

INDEX.

	PAGE
Judgment Record, filed February 10, 1920.....	1
Summons issued July 2, 1919.	
Returnable July 10, 1919.	
State of Demand July 15, 1919.	
Trial and Judgment December 30, 1919.	
Notice of Appeal and Bond filed January 9, 1920.	
Certificate of Clerk.....	2
Summons	3
State of Demand.....	4
State of Case Settled by Court, filed February 10, 1920....	5
Notice of Appeal, filed January 9, 1920.....	7
Specification of Determinations, filed February 6, 1920.....	8
Opinion of Supreme Court, filed June 14, 1920.....	9
Judgment of Supreme Court.....	14
Notice of Appeal and Specification of Errors.....	15
Annexed:	
Contract of Insurance, Exhibit P. 1.	
Application, Exhibit P. 2.	

Judgment Record.

Policy 1247 marked P. 1. Louis Solomon and Reuben B. Kantrowitz sworn for plaintiff, appl. marked P. 2. Check marked P. 3. Mortimer R. Simon sworn for plaintiff. Edward M. Carroll and Wm. S. Hanna, sworn for defendant.

December 30, 1919.

- 10 The evidence being closed, the Court reserved decision.

The evidence being closed, the Court rendered judgment in favor of the plaintiff and against the defendant in the sum of one hundred twenty-five dollars damages with costs, whereupon judgment is entered in favor of the plaintiff and against the defendant in the sum of \$125 damages with costs.

January 9, 1920.

Notice of appeal and bond filed.

- 20 THIS IS TO CERTIFY that the foregoing is a true and correct transcript of the Judgment Record in the case of Louis Solomon, M. R. Simon and Mortimer R. Solomon, co-partners, trading as the "S. & S. Company," plaintiffs, and New Jersey Indemnity Company, a corporation, defendant, in the District Court, East Orange, New Jersey.

ARTHUR G. SMITH,
Clerk.

(SEAL)

30

40

District Court Summons.

DISTRICT COURT SUMMONS.

Issued July 2, 1919.

STATE OF NEW JERSEY, }
ESSEX COUNTY. } ss.

To any Constable of said County, or to the Sergeant-at-Arms
of the East Orange District Court:

New Jersey Indemnity Company, a corporation, to appear before the District Court of the City of East Orange, to be held at the City Hall, Main street, in the said city, on the 10th day of July, 1919, at ten o'clock in the forenoon, to answer unto Louis Solomon, M. R. Simon and Mortimer R. Solomon, co-partners trading as the "S. & S. Company," in an action upon contract to the damage of the plaintiff five hundred dollars. Hereof fail not.

WITNESS, Charles B. Clancy, Esq., Judge of said Court, at East Orange, aforesaid, the 2nd day of July, in the year One thousand nine hundred and nineteen.

ARTHUR G. SMITH,
Clerk.

State of Demand.

STATE OF DEMAND.

Filed July 15, 1919.

10 Plaintiffs, Louis Solomon and Mortimer R. Simon, co-partners trading as the S. & S. Company, by J. Victor D'Aloia, their attorney, say:

1. Plaintiffs are owners of a Ford automobile, and were owners at the time same was insured and at the time of the accident thereto.

2. On or about May 20th, 1919, and at all times hereinafter mentioned, defendant was and still is a corporation, duly incorporated with power to insure against accident.

20 3. On said May 20th, 1919, in consideration of \$57.70, a part of which was paid, defendant executed to plaintiffs a policy of insurance on said automobile, insuring same against accidents which policy of insurance is now in possession of the defendant.

4. On June 10th, 1919, said automobile was damaged in an accident and plaintiff's loss thereby was \$400.

5. Plaintiffs notified defendant of said accident and of the amount of damage suffered by them and otherwise duly performed all the conditions of said policy on their part.

6. Defendant has not paid said loss.

Plaintiffs demand \$400 damages.

30

J. VICTOR D'ALOIA,
Attorney for Plaintiff.

40

State of Case Settled by Court.

STATE OF CASE SETTLED BY COURT.

Filed District Court January 22, 1920.

Filed Supreme Court February 10, 1920.

J. Victor D'Aloia, attorney of plaintiff.

W. Eugene Turton, attorney of defendant.

The parties hereto, or their attorneys, having been unable to agree upon a state of the case for appeal, and having applied to me, Judge of said Court, within the time limited by law, I do hereby settle the case as follows:

This was an action brought to recover under a policy of insurance issued by the New Jersey Indemnity Company, attorney in fact, to the plaintiff.

The testimony showed that the plaintiff has paid to Reuben B. Kantrowitz the sum of \$17.50, first instalment of premium and procured the policy which is introduced in evidence and marked P. 1 from the said Kantrowitz, the balance of the premium of \$57.50 to be paid within thirty days.

On June 10th, it appears that plaintiffs ran their automobile into a tree at Fort Less and the car was damaged to such an extent that it was practically a wreck. It appears that the plaintiff notified the agent, Kantrowitz, and then subsequently spoke to Mr. Carroll, president of the defendant company; that an investigation was made by the adjuster of the defendant and that the defendant has refused to make good the loss.

Mr. Carroll, testifying for the defendant, admitted that he was notified of the accident by telephone two days after the happening of the accident, and that he sent their representative to make a survey; that they sent the policy by mail to Mr. Kantrowitz; that Kantrowitz had done certain advertising in the vicinity of Passaic.

The defendants rested their case on the theory that the plaintiff had sued the wrong defendant in that the New Jersey Indemnity Exchange, defendant, was only an attorney in fact for the subscribers and therefore was not personally liable. In support of this contention defendant calls attention of the Court to Clause N of the contract of insurance, which is marked P. 2, which reads as follows:

State of Case Settled by Court.

10 "In the event of litigation, to avoid a multiplicity of suits, non-suit or other proceeding at law or in equity shall, in any event, be begun or maintained for the recovery of any claim upon, under or by virtue of this contract, against more than one of the Subscribers hereat at any time, nor in any court other than the highest court of original jurisdiction, and a final decision in such court or other proceeding shall be taken to be decisive of a similar claim, so far as same may subsist, against each of the other Subscribers hereat, absolutely fixing his liability in the premises. Each of the Subscribers hereat, in consideration of this entire stipulation, so far as he individually is or may be concerned, expressly agrees to accept and abide by the result of such final decision in the same manner and to the same effect as if he had been the sole defendant in a similar suit or proceeding as to a similar claim against him, so far as the same may subsist, save and except, however, as to the matter of costs and disbursements, and the attorney is hereby authorized, as to each Subscriber hereat, to receive and admit service of process in any suit or proceeding begun or maintained as aforesaid."

20 The attention of the Court was also called to Clause L of the contract, which reads as follows:

30 "No action by a Subscriber shall lie against the Attorney or any of the Subscribers at the Exchange to recover for any loss under this contract unless brought by the Subscriber himself, nor to recover for any loss arising under Clause four or five unless brought by the Subscriber himself to recover for moneys actually paid by him in legal tender of the United States in satisfaction of a final judgment after trial of the issue; and unless such action be brought within two years after the occurrence causing the loss or damage, or within two years from such a final judgment."

40 I found from the wording of Clause L above referred to, that an action would lie either against the attorney in fact or any other subscriber at the Exchange, and that the insured might elect either to sue the attorney or any of the subscribers at the Exchange, and in this case he had elected to sue the attorney,

Notice of Appeal.

and accordingly found that the defendant in this suit was a proper defendant in accordance with the terms of the contract.

The amount of the damage is determined by Clause G of the contract, which provides, among other things, that "it is agreed that the original cost price of the automobile therein described is five hundred dollars, and that the amount of the loss shall be determined by the age of the automobile," etc. The testimony in the case shows that the automobile was a 1916 Model, which, in accordance with Clause G, would, on and after January 1, 1919, be considered to be in its fourth year, and therefore the amount of the loss sustained by the plaintiff would be one-fourth of the original cost price, or \$125.

I accordingly gave judgment in favor of the plaintiff and against the defendant for the sum of \$125.

Case settled and signed by me this twenty-second day of January, 1920.

CHAS. B. CLANCY,
Judge of East Orange District Court.

Attest:

ARTHUR G. SMITH,
Clerk.

Filed January 9, 1920.

NOTICE OF APPEAL.

Filed January 9, 1920.

*To Louis Soloman, Mortimer R. Simon and J. Victor D'Aloia,
Esq., Attorney:*

TAKE NOTICE, that the defendant, the New Jersey Indemnity Company, hereby appeals to the New Jersey Supreme Court from the judgment of the East Orange District Court, rendered in the above-stated action, on the 30th day of December, 1919.

W. EUGENE TURTON,
Attorney of Defendant.

Dated: January 8th, 1919.

Specification of Determinations.

New Jersey Supreme Court

Filed February 6, 1920.

10 **Specification of the determinations or directions of the District Court with respect to which defendant is dissatisfied in point of law.**

1. The Court rendered judgment against the New Jersey Indemnity Company, a corporation, whereas there was no proof in the case that the New Jersey Indemnity Company had made any contract with the plaintiffs upon which it was liable.

20 2. The proofs in the case showed that the New Jersey Indemnity Company acted as attorney in fact for certain insurers and the Court should have held, at the request of defendant, that no judgment could be rendered upon the contract against the New Jersey Indemnity Company, a corporation, in its individual capacity.

