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NOTICE OF APPEAL AND GROUNDS.

Filed July 3, 1928.

New Jersey Supreme Court

JOSEPH ROTH and MINNIE ROTH,
Plaintiffs-Respondents,

vs.

GENERAL CASUALTY & SURETY COMPANY, a corporation,
Defendant-Appellant.

Action at Law.

Notice of Appeal and Grounds.

To Abe J. David, Esquire, attorney for plaintiff-respondent, Minnie Roth.

TAKE NOTICE that the appellant, General Casualty & Surety Co., appeals to the Court of Errors & Appeals of the State of New Jersey from the whole of the judgment entered in this cause upon the following grounds:

1. Because the Trial Judge upon the trial of said cause directed a verdict in favor of the plaintiff, Minnie Roth and against the defendant over the objection of the defendant, whereas the said Trial Judge should have submitted the case to the jury for its verdict.

2. Because the Trial Judge upon the trial of said cause directed a verdict in favor of the plaintiff, Minnie Roth and against the defendant over the objection of the defendant, whereas the said Trial Judge should have directed a verdict in favor of the defendant and against the plaintiff, Minnie Roth.

Notice of Appeal and Grounds.

3. Because the Trial Judge upon the trial of said cause denied defendant's motion for a direction of verdict in its favor and against the plaintiff, Minnie Roth.

4. Because the Trial Judge upon the trial of said cause directed the jury to include in its verdict against the defendant and in favor of the plaintiff, Minnie Roth, lawful interest on the sum of $14,500 from the date of the alleged purchase by her of the two judgments of Regina Mendel, administratrix, and Annie Mendel, administratrix, against Joseph Roth.

5. Because the Trial Judge upon the trial of said cause denied defendant's motion for a nonsuit as to the plaintiff, Minnie Roth, on the first count upon the opening of counsel for the plaintiff, Minnie Roth.

RIKER & RIKER,
Attorneys of Appellant.

Service of a copy of the within notice of appeal and grounds is acknowledged this 28th day of June, 1928.

ABE J. DAVID,
Attorney of Plaintiffs-Respondents.

NOTICE OF CROSS APPEAL AND GROUNDS.

Filed July 7, 1928.

NEW JERSEY SUPREME COURT.

JOSEPH ROTH and MINNIE ROTH, *Plaintiffs-Cross Appellants,*	*Action at Law.*
vs.	
GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant-Cross Respondent.*	*Notice of Cross Appeal and Grounds.*

To Messrs. Riker & Riker, attorneys for defendant-cross respondent.

Gentlemen:

PLEASE TAKE NOTICE that the plaintiffs, Joseph Roth and Minnie Roth, do hereby each appeal to the Court of Errors and Appeals of the State of New Jersey from so much and such parts of the judgment entered in said cause as hereinafter specified upon the following grounds, to-wit:

1. That the said Joseph Roth appeals from so much and such part of said judgment as directed a verdict against him because the Trial Judge instead of directing a verdict against said Roth should have permitted the jury to have rendered a verdict in his favor for the amount of money paid by him on account of the judgments recovered against him by the said Mendels.

2. The said Minnie Roth appeals from so much and such part of said judgment as did not permit her to recover interest upon any sum of money in excess of $14,500.00 because by the

terms of the policy of insurance the defendant, General Casualty & Surety Company, agreed to pay interest on the amount of judgments recovered and that the amount of judgments recovered were $23,333.00 and that the judgment directed in favor of the said Minnie Roth should have included interest on that sum and should not have limited the recovery of interest on the sum of $14,500.00.

ABE J. DAVID,
Attorney for Plaintiff-Cross Appellants.

Service of a copy of the within notice of cross appeal and grounds is acknowledged this 5th day of July, 1928.

RIKER & RIKER,
Attorneys of Defendant-Cross Respondents.

COMPLAINT.

Filed November 25, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JOSEPH ROTH and MINNIE ROTH, *Plaintiffs,* *vs.* GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant.*	*Action at Law.* *Complaint.*

The plaintiffs, Joseph Roth and Minnie Roth, residing at No. 811 Colonial Road, in the City of Elizabeth, in the County of Union, and State of New Jersey, complain and say:

FIRST COUNT.

1. That at all times hereinafter mentioned, the defendant was a corporation of the State of Michigan, duly authorized to do business in the State of New Jersey, as a Surety Company, and for a reward to it in that behalf paid, did issue and grant policies of insurance, indemnifying the insurers therein named.

2. That on the 1st day of May, 1921, the said defendant for a money reward to it in that behalf paid by Joseph Roth, did issue and deliver to said Joseph Roth its policy number AL 10625, insuring Joseph Roth against loss from the liability imposed by law upon Joseph Roth for damage on account of bodily injury, including death resulting at any time therefrom, accidently

suffered or alleged to have been suffered by any person or persons not employed by the assured, caused by the automobile vehicle described in Statement Numbered 5 of the Schedule, within the United States and Canada, a copy of which policy of insurance is hereto annexed, and made a part hereof, as Exhibit A.

3. That by said policy of insurance, the plaintiff Joseph Roth was insured against loss from liability while operating an automobile vehicle, known as Selden Truck No. 5924.

4. That while said plaintiff Joseph Roth was operating said automobile in the United States on the 8th day of June, 1921, while said policy of insurance was in full force and effect, as a result of the alleged negligence of the plaintiff, Joseph Roth, in the operation of said automobile, there was a collision, the result of which, one Edward Mendel and one Jacob Mendel, were so seriously injured at Rahway, in the State of New Jersey, that within several days thereafter, the said Edward Mendel and said Jacob Mendel, did both die as a result of the injuries so received.

5. That thereafter one, Regina Mendel, the widow of said Edward Mendel, was appointed administratrix *ad prosequendum,* by the Surrogate of the County of Essex, of the estate of Edward Mendel, deceased.

6. That thereafter one, Annie Mendel, the widow of said Jacob Mendel, was appointed administratrix *ad prosequendum,* by the Surrogate of the County of Essex, of the estate of Jacob Mendel, deceased.

7. That on or about the 15th day of October, 1921, the said Regina Mendel, as administratrix

ad prosequendum of the said Edward Mendel, deceased, and Annie Mendel, as administratrix *ad prosequendum* of the said Jacob Mendel, deceased, did each institute suit in the New Jersey Supreme Court against the plaintiff Joseph Roth, and such proceedings were had in each of said suits, that on the 27th day of January, 1922, a verdict was rendered in favor of the said Regina Mendel, as administratrix as aforesaid, and against the plaintiff Joseph Roth, in the sum of $20,000.00, besides costs, and in favor of said Annie Mendel, as administratrix as aforesaid, and against the plaintiff Joseph Roth, in the sum of $35,000.00 besides costs.

8. That judgment final was entered in each of said cases, and execution was forthwith issued and delivered to the Sheriff of Union County, the county in which the plaintiff Joseph Roth resides, and levy made upon all his property and assets.

9. That under the rule to show cause taken out in the name of the plaintiff Joseph Roth by the defendant, and prosecuted in the New Jersey Supreme Court, such proceedings were had, that said Supreme Court set aside the verdict as to damages only, and directed a new trial on the question of damages.

10. That on the 15th day of November, 1922, a new trial was had in said causes, which resulted in a verdict in the sum of $8,666.67 in favor of the said Regina Mendel, administratrix as aforesaid, and in the sum of $15,000.00 in favor of the said Annie Mendel, administratrix as aforesaid.

11. That this defendant, in the name of the plaintiff Joseph Roth, appealed from the last

named judgments of the Supreme Court to the Court of Errors and Appeals of the State of New Jersey, and such proceedings were had before the Court of Errors and Appeals that the judgments of $8,666.67 and $15,000.00 against the plaintiff Joseph Roth were affirmed by the Court of Errors and Appeals of the State of New Jersey, with costs, and that the costs of suit taxed and assessed against the plaintiff Joseph Roth in said proceedings amounted to a large sum of money, to wit, $750.00.

12. That said two judgments so recovered against the plaintiff Joseph Roth were by various mesne assignment assigned, transferred, and sold to the plaintiff, Minnie Roth.

13. That said policy, "Exhibit A" contained among others a certain clause and agreement in the following words: "In the event that an execution on the judgment against the assured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the company to the same extent that the assured could have had he paid the judgment."

14. That after the entry of said judgments in the sum of $8,666.67 and $15,000.00 respectively, executions were issued thereon out of the New Jersey Supreme Court against the said plaintiff Joseph Roth, directed to the Sheriff of Union County, and both of said executions were on April 21, 1925, returned by said Sheriff of Union County as wholly unsatisfied, and that by means thereof and the clause of said policy mentioned in the preceding paragraph, a cause of action has accrued to the plaintiff Minnie Roth as against the defendant.

To the damage of the plaintiff Minnie Roth, in the sum of Twenty-five Thousand ($25,000) Dollars.

SECOND COUNT.

1. Plaintiffs repeat the allegations of the first count.

2. On July 19, 1923, the defendant, in writing, did state to and notify the plaintiff Joseph Roth that it, the said defendant did disclaim any and all further liability under the said policy of insurance, "Exhibit A."

3. That thereafter, said plaintiff, Joseph Roth, did pay to the owner or various owners of said judgments from time to time divers sums of money on account thereof, and paid a sum of money on said judgments far in excess of Ten Thousand Dollars, the interest on Ten Thousand Dollars, and the costs of suit. By reason thereof a cause of action has accrued to the plaintiff, Joseph Roth, as against said defendant and he is entitled to receive from said defendant the aforesaid sum of $10,000.00 together with interest thereon, and costs of suit.

Judgment will be claimed for $25,000.00.

Judgment will be claimed in the alternative against the defendant on the first count in favor of Minnie Roth, and on the second count in favor of Joseph Roth.

ABE J. DAVID,
Attorney for Plaintiffs.

EXHIBIT A.

Number
AL10625 Amount

GENERAL CASUALTY & SURETY COMPANY
Detroit, Michigan.

A Stock Company.

In Consideration of the payment of the premium and of the statements contained in the Schedule hereinafter set forth, the

GENERAL CASUALTY & SURETY COMPANY

hereinafter called the Company, does hereby agree to indemnify the Assured designated in the said Schedule AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW UPON THE ASSURED for damages on account of bodily injuries, including death resulting at any time therefrom, accidently suffered or alleged to have been suffered by any person or persons not employed by the Assured, caused by the automobile vehicles described in Statement numbered 5 of the Schedule, or by the loading or unloading of merchandise carried on vehicles of the commercial type, within the United States and Canada, subject to the following conditions:

CONDITION A. This Policy does not cover (1) any obligation assumed by or imposed upon the Assured by any Workmen's Compensation Law or agreement or plan, or (2) while any automobile vehicle is being used for or in any race or speed test, or (3) being drive*d* by any person in violation of law as to age, or if there be no age limit, under the age of sixteen years,

or (4) being used for towing or propelling any trailer or any other vehicle used as a trailer, or (5) being used for rental or livery purposes or for the carrying of passengers for a consideration.

CONDITION B. Upon the occurrence of an accident, the Assured shall, as soon as practicable, give written notice thereof with the fullest information obtainable at the time to the Executive office of the Company in Detroit, Michigan, or to its duly authorized agent. If a claim is made on account of such accident, the Assured shall give like notice thereof with full particulars.

CONDITION C. If thereafter any suit is brought against the assured to enforce such a claim for damages, the Assured shall immediately forward such Executive Office of the Company every summons or other process, and the Company will defend such suit, whether groundless or not; the expenses incurred by the Company in defending such suit, including court costs and all interest accruing after entry of judgment, will be borne by the Company irrespective of the limit*es* of liability expressed in the Policy. The Company shall have the right to settle any claim or suit at any time. In the event that an execution on a judgment against the assured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the Company to the same extent that the Assured could have had, had he paid the judgment.

CONDITION D. The Assured shall not voluntarily assume any liability, nor incur any

expense or settle any claim unless such settlement or expenditures are first authorized in writing by the Company; except that the Assured may provide at the time of the accident and at the cost of the Company such immediate surgical relief as is imperative.

CONDITION E. In case of payment of loss under this Policy the Company shall be subrogated to all rights of the Assured against any person or corporation as respects such loss.

CONDITION F. If the Assured carries other valid insurance against loss and expenses arising from any accident covered by this Policy, the Assured shall not be entitled to recover from this Company a larger proportion of the entire loss and expense than the amount hereby insured bears to the total amount of his valid and collectible insurance.

CONDITION G. No assignment or change of interest under this Policy whether voluntary or involuntary shall bind the Company unless the written consent of the Company is endorsed thereon signed by its President, Vice-President or Secretary, but in the event of the death of the Assured, if an individual, this insurance shall continue in force for the benefit of the executors, administrators or trustees of the estate of the Assured, for a period within the term of this policy of thirty days from twelve o'clock noon of the date of such death and not later unless consented to by endorsement as above.

CONDITION H. This Policy may be cancelled by the Assured by notice to the Company. It may be cancelled by the Company at any time by giving five days' written notice to the Assured

at his address given herein, stating when the cancellation may be effective. If cancelled by the Company the Company shall be entitled to the earned premium, pro rata. If cancelled by the Assured, the Company shall be entitled to the earned premium, calculated at short rates, in accordance with the table printed on the back of this Policy. The check of this Company mailed to the address of the Assured as given herein shall be a sufficient tender.

CONDITION I. No condition or provision of this policy shall be waived or altered by any one unless by endorsement hereon signeed by the President, Vice-President or Secretary of the Company, nor shall notice to any agent, nor shall knowledge possessed by any agent or by any other person be held to effect a waiver or change in this contract or in any part of it.

CONDITION J. If the limitation of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto in force in the state in which the business operations herein described are conducted, such specific statutory provisions shall supersede any such condition in this contract inconsistent therewith.

CONDITION K. The word "Assured" whenever used in this Policy shall be construed to include, in addition to the Assured named in the Policy, any peron or persons while riding in or operating any automobile insured hereunder for private pleasure or business calls (excluding automobiles of the commercial type) with the permission of said named Assured, or with the permission of any adult member of said named

Assured's household other than a chau*feur* or domestic servant.

CONDITION L. The liability of the Company for loss from an accident resulting in bodily injuries to or in the death of one person only is limited to Five Thousand and 00/100 Dollars ($5000.00) and, subject to the same limit for each person, the total liability of the Company for loss from death of more than one person is limited to Ten Thousand and 00/100 Dollars ($10,000.00).

CONDITION M. The period of time during which this policy shall be in force is 12 months, beginning on the first day of May, 1921, noon, and ending on the first day of May, 1922, noon, standard time, at the place where this policy has been countersigned.

Automobile Property Damage Endorsement.

Including Loss of use.

IN CONSIDERATION OF Incl. in Total Prem. Dollars ($ Incl.) additional premium and subject to the conditions of the policy to which this endorsement is attached, the Company hereby agrees to indemnify the Assured hereunder against loss by reason of his legal liability for damage to or the destruction, includng resultant loss of use, of property of every description (excluding, however, property of the Assured or in charge of the Assured or his employees, or carried in or upon the automobiles covered hereunder), resulting solely and directly from an accident due to the ownership, maintenance or use of any of the said automobiles, provided such damage or destruction occurs during the period of this insurance.

The Company's liability hereunder is limited to the actual value of the property damaged or destr*i*yed at the time of such damage or destruction, which shall not be greater than actual cost of the repair or replacement thereof; and to loss sustained as a result of loss of use, and in no event in excess *to* the sum of One Thousand Dollars ($1,000.00) for one accident resulting in damage or destruction or loss of use of such property whether of one or more persons. The Company's limit of liability as expressed herein shall apply to each of the automobiles covered by this endorsement.

Attached to and forming part of Automobile Liability Policy No. AL 10625 issued by the GENERAL CASUALTY & SURETY COMPANY to Joseph Roth, of Elizabeth, N. J.

This endorsement shall become effective at Newark, N. J. on this 1st day of May, 1921, and shall not be valid unless countersigned by a duly authorized representative of the Company.

GENERAL CASUALTY & SURETY COMPANY.

ELMER H. DEARTH,
President.

Countersigned:
Frederick R. Knopf & Co.
Frederick R. Knopf
Authorized Representative
President.

SHORT RATE TABLE.

Periods exceeding 20 days, and not exceeding 25 days, to be the rate of 25 days, and so on up to one year.

If Policy was written for ONE year, and has been in force any number of days indicated in left hand column, the company may retain from the annual premium the percentage indicated by the figures set opposite in the right hand column.

1 day	2
2 days	4
3 "	5
4 "	6
5 "	7
6 "	8
7 "	9
8 "	9
9 "	10
10 "	10
11 "	11
12 "	12
13 "	13
14 "	13
15 "	14
16 "	14
17 "	15
18 "	16
19 "	16
20 "	17
25 "	19
30 "	20
35 "	23
40 "	26
45 "	27
55 days	29

60 "		30
65 "		33
70 "		36
75 "		37
80 "		38
85 "		39
90 "	or 3 mo.	40
105 "		45
120 "		50
135 "		55
150 "	or 5 mo.	60
165 "		65
180 "	or 6 mo.	70
195 "		73
210 "	or 7 mo.	75
225 "		78
240 "	or 8 mo.	80
255 "		83
270 "	or 9 mo.	85
285 "		88
300 "	or 10 mo.	90
315 "		93
330 "	or 11 mo.	95
360 "	or 12 mo.	100

NOTICE TO THE WITHIN NAMED DEFENDANT:

In case of the within summons and complaint are served upon you personally, then take notice that if you intend to make a defense to this action, you must file an affidavit of merits within ten days from the date of service hereof upon you, and must file your answer within twenty days from the date of such service, and in default of the filing of such affidavit and answer, judgment will be entered against you.

Complaint—Exhibit A.

Lawful service upon a corporation is deemed personal service for the purpose of this notice. (L. P. 1912, p. 394, Rule 56.)

A. J. David
Attorney of Plaintiffs.

ANSWER.

Filed December 9, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JOSEPH ROTH and MINNIE ROTH, *Plaintiffs,* *vs.* GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant.*	*Action at Law.* *Answer.*

The answer of General Casualty & Surety Company, a Michigan corporation, to the complaint filed herein, says that:

AS TO THE FIRST COUNT.

1. It admits paragraph 1.

2. It denies the allegations of paragraph 2, except that it admits that for a money reward it did issue and deliver to Joseph Roth, its policy number AL10625, a copy of which is annexed to the complaint and marked Exhibit A.

3. It denies paragraph 3 as alleged, but refers to the said policy of insurance for the terms and effect thereof.

4. It admits the allegations of paragraphs 4, 5, 6 and 7.

5. It admits that judgment final was entered as alleged, but has not sufficient knowledge or information to form a belief as to the other

allegations of paragraph 8 and therefore leaves plaintiff to make proof thereof.

6. It admits the allegations of paragraphs 9 and 10.

7. It admits the allegations of paragraph 11, except that it has no knowledge or information sufficient to form a belief as to the costs of suit taxed and assessed against Joseph Roth in the proceedings referred to and therefore leaves plaintiff to make proof thereof.

