

J. Horace Shale,
Treasurer.

As to Rachel A. Lynch,
Executrix and Trustee.
Wilfred H. Jayne, Jr.

RACHEL A. LYNCH,
Executrix and Trustee.

EXHIBIT P. 3.

General Release in usual form was given, but same has been mislaid.

EXHIBIT P. 4.

Copy.

NATIONAL STATE BANK.

Newark, N. J., October 18, 1917. No. 12

Pay to the order of Richard Stockton, Att'y for Joseph M. Haberbush $250.00/100.....
Two hundred and fifty and no/100 Dollars.

COULT & SMITH,
Att'ys.

Endorsed: Richard Stockton, Att'y for Joseph M. Haberbush.

Exhibit P. 5.

EXHIBIT P. 5.

NEW JERSEY SUPREME COURT.

JOSEPH HABERBUSH,
Plaintiff,

vs.

RACHEL A. LYNCH, Executrix of and Trustee under the Will of RACHEL A. CARTWRIGHT, deceased,
Defendant.

Costs of Defendant on Discontinuance as between Atty. & Client.

COSTS.	$	DISBURSEMENTS.	$
After Notice of Trial (Deft.)..	8.00	Clerk's fees entg. Disct, &c.....	2.00
Discontinuance .	8.00		
Total Costs.....	16.00	Total Disbursements	2.00
Total Disbursements	2.00	Taxed at 18 dollars 00 cents Oct. 19, 1917.	
Total	18.00	WM. C. GEBHARDT, *Clerk.*	

A True Copy.

WM. C. GEBHARDT,
Clerk.

Exhibit P. 5.

Endorsed: New Jersey Supreme Court.

JOSEPH M. HABERBUSH, *vs.* RACHEL A. LYNCH, Execux. &c. COULT & SMITH, *Attorneys.*	Action at Law.

Filed Oct. 19, 1917.

WM. C. GEBHARDT,
Clerk.

Specification of Determinations.

NEW JERSEY SUPREME COURT.

Filed February 15, 1918.

RACHEL A. LYNCH, Executrix of and Trustee under the Last Will and Testament of RACHEL A. CARTWRIGHT, deceased, *Plaintiff-Respondent,* *vs.* COMMERCIAL CASUALTY INSURANCE CO., a corporation, *Defendant-Appellant.*	*On Contract.* *Specification of Determinations of District Court with which Appellant is dissatisfied in point of law.*

The following is a specification of the determination of the First District Court of the City of Newark, with which the appellant is dissatisfied upon the point of law.

1. The learned trial court erred in giving judgment to the plaintiff against the defendant herein.

2. The learned trial court erred in failing to give judgment in favor of the defendant, for the reason that the loss suffered by the plaintiff was caused through the maintenance by said plaintiff of an elevator in charge of and operated by a person under the age of fourteen years, contrary to the provisions of the policy of insurance held by the plaintiff.

3. That the loss of plaintiff for which this action was brought, arose by reason of the negligent operations of an elevator by one Ernest Schwab, an infant, under the age of sixteen years, and by the terms of the contract or policy of in-

surance between the plaintiff and defendant herein, such loss is excepted from the policy, and no recovery can be had therefor.

4. That on the whole case the learned trial court erred in its determination, and appellant is dissatisfied with same on point of law.

WM. E. HOLMWOOD,
Attorney for and of Counsel with Appellant.

Opinion of Supreme Court.

Filed November 16, 1918.

NEW JERSEY SUPREME COURT.

JUNE TERM, 1918.

RACHAEL A. LYNCH, Executrix of & Trustee, etc., of Rachael A. Cartwright, deceased,
Plaintiff-Respondent,

vs.

COMMERCIAL CASUALTY INSURANCE CO., a corporation,
Defendant-Appellant.

Submitted June term, 1918. Decided November 1918.

On appeal from First District Court of Newark.

Before Justices Bergen, Kalisch and Black.

For the appellant, William E. Holmwood.

For the respondent, Coult and Smith.