30 3. The proofs showed that the contract upon which suit was brought was made by the New Jersey Indemnity Company as attorney in fact or agent, and there was no proof from which any liability could be predicated against the New Jersey Indemnity Company, a corporation, in its individual capacity, and the Court should have given judgment for the defendant or dismissed the proceeding as prayed for by the defendant.

4. The Court refused to dismiss the proceedings upon motion of the defendant on the ground that the proofs showed no contract on which the defendant was liable in its individual capacity.

MERRITT LANE,

Attorney for Appellant.

Opinion of Supreme Court.

OPINION OF SUPREME COURT.

Filed June 14, 1920.

Before Justices Swayze and Parker.

J. Victor D'Aloia, Esq., for plaintiffs-respondents.

Merritt Lane, Esq., for defendant-appellant.

10

Action to recover under a policy of insurance issued by the New Jersey Indemnity Company, attorney in fact. Whether the defendant is a partnership, an incorporated association or a corporation does not appear except as averred in the state of demand. The words "a corporation" appear in the title of the cause, but not in the policy. The policy is signed "New Jersey Indemnity Company, attorney in fact. E. M. Carroll, President." By the terms of the policy "Subscribers to Motor Car Underwriters at New Jersey Indemnity Exchange severally agree to indemnify the subscriber named herein" against certain specified losses subject to conditions, the most important of which for the present purpose are that the amount of the loss shall be ascertained by the subscriber and the attorney (i. e., the attorney in fact) or if they differ by two appraisers, one named by the attorney and one by the subscriber; in the event of their disagreement an umpire is to be chosen and the award in writing of two appraisers or an appraiser and the umpire is to fix and determine the amount of damage. The Exchange and the subscriber are each to pay his own appraiser and to bear equally the other expenses of the appraisers and the umpire. No suit is to be brought until this condition has been complied with. Upon payment of any loss, the Exchange is to be subrogated to the extent of the loss to all rights of recovery by the subscriber. The Exchange may take over and conduct in the name of the subscriber the defense or prosecution of any claim or suit for indemnity, damages or otherwise against any third party. The word Exchange and the word Subscriber are capitalized as above indicated; whether "the Exchange" has any particular meaning and if so what it is, does not appear. The contract may be cancelled by either party upon five days prior written notice to the other. Notice of cancellation mailed by either party to the other's address "herein given" is declared to be sufficient notice. "No action by a subscriber shall lie against the attorney or any of the subscribers at the Exchange to recover for any

20

30

40

Opinion of Supreme Court.

loss under this contract unless brought by the Subscriber himself." To avoid a multiplicity of suits, no suit or other proceeding at law or in equity was to be maintained for the recovery of any claim upon, under or by virtue of the contract, against more than one of the subscribers *hereat*. Each Subscriber *hereat* agrees to accept and abide by the result as if he had been sole defendant in a similar suit or proceeding. The attorney is authorized to receive and admit service of process. The policy declares that "the Subscribers at the Motor Car Underwriters herein called Exchange are individuals, firms and corporations that have each executed an agreement (hereby made a part hereof) which vests in the New Jersey Indemnity Company, herein called Attorney, power to issue this contract for them." It is understood and agreed that there is assumed by each Subscriber, as if a separate contract were issued therefor, a sum which is the same proportion of the aggregate liability hereunder that each Subscriber's advances bear to the aggregate of all Subscriber's advances under all contracts in effect at the time of the loss. Whenever the word contract occurs herein, it means, and shall be taken, and construed to mean, this contract in its entirety, which is issued to the Subscriber named herein in exchange for and in consideration of, indemnity extended by him to other Subscribers. No condition or provision of this contract shall be altered or waived except by written endorsement attached hereto and signed by the Attorney at the "Exchange." The policy concludes with an attestation that the Subscribers to Motor Car Underwriters at New Jersey Indemnity Exchange have caused these presents to be signed by their attorney, and then follows the signature in the form already set forth. No agreement such as is said to have been executed by the Subscribers to Motor Car Underwriters herein called Exchange and made part of the policy is produced nor are the names of the underwriters made known.

The opinion of the Court was delivered by
 40 SWAYZE, J.:

The provisions of the policy set forth in the above state of facts show that it is an anomalous one, and the difficulty in the case arises out of the inartistic way in which the contract is drawn. It resembles the Lloyds policies, which were before the

Opinion of Supreme Court.

Court in *Enterprise Lumber Co. v. Mundy*, 62 N. J. Law 16, but no names are signed to it, nor is the alleged agreement signed by the Subscribers, produced, nor was there proof in the trial court, as far as the State of the Case shows, of their names or identity. The contract plainly was a contract by an agent for unnamed principals. The question to be decided is whether the agent is liable. The case comes within the rule thus stated by Pollock (7th English edition 99): "When the principal is not named, although the agent is known to be an agent, *prima facie* the agent binds himself personally, the other party not being presumed to give credit exclusively to an unknown principal." The case is thus likened to the case where the principal resides abroad. Williston in his new treatise on the law of contracts properly criticizes the broad statement in some of the cases as to the universality of the rule (Williston on Contracts, Sec. 285). We think the question is to be determined in each case by the intention of the parties ascertained in accordance with settled rules of construction and in view of all the language of the contract. It is a subsidiary rule in construing a contract by an agent that, where nothing appears in the body of the contract to indicate the maker, and it is subscribed by a person who adds words to his signature indicating that he signs it in a representative capacity, the obligation is *prima facie* that of the person subscribing; but this presumption is disputable, and parol evidence is admissible to show the intention of the parties and the right of the signer to bind the person whom he claims to have represented. *Phelps v. Weber*, 84 N. J. Law 630; *Sadler v. Young*, 78 N. J. Law 594; *Kean v. Davis*, 21 N. J. Law 683. The cases cited are cases where it was not only shown that the agent was an agent but his principal was named. The rule applies with greater force where the principal is unnamed. *Prima facie* the policy in suit is the contract of New Jersey Indemnity Company, the present defendant. There was no parol proof to explain or qualify the liability. Does anything appear in the body of the policy to indicate the contrary? The language of the policy is confused. In some places it indicates that the Subscribers are liable; in other places that the Exchange (whatever that may mean) it liable; in other places that the attorney in fact is liable. If the principal were named we should have more difficulty, but as the attorney is *prima facie* liable and the principals are not named, we have no difficulty in reaching the con-

10

20

30

40

Opinion of Supreme Court.

10 clusion that the attorney in fact is liable. This finds support
 in the provision that the loss should be ascertained by the sub-
 scriber and the attorney; that if they differ each should appoint
 an appraiser; that the Exchange and the Subscriber should pay
 the appraisers and the umpire; that the attorney should have
 the right and opportunity to inspect the vehicles insured; that
 the Exchange should be subrogated to the Subscriber's rights of
 recovery; that the contract may be cancelled by either of the
 parties, evidently contemplating only the insurer and the as-
 sured, and indicating by the word "either" that there were but
 two parties to be notified, thus excluding the idea that all the
 subscribers, who might be very numerous, should be notified;
 that no action should lie against the Attorney unless brought
 by the Subscriber himself, clearly indicating by the exception
 20 which proves the rule, that the Subscriber himself might sue the
 Attorney; that power is vested in the New Jersey Indemnity
 Company by the Subscribers at the Motor Car Underwriters
 herein called Exchange to issue the policy for them; that no con-
 dition or provision of the contract shall be altered or waived ex-
 cept by written endorsement attached hereto and signed by the
 Attorney at the Exchange; and that notice to or knowledge pos-
 sessed by any agent or other person shall not be held to effect
 a waiver or change in any part of the contract. Looking at all
 these provision in a broad way to reach the real intent of the
 parties and not merely with grammatical, rhetorical or even legal
 30 nicety, although these support the same view, we think the con-
 tract was meant to be a contract of insurance by the New Jer-
 sey Indemnity Company, acting not as agent for the Subscribers
 but as an insurance company, in which the subscribers were in-
 terested pretty much as stockholders, liable to contribute a cer-
 tain amount by way of subscription to the liability of the in-
 demnity company from time to time to the extent of a propor-
 tionate share of each separate loss as it occurred and limited to
 an obligation to pay the proportion of the aggregate liability as
 set forth in paragraph "O" of the policy. In this view the
 40 New Jersey Indemnity Company is the medium by which each
 subscriber fulfilled his obligation to indemnify each of his fellow
 subscribers who suffered a loss, and received from each of his
 fellow subscribers the indemnity to which he was entitled. The
 case differs from a Lloyds policy such as was before us in the

Opinion of Supreme Court.

Enterprise Lumber Company case, in that there each underwriter specified the amount he underwrote; here there must be an ascertainment of each subscriber's proportion of the aggregate liability; to ascertain that proportion there must be some machinery. We can find none provided unless it is the New Jersey Indemnity Company, the insurer, backed by the obligation of the subscriber to put it in funds. This view throws some light on the curious use of the word "Exchange."

10

It is suggested, although not really argued, and although the point was not made in the trial court, that there was not evidence that the defendant had power to insure against accident. We are at a loss to know at what point this suggestion is directed. The charter of the New Jersey Indemnity Company if it had a charter and was a corporation is not produced, and, for all the evidence shows, the words may be only a trade name for individuals, or an unincorporated association. In either case the Insurance Act does not forbid individuals from transacting the business of insurance. *Schenk v. State*, 60 N. J. Law 381. Although the title of the act has been changed since the decision in *Schenk v. State*, we do not find that any change in the act itself prohibits individuals from making insurance contracts. If, however, the point of attack is that the state of demand avers that the defendant was duly incorporated with power to insure against accident, and there was no proof of the power, then the defendant by failing to traverse the averment or raise the point orally at the trial, precludes itself from relying thereon on this appeal, even if it had been definitely raised in the specifications of the grounds of appeal.