8. It has no knowledge or information sufficient to form a belief as to the allegations of paragraph 12 and leaves plaintiff to make proof thereof.

9. It admits the allegations of paragraph 13.

10. It denies the allegations that a cause of action has accrued to the plaintiff, Minnie Roth, against the defendant and it has no knowledge or information sufficient to form a belief as to the other allegations of paragraph 14 and therefore leaves the plaintiff to make proof thereof.

FIRST SEPARATE DEFENSE.

1. In about the month of April, 1923, the plaintiff, Joseph Roth, by the payment of about the sum of $14,000 to the persons then entitled to payment of said judgments, settled and discharged his liability thereunder and also the liability, if any, of the defendant.

2. Any assignments of said judgments that may have been made by which said judgments now appear of record in the name of the plaintiff, Minnie Roth, were made upon a consideration moving from the plaintiff, Joseph Roth, and

placed in the name of Minnie Roth in fraud of the rights of the defendant.

3. Said judgments are in fact owned by the plaintiff, Joseph Roth, and the plaintiff, Minnie Roth, holds the same in trust for him.

SECOND SEPARATE DEFENSE.

1. The plaintiff, Joseph Roth, in about the month of April, 1923, by a payment of about the sum of $14,000 settled and discharged the judgments referred to in the complaint.

2. Such action on the part of the plaintiff, Joseph Roth, was without the written consent of the defendant company.

3. Such action by the plaintiff, Joseph Roth, was in violation of the provisions of the policy which were, among others, as follows:

> "Condition D. The assured shall not voluntarily assume any liability nor incur any expense or settle any claim unless such settlement or expenditures are first authorized in writing by the Company; except that the assured may provide at the time of the accident and at the cost of the Company such immediate surgical relief as is imperative."

4. Plaintiff, Joseph Roth, as assured thereby released the defendant from its liability if any under the policy.

5. The defendant on or about July 19, 1923, notified the plaintiff, Joseph Roth, in writing that it did disclaim any and all further liability under the said policy of insurance.

Answer.

THIRD SEPARATE DEFENSE.

1. In about April, 1923, there was paid to the persons then entitled to payment under the said two judgments referred to in the complaint about the sum of $14,000 which amount was paid in full settlement and discharge of said judgments.

2. In making up such settlement, plaintiff, Joseph Roth, without the consent of the defendant company in writing, assumed the liability of payment of said sum of $14,000 or some part thereof, which action on his part was in violation of the policy which provided, among other things, as follows:

> "Condition D. The assured shall not voluntarily assume any liability nor incur any expense or settle any claim unless such settlement or expenditures are first authorized in writing by the Company; except that the assured may provide at the time of the accident and at the cost of the Company such immediate surgical relief as is imperative."

3. By such action plaintiff, Joseph Roth, as assured violated the terms of the policy and release the defendant company from its liability if any under the policy.

4. The defendant on or about July 19, 1923, notified the plaintiff, Joseph Roth, in writing that it did disclaim any and all further liability under the said policy of insurance.

AS TO THE SECOND COUNT.

1. It repeats its answers to the allegations of the first count.

Answer.

2. It admits paragraph 2.

3. It denies the allegations of paragraph 3, except that it admits that the plaintiff, Joseph Roth, did pay about the sum of $14,000 in about April, 1923, to the persons entitled to payment under the said judgments.

FIRST SEPARATE DEFENSE.

1. It repeats the allegations contained in the second separate defense to the first count.

SECOND SEPARATE DEFENSE.

1. It repeats the allegations contained in the third separate defense to the first count.

RIKER & RIKER,
Attorneys of Defendant.

AMENDMENT TO ANSWER.

Filed December 23, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JOSEPH ROTH and MINNIE ROTH, *Plaintiffs,* *vs.* GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant.*	*Amendment to Answer.*

The defendant, General Casualty and Surety Company, by way of amendment to the answer filed by it to the complaint herein, says that:

AS TO THE FIRST COUNT.

FOURTH SEPARATE DEFENSE.

1. In about the month of May, 1923, plaintiff, Joseph Roth, paid or caused to be paid the sum of $14,000 to the person then entitled to payment of such judgments.

2. In consideration of such payment the plaintiff, Joseph Roth, caused assignments of said judgments to be made through mesne assignments to plaintiff, Minnie Roth, his wife.

3. Said Minnie Roth and all persons holding said judgments by assignment subsequent to the original judgment creditors were friendly to the plaintiff, Joseph Roth, and held said judgments subject to his control and direction.

Amendment to Answer.

4. At the time of such assignments the said judgments were under appeal at the instance of the defendant company.

5. It was an implied and express obligation on the plaintiff, Joseph Roth, under the terms of his contract with defendant company to cooperate with the company in its contest of the suits brought by the said Mendels. Such action on the part of the plaintiff, Joseph Roth, violated the terms of his contract with the defendant company and thereby released the company from any liability thereunder.

6. Defendant company on or about July 19, 1923, notified the plaintiff, Joseph Roth, in writing, disclaiming any and all further liability under the said policy.

FIFTH SEPARATE DEFENSE.

1. In about the month of April, 1923, the plaintiff, Joseph Roth, did represent to the defendant company that he had settled the said judgments against him.

2. The defendant company relyng upon such representation did on or about July 19, 1923, disclaim any and all further liability under said policy and did discontinue all further prosecution of the appeals from said judgments.

3. The plaintiff, Joseph Roth, and his agent or trustee, the defendant, Minnie Roth, are both estopped to deny that both said judgments were settled.

Amendment to Answer.

AS TO SECOND COUNT.

THIRD SEPARATE DEFENSE.

1. It repeats the allegations contained in the fourth separate defense to the first count.

FOURTH SEPARATE DEFENSE.

1. In about the month of April, 1923, the plaintiff, Joseph Roth, did represent to the defendant company that he had settled the said judgments against him.

2. The defendant company relying upon such representation did on or about July 19, 1923, disclaim any and all further liability under said policy and did discontinue all further prosecution of the appeals from said judgments.

3. Plaintiff, Joseph Roth, is thereby estopped to deny that he has settled said judgments.

RIKER & RIKER,
Attorneys of Defendant.

REPLY.

Filed December 29, 1927.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JOSEPH ROTH and MINNIE ROTH, *Plaintiffs,* *vs.* GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant.*	*Action at Law.* *Reply.*

The reply of the plaintiffs to the answer and amendment to answer of the defendant, says:

The issue is joined on the answer to the first count.

TO FIRST SEPARATE DEFENSE.

Plaintiffs deny each and every allegation thereof and reiterate the allegations contained in the complaint.

TO SECOND SEPARATE DEFENSE.

Plaintiffs deny the allegations of paragraphs 1, 2, 3 and 4 thereof and reiterate the charges contained in the complaint.

TO THIRD SEPARATE DEFENSE.

Plaintiffs deny the allegations of paragraphs 1, 2 and 3 thereof and repeat the allegations of the complaint.

Reply.

As to the defense to the second count and the first count and the separate defenses thereof, plaintiffs repeat the same reply as to the first count and the separate defenses thereof.

RESERVATION OF OBJECTION.

Plaintiffs reserve the right at or before trial to move to strike out the said several separate defenses upon the ground that none of them constitute any defense to the cause of action pleaded in plaintiffs complaint and upon the particular ground that "Condition D" refers to a claim not reduced to final judgment. The allegations of the complaint show that final judgment was entered in this cause, confirmed by an appellant court.

TO FOURTH SEPARATE DEFENSE TO FIRST COUNT.

Plaintiff admits that after judgments were recovered against the plaintiff, Joseph Roth, for the sum of fourteen thousand ($14,000) dollars, then and there paid to the person entitled thereto, assignments of said judgments were taken and assigned to the Elizabeth Trust Company from which institution the money was borrowed to take care of the assignment of said judgments.

Plaintiffs deny that they violated any terms of their contract as set forth in paragraph 5 of the said fourth separate defense but say, they in all things, complied with and carried out the agreement with the defendant.

Reply.

TO THE FIFTH SEPARATE DEFENSE TO FIRST COUNT.

Plaintiff denies each and every allegation thereof and reiterates the allegations contained in the complaint.

TO THIRD SEPARATE DEFENSE TO SECOND COUNT.

The plaintiffs reiterate the same reply as made to the fourth separate defense to the first count.

TO FOURTH SEPARATE DEFENSE TO SECOND COUNT.

Plaintiffs deny each and every allegation thereof and reiterate the allegations contained in the complaint.

RESERVATION OF OBJECTIONS.

Plaintiffs reserve the right at or before trial to move to strike out the fourth separate defense to the first count and the similar defense to the second count on the ground that the facts therein alleged do not constitute any defense whatsoever to the action of the plaintiffs and to strike out the fifth separate defenss to the first count and the similar defense to the second count also upon the ground that none of the allegations contained in the separate defenses are sufficient in law to constitute defenses in plaintiffs cause of action.

ABE J. DAVID,
Attorney for Plaintiffs.

POSTEA.

Filed June 23, 1928.

NEW JERSEY SUPREME COURT.

UNION COUNTY.

JOSEPH ROTH and MINNIE ROTH, *Plaintiffs,* *vs.* GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant.*	*Action at Law.* *Postea.*

The above cause was tried at the Union Circuit of the New Jersey Supreme Court before the Honorable Peter F. Daly, Judge, and a jury on the 11th and 12th days of June, 1928, and both plaintiffs and defendant having offered their evidence and rested and the defendant, by its attorney, moving for a directed verdict in its favor and the plaintiffs, by their attorneys, moving for a directed verdict in favor of the plaintiffs, thereupon the Court did deny the motion of said attorney for the defendant and did direct the jury to render a verdict in favor of the plaintiff, Minnie Roth, against the defendant, General Casualty & Surety Company, a corporation, in the sum of fourteen thousand eight hundred and ninety-eight dollars and twenty-one cents ($14,898.21), and that the jury should find no cause of action on the second count in favor of the plaintiff Joseph Roth, and thereupon, pursuant to such direction of the Court, the jury did find a verdict in favor of the plaintiff Minnie Roth

Judgment for Defendant.

and against the defendant, General Casualty & Surety Company in the sum of fourteen thousand eight hundred and ninety-eight dollars and twenty-one cents ($14,898.21) and that the plaintiff Joseph Roth had no cause of action on the second count as against the said defendant.

PETER F. DALY,
Circuit Judge.

JUDGMENT.

NEW JERSEY SUPREME COURT.

GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant,* *ads.* JOSEPH ROTH, *Plaintiff.*	*Action at Law.* *On Postea.*

It is ordered that judgment be and hereby is entered in favor of defendant and against the plaintiff on the second count of the plaintiff's complaint with costs to be taxed *nisi.*

Entered June 16, 1928.

On motion of

RIKER & RIKER,
Attorneys.

JUDGMENT.

NEW JERSEY SUPREME COURT.

MINNIE ROTH, *Plaintiff,* vs. GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant.*	*Action at Law.* *On Postea.*

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of fourteen thousand, eight hundred and ninety-eight dollars and twenty-one cents, besides costs to be taxed *nisi.*

	$14,898.21
	84.14
	$14,982.35

Entered June 13, 1928.

On motion of

ABE. J. DAVID,
Attorney.

RECOGNIZANCE.

Filed June 29, 1928.

KNOW ALL MEN BY THESE PRESENTS that General Casualty & Surety Co., a corporation of the State of Michigan, duly authorized to transact business in the State of New Jersey, as principal, and New Jersey Fidelity & Plate Glass Insurance Company, a corporation of the State of New Jersey, with principal office in the City of Newark, as surety, are jointly and severally held and firmly bound unto Minnie Roth in the sum of twenty-nine thousand nine hundred and sixty-four dollars and seventy cents ($29,964.70), lawful money of the United States of America, to be paid to the said Minnie Roth, her executors, administrators and assigns, for which payment, well and truly to be made, they bind themselves, and their successors, firmly by these presents.

Sealed with their corporate seals and dated this 28th day of June, 1928.

The condition of the above obligation is such that whereas in an action at law in the New Jersey Supreme Court wherein Joseph Roth and Minnie Roth were plaintiffs and General Casualty & Surety Co. was defendant, which was tried in the Union County Circuit before the Honorable Peter F. Daly and a jury, there was entered a judgment on the 13th day of June, 1928, in favor of Minnie Roth, plaintiff, and against General Casualty & Surety Company, defendant, in the sum of $14,898.21 damages and $84.14 costs, and

WHEREAS, General Casualty & Surety Co. intends to appeal from said judgment to Court of Errors and Appeals of New Jersey,

Recognizance.

Now, Therefore, if the General Casualty & Surety Co. shall prosecute with effect the appeal of said judgment to the Court of Errors and Appeals of New Jersey and shall pay and satisfy if the said judgment be affirmed, all the debt or debts, damages and costs adjudged on the former judgment and all costs and damages to be awarded for the delay of execution, then this recognizance to be void, else to remain in full force and effect.

GENERAL CASUALTY & SURETY CO.,

By William T. Farrell,
Attorney-in-Fact.

Attest:
Earl R. Ryno.

NEW JERSEY FIDELITY & PLATE GLASS INSURANCE COMPANY,

By V. E. H. Hoagland,
Vice President.

Attest:

Robt. A. Fraser,
(seal) Asst. Secretary.

The above recognizance was duly acknowledged and is, together with the surety therein, hereby approved and allowed.

June 28, 1928.

FRANCIS CHILD,
A Supreme Court Commissioner of New Jersey.

Recognizance.

State of New Jersey,
County of Essex. *ss.*

On this twenty-eighth day of June, nineteen hundred and twenty-eight, before me, the subscriber, a Notary Public, personally appeared William T. Farrell, attorney-in-fact of the General Casualty Insurance Co., who, I am satisfied, is the person who signed the within instrument, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as such attorney-in-fact as aforesaid, and that the within instrument is the voluntary act and deed of such corporation made by duly given authority of said company.

PAUL A. DONNELLY, (seal)
Notary Public of New Jersey.

TESTIMONY.

NEW JERSEY SUPREME COURT.

UNION COUNTY CIRCUIT.

May Term, 1928.

JOSEPH ROTH and MINNIE ROTH

vs.

GENERAL CASUALTY & SURETY COMPANY, a corporation.

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. Peter F. Daly, Circuit Court Judge, and a jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the 11th day of June, A. D. 1928, at 1:30 P. M.

Appearances:

Abe J. David, Esq., and Samuel Koestler, Esq., counsel for the plaintiffs.

Messrs. Riker & Riker, Irving Riker, Esq. (present), counsel for the defendant.

A jury being empanaled and found satisfactory, they were sworn.

Mr. Riker: Your Honor, may I ask to have the openings taken down at this time?

The Court: Why?

Mr. Riker: There are two different counts which to my mind are inconsistent, and I contemplate that it may be necessary for the plaintiff to take one position or the other at the opening. I think that ought to be a matter of record.

Mr. Koestler: We pray for judgment in the alternative, your Honor.

The Court: Under the rule, you know that openings are not ordinarily a matter of record. However, there cannot be any harm to it. You may take it.

Mr. Koestler: May it please your Honor and gentlemen of the jury: This is an action which arises out of an automobile injury resulting in two deaths, but it is not the ordinary action which you have to try where a person sues the owner of the automobile. This is an action where the owner of an automobile and his wife are bringing suit against the bonding company because the bonding company did not pay the amount of their bond.

Joseph Roth, on May 1, 1921, was the owner of an automobile, and he insured that automobile with the defendant company, the General Casualty & Surety Company, under what is known as a five and ten thousand dollar policy, by which liability is limited to $5,000 in case of one injury or one death, and $10,000 for two.

Now, shortly after this policy was taken out and while it was in full force and effect, Mr. Roth, either very late one night or very early in the morning, was coming down one of our public roads and unfortunately he had an accident. His car ran into a car which was stationary in the road, and under that car were lying two men who were working, trying to fix the car. As the result of that accident these two men were injured and almost immediately died.

Under the process of law, administrators to prosecute the suit were appointed for each of these dead men, and they started two suits in the Supreme Court, bringing the trial on in Essex County. Those two suits resulted in extremely large verdicts against Joseph Roth. The total of the verdicts was $55,000.

Plaintiffs there were represented by very able counsel and they immediately took out what we call an execution, under which they levied on Mr. Roth's place of business, on his household furniture—the sheriff came down there and made a levy—also on his real estate if he had any. The bonding company defended these cases when they were being tried, and thereafter, judgment having been entered and execution issued as I have told you, the bonding company took out what we call a rule to show cause in Mr. Roth's name, and brought those actions down to Trenton before the bench of the Supreme Court. On those proceedings the Supreme Court decided that there was liability against Roth, but that the damages were excessive, and they sent the cases back to Newark to be retried, limited to the question of damages only.

Now, that fixed Roth's liability to pay, but not the amount.

These cases then went to retrial on the question of damages, and it would have to be a verdict for the plaintiffs in some amount of money. Of course, the original amounts were $55,000, and when they were retried there was a verdict in one case of $15,000 and in the other of $8,666.67; and Mr. Roth didn't have money to pay them at that time.

When Mr. Roth had the original judgments taken out against him, of course, they were $55,000, and the limit of liability of the bonding company was $10,000, and the usual course to follow is that somebody should put up a bond to stay execution. Roth could not put up a bond in double $55,000. He didn't have it. He was a poultry man engaged in the poultry business here in Elizabeth. The bonding company would not put up the bond, either, so that Roth, in order to protect himself—this was before the retrial on the question of damages—in order to protect himself, his family and his other creditors, as well as to do something that would aid the bonding company, filed a petition in bankruptcy, which stayed the proceedings.

Then afterwards when the judgments were reduced to something over $23,000, he tried to get the bonding company to pay their share of the liability so that he could get out of bankruptcy, but they refused to do that.

He finally got an offer from these people that they would take $14,500 to settle these $23,000 judgments, but the bonding company was obdurate. They said, "No. We are going to appeal this until everybody gets tired. We are not going to pay."

Now, we claim there that there was a breach of their obligation. The law was constitutional which directed the recovery, or the sending back of that case to the Supreme Court for retrial limited to damages only. There is a law in New Jersey that holds that every law is constitutional until it is declared otherwise, and this law was finally declared by our Court of Errors and Appeals to be constitutional.

Now, I do not want to go into the quesion of the damages that there are going to be in this case, because I think they are technical, and I generally say this: Shortly after the time that Mr. Roth was in this accident and killed these two men most of his property was standing in his wife's name alone, or in the name of himself and his wife as tenants by the entirety. On the advice of counsel long before these suits were started he made a deed of, I think, the one piece of property which was standing in his name and his wife's name, to his wife. Now, that also worked for the protection of the bonding company, I will urge before you afterward, because it might induce a more reasonable settlement.