Per Curiam:

The plaintiff had a General Public Liability Policy, in the defendant company, insuring her against loss and expense resulting from claims upon her for damages on account of bodily injuries, including death accidentally suffered, by any person or persons, other than to the employees of the assured, while or upon the premises described in the policy. The policy contained this clause: "Except claims arising by reason of: Injuries or death caused by any per-

son employed in violation of law while in charge of or operating any elevator, or by any person so employed under the age of (16) years, where no age limit is fixed by law for elevator attendants, or by any person otherwise employed in violation of law as to age or under the age of fourteen years where there is no legal restriction as to age of employment."

The case was tried before the Court, sitting without a jury, and resulted in a judgment for the plaintiff against the defendant for the sum of two hundred and fifty dollars, from which judgment the defendants appeals.

The facts are: John Haberbush, while upon the defendant's premises was precipitated from the ground floor to the basement, as the result of stepping into an open elevator shaft. The elevator was under the care and management of a boy fourteen years of age, who it appears from the testimony, left the elevator and its entrance door open and unattended, while he went to the front of the hall of the building to talk to a bootblack, named Joe. There was testimony that some one on the fifth floor of the building pulled the elevator up from the ground floor, almost immediately preceding the accident. It further appears that the plaintiff paid Haberbush two hundred and fifty dollars, in settlement of his claim for damages against her, and by stipulation between counsel it was agreed to waive the provision of the policy requiring an action to be brought by Haberbush to be prosecuted to a final judgment.

The legal question to which these facts give rise is whether or not the exception, above quoted, contained in the policy, operates to relieve the company from liability, where the claim

of the assured arises, by reason of an act of its employee, under the age of sixteen years, having charge of or operating an elevator.

Counsel of respondent, in support of the judgment, argue that since the policy does not provide that the company shall be excused from liability where the accident is caused by the negligence of an elevator boy, under the age of sixteen, but expressly limits its liability in that respect for injuries caused by such employee while in charge of the elevator; and since it further appeared that the elevator boy was absent, even though momentarily, at the time of the accident, he was not then in charge of or operating the elevator, and since it further appeared that the elevator was lifted from its place by a tenant of the assured, who was on the fifth floor, it follows that it was this intervening act which was the proximate cause of the accident, and, therefore, the defendant company is not exonerated from liability to the assured, by virtue of the exception contained in the policy.

This reasoning is palpably unsound in many respects. The undisputed fact in the case is, that the elevator boy not only left his post of duty, but permitted the door, leading directly onto the elevator, when in place, to remain open. This left an open shaft, which was nothing less than a dangerous trap for those who happened to come along, at that critical juncture, to make use of the elevator. The fact that the elevator boy was momentarily absent from the place where his duty required him to be, cannot properly be said to have divested him of having charge of or operating the elevator, within the clear and common sense meaning of these words.

It would be running into the absurd to claim that a motorman, who left the platform of his

car to pick up something in the street, or to shake hands with a friend, was not in charge of his car while he was deviating from the line of his duty, and, yet, that is the logic of the reasoning which we are asked to apply to the facts of the present case.

The fact that the elevator was lifted from its place by a person on the fifth floor, and thus caused an open space to be left in the shaft, from the ground floor to the basement, and, therefore, in nearness, in time, contributed to Haberbush's fall and injury cannot alter the legal situation arising from the conceded facts, here, present. The original wrongdoer was the person who was entrusted with the charge of the elevator. He it was who, momentarily, deserted his post of duty, leaving open the door leading into the shaft where the elevator would be, when in place. If the boy had remained at his station of duty the accident could not have happened. We have, therefore, this situation that the intervening act of a third person in lifting the elevator from its place was not an independent act and the sole cause of the injury, but was an unconscious act co-operating with the wrongful act of the person in charge of the elevator, and, therefore, the injury to Haberbush sprung from the wrongful act of an employee, of the plaintiff, under the age of sixteen, entrusted by her with the charge and operation of the elevator, on her premises. It is, therefore, obvious that, by virtue of the exception in the policy of insurance, the company incurred no liability to the plaintiff, for the injuries sustained by Haberbush.

The judgment of the District Court is reversed, and judgment given for defendant-appellant.

Judgment of Reversal.

Entered February 14, 1919.

NEW JERSEY SUPREME COURT.