20

30

Let the judgment be affirmed with costs.

40

Judgment of Supreme Court.

JUDGMENT OF SUPREME COURT.

This case was heard before our Supreme Court at the February Term, 1920, and judgment of affirmance was entered in favor of the plaintiffs on June 14th, 1920.

10 Whereupon it is adjudged that the said plaintiffs-appellees, Louis Solomon and Mortimer B. Simon, co-partners trading as the "S. & S. Company," recover of the said defendant-appellant, New Jersey Indemnity Company, a corporation, the sum of \$135.05; debt and costs below, with interest hereon from December 30th, 1919, and also the sum of \$19 costs in Supreme Court.

20

30

40

*Notice and Grounds of Appeal.***NOTICE AND GROUNDS OF APPEAL.**

Filed July 7, 1920.

NEW JERSEY SUPREME COURT.

LOUIS SOLOMON and MORTIMER R. SIMON,
partners as S. & S. COMPANY,

*Plaintiffs-Respondents,**and*

NEW JERSEY INDEMNITY COMPANY, a corporation,

Defendant-Appellant.

*Appeal to New
Jersey Court
of Errors and
Appeals.*

10

To J. Victor D'Aloia, attorney for respondents:

20

TAKE NOTICE that the appellant, NEW JERSEY INDEMNITY COMPANY, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds:

1. Because the Supreme Court affirmed the judgment of the District Court of East Orange, although there was error in doing so.

2. Because the Supreme Court affirmed the refusal of the District Court of East Orange to dismiss the proceedings, although it was error so to do because there was no proof in the case that the New Jersey Indemnity Company had made any contract with the plaintiffs upon which it was liable.

30

3. Because the Supreme Court affirmed the judgment of the District Court of East Orange in granting judgment for the plaintiffs, although it was error so to do because it appeared by the proofs in the case that the New Jersey Indemnity Company acted as attorney in fact for certain insurers and the District Court should have held, at the request of the defendant, that no judgment could be entered upon a contract against the New Jersey Indemnity Company in its individual capacity.

40

4. Because the Supreme Court affirmed the judgment of the District Court in granting judgment for the plaintiffs, although it was error so to do because the proofs showed that the con-

Notice and Grounds of Appeal.

tract upon which suit was brought was made by the New Jersey Indemnity Company as attorney in fact or agent and there was no proof from which any liability could be predicated against the New Jersey Indemnity Company in its individual capacity, and the District Court should have given judgment for defendant or dismissed the proceedings as prayed for by the defendant.

10

5. Because the Supreme Court affirmed the judgment of the District Court of East Orange in refusing to dismiss the proceedings upon motion of the defendant, although it was error so to do, because the proofs showed no contract on which the defendant was liable in its individual capacity.

20

6. Because the Supreme Court erred in holding that the contract of insurance in the case was meant to be a contract of insurance by the New Jersey Indemnity Company not acting as agent for the subscribers, but as an insurance company in which the subscribers were interested pretty much as stockholders, liable to contribute a certain amount by way of subscription to the liability of the Indemnity Company from time to time to the extent of a proportionate share of each separate loss as it occurred and limited to an obligation to pay the proportion of the aggregate liability as set forth in paragraph "O" of the policy and so holding affirmed the judgment of the District Court, although it was error so to do.

30

7. Because the Supreme Court held that it was sufficiently proven in the case that the defendant corporation had power to insure against accident and so holding affirmed the judgment of the District Court of East Orange, although it was error so to do.

8. Because the Supreme Court refused to consider that it had been proven in the case that the New Jersey Indemnity Company was a corporation, and so holding affirmed the judgment of the District Court of East Orange, although it was error so to do.

40

9. Because there were other manifest errors in the record and the Supreme Court erred in affirming the judgment of the District Court of East Orange.

MERRITT LANE,
Attorney for Appellant.

MOTOR CAR UNDERWRITERS

at

New Jersey Indemnity Exchange Newark, New Jersey

In consideration of the premium deposit herein provided and in pursuance of the application and the statements made therein, which is hereby made a warranty and a part of this policy, do hereby severally agree to indemnify the subscriber named herein,

CLAUSE ONE

Loss by
Fire.

Against actual loss or damage to any automobile, including its operating equipment, described herein, if sustained within the policy period, and if caused solely by fire, explosion, self-ignition, lightning; also loss or damage while being transported in any railroad car or steamship if the loss or damage results from the derailment, collision, stranding or sinking of such conveyance, including general average and salvage charges for which the Subscriber may be liable.

CLAUSE TWO

Theft.

Against actual loss of, or damage to, any automobile, including its operating equipment, described herein, if sustained within the policy period, and if caused solely by the theft, robbery or pilferage of any person not in the employment, service, or household of the Subscriber.

CLAUSE THREE

Loss or
Damage by
Collision.

Against loss or damage to any automobile described herein, including its operating equipment while attached thereto, if sustained within the policy period, and if caused solely by collision with another object. (This clause does not cover any loss or damage due to fire from any cause whatsoever.) Loss or damage to tires shall not be covered unless the total loss or damage resulting from any one collision shall exceed Two Hundred Dollars. Each claim shall be adjusted separately.

CLAUSE FOUR

Damage to
Another's
Property.

Against loss resulting directly from the manipulation or use of any automobile described herein, by reason of the liability imposed by law upon Subscriber for damages on account of injuries accidentally inflicted upon the property of another during the policy period (property of the Subscriber, or in charge of the Subscriber or any of his employees, or carried in or upon said automobile, or any loss or damage due to fire from any cause, not being covered by this clause.) The liability of the Exchange for loss or damage described in this clause is limited to not more than One Thousand Dollars for any one accident.

CLAUSE FIVE

Injuries
to Persons.

Against loss resulting directly from the manipulation or use of any automobile described herein by reason of the liability imposed by law upon the Subscriber for damages on account of bodily injuries (including death resulting therefrom) accidentally inflicted upon any person or persons during the contract period, liability of the Exchange being limited to Five Thousand Dollars for injury to or death of any person, and, subject to the same limit for each person, limited to Ten Thousand Dollars for any one accident involving injury to or death of several persons. In addition to these limits, however, the Company will also pay the cost and expense attendant upon the investigation, adjustment and settlement of claims, all costs taxed against the Assured in any legal proceedings defended by the Exchange as provided in Condition B, and all interest accruing after entry of judgment upon such part thereof as shall not be in excess of the Exchange's liability as herein expressed; and such immediate surgical relief as is imperative at the time of the accident.

SUBJECT TO THE FOLLOWING CONDITIONS:

A. This Contract does not cover loss resulting or arising from any of the following causes, or while any automobile described herein is being used or maintained under any of the following conditions:

Exclusions.

Operation or manipulation in any race or speed test, or in the twenty-four hours preceding or following any such race or test in which any automobile described herein may be entered; while being driven by any person prohibited by law from driving an automobile; while an automobile described herein is being operated by any person under sixteen (16) years of age; while carrying persons for hire; while beyond the boundaries of the United States of America and Canada, except when on inland or coastwise steamer between ports within said boundaries; loss or damage which may be occasioned directly or indirectly by reason of invasion, insurrection, war, riot, civil commotion, military or usurped power; while in Alaska, or the Hawaiian or Philippine Islands or Porto Rico, or Mexico.

This contract does not cover any obligation assumed by or imposed upon, the Subscriber by any Workmen's Compensation agreement, plan, or law, unless the contract is extended by an endorsement covering such obligation.

Notice of Accidents, Claims and Suits.

B. The Subscriber shall give the Attorney IMMEDIATE WRITTEN NOTICE of any accident, claim, loss or suit hereunder with fullest information obtainable, including names and addresses of witnesses as far as known, and take all needful steps to protect the property covered hereunder from further damage. The Attorney shall have reasonable time and opportunity to examine any damaged vehicle or its equipment covered hereunder before repairs are undertaken or physical evidence of damage removed, but the Subscriber shall not be prejudiced by any reasonable act undertaken for the protection or salvage of the damaged vehicle or its equipment. The Subscriber shall immediately forward to the Attorney every notice, summons or other process served on him on behalf of third persons, when the Exchange will, at its own cost, defend, in the name and on behalf of the Subscriber, suits covered in Clauses four and five hereof. The Subscriber shall aid in securing information, effecting settlements and prosecuting appeals, but he shall not (without the written consent of the Attorney previously given) voluntarily assume or admit any liability, release the liability of any third party, or incur any expense (except immediate surgical relief), or settle any claim, except at his own cost.

Liability of Others.

C. It is understood and agreed that in the event of any warehouseman, carrier, bailee or other corporation or person assuming any insurance risk (or procuring insurance to be effected) in respect to any automobile described hereunder, such protection shall to its full extent be deemed insurance prior to this Contract.

Property Loss.

D. The liability at the Exchange shall be reduced by the amount of any property loss or damage to any automobile, described herein, whether covered hereunder or not, until repairs have been completed or parts replaced, when, if recoverable hereunder, it shall attach for amounts originally written.

Repair and Replacement.