These judgments were entered in the Supreme Court for $23,000, and the bonding company in Roth's name took an appeal to the Court of Errors and Appeals on the ground that the statute permitting the sending back of that case for an assessment of damages only was unconstitutional. In that they were unsuccessful. Pending that appeal, Mr. Roth, in order to be able to get back in business, arranged that his wife should borrow money from the Elizabeth Trust Company and pledge her property as security, and his note and her note were taken to the Elizabeth Trust Company and discounted and purchased by that bank, and the bank took Mrs. Roth's mortgage as collateral security covering her property. The $14,500 was placed in Judge David's hands by the certified check of Minnie Roth, and that money was taken and paid for the purchase of these two judgments, the assignment being taken for convenience's sake in the name of Charles Bauer, a clerk in Mr. David's office, and thereupon Bauer assigned these judgments to the

Elizabeth Trust Company as additional collateral security. When an arrangement was made by which this $20,000 mortgage, which was given by Mrs. Roth to the Elizabeth Trust Company, was cancelled, those judgments were reassigned to Minnie Roth, and the assignments will be produced here.

Immediately after obtaining those assignments of judgments Mrs. Roth caused execution to be issued on the new judgments for $23,000 against her husband. Those executions were placed in the hands of the sheriff of Union County and were returned wholly unsatisfied.

Now, you will find in the policy of insurance that it is provided that if execution should issue on a judgment and be returned unsatisfied, the holder of the judgment or the judgment creditor should have the same cause of action against the bonding company that Roth could have had had he paid the judgments. Now, that in law and in fact gives a cause of action to Mrs. Roth against this bonding company. Roth paid money to be insured, and he was insured for $10,000.

Now, I claim what she is entitled to recover is $10,000 plus interest on the amounts of the judgments from the day they were entered till today, and the costs of those suits that were pending in the Supreme Court. The reason I claim interest on $23,666.67 instead of only on $10,000 is because the terms of the policy say that is what the bonding company should pay. It is written right into the policy.

In behalf of Mr. Roth, what did he do? As soon as he was discharged from bankruptcy, like a man he went back into business and he tried to earn a living for his wife and family. He

made payments to the Elizabeth Trust Company on account of that note, reducing the note from the original amount of $20,000 to something like $13,000; so that Roth paid money.

There may be a question of fact as to how much of the amount of that claim is payable to Mrs. Roth first and how much to Mr. Roth. It may be that inasmuch as Roth has reduced the obligation, he is entitled to a credit.

We will prove those facts at your hands, gentlemen, and then we will ask for a verdict either in favor of Mrs. Roth for the entire amount or for it split up in both ways.

Mr. Riker: Your Honor, I want to move for a non-suit on the opening of counsel on the ground that it is stated by him as part of their case that this settlement was made by Roth. This is as to the first count. The settlement was made by him and he paid the money. Obviously, under the terms of the contract, if the assured pays the money on the judgment, there is no right to any judgment creditor—the right of the judgment creditor under the terms of the policy is limited to the event that the judgment is not paid by the assured, but that execution is issued against him and returned unsatisfied.

Now, in this case in the statement of counsel he says that Roth paid the money. Such being the case, obviously there can be no cause of action to the holder of the judgment or to the judgment creditor.

The Court: What is the provision of the policy that is pertinent to that question?

Mr. Riker: With regard to what, your Honor?

The Court: Relative to your motion.

Mr. Riker: Under condition "C," as I recall it, the last sentence of the paragraph.

The Court: What have you to say, Mr. Koestler?

Mr. Koestler: If your Honor please, I did not know just to what point Mr. Riker was alluding, so I cannot intelligently answer it, except that I did state in my opening that Mrs. Roth's money was used for the purchase of these judgments, and that thereafter Roth repaid a portion of the money to her. That was what my opening was—not all of it.

Mr. Riker: I concede that if Mr. Roth obligates himself for the payment of the money with which the judgments are settled, and that he makes payment thereafter, that he perhaps has a right against the company provided he has not otherwise violated the policy; but in the case that the assured, the judgment debtor, makes payment of the judgments, then in that case there are no rights under the last paragraph, the last sentence of condition "C," which is limited to the case where the assured does not make payment. That is the very purpose of it.

The Court: Let me see if I have that point clear. Condition "C" among other things provides, "In the event that an execution on a judgment against the assured," in this case Roth, "be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the company to the same extent that the assured could have had had he paid the judgment." Your point is that the judgment creditor in this case, under this policy, in case he could not get the money out of the assured, could go to

the extent of his judgment, but not beyond the amount of the policy, against the company.

Mr. Riker: Provided that the assured had not paid.

The Court: Where does it say that?

Mr. Riker: The last few words of the clause which you just read, "had he paid the judgment." That assumes the condition that he had not paid.

The Court: Well, this practically provides that if a judgment is obtained against the assured and the assured pays the judgment, that then he can compel the indemnity company to pay him provided the other terms of the policy were not violated. That you agree to.

Mr. Riker: Yes.

The Court: Now, this is a case where the assured did not pay the judgment. The judgment was obtained against the company, and his wife paid the plaintiff and obtained from the plaintiff an assignment of the judgment. Is that right?

Mr. Koestler: Correct.

The Court: In substance what is the difference to the indemnity company? They entered into a policy to pay a certain amount in a certain event, and if they do not do it and the assured does it, the assured can compel them to reimburse him. Now, the wife of the assured takes an assignment of the judgment.

The motion for a nonsuit is denied. You may take an exception.

Mr. Riker: May it please your Honor and gentlemen of the jury: Counsel for the plaintiff stated to you that he was not going to go into the defenses, but he thought they were technical. Just let me say that they may be technical in so

far as any interpretation of construction of the contract is technical, but the plaintiffs are the real technical ones in this case.

The facts as he stated them to you I agree with up to a certain point. There is not much dispute as to the facts in this case and, of course, we are here only to determine the questions of fact, and they are very few. It is true that judgment was obtained against this plaintiff, Joseph Roth, in the amount of about $55,000, and there was a new trial as to damages only resulting in judgments against him of about $23,000 and a little bit more. It is also true that he at the advice of his counsel, Judge David and Mr. Koestler, filed a petition in bankruptcy. It is also true that the bonding company, the insurance company, the defendant here, did not put up a bond to stay execution of those $55,000 judgments. Why should they? Their limit of liability was $10,000. Why should they put up a bond for $55,000? As a matter of law after those judgments stood they were only liable for $10,000, and Mr. Roth the remaining $45,000. They did not have to assume that, and this Court has already ruled in a former case between these same parties that there was no obligation for the bonding company to put up that bond. Now, what happened?

Mr. Koestler: Just one minute. I think, if your Honor please, that remark was contrary—it is not in the pleadings or anything. It is an improper remark to make to the jury at this time about some prior case.

Mr. Riker: It is a statement of law, your Honor.

The Court: Any statement of law that the Court made in a prior case is perfectly compe-

tent to quote. Any statement or conclusion of fact is not competent.

Mr. Riker: I thought I limited myself to that, your Honor.

The Court: You did.

Mr. Riker: (Continuing to the Jury.) Now, Mr. Roth has paid judgments against him totalling $23,000, and he had an insurance policy of $10,000. Under the terms of that insurance policy the right of conducting the contest of the two suits of the Mandels, the people who were killed, against him was in the insurance company. They agreed to have him represented by counsel to defend their suits, and in turn he agreed that they should have the control of the contest of those suits. That, of course, includes the right of appeal. It does not mean that they have to accept the judgments for $23,000 against Roth and pay them, but they have a further right to go on and appeal as the law allows them to. There was a further right of appeal, and they were to appeal on the ground that this New Jersey Statute that Mr. Koestler has referred to is unconstitutional. I might say that there are decisions in the Federal courts saying that similar statutes, or very similar statutes, in other states are unconstitutional. There was a very fair question of law as to whether or not this New Jersey Statute would be held constitutional or not if an appeal had been taken. It was the intention of the insurance company to take that appeal, and they wanted to, and they told Mr. Roth through his attorney, but he would not have it.

What does Roth do? He himself through his attorney, despite the fact that the policy reserves to the company the right to negotiate any settlement, attempts to make settlement with them, and

he does make a settlement with them of $14,000 or maybe $14,500—I have forgotten exactly—for $23,000.

The next question is how is he going to raise the money? So he and his counsel arranged, I think with the Elizabeth Trust Company, to raise $14,000. As a matter of fact I believe that was raised to take care of some other claims at the same time, but at any rate they got the $14,000 there. In order to do so I believe it to be the fact, and I think the evidence will show, that his note and the note of his wife was given to the Trust Company, on which the money was loaned. The money was paid to the judgment creditors, the two Mandel estates, through Judge David, who has been Mr. Roth's attorney all the way through this matter.

Now, the next thing was: "How are we going to effect this settlement, which in essence is in violation of the policy, and still at the same time through technicality hold the insurance company? We have taken away their right to contest this matter, but still we want to hold them for the $10,000. How are we going to do it?"

Of course, quite obviously they said, "We will take the assignment of the judgment instead of the discharge of the judgment, and we will take the assignment in the name of my wife." That is what they did.

Now, I think that you will be satisfied after you hear the evidence in this case that Mr. Joseph Roth settled those judgments in reality, that that was in violation of the policy, and that therefore he has no further rights under the policy; and furthermore, that he took an assignment in the name of his wife who, as a result, held those judgments really in trust for him as

his agent, and obviously if that is so she, as agent or trustee for Roth, can have no more rights than he would have himself, and therefore her claim under this other provision of the policy, that a judgment creditor may collect from the insurance company in the event that execution is issued on the judgment and returned unsatisfied, has no application. That is not what the policy means as a judgment creditor. It means the Mandels, the people who got the judgments. It does not mean Roth himself, being the judgment against himself. Those, I think, are the real facts that will be in that issue.

(Argument.)

DAVIS J. McCAFFERY, a witness produced on behalf of the plaintiffs, being duly sworn according to law on his oath saith:

Direct examination by Mr. Koestler.

Q Mr. McCaffery, you are connected with the office of the clerk of the Supreme Court? A Yes, sir.

Q Have you there the record of two suits brought by Mandel against Roth? A Annie *vs.* Joseph Roth, and Regina Mandel, Administratrix, *vs.* Roth.

Mr. Koestler: I offer in evidence the entire record of the New Jersey Supreme Court in the case of Annie Mandel, Administratrix ad Prosequendum of Jacob Mandel, deceased, plaintiff, *vs.* Joseph Roth. That is the first suit. May I note them in order?

The Court: Yes.

Mr. Koestler: The first is the summons and complaint filed August 4, 1921.

The Court: You may mark it as a whole. Mr. Riker will follow them.

Mr. Koestler: It shows the original judgment entered January 27, 1922, for $35,047.81. The rule to show cause filed January 31, 1922, returnable at the next term of the Supreme Court. And an order entered on the rule to show cause under date of November 14, 1922, that the rule be made absolute on the matter of damages only, and that a venire de novo issue for the trial as to damages only; the second paragraph showing judgment entered in this case for $15,000 damages, $78.72 costs, filed February 2, 1923. A notice of appeal taken by the defendant Roth, Heine, Bostwick & Bradner, attorneys for appellant, to the Court of Errors and Appeals, dated March 15, 1923. Next a consent to substitution of attorney by Jacob L. Newman, attorney of plaintiff, substituting Stamler, Stamler & Koestler for the plaintiff, filed June 11, 1923. The next is an order of affirmance and remittitur dated November 19, 1923, marked filed December 22, 1923, Thomas F. Martin, clerk, and filed in the office of the clerk of the Supreme Court together with the copy of the judgment and notice of appeal. And the final paper is a writ of execution issued in the sum of $15,078.72, directed to the sheriff of Union County, dated April 17, 1925, Stamler, Stamler & Koestler, attorneys, Edward L. Kelleher, clerk, and endorsed, "This writ is hereby returned unsatisfied by order of attorneys for the plaintiff. Harry Simmons,

sheriff. Dated ~~October~~ April 21, 1925." That is the entire record in the one case.

(The file of papers referred to was received in evidence and marked Exhibit P. 1.)

By Mr. Koestler.

Q Have you the record in the other case? A Yes. Both of those records are complete, everything in the office.

Mr. Koestler: I offer in evidence the entire record in the case of Regina Mandel, Adistratrix ad Prosequendum of Edward Mandel, deceased, *vs.* Joseph Roth. I think in this case, if your Honor please, the papers are identical and run along the same course excepting that in this case the original judgment was for $20,000 and $47.76 costs, and subsequently reduced and entered for the second judgment for $8,666.67 and $78.72 costs, with a similar execution and a similar return of unsatisfied, the same dates running right through.

(The file of papers referred to was received in evidence and marked Exhibit P. 2.)

Q Those judgments are still open of record, aren't they? A Still open of record.

Mr. Koestler: Cross examine.

Cross examination by Mr. Riker.

Q Is there any assignment on the record of those judgments? A I didn't find any; no, sir.

Mr. Riker: That is all.

The Court: Then is it consented to that Mr. McCaffery may take those back?

Mr. Koestler: Yes, sir. If your Honor please, the defendant has likewise subpoenaed or directed to be brought here the records of the United States District Court by Mr. Havens, the clerk of that court. I haven't any objection for convenience for Mr. Havens, to letting them go in now, if they want to do that.

Mr. Riker: I also have the clerk of the the Chancery Court here. I do not think that I will want them until the plaintiffs' case is concluded. I do not want to put them in and then be bound by that action. I do not want to be put in the position of having put in a part of my case.

Mr. Koestler: I am not attempting any objection.

The Court: His point is that once he puts anything in now, it may affect the motion for a nonsuit.

Mr. Riker: Precisely.

Mr. Koestler: We do not want to take advantage of that.

The Court: You will not be permitted to take any advantage of that.

Mr. Koestler: No, sir. I would not do it.

The Court: You can put that in now, and it is agreed that whatever is put in now will not be regarded as in unless you offer it.

Mr. Koestler: It can be taken formally now and not actually offered in evidence until the defendant's case goes on.

The Court: It is agreed that whatever is taken now from these witnesses is simply

done for the matter of the convenience of the witnesses and for the matter of the convenience of the courts they represent, and that there is no formal offer now. It is only done so that in case the counsel for the defendant wants to offer it at the proper time under his own case, he may do so without recalling these witnesses physically.

BENJAMIN F. HAVENS, a witness produced on behalf of the defendant; being duly sworn according to law on his oath saith:

Direct examination by Mr. Riker.

Q Mr. Havens, you are connected with the clerk of the United States District Court for the district of New Jersey, aren't you? A I am the chief deputy of that court.

Q Have you the file there in the matter of the bankruptcy of Joseph Roth? A I have and herewith produce it.

Q Is this the whole file? A That, and these papers here.

Mr. Riker: I want to offer the whole file in evidence.

(The file of papers referred to was received in evidence and marked Exhibit D. 1.)

Q Have you got the schedules? A I have the schedules and herewith produce them.

Mr. Riker: I want to call attention to the fact that the schedules were filed February 1, 1922.

Q Can you tell me from that what the schedule shows as to the total liability listed? A I can. The total liabilities listed are $74,107.23.

Q Does that include two judgments of the Mandels in the sum of $55,000? A It does. Mrs. Annie Mandel, $35,000; Mrs. Regina Mandel, $20,000.

Q What are the total assets? A The total assets are scheduled at $10,298.63.

The Court: This is the bankruptcy proceeding?

Mr. Riker: Yes.

Q Does that include any asset in the form of this insurance policy in question here with the General Casualty & Surety Company? Do you find any? A I do not.

Mr. Riker: That is all.

Cross examination by Mr. Koestler.

Q What was the date of the adjudication, Mr. Havens? A The date of the adjudication was the same day that the petition in bankruptcy was filed; to wit, February 1, 1922.

Q Was the adjudication in bankruptcy ever vacated and the petition dismissed? A Yes. On June 4, 1923, the adjudication of bankruptcy was vacated and the petition in bankruptcy dismissed.

Mr. Koestler: That is all.

Re-direct examination by Mr. Riker.

Q Who does the final show was the receiver and trustee in bankruptcy? A The receiver was

Samuel Koestler of 207 Broad street, Elizabeth, New Jersey, and the trustee was the same person.

Q Is there an order there containing the usual form of stay against the creditors of the bankrupt? A I don't seem to find any restraining order of that nature in this case.

Mr. Riker: In order to save time supposing we pass that question up. That file will speak for itself if we have to use it.

Re-cross examination by Mr. Koestler.

Q Mr. Havens, by what method was Samuel Koestler appointed receiver of the bankrupt's estate? A By an order of the judgment of this Court.

Q And by what method was Samuel Koestler appointed the trustee of the bankrupt's estate? A Presumably by a vote of the creditors, or if they waived it, then by appointment of the referee in bankruptcy. I do not seem to find any such order as you refer to, Mr. Riker.

PASCAL DILEO, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Riker.

Q You are connected with the office of the Clerk of Chancery of New Jersey? A I am.

Q Have you the file there in the matter of Samuel Koestler, trustee in bankruptcy, against General Casualty & Surety Company? A Yes, sir.

Q Will you produce it?

Mr. Riker: I ask to have that marked subject to being offered later.

Mr. Koestler: I do not object, but I would like to reserve the right when it is finally offered to move to strike it out if it should be held to be immaterial.

(The file of papers referred to was marked Exhibit D. 2 for identification.)

Mr. Riker: I do not want to take the trouble to read this bill of complaint in the record, but when the times comes we have a copy here, and I think Mr. Koestler has a copy. If we need it I think it will be satisfactory to Mr. Koestler to offer a copy at that time.

Mr. Koestler: I won't object to the copy being used in lieu of the original, but I will object to it as being not proper evidence in this case, because this suit was never concluded. There was no judgment or decree in it.

Mr. Riker: I am not offering it at this time, but I assume that objection will be made later.

Mr. Koestler: I think it also ought to be noted on the record that Stein, Stein & Hannoch were the solicitors of record in this suit. All right; I have no objection to your using copies.

Mr. Riker: That is all.

ABE J. DAVID, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Koestler.

Q Judge David, you are an attorney and counselor at law and have been a member of the New Jersey Bar for about thirty years past? A Yes.

Q And your offices are here in Elizabeth? A Yes, sir.

Q Did you, about 1921, represent Joseph Roth? A I did.

Q And have you generally from that time to this time acted as his attorney? A I have.

Q Did you know that in 1921 his automobile had a collision as a result of which two men were killed? A I did.

Q Did you know at that time that he had a policy of insurance in the defendant company, the General Casualty & Surety Company? A I did.

Q Were suits brought against Mr. Roth? A There were.

Q By whom was the defense in those suits handled? A By Mr. Heine of the firm of Heine, Bostwick & Bradner. I am quite sure that that was the firm, Heine, Bostwick & Bradner.

Q Whose attorneys were they? A They represented the insurance company that issued the policy to Mr. Roth.

Q Did you participate in the defense of the cases against Roth? A I did not.

Q After judgments were recovered against Roth, the first judgments of $55,000, did you have anything to do with it? A I had some conferences with Mr. Heine and some correspondence with him.

Q Did you have anything to do with the taking out of this rule to show cause that was offered in evidence here? A I did not.

Q Do you know whether pending the taking of the rule to show cause and the argument of it, there was any stay of execution issued in those cases? A There was not. The insurance company filed no bond.