RACHAEL A. LYNCH, Executrix of & Trustee, etc., of Rachael A. Cartwright, deceased, *Plaintiff-Respondent,* *vs.* COMMERCIAL CASUALTY INSURANCE CO., a corporation, *Defendant-Appellant.*	*On Appeal.* *Judgment of Reversal.*

A judgment in favor of the plaintiff-respondent having been entered in the First District Court of Newark, N. J., and an appeal having been taken from same which was decided November term, 1918, in favor of the defendant-appellant herein;

It is thereupon on this fourteenth day of February, 1919, on motion of William E. Holmwood, attorney for defendant, Ordered that the judgment of the First District Court of Newark, N. J., be and the same is hereby reversed and judgment be and the same is hereby entered in favor of the defendant-appellant and against the plaintiff-respondent.

Entered February 14, 1919, on motion of

WILLIAM E. HOLMWOOD,
Attorney.

Arthur W. Cross, Law Printer, 843 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

No. 19, June Term, 1919.

RACHEL A. LYNCH, executrix of and trustee under the last will and testament of Rachel A. Cartwright, deceased,
Plaintiff-Appellant,

vs.

COMMERCIAL CASUALTY INSURANCE CO., a corporation,
Defendant-Respondent.

On Appeal from Supreme Court.

BRIEF OF COULT & SMITH FOR PLAINTIFF-APPELLANT.

The facts are substantially reviewed in the opinion of the Supreme Court (Case, p. 41) and it will not be necessary to deal with them further except to call attention to the fact that the elevator boy left the elevator stationary at the ground floor when he left the door open and went to the front of the building. The more pertinent testimony is that of Ernest Schaub, the elevator boy (Case, pp. 15 and 18), and Mike Steefel, the engineer (Case, pp. 20-21).

The exception on the first page of the policy (Case, p. 22) it is held relieves the company from liability. The exception is quoted on page 5, but a free reading of the clause would be that

> the company shall not be liable for claims arising by reason of injuries CAUSED BY the elevator boy while IN CHARGE OF or operating the elevator.

The motion for judgment for the plaintiff in the District Court is not set out in the record, but it was substantially as follows:

1. The accident was caused by the moving up of the elevator, and the elevator was not moved by the elevator boy, but was started by somebody on the fifth floor.

2. The accident was caused by Haberbush's stepping into the elevator shaft when the car was not there, and he was negligent in so doing.

3. The elevator boy was not in charge of the elevator at the time of the accident.

4. The injuries were not caused by the elevator boy.

The Court did not find specifically that the elevator boy was negligent in leaving the door open. His negligence, however, would not excuse the insurance company from liability. The policy does not provide that the company shall be excused from liability where the accident is caused by the negligence of an elevator boy who is under the specified age, but provides that the company shall not be liable for injuries *caused by* such elevator boy while *in charge* of the elevator. This, therefore, calls for the determination of the proximate cause of the accident.

It is perfectly clear that the injury in the case was caused, on the one hand, by the elevator being started by the man on the fifth floor. As to this fact, the defendant is concluded, he having called as his only witness in defense, Mike Steefel, the engineer, who testified (pp. 20 and 21), "somebody was pulling it up from the fifth floor." On the other hand, the injury was caused by Haberbush's stepping into the elevator shaft.

The very wording of the section of the policy in question indicates that there must be some moving force on the part of the elevator boy which accounts for the accident. The status of the elevator boy in the present case was passive. Actively, he did nothing to cause the accident. There were certainly intervening causes which occasioned this accident, and these intervening causes were those which occurred after the elevator boy had left the elevator. They were the starting of the elevator by the party on the fifth floor and the action of Haberbush, the injured man, in stepping into the elevator shaft.

The question of what was the proximate cause of the accident is a question of fact. *D. L. & W. R. R. Co.* v. *Salmon,* 29 N. J. L., at pages 310 and 311

The District Court having found the facts in favor of the plaintiff, the defendant is concluded by that finding that the conduct of the elevator boy was not the proximate cause of the injury.

The Supreme Court in its opinion (Case, p. 43) sums up the claim made by the plaintiff as to the intervening matters which show that the accident was not caused by the elevator

boy, but omits the main contentions of fact on which the plaintiff relies to show that the accident was not caused by the elevator boy. One of these contentions is that the elevator boy left the elevator opposite the door so that there was no danger from the shaft if the elevator remained stationary. Further, the Court omits to state that the plaintiff's claim is that the proximate cause of the injury is the action of Haberbush in stepping through the doorway into an open elevator shaft when no elevator was opposite the door—clearly an act of contributory negligence.