E. The liability at the Exchange for partial loss or damage to property described hereunder is limited to the actual intrinsic value of the property destroyed, damaged or stolen at the time of the destruction, damage or loss or the cost of its suitable repair or replacement, which repair or replacement, so limited, the Attorney may accomplish by such means as he elects, or, at his option, pay in money the amount of loss as determined under Condition G.

Proof of Loss.

F. In addition to the notice provided for in Section B hereof, the Subscriber shall, within sixty days after a loss occurring under Clause one, two, or three hereof, render a written statement, signed and sworn to by him, stating his knowledge and belief as to the date and cause of the loss, the articles or parts damaged or lost, date purchased, depreciation by use, net cash value at the time of the loss, indemnity claimed, interest of the Subscriber in and encumbrances on the property and other insurance or indemnity applicable thereto. The Subscriber shall, upon request, produce any books, papers or vouchers bearing upon the claim made.

Valuation and Adjustment.

G. The amount of such damage or loss shall be ascertained by the Subscriber and the Attorney, or, if they differ, by two appraisers, one named by the Attorney and one by the Subscriber. The appraisers shall then together estimate and appraise the loss or damage, stating in a schedule the items of loss or damage, and, if they fail to agree thereon, they shall forthwith, before proceeding further, submit their differences to an umpire chosen by them, and the award in writing, sworn to by any two of them, either by the appraisers or by an umpire and an appraiser, shall fix and determine the amount of damage on the property. The Exchange and the Subscriber shall pay the appraisers respectively selected by them, and bear equally the other expenses of the appraisers and the umpire, if one is selected. No suit shall be brought until above conditions have been complied with.

Inspection.

H. The Attorney, or any of their duly authorized representatives, shall have the right and opportunity, whenever they so desire, to inspect any of these vehicles described herein, either before or after a loss has occurred.

Subrogation.

I. Upon the payment of any loss, the Exchange shall be subrogated to the extent of such loss to all rights of recovery by the Subscriber, and the Subscriber shall fully co-operate with the Exchange to secure to it such rights. The Exchange may take over and conduct, in the name of the Subscriber, the defense or prosecution of any claim or suit for indemnity, damages, or otherwise, against any third party.

Cancellation.

J. This contract may be cancelled by either of the parties, upon five days' prior written notice to the other. The date of cancellation shall then be the end of the contract period. Notice of cancellation mailed by either party hereto to the other's address herein given shall be sufficient notice (and the voucher check of the Attorney, similarly mailed, a sufficient tender of any unused advances). Upon such cancellation, the unearned portion of the premium actually paid shall be returned upon surrender of this contract, the Exchange retaining the customary short rate and in addition thereto 25% of the original premium deposit for Attorney's fees, except that when the Contract is cancelled by the Exchange it shall retain only the pro rata premium.

Concurrent Insurance.

K. If at the time of accident or loss there be any other insurance, direct or indirect, on the property covered hereby which would attach if this contract had not been written, then and in that event, this contract shall be null and void to the extent of such other insurance.

Subscriber's Right of Recovery.

L. No action by a Subscriber shall lie against the Attorney or any of the Subscribers at the Exchange to recover for any loss under this contract unless brought by the Subscriber himself, nor to recover for any loss arising under Clause four or five unless brought by the Subscriber himself to recover for moneys actually paid by him in legal tender of the United States in satisfaction of a final judgment after trial of the issue; and unless such action be brought within two years after the occurrence causing the loss or damage, or within two years from such a final judgment.

Change of Interest.

M. Any assignment or transfer of interest hereunder, whether voluntary or otherwise, shall immediately terminate this contract.

Method of Recovery.

N. In the event of litigation, to avoid a multiplicity of suits, no suit or other proceeding at law or in equity shall, in any event, be begun or maintained for the recovery of any claim upon, under or by virtue of this contract, against more than one of the Subscribers hereat at any time, nor in any court other than the highest court of original jurisdiction, and a final decision in such court or other proceeding shall be taken to be decisive of a similar claim, so far as same may subsist, against each of the other Subscribers hereat, absolutely fixing his liability in the premises. Each of the Subscribers hereat, in consideration of this entire stipulation, so far as he individually is or may be concerned, expressly agrees to accept and abide by the result of such final decision in the same manner and to the same effect as if he had been the sole defendant in a similar suit or proceeding as to a similar claim against him, so far as the same may subsist, save and except, however, as to the matter of costs and disbursements, and the Attorney is hereby authorized, as to each Subscriber hereat, to receive and admit service of process in any suit or proceeding begun or maintained as aforesaid.

Definitions.

O. The Subscribers at the Motor Car Underwriters, herein called "Exchange," are individuals, firms, and corporations that have each executed an agreement (hereby made a part hereof) which vests in the New Jersey Indemnity Company, herein called "Attorney," power to issue this contract for them. It is understood and agreed that there is assumed by each Subscriber, as if a separate contract were issued therefor, a sum which is the same proportion of the aggregate liability hereunder that each Subscriber's advances bears to the aggregate of all Subscriber's advances under all contracts in effect at the time of the loss.

Contract.

Whenever the word "Contract" occurs herein, it means, and shall be taken and construed to mean, this Contract in its entirety, which is issued to the Subscriber named herein in exchange for, and in consideration of, indemnity extended by him to other Subscribers.

Alterations or Waiver.

P. No condition or provision of this Contract shall be altered or waived except by written endorsement attached hereto and signed by the Attorney at the Exchange; nor shall notice to or knowledge possessed by any agent or other person be held to effect a waiver or change in any part of this Contract. The personal pronoun used herein to refer to the Subscriber shall apply regardless of number or gender.

Subscriber's
Advances.

Q. The Subscriber agrees to advance for his credit with the Attorney at the Exchange..... Dollars for the purpose of exchanging indemnity as herein contemplated, such advance being in no sense stipulated payment to other Subscribers for this Contract. Unless this amount is paid in full within thirty days from the date the Contract bears, the Contract shall be void from the beginning, and the risk shall not attach hereunder.

Contract
Period.

R. The Contract Period shall begin at NOON on the.....day of.....19.....and end at NOON on the.....day of.....19....., standard time at Subscriber's address

S. The following Warranties are hereby made a part of this Contract, and are acknowledged and warranted by the Subscriber to be true on acceptance of this Contract:

SCHEDULE OF WARRANTIES:

1. Subscriber's name is.....

2. Subscriber's address is No.....Town.....

3. Usual place of storage

Private garage	}	Street No.....Town.....
Public garage		

4. The automobiles are principally used at.....
(State location and where to be operated)

5. Subscriber is..... 6. Business of Applicant.....
(State whether individual, co-partnership or corporation)

7. Occupying position of..... 8. The number of automobiles owned by Subscriber is.....

9. State name of each person who drives car and how long he has driven.			
Name	Time has driven Automobile	Name	Time has driven Automobile
.....	years		years
.....	years		years

10. Subscriber or chauffeur has never been arrested for violation of traffic laws except as follows:.....

11. Subscriber has never suffered an accident except as follows:.....

12. No claim has ever been made by or against the Assured for Loss or Damage or Personal Injury caused to or by an Automobile driven by or for him except as follows:.....

13. Classes of indemnity covered.	Clause one.	Clause two.	Clause three.	Clause four.	Clause five.
	Fire	Theft	Collision Damage	Another's Property	Injuries to Persons
Amount.....\$	\$.....	\$.....	\$.....	\$1,000.00	\$ 5,000.00 death or injury, 1 person. \$10,000.00 death or injury, 2 or more persons.
Rate.....\$	\$.....	\$.....	\$.....	\$.....	\$.....
Prem. Dep. \$	\$.....	\$.....	\$.....	\$.....	\$..... Total, \$.....

14.	Trade Name of Automobile	Model No.	Factory No.	Type of Body	Motive Power	No. of Cylinders	Horse Power	Model (Year)	Year Built

15. State when purchased new, Month.....Year.....

16. Actual cost to applicant, \$..... List price, \$..... Present value \$.....

17. The purpose for which automobile is to be used.....

18. It is warranted by the Subscriber that this indemnity shall not inure to the benefit of any carrier whatever. Warranted by the Subscriber that the automobile herein described will not be used for carrying passengers for hire, or for transportation of dynamite, nitro-glycerin, or explosive powder, or rented or leased during the term of this contract; and, in event of violation of this warranty of the Subscriber, this contract shall immediately become null and void as to such automobile.

19. No other insurance covering the risks hereby is, or will be carried by Subscriber on the described automobile while this Contract is in force, without the written consent of the Exchange.

20. The automobile described herein is owned by the Subscriber and is not mortgaged or encumbered except as follows:.....

21. No automobile Insurance of the Subscriber has ever been declined or cancelled except as follows:.....

IN WITNESS WHEREOF the Subscribers at the Motor Car Underwriters at New Jersey Indemnity Exchange have caused these presents to be signed by their Attorney, on this, the.....day of.....19....

NEW JERSEY INDEMNITY COMPANY,
Attorney-in-Fact.

Attest

.....Secretary.....President.

(This space is intended for the attachment of such statements, conditions, provisions or agreements by way of endorsement as may be executed as provided in the Policy, and, when so executed and attached, they are considered as a part of the Policy.)

No. 3760

Motor Car Underwriters
at
New Jersey Indemnity Company

New Jersey Indemnity Company
Attorney-in-Fact
45 Clinton Street, Newark, N. J.

Subscriber

Address

AUTOMOBILE

Effective

Expires

Premium Deposit, \$

TAKE NOTICE.