Q, Did Mr. Roth file any? A He did not. He wasn't able.

Q Do you know whether or not it was reported to you that execution had issued on these judgments? A It was.

Mr. Riker: I object. It doesn't make any difference whether it was reported or not. The question is whether it was.

Mr. Koestler: I want to show the action that Judge David took as the result of the information which was thus brought to his attention.

(The last question and answer were read by the stenographer.)

Q Did you then advise Mr. Roth as to any proceedings in bankruptcy? A I did.

Q Was it as a result of your advice that Roth filed his petition? A It was.

Q You learned that the Supreme Court set aside those judgments as to damages? A I did.

Q Did you subsequently learn of the amount of the verdict on retrial? A I did.

Q And after you learned of those judgments did you make any effort through Mr. Heine or the general attorney of the defendant company, Mr. Cass, to get the matter adjusted? A I did.

Q Did you have conferences? A Yes, sir.

Q When and where? A I can't very well give you the dates. I have a series of correspondence that would help fix the dates, but I know I had several conferences, both with Mr. Heine and Mr. Cass, who was, I believe, the general counsel for the insurance company.

Q Did the company put up any money to pay any part of these judgments? A They did not. They refused. I will qualify that. I think at one time Mr. Heine said that the company would pay $6,000 towards it.

Q Did you subsequently negotiate with the attorneys of the Mandels, the purchase of the judgments which they had recovered? A I did.

Mr. Riker: I object. The question is too leading.

The Court: Go on. It is answered.

Mr. Riker: I move to strike the answer out.

The Court: Oh, no.

Q As the result of your negotiations did anybody give you any money? A Yes, sir.

Q To purchase these? A Yes, sir.

Q Who? A Mrs. Roth gave me a check for some $14,500.

Q I show you this paper and ask you if that is the check you received? A It is.

Q Is it a certified check? A Yes, sir.

Q After you received it what did you do with it? A Deposited it in my account in the Peoples National Bank.

Q What is the date of the check? A April 30, 1923.

Mr. Koestler: I offer the check in evidence.

Mr. Riker: No objection.

(The check referred to was received in evidence and marked Exhibit P. 3.)

Q After you got that check of $14,000, did you disburse any of it? A $14,500 was the amount.

Q $14,500. Did you disburse any of it? A Disbursed all of it.

Q By check? A By three checks.

Q I show you three checks dated May 1, 1923, and ask you if those are the checks by which you disbursed that $14,500. A Yes, sir.

Q To whom did you deliver those three checks? A I delivered one check, $7,545.48, to Jacob L. Newman, the attorney for Annie Mandel, administratrix, and so forth. And I delivered one check for $6,454.52 to Stein, Stein & Hannoch, attorneys of Regina Mandel, administratrix and so forth. And I delivered the third check of $500 to Stein, Stein & Hannoch.

Mr. Koestler: I desire to offer the three checks in evidence.

(The three checks referred to were received in evidence and marked Exhibits P. 4, P. 5 and P. 6.)

Q Did you receive any papers as a result of turning over those checks? A I did.

Q What did you receive? A Assignments of judgments.

Q I show you a paper writing, Annie Mandel, administratrix, to Charles L. Bauer, dated May 7, 1923, and ask you if you ever saw that before? A Yes. That is one of the assignments.

Q You obtained that for one of those checks? A Yes, sir.

Mr. Koestler: I offer the assignment in evidence.

Mr. Riker: No objection.

(The paper referred to was received in evidence and marked Exhibit P. 7.)

Q That assignment is to Charles L. Bauer? A Charles L. Bauer, Jr.

Q Who is Charles L. Bauer, Jr.? A Clerk in my office.

Q I show you an assignment from Regina Mandel, administratrix, to Charles L. Bauer, dated April 25, 1923, and ask you if you ever saw that before? A Yes, sir.

Q For what did you get that? A That was the assignment of the other judgment for which the money was paid.

Q I show you another assignment from the Mandels to Mr. Bauer dated June 8, 1923, and ask you if that had anything to do with the matter? A Yes, sir. This was a confirmatory assignment of those judgments. I think there was some mistake or omission in the signature or the title of one of these assignors, or both of the assignors, on the original assignments, and this third assignment was taken to confirm the previous two.

Mr. Koestler: I offer these two assignments in evidence.

(The papers referred to were received in evidence and marked Exhibit P. 8 and Exhibit P. 9, respectively.)

Q I show you an assignment from Charles L. Bauer, Jr., to the Elizabeth Trust Company, and ask you if you had anything to do with that paper? A Yes, I prepared it or had it prepared.

Q Was that delivered to the Elizabeth Trust Company? A It was.

Mr. Koestler: I offer it in evidence.

(The paper referred to was received in evidence and marked Exhibit P. 10.)

Q I show you now another assignment from Charles L. Bauer to the Elizabeth Trust Company for the other judgment, and ask you if you also prepared that? A I did.

Q Was that executed and delivered to the Elizabeth Trust Company? A It was.

Mr. Koestler: I offer it in evidence.

(The paper referred to was received in evidence and marked Exhibit P. 11.)

Q Do you know whether or not any other security was delivered to the Elizabeth Trust Company in connection with this matter? A There was one or more mortgages that were given to the Elizabeth Trust Company as security for their loan.

Q I show you a mortgage dated April 25, 1923, of Minnie Roth and Joseph Roth, her husband, to the Elizabeth Trust Company, and ask you if that is the paper to which you refer? A Yes, sir.

Q Is that a recorded instrument? A It is.

Mr. Koestler: I offer this mortgage in evidence.

Mr. Riker: No objection.

(The paper referred to was received in evidence and marked Exhibit P. 12.)

Q I show you a deed dated August 8, 1921, from Joseph Roth and Minnie Roth, his wife,

which was recorded in Book 837, page 99, and ask you if you had anything to do with the drawing of that deed? A It was prepared in my office.

Q Did you advise its execution? A I did.

Mr. Koestler: I offer the deed in evidence.

Mr. Riker: For what purpose?

Mr. Koestler: As part of our case to show that the property became Mrs. Roth's at the time of the execution of this mortgage.

Mr. Riker: No objection.

(The paper referred to was received in evidence and marked Exhibit P. 13.)

Mr. Koestler: I now desire to offer in evidence a deed from Thomas F. Green and Margaret J. Green, his wife, to Minnie Roth, wife of Joseph Roth, dated October 30, 1911, recorded the same date in book 585 of deeds for Union County, on page 58, covering part of the same premises described in the mortgage.

(The paper referred to was received in evidence and marked Exhibit P. 14.)

Mr. Koestler: I desire to offer in evidence deed dated May 27, 1919, made by the Elizabeth Trust Company to Joseph Roth and Minnie Roth, his wife, recorded June 7, 1919, in book 750 of deeds for Union County on pages 533, etc., covering also part of the same property covered by the Elizabeth Trust Company mortgage.

(The paper referred to was received in evidence and marked Exhibit P. 15.)

By Mr. Koestler.

Q Did you have anything to do with the reassignment of the judgments by the Elizabeth Trust Company to Minnie Roth? A No, I don't think I prepared those papers.

Q Did you ever see these papers before? A Yes, I have seen them, but I didn't prepare them.

Q Are you familiar with the seal of the Elizabeth Trust Company and the signatures of Mr. Schmidt, its president, and Coriell, its secretary? A Yes. That is Mr. Schmidt's signature, and Mr. Coriell's, and that is the seal of the Elizabeth Trust Company.

Mr. Koestler: I offer in evidence the assignment of the judgment from the Elizabeth Trust Company to Minnie Roth.

Mr. Riker: No objection.

Mr. Koestler: There are two assignments, your Honor. I offer both assignments, both dated April 14, 1925.

(The papers referred to were received in evidence and marked Exhibit P. 16 and Exhibit P. 17, respectively.)

Mr. Koestler: Cross examine.

Cross examination by Mr. Riker.

Q At the time you secured the two assignments of those judgments from the Mandels, did you, at the same time, acquire substitution of attorneys for the two judgments which were of record being assigned? A If I remember rightly there were substitutions taken. In whose name I am not just clear about now.

Q Did you negotiate that entire transfer of the judgments? A Yes, sir.

Q Did you nominate persons who were to be substituted as attorneys of record? A Yes, sir.

Q Did you testify in 1925 in a case between Joseph Roth and this defendant? A Yes, sir.

Q Your testimony there, of course, was correct? A I hope so.

Q You said in answer to this question: "Question: Now, Judge, after you got this letter did you endeavor in conjunction with Mr. Heine or alone to effect a settlement at a lower figure than $14,000? Answer: I did." Do you recall saying that? A Yes, sir.

Q Is it correct? A Yes, sir.

Q "Question: What efforts did you make and how long did they continue? Answer: They continued for several weeks and I had several conferences with counsel for both sides." Do you remember that? A Yes, sir.

Q Is that correct? A Yes, sir.

Q Another question. "Question: Did you take the matter up with Mr. Cass? Answer: I did." "Question: With what result? Answer: Mr. Cass said that the company would insist on taking a rule to show cause and carry the case up if necessary to the United States Supreme Court." Is that correct? A Is what correct?

Q Those questions and answers. A That question was asked me and I so answered.

The Court: Did they refer to a rule to show cause on the first verdict or the second?

Mr. Riker: On the first, your Honor.

The Witness: I think not.

Mr. Riker: I may be mistaken.

The Court: There could not have been any question as to the first verdict as to carrying it up to the Supreme Court.

Mr. Riker: I will go back a little bit.

Q I think you are right, Judge. The question is: "After the second judgments were entered did you have a conference with Mr. Heine in which he requested you to get in touch with New York counsel? Answer: I did." "Question: What was it? Answer: Well, I had a conference with him with reference to the payment of the amount under the policy for which new judgments were entered, and Mr. Heine said that he contemplated making another rule to show cause, and referred me to the general counsel of the company, Mr. Cass, who is here in court." A That is right.

Q Then, immediately preceding the questions which I have just read, another question: "Question: As a matter of fact you had not consummated a settlement at that time, had you? Answer: No. I told him a settlement we could make that had been agreed upon for $14,000." When you said "we," whom did you refer to? A I referred to myself and Mr. Newman, Mr. Stein of Stein, Stein & Hannoch, and Mr. Heine.

Q Whom were you representing? A I was representing the Roths, particularly Mr. Roth. Mr. Newman represented one of the judgment creditors, and Mr. Stein of Stein, Stein & Hannoch represented the other judgment creditor, and Mr. Heine represented the insurance company.

Q Another question. "Question: After that appeal was taken, Judge, did you still make any efforts to get the case settled? Answer: I did." Do you recall that? A Yes, sir.

Q "Question: During all that time were you endeavoring to get a better offer of settlement from the holders of the judgments? Answer: Well, I made some effort. I was convinced that was the best settlement that could possibly be made and assured by attorneys for the judgment creditors, and the judgment creditors." Do you remember that? A Yes, sir.

Q That is correct? A Yes, sir.

Q "Question: Did you finally, after your conference with Mr. Cass, at the end of April, 1923, raise money for Mr. Roth to take over these judgments? Answer: I arranged that Mr. Roth raise some money at the Elizabeth Trust Company." Do you remember that? A Yes, sir.

Q That is correct? A That is so; yes, sir.

Q Speaking of the judgments, "Question: How much money was paid for them? Answer: $14,000." "Question: Did Mr. Joseph Roth raise that money anywheres? Answer: Yes, he did; I arranged for him and with him to arrange at the Elizabeth Trust Company." That is correct? A That is right.

Q "Question: Did I understand you to say that money was borrowed from the Elizabeth Trust Company by Roth for taking up these judgments? Answer: It was." Who is referred to as Roth in that question? A Joseph Roth.

Q That is a correct statement, is it, the answer to the question? A That was a correct statement. It turns out that the bank insisted on making the loan to Mrs. Roth on her security, which they did.

Q This testimony here which you gave February 25 and 26, 1925, was after the money had been loaned from the Elizabeth Trust Company? A Yes, sir.

Q The situation wasn't changed at all since this testimony? A No, I never knew the detail of how the bank handled the transaction. I arranged to borrow money for Mr. Roth. The bank insisted on Mrs. Roth, it appears, giving her property, and making the loan to her, and she gave me her check.

Q Do you know whether Mr. Roth was liable for the loan to the bank? A I think he was. I think they took the joint note, or the note of one with the endorsement of the other. The detail of it you will have to get from the bank.

Q "Question: Judge, as a matter of fact, between March and June the appeal taken to the Court of Errors and Appeals was pending, was is not? Answer: It was." Is that correct? A That is right.

Q Do you know what year that was? A No. You will have to brush up, help me brush up on the years. I know this happened around 1923, in 1923.

Q Was Mr. Samuel Koestler associated with you all through these matters in which Mr. Roth and the General Casualty & Surety Company were involved? A I won't say all through. My best recollection is that after the levies, after executions on the judgments were issued and levies made on Roth's properties, I called Mr. Koestler in with me, and about that time or shortly after the petition in bankruptcy was filed, and from that time on Mr. Koestler was associated with me.

Q Is it true, Judge, that such part as Mr. Koestler has taken in these matters in this suit and the former suit between Joseph Roth and the General Casualty & Surety Company, and the Chancery matter between Samuel Koestler as

trustee against the General Casualty & Surety Company, and the filing of a brief on the appeal of the two judgments before the Court of Errors and Appeals—that his part in all those matters was as associate counsel with you? A No, I won't go that far. I had nothing to do with the Chancery matter. If I recall correctly Mr. Koestler took that up with the attorneys for the judgment creditors, who were forcing or pressing Roth in the bankruptcy proceedings at that time.

Q Well, about the filing of a brief before the Court of Errors and Appeals, was that done by him as associate counsel with you? A Well, we weren't associated, but whatever Mr. Koestler did after I had him associated in the matter was entirely satisfactory to me. I never have found fault with anything he did.

Q That hardly answers my question. What I want to know is whether he was acting with you or independently. A At that time it didn't need any second counsel and Mr. Koestler was acting —I had called him in some time previously, and he was handling the matter.

Q You and he were handling them together, weren't you? A No, I don't think I had any part of either of those proceedings that you have asked me about, but Mr. Koestler was handling them after I had called him in.

Q And he continued to act on account of your having called him in? A Yes, sir.

Q And your calling him in constituted him as an associate counsel, did it not? A Well, I can't agree with you that I was associate counsel in either of two matters that I had nothing to do with.

Q You just told me that you called him in and that he continued to do these things, and they

were satisfactory to you, is that right? A That is right.

Q I think that is enough. Another question: "How soon after the filing of the petition in bankruptcy did you enter into negotiations with the attorneys of the Mandels to try to settle the Roth case with them? Answer: Very soon after, just when I can't tell you." "Question: That continued, as your letters show, for a long period of time? Answer: It did." Were those answers correct to the questions? A Yes, sir.

Q "Question: So that Mr. Koestler has been jointly working with you as attorney for Roth all the way through, has he not, practically? Answer: Well, I have called him in from time to time to do whatever could be done to protect Mr. Roth." Is that right? A Yes, sir.

Q "Question: When was it that you reached the determination, Judge David, for or with your client that Mr. Roth, as you expressed it in one of your letters, would go out of bankruptcy? Answer: I can't tell you that. Mr. Roth was anxious to get out of bankruptcy as soon as he got in. He was very anxious to settle these judgments and arrange with his merchandise creditors. My letters will bear that out." Is that right? A Yes, sir.

Q "Question: Had he arranged with the Mandel people at the same time? Answer: I think we had already arranged on the amount of the settlement, and had arranged for the raising of the money, or had raised it about that time. We had arranged to prepare a petition in bankruptcy proceedings, get the consents and get out of bankruptcy." Is that correct. A That is correct.

Q "Question: Where did Mr. Roth get the money from, he then being in bankruptcy, to turn over to these creditors? Answer: I arranged through the Elizabeth Trust Company, I forget exactly the detail, I think it was on a note of Mrs. Roth with an endorsement, the detail of it I don't recall, but I arranged to raise the money for Mr. Roth at the Elizabeth Trust Company, and it was raised and went through my hands." That is the money you have just referred to with reference to these checks that have been offered in evidence; is that right? A Yes, sir.

Q Charles L. Bauer, or Charles L. Bauer, Jr., the assignee of those two judgments, is a clerk in your office? A He was then and he still is.

Q He didn't pay anything personally for those judgments? A No, sir.

Q He had no individual interest in them? A No, sir. The Elizabeth Trust Company entrusted that part of the work to me. I took the assignments in Mr. Bauer's name, and then assigned from Mr. Bauer to the Trust Company.

Q "Question: And the attorneys who were substituting in the place of Stein, Stein & Hannoch, in the Regina Mandel case, were Stamler, Stamler & Koestler, were they not? Answer: Right." "Question: And that same firm was substituted as attorney for Jacob L. Newman in the Annie Mandel case? Answer: In the two cases; yes, sir." Mr. Samuel Koestler, counsel for the plaintiff in this case, trying this case, is a member and was then a member of the firm of Stamler, Stamler and Koestler? A With this little qualification; the firm then of Stamler, Stamler & Koestler being the same Samuel Koestler who is now in this case. The firm now is Stamler & Koestler, being the same Samuel Koestler.

Q "Question: But there certainly was no antagonism between the holder of the judgments and Mr. Roth now, was there? Answer: Why it is already in evidence and admitted that it was a friendly judgment creditor we had take over the judgments." Is that right? A Referring to Mr. Bauer and the Elizabeth Trust Company?

Q Yes. A Yes, sir.

Q "Question: Do you remember that Mr. Koestler appeared before the Court of Errors and Appeals at the June term with a brief on behalf of the Mandels? Answer: Yes, sir." Do you remember that? A Yes.

Q Is that right? A I wasn't there, but I know it is so.

Q I show you what purports to be a brief in the New Jersey Court of Errors and Appeals in the matter of Annie Mandel, administratrix, and Regina Mandel, administratrix, against Joseph Roth. Is that the brief?

Mr. Koestler: We will admit the brief in evidence, but we do not admit there was an appearance by counsel. The brief was merely submitted.

(The papers referred to were received in evidence and marked Exhibit D. 3.)

Mr. Riker: I do not think the statement of counsel ought to appear as part of the evidence in this matter.

The Court: I did not even hear it. If it should be stricken out it will be stricken out.

Q "Question: And the conclusion of this brief was that the appeal should be dismissed and the judgment affirmed with costs? Answer:

Your reading seems to be correct." Do you recall that? A I recall making that answer, yes.

Q "Question: And the fact that you had put Mr. Roth into bankruptcy helped you to negotiate a more advantageous settlement, didn't it? Answer: It surely did." "Question: Is that one reason you put him in bankruptcy? Answer: Gave us time." "Question: And gave you something too—a talking point with the other side? Answer: It did." "Question: This man has gone broke? Answer: That is right. We had to make the best settlement we knew how." "Question: That was one of the things that moved you to have him file a petition in bankruptcy? Answer: One of the things; yes sir." Is that right? A Those questions and answers are correct.

Q Were any of the assignments of judgments which have been offered in evidence ever recorded? A I don't think so. To make sure, though, you could look. I don't think they were recorded. They were always held.