In the case of *Smith* v. *Van Sciver,* 58 N. J. L., 190, this Court held that a man stepping backward on what he thought was the elevator, and, instead, stepping into the open shaft, the elevator having descended, was guilty of contributory negligence.

The Supreme Court does not seem to have understood the facts, because, in its opinion (Case, p. 43, l. 30) it states, in regard to the elevator door being left open by the elevator boy:

> "This left an open shaft which was nothing less than a dangerous trap for those who happened to come along, at that critical juncture, to make use of the elevator."

And, again, the Court says:

> "He (referring to the elevator boy) it was who, momentarily, deserted his post of duty, leaving open the door leading into the shaft where the elevator would be when in place." (Case, p. 44, l. 19.)

The fact is, that while the elevator boy left the elevator with the door open, he also left the elevator stationary, opposite the door, and if it were not for the fact that the party on the fifth floor, after the elevator boy had left the elevator stationary in front of the door, started the elevator, there would not have been an open shaft for Haberbush to have fallen into.

Thus it is demonstrated that it was not the action or failure to act of the elevator boy which was the proximate cause of the accident. The judgment of the District Court, sitting as a jury, in effect found this as a fact, and this Court is concluded by that finding.

We submit that the act of intervention of the third person in causing the elevator to be lifted from its place was an independent act and was one of the causes of the injury, the other cause being the action of Haberbush in stepping into an open shaft.

There is no question of public policy involved in this case, and it is not claimed that the insured man was violating a law in employing an elevator boy under the age of sixteen years. The insurance company's claim is simply that the injury was caused by an infant under the age of sixteen years while in charge of the elevator, and, under the policy, this being the fact they were excused from liability.

The Supreme Court in its opinion (Case, p. 43, at the bottom of the page) says:

> "It would be running into the absurd to claim that a motorman who left the platform of his car to pick up something in the street, or to shake hands with a friend, was not in charge of his car while he was deviating from the line of his duty, and, yet, that is the logic of the reasoning which we are asked to apply to the facts of the present case."

The Court in this observation fails entirely to apply the other term of the exception in the policy, viz: that the injury must be caused by the elevator boy.

Were an accident to happen, occasioned by a passenger starting a trolley car after the motorman had left is stationary and had left the platform, it would be absurd to charge the trolley company with negligence.

We respectfully submit that the judgment of the Supreme Court should be reversed and the judgment of the First District Court of the City of Newark should be affirmed, with costs.

Respectfully submitted,

COULT & SMITH,
Attorneys of Plaintiff-Appellant.

WILLIAM A. SMITH,
Of Counsel.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

No. 19, June Term, 1919.

RACHEL A. LYNCH, executrix of and trustee under the last will and testament of Rachel A. Cartwright, deceased,
Plaintiff-Appellant,
vs.
COMMERCIAL CASUALTY INSURANCE CO., a corporation,
Defendant-Respondent.

On Appeal from Supreme Court.

BRIEF FOR DEFENDANT-RESPONDENT.

This action was brought upon a policy of insurance issued by the defendant to the plaintiff, dated June 27th, 1917, insuring the plaintiff against loss and expense resulting from claims upon the plaintiff for damages on account of bodily injuries received by any person or persons while upon premises of plaintiff, located at #306-#308 Market street, Newark, New Jersey, to recover for loss occasioned through an injury sustained by one Joseph M. Haberbush while upon said premises.

The case was tried before Hon. Cecil H. MacMahon, Judge of the First District Court of Newark, without a jury, the Court giving judgment in favor of the plaintiff, to which ruling exception was duly taken and appeal entered.

This decision was reversed by the Supreme Court and judgment entered in favor of the defendant and respondent herein. For opinion see Case, p. 41.

Statement of Facts.

The pertinent facts are that on July 24th, 1917, one Joseph M. Haberbush was injured by falling down the elevator shaft upon the premises of the plaintiff, from the ground floor to the basement. The elevator had been left momentarily unattended by the elevator boy, and the door had been left open. While in this situation a third person moved the elevator by means of the rope which operated it. Haberbush then came along and fell into the shaft. The boy in charge of the elevator was fourteen years old at that time.