DON'T fail to notify the Home Office of the Exchange, at Newark, N. J., of EVERY ACCIDENT, HOWEVER SLIGHT, IMMEDIATELY upon occurrence.

If accident is fatal or involves SERIOUS INJURY, TELEGRAPH or TELEPHONE at Exchange's expense, giving date of inquest, if one is to held.

DO NOT DELAY sending in notice, even through full information is not available. Send completed notice later.

MOTOR CAR UNDERWRITERS

Exchange Building, 45 Clinton Street, Newark, N. J.

RECIPROCAL AUTOMOBILE INDEMNITY

NEW JERSEY INDEMNITY COMPANY
ATTORNEY-IN-FACT

TEL. 3611 MARKET

APPLICATION, AGREEMENT AND POWER OF ATTORNEY

WHEREAS, the undersigned, hereinafter called "Subscriber," with a view of escaping excessive insurance rates, and of securing adequate protection against loss, agree, with other subscribers, to obtain such indemnity by the exchange of private contracts:

Appointment
of Attorney.

NOW THEREFORE, To that end, the office of the New Jersey Indemnity Company, at Newark, N. J., having been selected by Automobile owners as a place at which they may exchange indemnity, such place being called "Motor Car Underwriters at New Jersey Indemnity Exchange," I, as a subscriber thereat, hereby appoint the New Jersey Indemnity Company my Attorney-in-Fact, with power to substitute any other person or persons they may select, but said Attorney may transfer their office or offices to any other place or places in the State of New Jersey, subject to the approval of a majority of the Board of Trustees.

Attorney's
Authority.

My Attorney shall exchange for me indemnity with other subscribers at said Exchange, and have full power to do or perform every act I myself could do in relation to any such contracts of indemnity, including the appearance for me in actions, suits and proceedings, and the defense, compromise or adjustment of same, PROVIDED, however, that my Attorney shall not make me jointly liable with any other subscriber, but shall bind me separately and for myself alone, and for not more than one annual premium deposit on any one contract, which amount I hereby subscribe for the payment of excess losses, subject to the call of the Board of Trustees.

Subscriber's
Liability
Limited.

Individual
Accounts.

There shall be no joint funds, capital or stock, but my Attorney shall keep a separate account (open to my inspection) of all monies advanced by me as a result of this instrument.

Trustees.

A Board of Trustees of from five to fifteen, with tenure of office running one year, shall be selected from the subscribers. In choosing successors, the Attorney is authorized to ask subscribers whom they desire to serve on such Board. Members of the Board shall continue to serve until their successors have been chosen and have qualified. If any member of said Board shall cease to write indemnity, or if his Power of Attorney be revoked or cancelled, he shall immediately cease to be a member of the Board and the remaining members shall fill the vacancy.

Depository
for Funds.

Subscribers' funds shall be deposited in banks or invested in securities, subject to the approval of the Board of Trustees, and all disbursements shall be by voucher check signed by the Attorney. My Attorney shall pay out of my funds, my proportion of the necessary expenses and of the cost of any and all claims or demands, as adjusted, contested, compromised or reduced to judgment. In full consideration for their services, and the payment by them of all clerical help and office rent, my Attorney is authorized to retain 25% of all deposits of money made by me with the Motor Car Underwriters at New Jersey Indemnity Exchange.

Payment of
Losses.

Expense
Limited.

Attorney's
Bond.

The Attorney-in-Fact shall give a bond for the faithful performance of all duties, in such reasonable amount as the Board of Trustees may from time to time direct; said Bond to be approved by the said Board.

Cancellation.

This instrument may be revoked or cancelled by either party giving the other ten days' prior notice in writing, and notice mailed by either party to the other's address as herein given shall be sufficient notice. Thereupon my Attorney shall cancel all unexpired indemnity granted by me through them in accordance with the terms of the policy, liquidate my account, and return to me my net surplus and unused advances.

Agreement
Effective.

This instrument shall take effect on date policy becomes effective, when said Attorney is authorized to issue to me contract of indemnity in accordance with the following schedule. This Power of Attorney shall also apply to any additional protection hereafter applied for in the same manner as if written in this original schedule, and my limit of indemnity to be modified accordingly.

A personal pronoun herein used to refer to the Subscriber shall apply regardless of number or gender.

(Continued on Reverse Side)

SCHEDULE OF WARRANTIES.

The following Warranties will be incorporated in the Contract and become the Warranties of the Subscriber upon its delivery and acceptance, said Contract to become effective noon.....19....

1. Subscriber's name is.....
(To prevent errors, write or print names of applicant very plainly)
2. Subscriber's address is No.....Town.....State.....
3. Usual place of storage Private garage }
Public garage } Street No.....Town.....
4. The automobiles are principally used at.....
(State location and where to be operated)
5. Subscriber is.....
(State whether individual, co-partnership, or corporation)
6. Business of applicant.....
7. Occupying position of.....
8. The number of automobiles owned by Subscriber is.....
9. State name of each person who drives car and how long he has driven.

Name	Time has driven Automobile	Name	Time has driven Automobile
.....	years		years
.....	years		years

10. Subscriber or driver has never been arrested for violation of traffic laws except as follows.....
11. Subscriber has never suffered an accident while driving an automobile except as follows.....
(Describe fully)
12. No claim has ever been made by or against Subscriber for Loss or Damage or Personal Injury caused to or by an automobile driven by or for him, except as follows:.....
13. Classes of indemnity covered.

Clause one Fire	Clause two. Theft	Clause three. Collision Damage	Clause four. Another's Property	Clause five. Injuries to Persons
Amount... \$.....	\$.....	\$.....	\$1,000.00	\$ 5,000.00 death or injury, 1 person. \$10,000.00 death or injury, 2 or more persons
Rate..... \$.....	\$.....	\$.....	\$.....	\$.....
Prem. Dep. \$.....	\$.....	\$.....	\$.....	\$..... Total, \$.....

Trade Name of Automobile	Model No.	Factory No.	License No.	Type of Body	Motive Power	No. of Cylinders	Horse Power	Model (Year)	Year Built

14. State when purchased new, Month.....Year.....
15. Actual cost to applicant, \$..... List price, \$..... Present value, \$.....
16. The purpose for which automobile is to be used.....
17. It is warranted by the Subscriber that this indemnity shall not inure to the benefit of any carrier whatever. Warranted by the Subscriber that the automobile herein described will not be used for carrying passengers for hire, or for transportation of dynamite, nitroglycerin, or explosive powder, or rented or leased during the term of this contract; and, in event of violation of this warranty of the Subscriber, this contract shall immediately become null and void as to such automobile.
18. No other insurance covering the risks hereby is, or will be carried by Subscriber on the described automobile while this contract is in force, without the written consent of the Exchange.
19. The automobile described herein is owned by the Subscriber and is not mortgaged or encumbered except as follows:.....
20. No Automobile Insurance of the Subscriber has ever been declined or cancelled except as follows:.....

IN WITNESS WHEREOF I have hereunto set my hand and seal this.....day of.....19....

Endorsed by:.....

Applicant.

New Jersey Court of Errors and Appeals

LOUIS SOLOMON, *et al*,

Plaintiffs-Respondents,

vs.

NEW JERSEY INDEMNITY COMPANY, a corporation,

Defendant-Appellant.

*On Appeal from
Supreme Court.*

*Justices Swayze
and*

BRIEF FOR APPELLANT.

Statement of the Case.

The appeal is from a judgment of the Supreme Court affirming a judgment of the District Court of East Orange in a suit brought by respondents against the New Jersey Indemnity Company, appellant, to recover upon a contract of insurance made by the Motor Car Underwriters at New Jersey Indemnity Exchange.

The suit was brought against the New Jersey Indemnity Company as the insurer and judgment was rendered against the Company in its personal capacity.

The contention of appellant in the District and Supreme Courts was that the contract showed that it was made by the New Jersey Indemnity Company as an attorney-in-fact or as agent, and that there was no proof from which any liability could be predicated against the New Jersey Indemnity Company, a corporation, in its personal capacity.

The District Court held that suit was authorized against the attorney-in-fact under clause L of the contract, page , construing the words "No action by the subscriber shall lie against the attorney or any of the subscribers at the Exchange to recover for any loss under this contract except," etc., as by implication authorizing an action against the attorney. The Supreme Court disregarded the views of the District Court, and as I understand its opinion, held that inasmuch as the principals were not named in the contract, the burden was on the Indemnity Company of rebutting a presumption that it was intended that it should be responsible, and that it had not carried its burden.

There is language in the opinion indicating that the Supreme Court might have taken a different view of the contract. This language is as follows:

“Looking at all these provisions in a broad way to reach the real intent of the parties and not merely with grammatical, rhetorical or even legal nicety, although these support the same view, we think the contract was meant to be a contract of insurance by the New Jersey Indemnity Company, acting not as agent for the subscribers but as an insurance company, in which the subscribers were interested pretty much as stockholders, liable to contribute a certain amount by way of subscription to the liability of the Indemnity Company from time to time to the extent of a proportionate share of each separate loss as it occurred and limited to an obligation to pay the proportion of the aggregate liability as set forth in paragraph O of the policy. In this view the New Jersey Indemnity Company is the medium by which each subscriber fulfilled his obligation to indemnify each of his fellow subscribers who suffered a loss, and received from each of his fellow subscribers the indemnity to which he was entitled.”