Mr. Riker: That is all.

Mr. Koestler: That is all. I offer in evidence, if your Honor please, a copy of the policy of insurance. The original has been demanded and it has evidently been mislaid by one side or the other. This is a copy I have shown to Mr. Riker. He has no objection.

(The paper referred to was received in evidence and marked Exhibit P. 18.)

By Mr. Riker.

Q Judge David, do you remember writing a letter or receiving a letter from Mr. Cass?

Mr. Riker: This is the letter, Mr. Koestler, I asked to have produced. Have you got the original there?

(Argument.)

Mr. Koestler: Letter dated May 23, 1923, written by Mr. Cass to Judge David. Yes, we have it.

Q Do you recall receiving that letter, Judge? A Yes, sir.

Mr. Riker: I ask to have that marked for identification.

(The paper referred to was marked Exhibit D. 4 for identification.)

Q Did you answer that letter, Judge? A Yes, sir.

Q On the date of May 28? A Yes, sir.

Mr. Riker: I ask to have that marked for identification.

(The paper referred to was marked Exhibit D. 5 for identification.)

Mr. Riker: Have you a letter there from Judge David to the General Casualty & Surety Company under date of February 8, 1923?

Mr. Koestler: I do not see any. Have you a copy of it?

Mr. Riker: I have.

Mr. Koestler: Will you let us see it? All right. I have no objection to your using the copy.

Q Do you remember writing the letter of which this is a copy? A Yes, sir.

Mr. Riker: I ask to have that marked for identification.

(The letter referred to was marked Exhibit D. 6 for identification.)

Mr. Riker: Have you the reply to that under date of February 9? I ask to have that marked for identification.

(The letter referred to was marked Exhibit D. 7 for identification.)

Mr. Riker: I ask to have marked for identification letter dated June 12, 1923.

(The letter referred to was marked Exhibit D. 8 for identification.)

Adjourned until Tuesday, June 12, 1928, at 9:30 A. M.

SECOND DAY

Transcript of stenographer's notes of evidence in the above-entitled cause, taken before Hon. Peter F. Daly, Circuit Court Judge, and a Jury, at the Union County Court House, in the City of Elizabeth, New Jersey, on the twelfth day of June, A. D. 1928, at 9:30 A. M.

Appearances:

Abe J. David, Esq., Samuel Koestler, Esq., counsel for the plaintiffs.

Messrs. Riker & Riker, Irving Riker, Esq., (present), counsel for the defendant.

HARRY G. PFLUG, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Koestler.

Q Mr. Pflug, you are connected with the Elizabeth Trust Company? A Yes, sir, I am.

Q In what capacity? A Assistant treasurer.

Q Were you so connected with the company in the year 1923? A No, not at that time.

Q You were connected with the company, however? A I was connected with the company.

Q Have you produced here records of the Elizabeth Trust Company in connection with transaction with Joseph and Minnie Roth? A I have.

Q Do you show the purchase by the Elizabeth Trust Company of a note on April 25, 1923? A I do.

Q Whose note was it? A It was a note made by Joseph and Minnie Roth.

Q By both? A By both.

Q How much was it? A $20,000.

Q And to whose account were the proceeds of that note credited? A The proceeds were credited to the account of Minnie Roth.

Q I show you a mortgage dated April 25, 1923, which was offered in evidence as Exhibit P. 12, and ask you if this mortgage was given to the bank in connection with that discount of the $20,000. A It was.

Q Why was that mortgage given to the bank, if you know? A As collateral security against a loan of $20,000.

Q Now, was that note of $20,000 renewed from time to time? A It was.

Q Every three months? A Every three months.

Q Were payments made on account of it? A They were.

Q Who made the payments on account? A Joseph Roth.

Q To what amount was that note finally reduced when it was paid off? A To $13,000.

Q On what date was it finally paid off? A September 21, 1925.

Q What was the amount at that time? A $13,000.

Q Exactly $13,000? A $13,199.33.

Q $13,199.33? A $13,199.33.

Q What is the date? A September 21, 1925.

Mr. Koestler: Cross examine.

Cross examination by Mr. Riker.

Q Was any other collateral security taken for that loan? A In my knowledge, no.

Q Who applied for the loan? A That I couldn't tell you.

Q Did you handle it? A No, I didn't handle it at that time.

Q Do you know who did? A I believe our treasurer, Mr. Coriell, did.

Q How was the $13,199.33 paid off? A By charging the account.

Q Whose account? A Minnie Roth's.

Q Have you a record of the account of Minnie Roth there? A No, I think I am in error on that. That note wasn't paid that way. It was paid out of the proceeds of a new note given to Joseph Roth.

Q Given to Joseph Roth? A Credited to his account.

Q Whose note? A Joseph Roth. That was after September 21, 1925.

Q By the proceeds of a note discounted, made by Joseph Roth, is that right? A Yes, sir.

Q Did the Elizabeth Trust Company know at the time that the loan was originally made in 1923 that Joseph Roth was in bankruptcy? A Not being an officer at that time, I can't answer that question.

Mr. Riker: That is all.

Re-direct examination by Mr. Koestler.

Q Mr. Pflug, do you know whether or not it is a fact that the Elizabeth Trust Company now holds mortgages as collateral security covering Minnie Roth's property? A I believe we do, yes.

Q Did you bring that mortgage here? A No, I didn't.

Q Don't you know as a matter of fact you still hold such mortgage? A Yes.

Q That was a mortgage in substitution of this one that was offered in evidence here? A That is right.

Re-cross examination by Mr. Riker.

Q Do you know whether the new note that was given by Joseph Roth on September 21, 1925, has been paid, or any part of it? A Why, that was paid in full on September 22, 1926.

Q What happened to it then? Was it paid? A It was paid, yes.

Q In full? A In full.

Q By whom? A Well, according to our records there was a new note given to Joseph Roth for $25,000, secured by collateral mortgage out of the proceeds of which this other note was paid.

Q He sold it in September, 1926? Joseph Roth gave a new note for $25,000 from the proceeds of which his former note of the year before was paid off? A Yes. These notes were all made by Minnie and Joseph Roth combined.

Q In whose account were these second notes carried? A In Joseph Roth's account.

Q The last two notes? A The last two notes.

By Mr. Koestler.

Q You still hold a mortgage in connection with it? A We still hold a mortgage signed by Minnie Roth.

Mr. Koestler: That is all. Plaintiff rests.

DEFENDANT'S CASE.

Mr. Riker: These are the facts that have been agreed upon.

Mr. Cass, who was in court yesterday, and who is the general counsel in the East for this company, was called to Albany on a very important case and could not be here. In view of the fact that there is no real dispute as to what he would testify to, it has been agreed between the parties that the following are facts in the case: That there was a conference on April 28, 1923, in Newark, which was attended by Mr. Cass and Judge David. Mr. Roth was present but took no part. Mr. Heine and Mr. Bradner were there. Mr. Heine and Mr. Bradner were members of the firm of Heine, Bostwick & Bradner, who at that time were the attorneys of record for Joseph Roth in the two suits of the Mandels against Roth. They represented the General Casualty & Surety Company.

Judge David stated that we had come to the parting of the ways, that Roth could not stand it any more and was going to settle the judgments, that he had got somebody who would take an assignment of them and put up the money. In answer to Mr. Cass' question Judge David said they were paying $14,500, and he gave a long history of the negotiations, that he had gone to see Mr. Newman and some other attorney and they had gone to the house of Mr. Stein representing Mandel, that $15,000 had been the maximum and $14,000 the minimum and that they finally settled at $14,500 later on.

Mr. Roth was going to a trust company where he lives and discount a note. Judge David said the bank might require real estate surety.

Mr. Cass imagined that Mr. Roth was getting a couple of endorsements. Judge David stated that the trustee in bankruptcy had advertised the sale of the automobiles and some other personal property of Roth for the benefit of the creditors in bankruptcy, and that when Mrs. Roth had heard of this she had become prostrated and went to bed, and that Mr. Roth had to consider his wife no matter what it cost to get rid of the claims.

Judge David stated that Roth would then demand that the Casualty Company live up to its bond, meaning its policy, and that Mr. Roth would take such action as he saw fit, perhaps sue on the policy, that Judge David was perfectly satisfied that there would never be a less verdict than rendered in this case, referring to the two Mandel cases which resulted in judgments totalling $23,000 about.

Mr. Cass answered him that neither Mr. Heine nor himself had any authority to accept notification. Mr. Cass appreciated his courtesy in coming over and advising him. Mr. Cass told him that he did not want to be technical, but that Roth would have to give full and formal notice to the Casualty Company, and that the Casualty Company would acknowledge receipt. In that notice he would make his demands upon the Casualty Company. Mr. Cass asked him to please make his statements of fact full and explicit. He promised to do so and spoke of sending copies to Detroit. Mr. Cass told him he could send it anywhere so long as the company actually got it.

Judge David said that the deal was closed, and on Monday or Tuesday assignments would be obtained. He said he did not know whether

Mr. Roth would be discharged in bankruptcy or what form the matter would take. Mr. Cass asked him whether or not he had had the trustee in bankruptcy appraise the assets, as he had previously asked him to do. He said no in answer to the question. Mr. Cass asked him how he stood in his equity action to set aside the transfer. Mr. Cass asked him whether he had put in an answer. He said no, and he also admitted that his time had been delayed because of a negotiation for settlement. Mr. Cass told Judge David it was his opinion that the Casualty Company had the right to fight the case, and Mr. Heine stated that no Casualty Company could be bound to pay after a trial *nisi prius.*

The Court: What do you mean by that? Could not be compelled to pay?

Mr. Riker: I take it what it means is that after the trial here in the Circuit the Casualty Company has a further right to appeal and cannot be bound to pay at that particular moment of time.

Mr. David: This is no admission that this is a fact. It is an admission that Mr. Heine said that. Mr. Heine said that the Casualty Company could not be held to pay after trial *nisi prius.*

Mr. Riker: If that is not the law of course it has no binding effect.

The Court: Well, it is an incomplete statement of the law. That is all. Of course you can be compelled to pay after a trial *nisi prius* if you do not appeal and you have still the right to appeal.

Mr. Riker: I think that is what he meant without stating it in full.

At a conference on March 17, 1923, Mr. Cass went to Newark on appointment made by Judge David to call at Mr. Bradner's office. There was a long conference. Judge David first demanded that the company pay up on its policy. He said nothing could possibly be saved on the Casualty Company's policy, and there followed a long discussion with him.

Mr. Cass told Judge David about the condition of Mr. Roth's property, and that if the Mandels thought they could not collect from Roth and were fought by the Casualty Company, they would in due time make a reasonable settlement. Mr. Cass explained the advantages and probabilities on the success of appeal to the United States Supreme Court. He tried to get Judge David to take up criminal prosecution of the Mandels. Judge David refused to do this, although Mr. Cass suggested that the company would pay him.

Judge David promised to go ahead and get the appraisal in bankruptcy to help fix the liability of the Casualty Company, and said that he was going to file an answer in the equity action to set aside the transfer of the property. Judge David said that if the Casualty Company insisted upon taking an appeal, he would insist that they put up a bond on appeal. Toward the end of the conference Judge David appeared friendly disposed and he and Roth both promised to co-operate.

Mr. Cass telephoned Judge David on March 19, 1923, and told him that he was going to instruct Mr. Bradner to take an appeal. He asked him if he had done anything about the appraisal, and he said that he would attend to that tomorrow.

It is also admitted that the Casualty Company did not consent, either orally or in writing, to the payment of the $14,500 to the Mandels and the securing of the assignments of the judgments.

The following is admitted to be the testimony of Mr. Cass without being of itself admitted to be facts in the case, and I understand it will not be denied by the plaintiffs. On April 2, 1923, Mr. Cass telephoned Judge David. He stated that he had been advised that the appeal had been taken. He asked him to have the trustee in bankruptcy have an appraisal of the assets of the estate right away, and if shown to be a low figure the Casualty Company would probably tender cash and could probably settle with the Mandels very quickly. He promised to take up right away the matter of the appraisal of the estate.

I wish, at this time, to offer in evidence those exhibits which were marked for identification, other than the record of the United States District Court in the matter of Joseph Roth, bankrupt, and other than the Chancery file in the matter between Samuel Koestler, trustee, and the General Casualty & Surety Company.

(The papers which were previously marked Exhibits D. 3, D. 4, D. 5, D. 6, D. 7 and D. 8 for identification were received in evidence and marked Exhibits D. 3, D. 4, D. 5, D. 6, D. 7, and D. 8.)

Mr. Riker: I wish also to offer in evidence, this being by consent, copy of letter from Judge David to Mr. Cass under date of June 19, 1923.

(The letter referred to was received in evidence and marked Exhibit D. 9.)

Mr. Riker: And also letter from Mr. Cass to Judge David dated June 18, 1923.

(The letter referred to was received in evidence and marked Exhibit D. 10.)

Mr. Riker: I call for the production of letter from the General Casualty & Surety Company to Joseph Roth dated July 19, 1923. I offer that in evidence.

(The letter referred to was received in evidence and marked Exhibit D. 11.)

Mr. Riker: I wish to read the contents of Exhibits D. 4 and D. 5, the first being a letter from Mr. Cass dated May 23, 1923, to Judge David.

"Honorable A. J. David, Elizabeth, New Jersey. Dear Sir: On April 27 you asked me to meet you in Newark to speak about a matter of importance in this case. I met you and you then stated that Mr. Mandel"—

Mr. Koestler: All through there he made the mistake of saying Mandel and he meant Roth. There is no objection if you say Roth every time Mandel is stated.

Mr. Riker: It is admitted that where Mandel is in this letter, Roth is meant, and I will read it as Roth.

"I met you and you then stated that Mr. Roth had decided that he would settle the judgment owing to the mental and physical condition of his wife. You stated that the arrangement had been made and the money would be paid the next Monday or Tuesday. You stated that Mr. Roth had made up his mind and could not be changed from that course. Mr. Roth was present at that time and corroborated it.

"I stated to you that I would make an effort to dissuade Mr. Roth from that course if there was any use in preventing an argument. I felt that his course was entirely wrong and against his best interests. You stated that nothing could change Mr. Roth, that he had made up his mind and actually closed the arrangements and made arrangements to borrow the money for the purpose.

"At that time I stated to you that I had no authority from the Casualty Company to receive notification from Mr. Roth as a policy holder, but that the notice would have to be given to the Casualty Company. As I told you, I wasn't technical at all, and that the notice could be presented to the company at Detroit or its office in Newark, and that either Mr. Heine, at whose office we met, or myself, would be glad to take any notification that you had for the purpose of forwarding it to the company. You stated that the matter would be closed up and then formal notice would be given.

"In telephoning you since you told me that the matter had been closed but that you had not yet prepared formal notice to the Casualty Company. This letter is written so that there may be no misunderstanding in the matter. The information which you gave to me and Mr. Heine was then given informally and must not be deemed to be binding upon the Casualty Company.

"I am not criticizing your course nor your delay, merely wishing not to have my position prejudiced by that conference. I am sure that you had not intended this and will confirm the understanding in answer to this letter."

Exhibit D. 5, being written by Judge David to Mr. Cass under date of May 28, 1923: "Your letter of May 23 came duly to hand. Mr. Roth expects to be out of bankruptcy in about a week. When that happens I will be glad to write to you and the company just what the position has been and is of Mr. Roth, although I believe I made it plain at our last conference."

MOTION FOR DIRECTION OF A VERDICT.

Mr. Riker: Your Honor, I wish to make a motion for a direction of verdict. The first ground is that condition "C" of the policy provides that in the event that execution is issued on the judgments against the assured and returned unsatisfied, the judgment creditor shall have a right of action against the company to the same extent that the assured could have had had he paid the judgment. It is my contention that that provision is for the benefit only of the original judgment creditor, not an assignee.

The Court: Why? If he has a right of action why can he not assign it?

Mr. Riker: The right of action for personal injury of a person is not assignable.

The Court: No, but it has been reduced to judgment.

Mr. Riker: But the judgment is not final in so far as there still lay an appeal from it.

The Court: Oh, well, that is another point. You are talking now about the non-assignability. That is another point.

Mr. Riker: The policy does not say that judgment creditors or their assigns may have

this right. It says that the judgment creditor may.

The Court: What difference does it make that it does not say "and assigns"? John Jones recovers a judgment for an automobile accident for $10,000. He recovers that judgment against James Smith. He takes out execution and finds James Smith has nothing. He can sue on the bond to recover against James Smith, can he not? Now, since he has a judgment against James Smith that is good against the company that gave the policy, why can he not assign that the same as he could assign any other judgment?

Mr. Riker: Because it is not contemplated by the terms of the policy. This is a contract between the parties, and the contemplation of the contract is that the insurance company in contesting these claims shall be entitled to contest them with the parties who are injured.

The Court: If John Jones, who had the judgment, died before he collected it, his executor or administrator could not collect it then, could they? In other words, you say that it is purely and exclusively personal to him?

Mr. Riker: I do. I say that it cannot be assigned in this manner.

The Court: I know, but I want your reasons for it. I want to know why this judgment is different from a judgment generally.

Mr. Riker: On the ground that it is a personal claim, which before being reduced to judgment is not assignable, and has the same characteristics after being reduced to judgment.

The Court: All right. That is your reason. I disagree absolutely with you on that.

Mr. Riker: On the second ground for the motion—these are directed as to the first count only: If Minnie Roth, who claims under the first count as assignee, is entitled to the benefits of condition "C" as the assignee of the judgment creditor, under the terms of that condition she can have only the same rights against the casualty company as Joseph Roth could have had if he had paid the judgment. That is practically the language of the policy.

Now, if Joseph Roth had paid these judgments he did so in violation of the terms of the policy, or he would have done so in violation of the policy, because the company would not and did not at any time consent to his paying the judgments, but they insisted upon their right of appeal to set aside the entire judgments. Therefore since she has only the same rights against the casualty company as Joseph Roth would have had if he had paid the judgments, she has no rights because he would have had none if he paid them. She can have no more rights against the casualty company than Joseph Roth would have had if he had paid the judgments. I therefore say that she has no rights to recover under condition "C," which is the basis for the first count.

The next ground: The evidence shows plainly and beyond dispute that this settlement was made by Joseph Roth and his attorney Judge David. It was made for his benefit. It was made on his note and the note of his wife that he paid, I think in cash, $7,000 about on account of the $20,000 note, the proceeds of which were used to take over these judgments, that the remaining $13,000 was paid off by a new note made by both parties but carried and discounted in the

account of Joseph Roth. He therefore paid the money which secured the assignments of these judgments. It was taken in his wife's name and she holds them beyond dispute as agent and trustee for Roth, and therefore can have no rights except as much as Roth would have individually, and therefore has no rights under condition "C" as the assignee of the judgment creditor.

The Court: I do not quite get your point there.

Mr. Riker: I simply say this: Mr. Roth made the settlement. He paid up the money with which these assignments were secured. The assignments are his. Although they appear of record by the assignment which is in evidence in her name, nevertheless they are his and she holds them for him as his agent or trustee, and she can have no more rights under them than Joseph Roth would have himself individually.