By a stipulation (Ex. P. 2) the defendant below and appellant in this court, waived the provision of the policy requiring a suit brought by said Haberbush to be prosecuted to final judgment and settlement was made with him by the plaintiff for $250.00 and costs, and a release taken. This action is brought to recover the money expended in making such settlement.

The defendant-respondent contends that the plaintiff is without remedy under the policy, because she employed an incompetent child of fourteen years of age to attend the passenger elevator, contrary to an exception contained in the policy providing against such employment.

Under the undisputed facts in the case, the Trial Judge should have given force to the exception in the policy.

It seems evident that the direct and proximate cause of the injury to Haberbush was the neglect of the elevator boy in leaving the elevator unattended and in leaving the door open. Had he remained at his post the elevator could not have been moved. If the strength of the person at the other end of the pulley was sufficient to overcome the boy's resistence, had he been at his post, he could at least have closed the door, or given warning. Careless inattention, and lack of a sense of responsibility constitute the prime objection to the employment of children for work of this character.

The language of the policy on this point is: (See Policy Ex. P. 1, Case, p. 22.)

> "* * * Except claims arising by reason of: 1. Injuries or death caused by any person employed in violation of law while in charge of or operating any elevator, *or by any person so employed under the age of sixteen (16) years where no age limit is fixed by law for elevator attendants* or by any person otherwise employed in violation of law as to age or under the age of fourteen (14) years where there is no legal restrictions as to age of employment."

While policies of insurance are to be given a strict construction against the insurer, an exception of this character is in a line with sound public policy. See *Hetzel* v. *Wasson Piston Ring Co.*, 98 Atl. Rep., 308. There the hiring was in violation of law. Here the hiring is in violation of the contract of insurance.

The exception in the policy was set forth in the specification of defenses filed in the District Court (Case, p. 4). The de-

fendant moved for judgment thereon (Case, p. 21). Under the undisputed facts this presented a question of law, which was ruled upon adversely to the defendant company by the Trial Judge. (See judgment, Case, p. 7.)

The language of the exception is clear. The boy was only fourteen years old (Case, p. 19). It was his inattention to duty that caused the accident.

The appellant's contention that the alleged contributory negligence of Haberbush may have a bearing seems to be contrary to the provisions of the stipulation between the parties, under which the suit was brought. (See stipulation No. 3, Case, p. 35, ll. 30-36.) For the purposes of this proceeding the appellant's liability to Haberbush is admitted. Unless the conduct of Haberbush was the proximate cause of his injuries, the appellant cannot be benefited by this point. The case cited (*Smith* v. *Van Sciver,* 58 N. J. L., 190) where the plaintiff stepped *backward* into a shaft, presents an entirely different situation.

It is claimed that the act of the person on the fifth floor, who started the elevator, was an intervening cause, and that such intervening cause was the proximate cause of the accident. An intervening cause in order to become the proximate cause must be sufficient *independently* of all other causes to cause the injury. In this case the action of the third party could not have caused the injury without the concurring negligence of the elevator boy, in deserting his post, thus making it possible for an outsider to manipulate the elevator, and also his negligence in leaving the door open.

The contention of the appellant that the language of the exception in the policy as to injuries "caused by" an elevator boy, only refers to active negligence, is without foundation. Acts of omission or commission are the usual causes of injury. Desertion of his post was active negligence, on the part of the elevator boy. The failure to shut the door was an act of omission. Both acts contribute to bring about the injuries to Haberbush. The plain, every day sense of the language employed points to no other conclusion than that the injuries were caused by the elevator boy. Not by his wilful acts, but by his negligence. The judgment of the Supreme Court should be affirmed.

Defendant-Respondent, if successful, is entitled to costs in all courts.

This action was brought by the executrix in her own right, and upon an alleged cause of action which arose after the death of her testator. (See State of Demand, p. 1.) It is based upon a contract between the parties. In *Kinney, Admx.*, v. *Central R. R. Co.*, 34 N. J. L., 273, the Court said, p. 274:

> "* * * if an executor or administrator charge the wrong for which the suit is brought as being done to himself, and fail to prove his case, he shall pay the costs, for he sues in that case in his own right; but if he charge that the wrong was done to his testator or intestate, and fail to prove it, he shall not pay costs, for he sued in right of his testator—not of himself."

Respectfully submitted,

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