While this language was not necessary to the decision it is impossible to pass it without notice because of its claimed effect upon a case now on appeal in the Supreme Court brought by the State of New Jersey against the New Jersey Indemnity Company for an alleged violation of section 88 of an act entitled: “An Act to provide for the regulation and incorporation of insurance companies and to regulate the transaction of insurance companies in this State, Chapter 134 of the Laws of 1902, 2 C. S., p. 2867, it being insisted by the State that the Indemnity Company is transacting an insurance business in acting as attorney in fact in these contracts of insurance without being authorized by law. That case has been argued and briefed in the Supreme Court and there is submitted herewith a copy of the brief. It involves fundamental and underlying principles and is undoubtedly on its way to this court. The amount involved in the instant case is small. The effect of the decision, however, if there be considered the language of the opinion of the Supreme Court, goes to the very heart of the right to effect inter-indemnity or reciprocal insurance in this State.

GROUND S OF APPEAL.

As indicated in the statement of the case the District Court and the Supreme Court both held that the appellant, the Indemnity Company, was liable in its personal or individual capacity. It is insisted that both courts erred and that the Indemnity Company if liable to be sued under clause L was liable to be sued only as attorney-in-fact, and that this appears from a construction of the whole contract.

ARGUMENT.

I.

The nature of the contract and the obligations of the parties.

The contract consists of two parts, both in evidence: the application, containing an agreement and power of attorney, and the policy. The application agreement and power of attorney commences:

“Whereas, the undersigned, hereinafter called ‘Subscriber,’ with a view of escaping excessive insurance rates, and of securing adequate protection against loss, agree, with other subscribers, to obtain such indemnity by the exchange of private contracts;

“Now, therefore, to that end, the office of the New Jersey Indemnity Company, at Newark, N. J., having been selected by Automobile owners as a place at which they may exchange indemnity, such place being called ‘Motor Car Underwriters at New Jersey Indemnity Exchange,’ I, as a subscriber thereat, hereby appoint the New Jersey Indemnity Company my Attorney-in-fact, with power to substitute any other person or persons they may select, but said Attorney may transfer their office or offices to any other place or places in the State of New Jersey, subject to the approval of a majority of the Board of Trustees.

“My Attorney shall exchange for me indemnity with other subscribers at said Exchange, and have full power to do or perform every act I myself could do in relation to any such contracts of indemnity, including the appearance for me in actions, suits and proceedings, and the defense, compromise or adjustment of same, provided, however, that my Attorney shall not make me jointly liable with any other subscriber, but shall bind me separately and for myself alone, and for not more than one annual premium deposit on any one contract, which amount I hereby subscribe for the payment of excess losses, subject to the call of the Board of Trustees.

“There shall be no joint funds, capital or stock, but my Attorney shall keep a separate account (open to my inspection) of all moneys advanced by me as a result of this instrument.”

The instrument then provides for the appointment of a board of trustees. It then provides that the subscribers' funds shall be deposited in banks or invested in securities, subject to the approval of the Board of Trustees, and all disbursements shall be by voucher or check signed by the attorney. It then provides that the attorney shall pay out of the subscribers' funds his proportion of the necessary expenses and of the cost of any and all claims or demands, and that in full consideration for its services, and the payment by it of all clerical help and office rent, the attorney is authorized to retain twenty-five per cent. of all “deposits of money made by me with the Motor Car Underwriters at New Jersey Indemnity Exchange.”

Each person obtaining insurance is a subscriber and each insured signs an application agreement and power of attorney such as I have indicated. One was signed by the plaintiff in the instant case (Exhibit P. 2). The policy or contract is then issued and was issued in this case (Exhibit P. 1) the pertinent parts of which are as follows. It commences:

“Subscribers to Motor Car Underwriters at New Jersey Indemnity Exchange, Newark, New Jersey, in consideration of the premium deposit herein provided and in pursuance of the application and the statements made herein, which is hereby made a warranty and a part of this policy, do hereby severally agree to indemnify the subscriber named herein,”

and then follows the kind of loss insured against.

Certain conditions are printed in the contract or policy, the pertinent parts of which are as follows:

Condition B provides that the subscriber shall give the attorney notice of any accident, claim, loss or suit. It provides that upon notice being sent to the attorney of any suit brought against the subscriber on behalf of third persons “The Exchange will, at its own cost, defend, in the name and in behalf of the subscriber suits covered in clause four and five hereof.”

Condition D provides that the liability at the Exchange shall be reduced by the amount of property loss or damage, &c.

Condition G: “The amount of such damage or loss shall be ascertained by the subscriber and the attorney,” and

"The Exchange and the subscriber shall pay the appraisers respectively selected by them."

Condition H provides that the attorney shall have the right and opportunity to inspect.

Condition I provides that upon payment of any loss, the Exchange shall be subrogated to the extent of such loss to all rights of recovery by the subscriber, and the subscriber shall fully co-operate with the Exchange to secure to it such rights. The Exchange may take over and conduct, in the name of the subscriber, the defense or prosecution of any claim or suit, &c.

Condition J provides for cancellation and that upon cancellation by notice from the subscriber "the Exchange" shall retain the customary short rate, and in addition thereto twenty-five per cent. of the original premium deposit.

Condition L provides:

"No action by a Subscriber shall lie against the Attorney or any of the Subscribers at the Exchange to recover for any loss under this contract unless brought by the Subscriber himself, nor to recover for any loss arising under clause four or five unless brought by the Subscriber himself to recover moneys actually paid by him in legal tender of the United States in satisfaction of a final judgment after trial of the issue; and unless such action be brought within two years after the occurrence causing the loss or damage, or within two years from such a final judgment."

Condition N:

"In the event of litigation, to avoid a multiplicity of suits, no suit or other proceeding at law or in equity shall, in any event, be begun or maintained for the recovery of any claim, upon, under or by virtue of this contract, against more than one of the Subscribers hereat at any time, nor in any court other than the highest court of original jurisdiction, and a final decision in such court or other proceeding shall be taken to be decisive of a similar claim, so far as same may subsist, against each of the other subscribers hereat, absolutely fixing his liability in the premises. Each of the Subscribers hereat, in consideration of this entire stipulation, so far as he individually is or may be concerned, expressly agrees to accept and abide by the result of such final decision in the same manner and to the same effect as if he had been the sole defendant in a similar suit or proceeding as to a similar claim against him, so far as the same may subsist, save and except, however, as to the matter of costs and disbursements, and

the Attorney is hereby authorized, as to each Subscriber hereat, to receive and admit service of process or proceeding begun or maintained as aforesaid."

Condition O:

"The Subscribers at the Motor Car Underwriters, herein called 'Exchange,' are individuals, firms, and corporations, that have each executed an agreement (hereby made a part hereof) which vests in the New Jersey Indemnity Company, herein called 'Attorney,' power to issue this contract for them. It is understood and agreed that there is assumed by each Subscriber, as if a separate contract were issued therefor, a sum which is the same proportion of the agreement liability hereunder that each Subscriber's advances bears to the aggregate of all Subscriber's advances under all contracts in effect at the time of the loss."

The contract is signed "In witness whereof the subscribers at the Motor Car Underwriters at New Jersey Indemnity Exchange have caused these presents to be signed by their Attorney, on this _____ day of _____, 192 .

New Jersey Indemnity Company, Attorney in fact, by President."

The method of doing business indicated by these instruments have been before the courts in other jurisdictions and no difficulty has been indicated by those courts in arriving at the meaning of the language used or of the intent of the parties.

Blanchard & Company v. Hamblin, Manager, &c., 162 Mo. Appeals, 242; 144 S. W., 880 (Kansas City Court of Appeals).

State ex rel Revell, 257 Mo. Rep., p. 529; 165 S. W., 1084.

In explaining the method I may use the language slightly changed of John C. Barker, who was the Attorney General of Missouri, and represented the Superintendent of Insurance, in *State v. Revell, supra*, in an opinion which he rendered on May 7th, 1914, to the Superintendent of Insurance, a copy of which opinion is printed and made a part of this brief.

Certain individuals engaged in a similar line of business reciprocally agree with each other through private contracts to indemnify each other from loss from the causes set forth in the contract; through these contracts each one agrees to pay a certain proportion of any loss sustained by any other party to the contract or agreement; the contracting parties are termed "subscribers"; an office is established at some

convenient point where the books and accounts are kept; this office is called an "Exchange," this for the reason that it is the place where the reciprocal contracts are exchanged. Because of the fact that it would be inconvenient and impracticable to send each contract to the different subscribers for their signature, a common attorney in fact is appointed by written power of attorney to act for each of the subscribers in the execution of these contracts, in the keeping of the books of account and other records in the inspection of risks and in the adjustment and payment of losses; to avoid the levying of assessments as each loss occurs, each subscriber deposits annually with the attorney in fact a certain sum of money; these deposits are placed to the individual credit of the subscriber making same and as losses occur the proportionate part due from each subscriber is charged against his account at the end of the year whatever amount remains to his credit is returned to him in cash or remains to his credit at the Exchange as a guarantee for the payment of his proportion of excess losses; if, on the other hand, the deposit made is insufficient to pay the proportionate part of the subscriber of any losses, then under the provisions of the power of attorney the attorney in fact levies such assessment as may be necessary. There are no joint funds, capital or stock, and the attorney in fact is directed to keep a separate account of all money advanced as a result of the contract.