The Court: That is not disputed, is it?

(Argument.)

Mr. Riker: In answer to that I say that it was transferred to her on the record on the consideration moving from him, and if she takes it for him she therefore can have no more rights than he would have if the assignments had been made directly to him. On that ground I say that there is no cause of action under the first count, and there should be a direction as to the first count.

The next ground: The evidence shows that the two writs of execution which were issued on the Mandel judgments after the assignment to Minnie Roth were returned by the Sheriff unsatisfied by order of the attorneys of the plaintiff. Now, I submit that that is not the return of

unsatisfied that this policy contemplates shall give rise to a cause of action to the judgment holder, judgment creditor. It anticipates that if the judgment creditor is unable to collect from the assured, if he has no assets and he cannot get his money, then he shall have this right against the company. It certainly does not mean that where the assured has property the holder of a judgment can simply go to the Sheriff and say, "Return these executions unsatisfied," and then by doing that acquire a right against the casualty company. On that ground I move for a direction of verdict as to the first count.

Next as to both counts: The evidence shows that Joseph Roth made a settlement of these two judgments. The policy says that he shall not make settlement of claims without the written consent of the casualty company. It is admitted that no written consent was given. I submit that the evidence is clear and undisputed, and it is only capable of one interpretation—to the effect that it was Joseph Roth who settled these judgments, and that there he has violated his policy and relieved the casualty company from all liability on the policy; and there should be a direction of verdict as to both counts.

The next ground is the same, in that he violated the contract in attempting to make the settlements. He did not have the right to attempt to do it. The right of negotiation and complete control of the contest of these claims under the contract between the assured and the company is placed in the hands of the company, and the assured has no right to interfere with it whatsoever.

(Argument.)

Mr. Riker: The next ground: As to both counts I move for a direction of verdict on the ground that Joseph Roth violated the policy in that he assumed the liability in connection with this settement in violation of the policy, condition "D" of the policy providing that the assured shall not assume any liability. The evidence is undisputed that he signed the original notes and all subsequent notes, and as a matter of fact it even shows that he paid the $20,000. That was in violation of the terms of the policy and therefore voids the policy, and there is no liability on the casualty company.

The next ground is that Joseph Roth violated the policy by failing to co-operate, which was an implied provision of the policy, with the company in the contesting of these claims. He had an attorney, Mr. Koestler, or rather the firm of Stamler, Stamler and Koestler, substituted as attorneys of record in the two judgments, who filed briefs in the appeal of those cases in the Court of Errors and Appeals asking for the affirmance of a judgment against himself, which is nothing more or less than a contest of this matter with his insurance company, which was directly contrary to the intent of the agreement that he had entered into with them. In that way he had interfered with their right to contest the claim. On that ground I say he has violated the policy and there should be a direction of verdict.

Mr. Koestler: May it please your Honor, in answering the motion for a directed verdict made on behalf of the defendants I desire on behalf of the plaintiffs to move for a direction of verdicts as follows: Roth under the contract

of insurance is the principal and the bonding company or the surety company is the surety. This is a contract made for a money consideration paid to the insurance company, and therefore under all of the decisions the contract is most strictly construed against the insurance company.

Now, this insurance company by the very language of its policy shows that it appreciates and distinguishes the difference between a claim, a suit, and a judgment, because in condition "B" it says, "If a claim is made on account of such accident the assured shall give like notice thereof with full particulars." In condition "C" —"If therefore any suit is brought against the assured to enforce such a claim for damages, the assured shall immediately mail summons and complaint," and it goes on to say, "The expense incurred by the company in defending such suit, including court costs and all interest accruing after entry of judgment, will be borne by the company irrespective of the limits of liability expressed in the policy. The company shall have the right to settle any claim or suit at any time."

Then the policy goes on and shows something else. "In the event that an execution on a judgment against the assured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the company to the same extent that the assured could have had had he paid the judgment."

Now, there your Honor will perceive that the company by its contract has clearly distinguished between a claim, a suit, and a judgment.

Now, let us see. Clause "D," which is spoken of as giving the reason for a motion, says this, what the assured shall not do: "The assured shall not voluntarily assume any liability nor incur any expense or settle any claim unless first authorized in writing by the company." The contract does not say the assured may not settle a judgment, and the language is most strictly construed against the company."

The Court: Is not a judgment a claim?

Mr. Koestler: No, sir. Our law recognizes three classes: First, an oral contract; second, the next higher degree, a written contract, and third, the highest, a judgment of a court of record; and clearly distinguishes the three.

The Court: Yes, but they are all claims.

Mr. Koestler: No, it is no longer a claim. It is a judgment.

The Court: All right. We will not argue, but I hold that a judgment is a claim so far as that use of that word in the policy is concerned.

Mr. Koestler: Now, in this case, if your Honor please, the stipulation put upon the record shows that as early as March Judge David informed the bonding company that Roth was going to borrow money and take an assignment of the judgments, and there is not a word on the record that Mr. Cass, Mr. Heine, or anybody then and there made objection to his taking an assignment of the judgment.

The Court: When were the executions issued on these judgments?

Mr. Koestler: Were there executions at that time?

The Court: Yes.

Mr. Koestler: Yes, sir.

The Court: And returned unsatisfied?

Mr. Koestler: No, sir. Not at that time. The executions were issued by Stein, Stein & Hannoch and Jacob L. Newman, upon which levies were made, and then rules to show cause were taken and the judgments for $55,000 were set aside for the purpose of reassessing damages only.

The Court: Well, the rule to show cause did not stay the return of the levies.

Mr. Koestler: No, sir. They were not returned. They were held by the Sheriff until a long time afterwards. Then after the assignments of judgments to Mrs. Roth in 1925, new executions were issued and returned unsatisfied, giving a cause of action, as we contend, under clause "C." The contract expressly provides for a cause of action in that event. The statute provides that any cause of action may be assigned, and there is not any clause in here against assignment.

Now, point two made as to the first count is that Roth violated the policy and that the company did not consent to the payment. My answer to that is that the situation as disclosed to your Honor by the undisputed evidence is that the judgments are still open of record and assigned to and held by Mrs. Roth. The evidence is undisputed that it was her property which was pledged to raise the money, although Roth signed the note together with his wife.

Now, the point is made that this was a settlement of the claim, and I urge that it was a purchase of the judgment, although the word settlement has been used by Judge David and Mr. Cass and everybody in the case. The real facts

as disclosed by the evidence are that the judgments were assigned, held open of record, and were in fact what in law would be called a purchase. Therefore I contend that there is nothing in that point as a question of law, because on the law the evidence is undisputed that Mrs. Roth's property was pledged; and under the decisions which I have handed to your Honor, a wife may lawfully pledge her property for the benefit of her husband and stand in the place of the creditor.

Now, the next and final point on count one is that executions were returned unsatisfied by order of attorney. The language of the policy is that they shall be returned unsatisfied. It does not say how, by whom, or by what method, and the record before your Honor shows a return of these executions unsatisfied, without any contradictory evidence showing that there could have been raised the full amount of these judgments from any property which Roth had. Is there anything before your Honor produced by the defendant to show fraud or that Roth did in fact have property at the time these executions were returned unsatisfied? Therefore the return of the Sheriff is uncontradicted and stands affirmed before this Court.

Now, as to what is said as to the second count is practically covered by the argument which has been made. There is not anything in the policy which says that Roth shall not attempt to get the best figures at which these claims or judgments may be settled, and up to the time of the actual purchase of them there were negotiations in an endeavor to get the insurance company to contribute, either in the sum of $10,000 or some other sum, so that these judgments

could be gotten out of the way and canceled. They were never in fact canceled.

The policy does not in my opinion prohibit Roth having somebody purchase those judgments, who will be more friendly to him than the judgment creditors themselves, and that is what was done in this case. The evidence shows that friendly persons took assignments of those judgments and endeavored to give Roth additional time to pay them. The case which I have handed your Honor in 168 New York Supplement shows that that gave an absolute cause of action against the policy, and therefore entitle Mrs. Roth to a directed verdict.

Now, as to whether Roth interfered with the prosecution of these appeals—as a matter of fact the appeal was taken not on facts or on anything over which Roth or anybody had control. It was on a question of law, and I contend before your Honor that no matter what arguments are made, the law was the law. The law was on the book, and it was the law. It is presumed to be constitutional, and until it is declared unconstitutional it is constitutional. That is the decision of Bayonne against McGrath in 83 New Jeresy Law; and the Court of Errors and Appeals finally declared this statute constitutional. Although there may have been no decision by the Court of Errors and Appeals, the decision was merely a pronouncement of the fact that the law was constitutional.

What Mrs. Roth did in purchasing those judgments did not interfere with the bonding company prosecuting an appeal. In fact, they did prosecute the appeal and they got licked, but before that time came they, knowing the handwriting on the wall and being able to read it,

pleaded the baby act, and on July 19, 1923, they wrote a letter trying to ditch the case and trying to throw their policy overboard. That is what they did.

The Court: You say that they were licked on appeal. What appeal?

Mr. Koestler: The appeal which they took to the Court of Errors and Appeals.

The Court: On what?

Mr. Koestler: From the last judgments. They took the appeal, and there is in evidence here the remittitur from the Court of Errors and Appeals to the Supreme Court affirming those judgments of $23,000.

The Court: That was simply on the question of the constitutionality of the second trial, wasn't it?

Mr. Koestler: Yes, your Honor. Now, the judgments are still there. After that decision, if they had not tried to get out of this they could have gone to the United States Supreme Court.

The Court: Was it a judgment acquired by Mrs. Roth after that final appeal or before?

Mr. Koestler: The judgments were purchased by the assignment to Mrs. Roth before the determination in the Court of Errors and Appeals.

The Court: But after Roth went into bankruptcy?

M. Koestler: Oh, long after. Yes, after Roth was in bankruptcy.

The Court: Roth went into bankruptcy before the trial of the second case?

Mr. Koestler: Yes, sir; immediately after the judgment and levy on the first judgments.

The Court: Yes.

Mr. Koestler: Now, in opposing the motion I have said what I want to say, and now I want to make a motion in this case for a directed verdict in favor of the plaintiff. This policy provides, as I have stated, that the expense incurred by the company in defending the suit, including court costs and all interest accruing after entry of judgment, will be borne by the company irrespective of the limits of liability expressed in the policy. That means something.

In this case the limit of the policy is $10,000, there being two deaths. Without that clause the limit of liability would be $10,000. With that clause we are entitled to recover interest on the judgments as well as the court costs. The interest on those judgments amounts to $9,031, and together with the $10,000 and the costs a total amount of $19,265.05. I contend that Mrs. Roth is entitled to a judgment for that amount less the amount that Roth has paid in reduction of the original $20,000 loan, which according to the evidence of Mr. Flood is $6,862.

The Court: I do not understand that at all. Where does Roth come in this?

Mr. Koestler: He is the party who is insured under the policy.

The Court: I know, but so far as this suit is concerned.

Mr. Koestler: He is a party plaintiff.

The Court: Why is he a party plaintiff?

Mr. Koestler: Because, if your Honor please, after the judgment was assigned to Mrs. Roth or to the Elizabeth Trust Company for her benefit, Mr. Roth paid money in reduction of it.

The Court: Then he looks to Mrs. Roth for that, does he not?

Mr. Koestler: So I am asking the judgment in the alternative this way, your Honor: Firstly, Mrs. Roth would be entitled to the full $19,265; secondly, if as a matter of law your Honor should hold that what Roth has paid off in reduction of that note she cannot now recover from the bonding company, then Roth, unless there are some defenses against Roth personally, would be entitled to recover that $6,800 from the bonding company. So therefore my prayer for judgment is in the alternative either that Mrs. Roth have a judgment for the full amount of $19,265, or that she have a judgment for $12,464, and Roth a judgment for $6,800.

The Court: You will never get both from me. Mrs. Roth is not a defendant with her husband as plaintiff.

Mr. Koestler: I do not understand.

The Court: Mrs. Roth is not suing her husband because he paid on account of a judgment that she owned, so much money.

Mr. Koestler: No. Mrs. Roth is suing the bonding company.

The Court: That is a matter between the two of them.

Mr. Koestler: And Mr. Roth is also suing the bonding company. If Mrs. Roth is entitled to recover the full amount under the terms of this policy, then Roth has no cause of action against the bonding company.

The Court: Well, if she is not entitled, then no one is entitled to recover, so far as this suit is concerned, according to the facts as presented in this case.

Mr. Koestler: I cannot quite agree with that.

The Court: All right. It is either one thing or the other.

But the question of interest concerns me a great deal. The judgments amounted to $23,500, and according to your claim she bought those judgments for $14,500. You claim that she is entitled not only to interest on $14,500, but interest on the face of the judgments, which was $23,500, from the time those judgments were entered. That is your claim, isn't it?

Mr. Koestler: Well, that is one construction, of course. This contract, if your Honor please, may be susceptible of another construction, and that construction could possibly be susceptible of three constructions. It could possibly be susceptible of a construction that the interest is not on the full face of an excessive judgment over and above the amount of liability, but interest on the amount of their liability. That would be interest on $10,000. I have not computed that. I shall compute that and give your Honor the figure on that. Or it might mean a middle ground, that she is entitled to interest for the amount which she paid for those judgments, $14,500. In my opinion it may be susceptible of three constructions.

The Court: My construction of this section "C" in reference to that part which is expressed in this language, "The expenses incurred by the company in defending such suit, including court costs and all interests accruing after entry of the judgment, will be borne by the company irrespective of the limits of liability expressed in the policy," is that it plainly means this: That if there is a $10,000 policy and the verdict is for $15,000, everything else being all right so

far as the full compliance with the policy is concerned, the company who defends the suit under their right acording to the terms of their policy have to pay the $10,000, and they have to pay all the costs of the suit, and they have to pay the interest on the $15,000 and not on $10,000. There is no question in my mind that is the common sense, and being the common sense, is the legal interpretation of that language, the point being that it is their duty to immediately settle the judgment once it is recovered, if their policy has been complied with, up to the extent of their $10,000. If they do that, why then it is up to the policy holder if there is a verdict for an amount in excess.

But here was the verdict for $23,000—when I say verdict I mean the two included in one, because it was the one physical transaction that was involved, and the one policy. That covered the full claims, the suits. The wife of the defendant comes along and buys up the $23,500 judgment. She buys it up for $14,500.

Now, you claim that she is entitled to interest on $23,000 from the time of the entry of the judgment, plus the costs of the suit, plus the $10,000, the amount of the insurance policy. That is what is concerning me—whether she is entitled to the interest, if she is entitled to a verdict at all.

What facts are undisputed in this case, or what facts are disputed in this case? What is there for the jury to pass upon?

Mr. Riker: I do not think there is anything, your Honor.

The Court: I am going to recite the facts as I understand them, and if you disagree with me

then I shall amend before I reach my conclusion on the motions for a directed verdict. Will you kindly give me the dates as I go along?

The undisputed facts in this case as the Court understands them to be justify the recital of such facts as follows: Joseph Roth carried liability insurance with the General Casualty and Surety Company under a policy with a limit of $10,000. Five thousand dollars was the limit in case of damage done to person or property in an individual case, and if there was more than one case, or more than one person for example, then the limit was $10,000.

Roth's car covered by this policy was in an accident. As a result of that accident two suits were started because of the death of one Edward Mandel and the death of one Jacob Mandel. These suits were tried before a judge and jury in the Essex Circuit of the Supreme Court, and verdicts were rendered by the jury to a total in both cases of $55,000. A rule to show cause was obtained by the defendant, whose defense had been conducted entirely and exclusively by the surety company as provided for by the policy; and there is no evidence whatever that up to the time of the trial and the rendering of a verdict in the Essex Circuit Roth in any way interfered with the surety company in the conduction of the defense of the cases, nor is there even a suggestion that in any way he failed to furnish any cooperation that he was able to furnish towards an effective defense.

The rule to show cause which was obtained by the Casualty and Surety Company did not contain a stay of execution, nor did Roth as defendant or the surety company enter any bond to

effect such a stay of execution. Shortly after these verdicts were rendered, totaling as stated $55,000, Roth went into bankruptcy. Executions were issued on these verdicts, and levies were made, but the levies under those judgments were never followed up. Presumably the fact that Roth had gone into bankruptcy precluded the effectiveness of any following up of the executions and levies which had been made.

The Appellate Court in passing upon these verdicts sustained the verdicts so far as the liability of the defendant was concerned, but held that the amounts rendered by the Essex Circuit were excessive, and sent the cases back for retrial, expressly limiting the retrials to the question of damages only. As a result of such retrials the verdicts in the two cases totaled, instead of the $55,000 formerly obtained, the sum of $23,000.

Up to this time, the time of the rendering of the second verdicts, there was no act upon the part of Roth that in any way interfered with or lessened the exclusive right taken by the General Casualty and Surety Company to defend the suits, so far as the evidence in this case is concerned.

The General Casualty and Surety Company appealed from these verdicts, not on the question of the amount of damages, but they took the position, according to their admissions here in this case, that our Appellate Court had no constitutional right to send back those cases to be tried limiting the trial to the question of damages only. On appeal to our Appellate Court they lost, and notwithstanding that they informed Roth, either directly or through his attorney or both,

that they were going to carry up the ruling of our Appellate Court to the United States Supreme Court on the question as to whether our Appellate Court had a right to limit a new trial to the question of damages only in such a case as this; which action we know as a matter of common knowledge under ordinary practice and procedure would have meant a delay for at least another year.

After the second verdicts, but before the determination of the second appeal, Mrs. Roth secured an assignment of these judgments obtained for the amounts totaling $23,000.

It is claimed that the husband's money was really behind it. The judgments as they appear were legally purchased and legally bought by Mrs. Roth. There is evidence to the effect that her mortgages on her own individual real estate were given as collateral security. Be that as it may, she was and is the legal holder of these judgments. She obtained them by assignment from the plaintiffs in this case.

Now, then, it is contended that she has no right to sue the General Casualty and Surety Company as the assignee of the judgments obtained by the plaintiffs in those accident cases. It is contended that under the following language in condition "C" of the policy of the General Casualty and Surety Company—"In the event that an execution on a judgment against the assured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the company to the same extent that the assured could have had had he paid the judgment," but that is a right that is

personal and exclusive to the assured, or in the event of the failure of the assured paying the judgment, then it is personal and exclusive to his judgment creditor; that is, in this case, the original plaintiffs in the automobile accident.

The Court holds that such judgments as these may be assigned by the parties obtaining them the same as any ordinary judgment can be assigned, and that the assignment from the plaintiffs in the accident cases to Mrs. Roth was a legal, effective assignment.

The Court holds that if the assured, or if the plaintiffs in the original accident cases, could at this time have no right of action against the General Casualty and Surety Company, then of course neither could the assignee of the judgments that were obtained have any action. Mrs. Roth as the assignee of the judgments could have no more right to action or have a different kind of action against the General Casualty and Surety Company than the assured or the assured's judgment creditor could have under the terms of the policy.