For its services the attorney in fact is authorized to retain twenty-five per cent. of deposits made by the subscribers. The insurance is not for profit. The purpose is for each individual subscriber to secure indemnity at cost.

The Attorney General of Missouri further stated:

"It is, therefore, the opinion of this department, that individual members or subscribers at reciprocal or inter-insurance exchanges, making contracts of indemnity reciprocally among themselves, and not dealing with the public generally, or the attorney in fact or manager representing them in good faith, are not engaged in the business of insurance within the meaning of our insurance laws and, therefore, are not violating the laws of this State."

That the business conducted by the New Jersey Indemnity Company and by the subscribers, if business it may be called, is not contrary to the laws of this State was fully argued in the Supreme Court in the matter of "THE STATE OF NEW

JERSEY AGAINST NEW JERSEY INDEMNITY COMPANY," the brief in which is herewith submitted to this court.

The Supreme Court in its statement of facts in the case at bar states that

"No agreement such as is said to have been executed by the Subscribers to Motor Car Underwriters herein called Exchange and made part of the policy is produced nor are the names of the underwriters made known."

The Supreme Court, with respect to the agreement, has reference to Clause O of the contract, which contains the language:

"The Subscribers at the Motor Car Underwriters, herein called 'Exchange,' are individuals, firms, and corporations that have *each executed an agreement* (hereby made a part hereof) which vests in the New Jersey Indemnity Company, herein called 'Attorney,' power to issue this contract for them."

It is insisted that the Supreme Court was mistaken when it stated that this agreement was not produced. It is Exhibit P.2 and is headed, "Application, agreement and power of attorney." It is signed by the subscriber and expressly gives the attorney in fact power to issue the contract of insurance for the subscriber. Each subscriber executes a similar agreement.

The Supreme Court had difficulty with the use of the word "Exchange."

It is submitted that it is quite clear from the context of the two instruments just what is intended by the use of this word. In the application, agreement and power of attorney it is specifically stated that the place where the insurance contracts are written or exchanged is called "Motor Car Underwriters at New Jersey Indemnity Exchange." In the contract or policy the word "Exchange" is used in another sense. It is there used to indicate the subscribers as a whole as where it is stated the "Exchange" will or will not do certain things, as for instance, in condition "B" that the "Exchange" will, at its own cost, defend; in Condition "I" that the "Exchange" shall be subrogated; in Condition "J" that the "Exchange" shall retain the customary short rate or the pro rata rate as the case may be. This use of the word "Exchange" is clearly indicated in condition "O," which reads:

"The Subscribers at the Motor Car Underwriters, herein called 'Exchange,' are individuals, firms, and corporations that have each executed an agreement (hereby made a part hereof) which vests in the New Jersey

Indemnity Company, herein called 'Attorney,' power to issue this contract for them."

The word is never used to indicate the Indemnity Company.

The Supreme Court, in its opinion, said:

"The language of the policy is confused. In some places it indicates that the Subscribers are liable; in other places that the Exchange (whatever that may mean) is liable; in other places that the attorney in fact is liable."

It is respectfully submitted that when the application, agreement, power of attoreny and policy are considered together, as they must be, there is no confusion whatever, and it is respectfully urged that there is not within the four corners of these papers any intimidation that under any circumstances the attorney shall be liable for a loss. The moment it is realized that the word "Exchange" is used in the sense of a place where these contracts are exchanged and as a word which indicates the "Subscribers" as a whole, the apparent confusion, if there be any, ceases.

By the application, agreement and power of attorney, the applicant constitutes the Indemnity Company as attorney in fact with power for him to exchange obligations. The purpose of the agreement is expressed, *i. e.*, the exchange of indemnity. It is further expressed to be the obtaining of such indemnity by the "*exchange of private contracts.*" The contract purports to be made by the "Subscribers to Motor Car Underwriters at New Jersey Indemnity Exchange" (that is to say, those who have signed agreements similar to that signed by the subscriber in the case at bar constituting the New Jersey Indemnity Company their attorney in fact). The subscribers, in the language of the contract, "do hereby severally agree to indemnify the Subscriber named herein." That there may be no doubt as to the intent condition O provides:

"The Subscribers at the Motor Car Underwriters, herein called 'Exchange,' are individuals, firms and corporations that have each executed an agreement (hereby made a part hereof) which vests in the New Jersey Indemnity Company, herein called 'Attorney,' power to issue this contract for them. It is understood and agreed that there is assumed by each Subscriber, as if a separate contract were issued therefor, a sum which is the same proportion of the aggregate liability hereunder that each Subscriber's advances bears to the aggregate of all Subscriber's advances under all contracts in effect at the time of the loss."

The contract closes "In witness whereof the Subscribers at the Motor Car Underwriters at New Jersey Indemnity Exchange have caused these presents to be signed by their Attorney on this, the day of . Signed, New Jersey Indemnity Company, Attorney in fact."

It is quite clear from the instruments that the word "Exchange" does not mean the attorney in fact, and I cannot find any words which indicate an intent to impose any liability upon the New Jersey Indemnity Company except such liability as is imposed upon it as an agent or trustee.

It is submitted that there is nothing in the instruments which warrants the language of the Supreme Court:

"Looking at all these provisions in a broad way to reach the real intent of the parties and not merely with grammatical, rhetorical or even legal nicety, although these support the same view, we think the contract was meant to be a contract of insurance by the New Jersey Indemnity Company, acting not as agent for the Subscribers but as an insurance company, in which the Subscribers were interested pretty much as stockholders, liable to contribute a certain amount by way of subscription to the liability of the indemnity company from time to time the extent of a proportionate share of each separate loss as it occurred and limited to an obligation to pay the proportion of the aggregate liability as set forth in paragraph 'O' of the policy."

This construction, I insist, is contrary to the express words of the instruments, the manifest intent of the parties, and to the construction which has been put upon similar instruments by every court in which the question has arisen.

II.

Clause L does not authorize a suit against the Attorney In Fact in its individual capacity.

The District Court apparently rested its conclusion that there might be recovery against the New Jersey Indemnity Company individually upon the provisions of Clause L. That clause provides that no action "by a subscriber shall lie against the attorney or any of the subscribers at the Exchange unless brought, etc." This clause, particularly in view of the other provisions of the contract, is not sufficiently broad to permit an action against the attorney in fact in its individual capacity.

It is my contention that it is not sufficiently broad to permit an action against the attorney in fact at law for any purpose. There are under the contract certain duties which the attorney in fact as such must perform. It must keep the funds, render accounts, cause moneys to be collected, pay losses out of designated funds, etc., and these duties if neglected it may be forced to perform by a court of equity. It is my insistence that the only purpose of the insertion of the word "attorney" in Clause L was to provide a limitation with respect to such actions. The clause does not purport to give a right to sue. But if it did the suit must be based upon some right of action existing against the attorney in fact and that right of action must be found elsewhere in the contract, for it is not found in Clause L. Nor is it found elsewhere, for there are no provisions in the contract which makes the attorney in fact individually responsible to the insured. Indeed, it may be claimed that if such a provision purported to permit a suit against the attorney in fact such provision would be void.

Enterprise Lumber Co. v. Mundy, 62 N. J. L., 16.

In the Mundy case, it was held by the Supreme Court (and the case is a leading case in the country) that where the attorneys in fact are *also underwriters* and *so named in the policy* a stipulation that no action shall be brought except against the attorneys in fact is valid. And the Court said, p. 29: "In these latter cases the attorneys in fact were underwriters, and there seems to be a clear distinction between such cases and those cases where the attorneys were strangers to the contract and were merely attorneys, and were not otherwise interested, and therefore beyond the consideration of the contract." In the case at bar the attorney in fact is a stranger to the contract. It is merely an attorney. And as the Supreme Court said in *Enterprise Lumber Co. v. Mundy*, p. 27, referring to *Evans v. Hooper*, 1 Q. B. Div. 45, "an action could not be maintained by or against a mere agent as he was not a party to the contract at all, and as between the plaintiff and defendant there was no consideration for the promise."

But if it be held that under Clause L the subscribers have agreed to abide by the result of any judgment against the attorney in fact and the attorney in fact has agreed to permit a suit to be brought against it and that such provision is legal, then the action must be against the attorney in fact as such. This is the practice in cases involving Lloyds insurance. In the

case of the *Enterprise Lumber Co. v Mundy*, it appears from a consideration of the case on page 19 that the action against the attorney-in-fact was brought against the attorney-in-fact as such, and it cannot be otherwise. The New Jersey Indemnity Company has assumed no personal liability. The judgment rendered in this action, however, is against the New Jersey Indemnity Company and its assets may be taken in satisfaction thereof. The assets of the New Jersey Indemnity Company are not liable for the claim. The effect of the proper judgment, as was said by the Supreme Court in the Mundy case, "is to fix the individual liability of each of the underwriters to be enforced if the funds named in the condition are not in existence to satisfy it by a separate action or proceeding against each of the underwriters. The policy clearly provides that each of the underwriters answers for his own proportionate share of loss and not for the loss of any other underwriter, and as no statute has been cited which provides a legal name for such an unincorporated association, the action, of course, must be against each individual underwriter for his proportionate liability."

"The conclusion reached is that the judgment in New York against Beecher and White was only a valid one for the purposes expressed in the condition precedent in the policy, in order to reach certain funds in the hands of the attorneys in fact and as a condition precedent required by the contract of insurance, in order to establish the liability of the defendant, to be enforced against him by an ordinary action at law."

"In other words, the object and effect of such action and judgment, so far as the defendant here is concerned, was the ascertainment of the amount that was due from him to the plaintiff. The effect of the judgment is simply to adjust the amount which is due from each underwriter and necessary to be averred as a condition precedent to recovery."

What the plaintiffs are entitled to if they may sue the attorney in fact at all is a judgment which will reach the funds in the hands of the attorney in fact belonging to the underwriters and a judgment which will establish the amount of their claim as against all of the underwriters should it be necessary to bring an action against them individually. The judgment also might give them the right to apply to a court of equity to compel the attorney in fact to exercise its power to collect in funds to pay the judgment. The plaintiffs are not entitled to any

judgment that the New Jersey Indemnity Company as such should pay the losses and that is the effect of the judgment recovered in the instant case.

It is insisted, therefore, that if the plaintiffs were under the contract permitted to sue the attorney in fact they were bound to sue it as attorney in fact.

III.

The rule that where a principal is not known the agent is liable does not apply.

The Supreme Court intimated that the case came within the rule stated by Pollock (7th English edition, 99), that when the principal is not named, although the agent is known to be an agent, *prima facie* the agent binds himself personally, the other party not being presumed to give credit exclusively to the unknown principal.

This rule is based upon a presumption and ought never apply where the express agreement of the parties indicates the contrary.

The Supreme Court considered this to be the law when it stated: "We think the question is to be determined in each case by the intention of the parties ascertained in accordance with settled rules of construction and in view of all the language of the contract."

It then applied, what it termed, a subsidiary rule in construing a contract by an agent, *i. e.*, where nothing appears in the body of the contract to indicate the maker, and it is subscribed by a person who adds words to his signature indicating that he signs it in a representative capacity, the obligation is *prima facie* that of the person subscribing. But this presumption if there be such is disputable, and parol evidence is admissible to show the intention of the parties and the right of the signer to bind the person whom he claims to have represented. The Supreme Court said that the policy was *prima facie* the contract of the New Jersey Indemnity Company, and that there was no parol proof to explain or qualify the liability.

The rule may be that where an instrument upon its face does not appear to be made on behalf of a principal or an agent, and the signature only contains words indicating that the signer acts as agent, the obligation is *prima facie* that of the person

subscribing, but this rule should not apply where the instrument upon its face indicates that the liability is intended to be not that of the person signing but of a principal, and if the instrument upon its face so indicates the fact that the principal is unnamed or even unknown does not make any difference. As the Supreme Court said, "The question is one of intent."

It is conceded that there are some cases in this country which state the rule broadly that where an agent contracts and does not disclose the name of his principal, although it is clear that he is contracting for a principal, nevertheless he, the agent, is liable.

See the cases cited in *Williston on Contracts*. In section 285, Williston says with respect to this rule:

"It is not infrequently laid down broadly that if an agent discloses the fact that he is an agent, but not the name of the principal, he is personally liable. This, however, cannot be literally true. It must everywhere be possible by language clearly indicating that the agent intends to assume no liability, and that all rights and liabilities are to be those of an unnamed principal to produce the desired result. * * * The imposition of liability on the agent where he has stated plainly that he is contracting on behalf of an unnamed principal can certainly not be defended on ordinary principles of contract, and if supported, must be based on requirements of policy. In England the rule is less artificial than in the United States. If an agent contracts merely as such he is not liable personally, even if he does not name his principal."

An examination of the cases referred to,

47 L. R. A., N. S., 232;

27 L. R. A., 503;

6 A. L. R., 649.

will, I think, indicate that while some of the cases in the United States contain the broad statement indicated by Pollack and Williston, nevertheless, in most of the cases where the rule has been applied, it will be found that the language of the contract was of such a nature as might lead the other contracting party to believe that the agent intended to bind himself. In other words that the contract made by the agent was "in such form" as to make him personally responsible.

The broad rule referred to by Williston has never been adopted by the courts in this State.

In *Sadler v. Young*, 78 N. J. L., 594, at p. 596, this Court said:

“Since the decision of *Kean vs. Davis*, Spenc., 425; S. C. on Error, 1 Zab., 683, the law has been settled in this State that an agent who *contracts in such form* as to make himself personally responsible cannot afterwards, whether his principal was or was not known at the time of the making of the contract, relieve himself from that responsibility.” (Italics mine.)

In *Phelps v. Weber*, 84 N. J. L., 630, at p. 632, this Court said:

“The rule to be adduced from the case of *Kean vs. Davis*, 1 Zab., 683; *Reeve vs. First National Bank*, 25 Vroom, 208; and *Simanton vs. Vliet*, 32 *Id.*, 595, is that where nothing appears in the body of the contract to indicate the maker, and it is subscribed by a person who adds words to his signature indicating that he signs it in a representative capacity, the obligation is, *prima facie*, that of the individual; but this presumption is disputable, and parol evidence is admissible to show the intention of the parties and the right of the signer to bind the person whom he claims to have represented.”

This was the rule relied upon by the Supreme Court as a subsidiary rule of construction as it stated in holding that the obligation under the contract was *prima facie* that of the person subscribing.

But this rule only applies under the cases to those instances where there is nothing upon the face of the contract to indicate who the maker is and where there is added to the signature of the subscriber words indicating a representative capacity. The instrument in the case at bar is not signed by the Indemnity Company as such with words added indicating a representative capacity within the meaning of the rule. The signature must be taken in connection with the clauses preceding which indicate that it is the subscribers who are signing *by* their attorney in fact. The cases are important, however, as indicating that it is not the rule in this State that the mere failure to disclose the principal's name is sufficient to fix responsibility upon the agent.

IV.

The principals were disclosed within the meaning of the rule.

As stated in 21 Ruling Case Law, title "Principal and Agent," sec. 71:

"It becomes a very close question at times whether the facts were such as to impute knowledge of the principal's existence and identity. It has been held that when an agent of a corporation, without expressly binding himself, requests an architect to prepare plans and specifications for a college building, the latter knowing such building to be intended for a public, and not for a private, purpose, and being aware of circumstances, which, if inquired into, would have developed a responsible principal, such agent will not be personally bound for services rendered, in the preparation of such plans and specifications."

See,

Johnson v. Armstrong, 83 Tex., 325; 18 S. W., 594; 29 A. S. R., 648.

And see,

Mercer v. Leigy, 139 Mich., 453, 122 N. W., holding that where an auctioneer discloses the fact that he is acting on behalf of his principal he is presumed to be contracting for the latter and not for himself.

In the *Mercer* case the principal was not named but was present and was pointed out.

And Williston says, sec. 288:

"It is said that the duty is on the agent to make the disclosure, not upon the person with whom he is dealing to discover it. Therefore, it is not sufficient to relieve the agent from personal liability that the person with whom he dealt had means of knowing that the agent was acting as such. But on the other hand, the general principles governing the formation of contracts require the conclusion that if the agent gave such information that a reasonable person in the light of the surrounding circumstances would have understood that the agent was acting for a principal indicated although not named, the contract is with the principal and not with the agent."

In the case at bar it is clearly stated in the contract that it is made on behalf of the subscribers and Condition O of the contract states that the subscribers are individuals, firms and corporations, that each executed an agreement which vests in

the New Jersey Indemnity Company called the "Attorney" power to issue the contract for them. This contract was in evidence and is signed by each one of the subscribers. The principals, therefore, were quite clearly pointed out as the subscribers to the plan, of whom the insured was one, for he was obliged to become a subscriber before he obtained his insurance.

V.

The insured was bound by the acts and by the knowledge of the New Jersey Indemnity Company as attorney in fact.

It must not be overlooked in this case that the New Jersey Indemnity Company was not only the attorney in fact for other subscribers who became bound by the contract, but it was also the attorney in fact for the insured. By the agreement, Exhibit P. , the insured constituted the New Jersey Indemnity Company as attorney in fact for the purpose of exchanging for him indemnity with other subscribers at the Exchange and by that power of attorney the insured gave the New Jersey Indemnity Company full power and authority to do and perform every act which he might do in relation to any such contracts of insurance.

It was acting in pursuance of this power of attorney signed by the insured constituting the New Jersey Indemnity Company the insured's attorney in fact that the New Jersey Indemnity Company as attorney in fact for the subscribers, in pursuance with the power of attorney and other similar powers of attorney executed to it, delivered to the insured the contract in question. The New Jersey Indemnity Company having performed all of these acts within the scope of the authority conferred upon it by the insured, it is insisted that the insured is bound by the acts and by the knowledge of the New Jersey Indemnity Company. The insured unquestionably has the right to call upon the New Jersey Indemnity Company as his attorney in fact to disclose to him the names of the other subscribers so that he may sue them. He has the undoubted right to call upon the New Jersey Indemnity Company to account for its acts as attorney in fact. But can he call upon the New Jersey Indemnity Company to pay the amount of insurance where it is quite clear that under the scheme to which he is a party it was not intended the New Jersey Indemnity Company should be

individually responsible and where whatever the New Jersey Indemnity Company has done has been in pursuance of authority given to it by him.

The effect of the decision of the Supreme Court is to permit the insured to disregard the express terms of the power of attorney signed by him because of the assumed application of a technical rule of contract law having relation to principal and agent, and never applied, so far as I have been able to discover, to a case where the contracting agent was agent for both parties to the transaction.

Conclusion.

It is respectfully submitted that the judgment of the Supreme Court should be reversed.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Appellant.

INDEX.

New Jersey State Library