But there is nothing in the case from the admitted facts in the case that lessens her right as the assignee of the judgments to be in fully the same power and position as the original holders of the judgments were.

It is claimed that no action is sustainable against the surety company at this time because this has been a settlement without their written consent. Under the same condition, condition "C" of the policy it is provided that in the event that an execution on a judgment against the assured be returned unsatisfied in an action by a person who is injured or whose property is

damaged, the judgment creditor shall have a right of action against the company to the same extent that the assured could have had had he paid the judgment.

After the second trial Mrs. Roth as the assignee of these judgments had executions issued and they were returned unsatisfied, and since we hold that she was exactly in the same position as the judgment creditor would have been if the judgment creditor has not assigned, then since those executions were returned unsatisfied, her right of action against this company commenced. She had a right of action, and the Court holds that she has a right of action now.

Having a right of action as the Court holds, and the facts being undisputed, what amount is she entitled to? The question of interest has given the Court concern.

She is entitled to a verdict from the undisputed facts in this case for the amount of the policy, $10,000, for the costs which were incurred in these suits heretofore brought against the defendant, and she is in my judgment entitled to interest on the amount that she paid for these judgments from the time that she paid them to the present time.

I direct a verdict acordingly, and you may have an exception.

Mr. Riker: Your Honor, may I ask that it be added to your statement of facts, the fact that the evidence shows that the negotiations for the taking over of these judgments by assignment were conducted entirely by Judge David as attorney for Joseph Roth?

The Court: Yes. That is undisputed.

Mr. Riker: And I also note an exception to the refusal of my motion.

The Court: Yes, certainly. What do you figure that to be? Where is the evidence as to what the costs were?

Mr. Koestler: The Clerk of the Supreme Court.

The Court: $234.05.

Mr. Koestler: Yes, sir; in one case $107.89, and in the other case $126.16.

The Court: What is the computation of the interest?

Mr. Koestler: The interest computed from February 2, 1923, to date, is $4,664.16.

The Court: Six per cent.?

Mr. Koestler: Six per cent. on $14,500; makes a total of $14,898.21.

The Court: Mr. Riker, have you checked up on the interest?

Mr. Riker: I have, your Honor. It is all right.

The Court: Under the ruling of the Court the jury is directed to return a verdict in favor of the plaintiff Minnie Roth against the defendant the General Casualty and Surety Company for the sum of $14,898.21; and as to Joseph Roth, plaintiff, a verdict of no cause of action for the defendant.

Mr. Koestler: I desire to take an exception to the Court's remarks limiting the interest on $14,500.

I also desire an exception to the direction of the Court that there should be no cause of action on the second count in favor of the plaintiff Joseph Roth against the defendant.

EXHIBIT D. 4.

May 23, 1923.

Mandel vs. Roth. 2601.

Hon. A. J. David,
Elizabeth, New Jersey.

Dear Sir:

On April 27th you asked me to meet you in Newark to speak about a matter of importance in this case. I met you and you then stated that Mr. Mandel had decided that he would settle the judgment owing to the mental and physical condition of his wife. You stated that the arrangement had been made and the money would be paid the next Monday or Tuesday. You stated that Mr. Mandel had made up his mind and could not be changed from that course. Mr. Mandel was present at that time and corroborated this.

I stated to you that I would make an effort to dissuade Mr. Mandel from that course if there was any use in presenting an argument. I felt that his course was entirely wrong and against his best interests. You stated that nothing could change Mr. Mandel, that he had made up his mind and had actually closed the arrangement and made arrangements to borrow money for the purpose.

At that time I stated to you that I had no authority from the Casualty Company to receive notification of any such step from Mr. Mandel as a policy holder, but that the notice would have to be given to the Casualty Company. As I told you, I was not technical at all, and that the notice could be presented to the Company at Detroit or its office in Newark, or that either

Exhibit D. 4.

Mr. Heine (at whose office we met) or myself would be glad to take any notification that you had for the purpose of forwarding it to the Company. You stated that the matter would be closed up and then formal notice would be given.

In telephoning you since, you told me that the matter had been closed, but that you had not yet prepared formal notice to the Casualty Company.

This letter is written so that there may be no misunderstanding in the matter. The information which you gave me and Mr. Heine was then given informally and must not be deemed to be binding upon the Casualty Company.

I am not criticising your course nor your delay, merely wishing not to have my position prejudiced by that conference. I am sure that you had not intended this, and will confirm the understanding in answer to this letter.

Very truly yours,

Alvin C. Cass.

ACC/jp

EXHIBIT D. 5.

May 28th, 1923.

Alvin C. Cass, Esq.,
35 Nassau St.,
New York City.

In re Mendel v. Roth (2601)

Dear Mr. Cass:

Your letter of May 23rd came duly to hand. Mr. Roth expects to be out of bankruptcy in about a week. When that happens I will be glad to write to you and the Company just what the position has been and is of Mr. Roth, although I believe I made it plain to you at our last conference.

With regards, I am

Very truly yours,

A. J. David

s.

EXHIBIT D. 6.

Feb. 8, 1923.

ABE J. DAVID
ELIZABETH, N. J.

General Casualty & Surety Co. of Detroit, Mich.,
Detroit, Mich.

Gentlemen: In re Mendel v Joseph Roth, 2 cases.

Mr. Joseph Roth informs me that either Mr. Heine or Mr. Bradner at the conclusion of the re-trials, made some mention of a further appeal. The insistment of your Company of prosecuting the previous appeal, resulted in considerable damage to Mr. Roth. The prosecution of a further appeal will result in further damage to him.

On behalf of Mr. Roth, I advised you sometime ago of his desire and opportunity to settle these claims. Mr. Roth still has an opportunity of making a favorable settlement, based so far as he is concerned on the payment by you of your liability under his policy.

I now write to request that prompt settlement by you be made and await your immediate reply.

Very truly yours,

A. J. David.

P. S.: I am sending a copy of this letter to the firm of Heine, Bostwick and Bradner.

EXHIBIT D. 7.

February 19, 1923.

A. J. David, Esq.,
Elizabeth, N. J.

Our file 861
Joseph Roth
Accident 6-8-21.

Dear Sir:

I beg to acknowledge receipt of your letter of February 8, and I have carefully noted the contents.

A previous letter from you Mr. David, was perhaps misunderstood. I may have been in error in drawing the conclusion that you were attempting to force us to do something which, in our opinion, was not proper, and on the other hand, it looked to me as though, you were attempting to effect a record in behalf of Mr. Roth.

From your subsequent letter I am of the opinion that you are just as desirous as we are in properly protecting your client and at the same time, get rid of this case. However, the situation as it exists today, should be fairly met. We are desirous of settling the case and we are further desirous of giving Mr. Roth full protection under his policy and seeing that he is relieved at the earliest moment of all of these judgments. There is, however, considerable more to be said in the case than this. We have the right, at our expense, to appeal these cases and if they can be reversed, full liability may be saved. This right is given to us and is accepted by the assured. We propose to appeal these cases to the United States Supreme Court, if necessary.

Exhibit D. 7.

The Federal Courts have held that the New Jersey rule reversing a judgment, as to the damages only, because of passion and prejudice is unconstitutional. It is manifestly unfair. If prejudice or passion causes a jury to improperly assess excessive damages, that same passion and prejudice warps their judgment when they are determining the issue of negligence. There is no such rule in other courts and, as stated, the thing is violative of common sense and the law laid down by the Federal decisions. Just precisely as Mr. Roth wishes the Company to live up to its obligations, we expect Roth in turn to live up to his obligations. We expect him to cooperate in the contest of these cases so long as there is a reasonably fair hope of reversal and dismissal, and it has been our impression and understanding that this has been Mr. Roth's desire and we have been operating and attempting to effect a settlement with this understanding. It is our opinion that the decedents in this case, were guilty of contributory negligence and upon a fair trial the jury would find for the defendant, Mr. Roth. We consider that the verdicts rendered in the first case were due to the prejudice and sympathy of the jury, and, of course, in the second case, the defendant was prejudiced from litigating the issue.

In spite of all this, we would be very glad to get into personal conference with you and see what may be done. We are not arbitrary and wish to strongly impress upon you that we are acting entirely in good faith, and, as we believe, the best interest of Mr. Roth, and if a fair and reasonable settlement can be had, we will certainly unite in it. Such a fair settlement, however, involves justice to the Casualty Com-

Exhibit D. 7.

pany for a large amount of money for which it is involved as well as for the small sum which is in excess of the policy limit, and which amount we have no doubt the plaintiffs would be very glad to settle cheerfully, or perhaps even release.

We suggest that you make an appointment to see Mr. Alvin C. Cass of 35 Nassau Street, New York City. Mr. Cass is our eastern counsel, and he will be instructed by us to go over this matter and without prejudice to the rights of either parties, to take the matter up with you at length. If you will do this please, I believe, that you will be serving best interest of both your client and ourselves.

Thanking you in advance for your co-operation, I am

Yours very truly,

B. E. Hulburt,
Supt. of Claims.

EXHIBIT D. 8.

June 12, 1923.

General Casualty & Surety Company,
Detroit, Michigan.

In re Mendel v. Roth—861

Gentlemen:

As I advised Mr. Cass some little time ago, Mr. Roth's position was such that he had to get out of bankruptcy. Consequently, the Mendel judgments were taken over by a friendly assignee and on consent of all creditors, an order was made discharging the bankruptcy proceedings.

The attorneys for the present judgment creditor now advise me that they propose to issue execution against Roth on the judgments. In view of the fact that on the appeal which you insisted on taking, (a) no bond was filed and (b) no stay of execution had. Roth's property is still and again in jeopardy. Mr. Roth renews the stand he took with reference to your right to insist on appeal, especially where his interests are not being properly safe-guarded.

I write to ascertain whether the amount of your bond is now to be paid and if not, whether you will take appropriate measures by the filing of a bond or otherwise to protect Mr. Roth's interests and property.

I await your prompt advice.

Very truly yours,

EXHIBIT D. 9

June 19, 1923.

ABE J. DAVID
ELIZABETH, N. J.
Messrs. Cass & Apfel,
Att. A. C. Cass, Esq.,
35 Nassau St.,
New York City.

In re Mendel v. Roth

Dear Mr. Cass:

Yours of the 18th is at hand. I thought I made it plain that Mr. Roth is now out of bankruptcy and with it, any proceedings, the outgrowth of the bankruptcy, are discontinued. I notice you do not reply to the question in my letter as to whether the Company will file a bond on the appeal of the cases in order to protect Mr. Roth against execution.

This will serve to notify the Company though you, that Mr. Roth will hold the Company for any damage by reason of the failure to file this bond, since the Company insists on the right to appeal.

Very truly yours,

A. J. David.

EXHIBIT D. 10.

June 18, 1923.

Mendel vs Roth 2601

Hon. Abe J. David,
Elizabeth, New Jersey.

Dear Judge David:

I beg to acknowledge receipt of your letter of June 12th, enclosing copy of letter of same date sent to General Casualty & Surety Company. There is not sufficient information contained in your letter to permit the Casualty Company to determine what it should do. What has become of the equity action brought by the trustee in bankruptcy? My last knowledge was that you were going to interpose an answer which you thought would defeat the action; both Mrs. Roth and the children had actual financial interest in the real estate whose rights the court would protect.

What has become of the appraisal of the assets of Roth in bankruptcy which you stated sometime ago you would see was promptly taken care of? Such appraisal is necessary to fix the amount of the liability of the Casualty Company and the amount for which security can be given by the Casualty Company on the appeals. There are other things of which information is needed, but this information is necessary before the inquiry in your letter of June 12th to the Casualty Company can be answered. That inquiry was:

> "x x x whether the amount of your bond is now to be paid and if not, whether you will take appropriate measures by the filing of a bond or otherwise to protect Mr. Roth's interests and property."

Exhibit D. 10.

The first part of your question can be answered. The Casualty Company will not pay the amount of the policy. It claims a right to contest the Mendel's claims further.

Yours very truly,

Alvin C. Cass.

ACC/hm

EXHIBIT D. 11.

SCHEDULE A

July 19, 1923.

Joseph Roth, Esq.,
135 Magnolia Avenue,
Elizabeth, N. J.

Our file 861
Joseph Roth
Accident 6-8-21

Dear Sir:

This is notice to you that the General Casualty and Surety Company hereby disclaims further liability under its policy AL 10625 to indemnify or hold you harmless against the claim and judgments of Annie Mendel as administratrix of Jacob Mendel, and Regina Mendel, as administratrix of Edward Mendel, deceased.

Liability is disclaimed because of your breaches of the policy. We have endeavored to ascertain but have not been sufficiently advised of what you have done in these matters, but these breaches of the policy appear:

(1) You have settled the aforementioned claim by the payment of some fourteen thousand

Exhibit D. 11.

dollars without the consent of this Company and against its wishes and without even consultation.

(2) The form that the settlement has taken has aggravated this breach of the policy. You have not taken releases of these people and satisfied the judgments, but have caused assignments of the judgments to be taken in the name of assignees friendly to you, and those assignees working for and on behalf of your interests are now actively fighting this Company in the name of the Mendels.

(3) You have made a settlement with these creditors causing the withdrawal of their claims in bankruptcy and your discharge from bankruptcy and have procured the discontinuance of the action brought by the Trustee in Bankruptcy to realize assets. These things also you have done without the knowledge or consent and against the wishes of this Company and without even consultation with us. Only by proper steps in bankruptcy could the assets and liabilities be determined and the amount of the liability of this Company, if any, determined. Only through such proceedings could the amount of bonds required to be given upon appeal be ascertained. You promised to take proper proceedings but have not done so.

(4) You have refused to permit this Company to continue the litigation with the Mendels. You have notified us that after the second judgments were rendered, that we had no right to continue further appeal. Upon the argument of the second appeals the attorney for the Trustee in Bankruptcy, now friendly to your interests and subservient to your wishes, and un-

Exhibit D. 11.

doubtedly sooner or later to be paid with your funds appeared as counsel for the Mendels and sought to have the judgments affirmed. Actually, he did not represent the Mendels and the Mendels did not care whether the judgments were affirmed or reversed, as they had previously gotten the full amount of the settlement.

(5) You have refused co-operation with the General Casualty and Surety Company. You have taken such step that your interests are adverse to that of this Company. You are now seeking to have the judgments affirmed. Should the judgments be reversed, your personal interests will require you to induce the Mendels, although they have been settled with, to go into court, swear to the claims over again, and try to get another judgment.

You have been previously advised that The General Casualty and Surety Company expected to reverse the judgments and desired to take the appeals to the United States Supreme Court. The General Casualty and Surety Company are prepared and desirous, if necessary, to go to the highest courts to test this case with the Mendels. The Mendels, however, have been settled with, and the General Casualty and Surety Company is now called upon to battle with you and your counsel. This company desired to have the amount of the bond necessary to be given upon appeal fixed by appropriate proceedings in the Bankruptcy Court. That cannot now be done, and the position of the General Casualty and Surety Company has been changed to its detriment.

To avoid misunderstanding, let us say that we have not overlooked the fact that these judg-

Exhibit D. 11.

ments are still outstanding of record. On the contrary, we have in this letter referred to that fact. If our opinion is correct, that fact does not change the relations between you and this Company.

We have instructed Messrs. Heine, Bostwick and Bradner (or as we are advised the firm's name now is Heine, Bradner and Laird), Attorneys in Newark, New Jersey, who handle this case for us, to send to you a consent to substitute your counsel as your attorneys upon these appeals. We understand that an additional or reply brief can still be submitted to the Appellate Court. You may desire to re-argue these appeals, as your counsel may have different theories of procuring a reversal than the writer or our counsel. This opportunity is therefore given you to step into the litigation at once to defend your interests.

Yours very truly,

B. E. HULBURT,
Supt. of Claims.

1030CT.T.1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH ROTH and MINNIE ROTH, *Plaintiffs-Respondents,* *against* GENERAL CASUALTY & SURETY COMPANY, a corporation, *Defendant-Appellant.*	*Action at Law.* *On Appeal.*

BRIEF FOR APPELLANT.

Statement.

This is an appeal taken by the General Casualty & Surety Company, the defendant, from a judgment in favor of the plaintiff, Minnie Roth, entered in the New Jersey Supreme Court on June 13, 1928, in the sum of $14,982.35 (record, p. 32). The other plaintiff, Joseph Roth, has filed a cross appeal from a judgment dismissing the second count in which he sought a judgment against the defendant (p. 31). The action was tried on June 11th and June 12, 1928, before the Honorable Peter F. Daly, Circuit Court Judge, and the trial resulted in directed verdicts resulting in the judgments described.

Facts.

The facts of this case are substantially undisputed and in brief are as follows:

The General Casualty & Surety Company issued its policy to Joseph Roth whereby it agreed to indemnify him against loss from liability on account of bodily injuries including death caused by his certain automobile (policy printed at p. 10). The limit of the policy was $5,000 for any

one person injured and $10,000 for two or more persons injured in any one accident.

On June 8, 1921, while the policy was in full force the assured had an accident resulting in the death of Edward Mendel and Jacob Mendel. Administratrices *ad prosequendum* were appointed for both said deceased Mendels and actions brought in the New Jersey Supreme Court against the assured. General Casualty & Surety Company did not question its liability and undertook the defense of these actions. This it was permitted and required to do under the terms of the policy (Condition C, p. 11).

Said Mendel suits proceeded to trial and resulted in judgments against Joseph Roth aggregating about $55,000 on January 27, 1922 (p. 49). On rules to show cause the verdicts were set aside as to damages only and upon the new trials judgments were rendered for $23,656.67, on February 2, 1923. The Company in the name of Joseph Roth again appealed from these judgments to the Court of Errors and Appeals on the ground that the statute of New Jersey allowing a new trial for damages only was unconstitutional.

Abe J. David, an attorney at law of New Jersey, was the personal attorney for Joseph Roth throughout these proceedings and at all times herein mentioned, although he took no part in the trial of the said Mendel suits against Roth (p. 56). On February 1, 1922, immediately following the entry of the first judgments for $55,000 Joseph Roth filed a voluntary petition in bankruptcy and was thereupon adjudged a bankrupt. His schedules showed liabilities of $74,104.23 which included these judgments and assets of $10,298.63. The adjudication was vacated and the petition dismissed on June 4, 1923 (p. 53).

Shortly after the second judgments were entered in favor of the Mendels and against Roth on February 2, 1923, and while appeals therefrom were pending, the assured together with his personal attorney, commenced negotiations to settle the judgments (p. 69). The question of settlement was taken up with the General Casualty & Surety Company and they were asked to contribute thereto, but refused to consider any settlement and insisted upon its appeal (p. 64, Exhibit D. 7, p. 112). The contract of insurance provided as follows:

> "Condition D. The Assured shall not voluntarily assume any liability nor incur any expense or settle any claim unless such settlement or expenditures are first authorized in writing by the Company" (p. 11).

The assured, Joseph Roth, disregarded the Company's refusal to settle and the above-quoted clause in the policy and (we say) settled claims of the Mendels in violation of the policy. The turning point in this case lies in the fact that this settlement brought about by Joseph Roth took the form of assignments of the Mendel judgments to Charles L. Bauer, Jr., a clerk in the office of his attorney who was admitted to have paid no consideration therefor. In this manner he sought to effect by indirection a settlement which the policy forbade (pp. 58 to 60 and 71).

The exact manner in which this transaction took place was as follows: On April 30, 1923, Minnie Roth, the wife of Joseph Roth, gave to Judge David her check for $14,500, which sum was paid to the Mendel interests and in consideration of such payments the judgments were assigned to Charles L. Bauer, Jr. Mr. Bauer paid no consideration therefor himself and thereafter assigned the judgments to the Elizabeth

Trust Company as collateral security for the loan made by Minnie Roth. The said judgments were thereafter on April 14, 1925, assigned to Minnie Roth. All this was done without the consent, written or otherwise, of General Casualty & Surety Company (p. 83).

Shortly after these judgments were so assigned at the direction of Judge David the firm of Stamler, Stamler & Koestler were substituted as attorneys of record for both Mendels (p. 70). A brief was filed by them with the Court of Errors and Appeals urging that the judgments of the two Mendels against Joseph Roth be affirmed (p. 71). Samuel Koestler who tried this case below is a member of the firm of Stamler, Stamler & Koestler and was called in by Judge David to take care of that litigation (p. 68).

The Company then sent its letter of disclaimer which became Exhibit D (p. 118). We quote in part from said letter as follows:

> "(1) You have settled the aforementioned claim by the payment of some fourteen thousand dollars without the consent of this Company and against its wishes and without even consultation.
>
> "(2) The form that the settlement has taken has aggravated this breach of the policy. You have not taken releases of these people and satisfied the judgments, but have caused assignments of the judgments to be taken in the name of assignees friendly to you, and those assignees working for and on behalf of your interests are now actively fighting this Company in the name of the Mendels. * * *"

And later the letter said:

> "You have been previously advised that The General Casualty and Surety Company expected to reverse the judgments and desired to take the appeals to the United States Supreme Court. The General Casualty and Surety Company is prepared and desirous, if necessary, to go to the highest courts to test this case with the Mendels. The Mendels, however, have been settled with, and the General Casualty and Surety Company is now called upon to battle with you and your counsel."

The Casualty Company was called upon to disclaim liability or waive its rights. *Utterback-Gleason Co.* v. *Standard Accident Insurance Company,* 179 N. Y. Supp. 836; affirmed 193 App. Div. 646 and affirmed 233 N. Y. Court of Appeals, page 549.

On April 17, 1925, after the assignment of said judgments to Minnie Roth executions were issued thereon and four days later returned unsatisfied at the direction of the attorneys for the plaintiffs (pp. 49-50).

The present suit was instituted in the New Jersey Supreme Court in the first count of which Minnie Roth claimed as owner of the judgments to be entitled to damages against the Company under the following clause of the policy:

> "In the event that an execution on a judgment against the Assured be returned unsatisfied in an action by a person who is injured or whose property is damaged, the judgment creditor shall have a right of action against the Company to the same extent that the Assured could have had, had he paid the judgment."

In the second count Joseph Roth, the assured, sued for the amount of the policy on the ground that he had paid to the owners of the judgments more than the amount of the policy. At the conclusion of the trial the Court directed the two verdicts above described to which exceptions were allowed (p. 106).

POINTS.

1.

The assured Joseph Roth violated the policy by settling the Mendel claims and the General Casualty & Insurance Company was thereby released from all liability thereunder.

2.

The assured Joseph Roth violated the policy by assuming a liability in violation of Condition "D" of the policy and the Company was thereby released from all liability thereunder.

3.

The Mendel administratrices have no power to give the assignments and Minnie Roth obtained no title thereby. She neither had right to issue or cause to be issued against her husband Joseph Roth the executions nor were the executions properly issued and returned unsatisfied.

ARGUMENT.

1.

The assured Joseph Roth violated the policy by settling the Mendel claims and the General Casualty & Surety Company was thereby released from all liability thereunder.

The manner in which the money was raised to pay off the Mendels is shown by the following:

Joseph Roth was an adjudicated bankrupt from February 1, 1922 until June 4, 1923 (p. 53). In April, 1923, pursuant to the arrangement made by Abe J. David for his client Joseph Roth, application was made to the Elizabeth Trust Company for a loan to take care of the settlement of

these judgments, but it developed that the Trust Company no doubt on account of the then bankruptcy of Joseph Roth required that the loan be made to Mrs. Roth upon a note signed by both and secured by a mortgage and the judgments (p. 67). The mortgage securing this note covered property conveyed to Mrs. Roth by three deeds—the first from Joseph Roth on August 8, 1921—the second from Thomas F. Green on October 30, 1911, and the third from the Elizabeth Trust Company on May 27, 1919 (pp. 61-62).

Accordingly on April 25, 1923, Minnie Roth negotiated to the Elizabeth Trust Company a $20,000 note made by herself and Joseph Roth (p. 75). From the proceeds of this note Mrs. Roth paid to Abe J. David as attorney the sum of $14,500 which was used to pay the Mendel interests and to acquire the judgments by assignment. The $20,000 note was renewed every three months and reduced by payments made on account thereof by Joseph Roth until September 21, 1925, when there remained due thereon only $13,-199.33 (p. 76).

This balance of $13,199.33 was paid off on September 21, 1925, from the proceeds of a new note made by Joseph and Minnie Roth and discounted by Joseph Roth in his account (p. 77). The new note was paid off on September 22, 1926, from the proceeds of a further note made by both Joseph Roth and Minnie Roth and discounted in the account of Joseph Roth. The Elizabeth Trust Company now holds a real estate mortgage as collateral security which it received in substitution of the first real estate mortgage (p. 78).

We quote the following principal parts of the evidence from which it appears that the settle-

ment was negotiated and completed by Joseph Roth the assured (p. 64):

"Q Did you negotiate that entire transfer of the judgments? A Yes, sir.

Q Did you nominate persons who were to be substituted as attorneys of record? A Yes, sir.

Q Did you testify in 1925, in a case between Joseph Roth and this defendant? A Yes, sir.

Q Your testimony there, of course, was correct? A I hope so.

Q You said in answer to this question: 'Question: Now, Judge, after you got this letter did you endeavor in conjunction with Mr. Heine or alone to effect a settlement at a lower figure than $14,000? Answer: I did.' Do you recall saying that? A Yes, sir.

Q Is it correct? A Yes, sir.

Q 'Question: What efforts did you make and how long did they continue? Answer: They continued for several weeks and I had **several conferences with counsel for both** sides.' Do you remember that? A Yes, sir.

Q Is that correct? A Yes, sir.

Q Another question. 'Question: Did you take the matter up with Mr. Case? Answer: I did. Question: With what result? Answer: Mr. Case said that the company would insist on taking a rule to show cause and carry the case up if necessary to the United States Supreme Court.' Is that correct? A Is what correct?

Q Those questions and answers? A That question was asked me and I so answered.

* * * * * * * *

Q Then, immediately preceding the questions which I have just read, another question: 'Question: As a matter of fact you had not consummated a settlement at that time, had you? Answer: No. I told him a settlement we could make that had been

agreed upon for $14,000.' When you said 'we,' whom did you refer to? A I referred to myself and Mr. Newman, Mr. Stein of Stein, Stein & Hannoch and Mr. Heine.

Q Whom were you representing? A I was representing the Roths, particularly Mr. Roth. Mr. Newman represented one of the judgment creditors, and Mr. Stein of Stein, Stein & Hannoch represented the other judgment creditor, and Mr. Heine represented the insurance company.

Q Another question. 'Question: After that appeal was taken, Judge, did you still make any efforts to get the case settled? Answer: I did.' Do you recall that? A Yes, sir."

In a statement of facts agreed upon in the case there appears at page 79 of the record the following:

"Judge David stated that we had come to the parting of the ways, that Roth could not stand it any more and was going to settle the judgment, that he had got somebody who would take an assignment of them and put up the money. In answer to Mr. Cass' question Judge David said they were paying $14,500, and he gave a long history of the negotiations that he had gone to see Mr. Newman and some other attorney and they had gone to the house of Mr. Stein representing Mandel, that $15,000 had been the maximum and $14,000 the minimum and that they finally settled at $14,500, later on.

Mr. Roth was going to a trust company where he lives and discount a note. Judge David said the bank might require real estate surety. Mr. Cass imagined that Mr. Roth was getting a couple of endorsements. Judge David stated that the trustee in bankruptcy had advertised the sale of the automobiles and some other personal property of Roth for the benefit of the creditors in bankruptcy, and that when Mrs. Roth had heard of this

she had become prostrated and went to bed, and that Mr. Roth had to consider his wife no matter what it cost to get rid of the claims."

In a letter from Abe J. David to the Company dated February 8, 1923, Exhibit D. 6 (record, p. 111) it is stated:

"On behalf of Mr. Roth, I advised you some time ago of his desire and opportunity to settle these claims."

In a letter from Alvin C. Cass dated May 23, 1923, Exhibit D. 4 (record, p. 108) the first paragraph thereof is as follows:

"On April 27th you asked me to meet you in Newark to speak about a matter of importance in this case. I met you and you then stated that Mr. Mandel had decided that he would settle the judgment owing to the mental and physical condition of his wife. You stated that the arrangement had been made and the money would be paid the next Monday or Tuesday. You stated that Mr. Mandel had made up his mind and could not be changed from that course. Mr. Mandel was present at that time and corroborated this."

That letter was answered by letter dated May 28, 1923, Exhibit D. 5 (record, p. 110) in which Abe J. David does not deny the statements in the former letter and says that he believes he made the position of Mr. Roth plain at the last conference.

On June 12, 1923, Judge David wrote to the Casualty Company:

"As I advised Mr. Cass some little time ago, Mr. Roth's position was such that he had to get out of bankruptcy. Consequently, the Mendel judgments were taken over by a friendly assignee and on consent of all creditors, an order was made discharging the bankruptcy proceedings."

This letter should have said that because Roth had to get out of bankruptcy, he had settled with the Mendels for the sum of $14,500, which he and his wife had borrowed from the Elizabeth Trust Company, and that he, Joseph Roth, intended to repay that sum. Is there any failure of this proof?

The attempt of the assured, Joseph Roth, to bring about what in reality was a settlement and to do it in such a manner that he would still through his wife retain a cause of action against the insurance company is itself a violation of the duty to exercise good faith in the performance of his contract.

We refer to the language of the Court in the case of *Weiss* v. *N. J. Fidelity & Plate Glass Insurance Co.*, 228 N. Y. Supp. 314, page 320:

"It is equally well established that the obligation of good faith in carrying out what is written in a contract is a contractual obligation of universal force which underlies all written agreements."

We again quote from the Company's letter of disclaimer:

"The form that the settlement has taken has aggravated this breach of the policy. You have not taken releases of these people and satisfied the judgments, but have caused assignments of the judgments to be taken in the name of assignees friendly to you, and those assignees working for and on behalf of your interests are now actively fighting this Company in the name of the Mendels. * * *" (page 119 of Record.)

As an argument that the facts here show that Joseph Roth settled the claims, we take the liberty of quoting in part from the previous decision of Judge Daly delivered orally in which he granted a non-suit in a former action at law

brought by Joseph Roth against the Company on the policy, in which a judgment of non-suit was entered. We, of course, do not cite it as an authority, but merely to show our position here.

> "It is clear from the testimony, if we take it at its full value, that Roth was the man who effected this settlement, but who paid the money? It was done undoubtedly largely through the influence of a man of the high standing and character of Judge David, who was the attorney of Roth, and the testimony of Judge David is that the wife of Roth gave a note to this Elizabeth Trust Company and the money was secured on the note of the wife, and the judgments were taken through assignments in the name of a young man in Judge David's office."
>
> * * * * * * * *
>
> "There is another thing about this policy, there is another important feature of it, according to the language of this policy, the defense of a claim, whether in its period of negotiation, or after suit is started, is absolutely and exclusively within the power and control of the company. That may seem harsh, but this is a contract, and the parties have agreed to that as a contract, and that is a power and control upon the part of the company that cannot be affected by any action of the policy holder, nor can he do anything to avoid that power or control, unless there is bad faith, fraud, or oppression upon the part of the company. There is no evidence in this case from which a jury can conclude that there was bad faith, fraud, or oppression on the part of this company. That right of defending these claims and these suits includes the right to appeal a judgment obtained in the trial courts, and through the appellate courts, even up to the highest court in the land, and if the policy holder does anything that substantially affects that right of defense upon the part of the company, then such action upon the part of the policy holder releases the company from liability.

> When these executions were originally issued on the $55,000 judgments, this levy had a substantial effect on the property, but there was no actual loss or damage as yet sustained by Roth. But even if there was, he did not follow that up then. What he is claiming is because he has been compelled to pay $14,000, or has paid $14,000, not on those judgments, not because of those executions, but because of the $23,000 judgments upon which executions were never issued. And in addition to that, although the judgments which he has now secured, and upon which he paid $14,000, and which is the basis of his suit, are judgments that never made him actually suffer any loss or damage because even an execution had not been issued; in addition to that he has substantially impaired the right of this company to prosecute with normal effectiveness and power, its right of appeal, and since there is nothing to show any fraud or bad faith in the taking of that appeal, but on the contrary shows that it is sincere and sane and prudent from every standpoint, that also releases them from liability under this bond, as I look at it.
>
> I think that since this is an indemnity policy against loss, and because of that no right of action accrues until actual damage or loss has been sustained, and that no actual damage or loss has been sustained as a result of these $23,000 judgments, and also because I think that Roth has so acted as to substantially affect the right and power and control of litigation, so far as these claims are concerned, that belongs to the company under this contract, that therefore it is my duty to grant this motion for a non-suit."

THE LAW.

The policy is one of indemnity against loss. The Casualty Company agrees only to reimburse the Assured for moneys which he is compelled to pay because of his liability for negligent in-

jury or killing with his automobile. The policy limits in this case were $5,000 for any one person injured, and $10,000 for any number of persons injured in the same accident. As the Assured may have a dozen accidents during the policy year it is obvious that the Casualty Company assumes an immense hazard in each case. Casualty Company insurance cannot be written without the strict enforcement of two fundamental provisions. The defense of suits is consigned completely to the Casualty Company. The Assured must do nothing to interfere therewith, nor to render a judgment against himself more likely to follow. Obviously, a policy holder cannot be permitted to connive with the injured party to bring about a judgment which the Casualty Company must pay. Secondly, right of settlement is left completely to the judgment of the Casualty Company. Again we can see that a policy holder worried over a pending action against him would be willing to make an improvident settlement provided the Casualty Company was obligated to reimburse him.

The harshness which these rules work in cases where the suits are for sums in excess of the policy limit is apparent but not real. The policy holder can obtain all the insurance he wishes by paying a premium, which decreases in ratio as the policy limit is raised. The decisions are unanimous that if he has seen fit to take out a policy which does not fully protect him against subsequent accidents, he must nevertheless leave the defense of the action and its settlement to the Casualty Company. If he violates either of these vital provisions of his contract he thereby releases the Company from its liability to the plaintiff in the negligence case as well as to himself.

One of the leading cases in the Court of Appeals, the highest Court of the State of New York, is *Auerbach* v. *Maryland Casualty Company,* 236 N. Y. 247. In that case the policy holder had a $5,000. limit policy. An injured person sued him for $40,000. damages and both the Assured and the Casualty Company decided that the action ought to be settled. Settlement could have been made for the sum of $6,500. The Casualty Company offered to pay $3,500. The policy holder refused and demanded that the Casualty Company should pay the limit of its policy, $5,000., and he would pay the excess of $1,500. The Casualty Company refused to do this.

Judgment was recovered by the plaintiff in the negligence action against the policy holder in the sum of $20,000. The Company paid its limit of $5,000. and the policy holder sued to recover the difference between the amount he was required to pay and the amount he would have had to pay if the settlement had been made. The case was dismissed.

We quote from the opinion of Mr. Justice McLoughlin:

> "* * * A contract of insurance, like other contracts, is to be construed according to the sense and meaning of the terms which the parties have used; and if such terms are clear and unambiguous, they are to be understood in their plain, ordinary and popular sense. (Imperial Fire Ins. Co. *v.* Coos County, 151 U. S. 452; Drilling *v.* New York Life Ins. Co., 234 N. Y. 234.) The terms here used are clear and unambiguous. The intent of the parties, if the language used be given a reasonable construction, cannot be misunderstood. There is nothing in the policy by which the insurance company obligated itself to settle, if an opportunity pre-

> sented itself. It was given the option to settle, if it saw fit to do so, or to try the action, as it preferred. It, however, was under no legal obligation, either express or implied, to compromise or settle the claims prior to the trial. The plaintiffs, when they accepted the policy, did so with full knowledge of the fact, if an action were brought, that they surrendered to the insurance company absolute, full and complete control of it, including the settlement or trial. (Rumford Falls Paper Co. *v.* Fidelity & Casualty Co., 92 Me. 574; Schmidt *v.* Travelers Ins. Co., 244 Penn. St. 286.)''

In the case of *Schmidt* v. *Travelers Insurance Co.,* 244 Penn. State, 286, cited as an authority in the opinion just quoted, the facts were these. The Casualty Company issued a $5,000. policy containing the usual clauses. Suit was brought by an injured person and judgment obtained for $9,200. It appeared that that settlement could have been effected for $6,000., and that the policy holder requested the Company to pay its $5,000. limit and offered to contribute the the additional $1,000.

Mr. Chief Justice Fell disposed of the dispute in the following terse statement:

> ''The rights of the parties are to be determined by the agreement into which they entered. By the provisions of the policy, the Insurance Company was obligated to defend at its own cost any action against the insurer and the entire management of the defense was expressly entrusted to it and the insurer was forbidden to settle any claim or to interfere in any negotiations for settlement or in any legal proceeding against it. The insurer was under no obligation to pay in advance of trial and the decision whether to settle or to try was committed to it. The plain words of the policy have no other meaning.''

In the case of *Streat Coal Company* v. *Frankfort General Insurance Company,* 237 N. Y. 60, the Court of Appeals ruled that in the absence of bad faith or fraud, the Company was within its rights in defending an action without settlement or even advising the Assured of an offer of settlement received from the injured party. This was so, although the policy limit was $5,000. and the trial resulted in a much larger judgment.

In the case of *Kennelly* v. *London Guarantee & Accident Company,* 184 App. Div., 1, the Casualty Company, under a $5,000. policy, defended an action which resulted in a judgment of over $12,000. It took an appeal but did not give bond to secure the judgment. The policy holder, threatened with a body execution, settled by payment of $6,000. It was held that he violated the policy and released the Company. The facts in our case are deadly parallel.

The Federal rule is the same. *Thacher* v. *Aetna Accident & Liability Company,* 287 Fed. Rep. 484.

The New Jersey Courts apparently intend to follow the same rule. In *Rosenberg* v. *Maryland Casualty Company,* 3 N. J. Misc., 1132, the Assured was permitted to settle the case, but that was only for the reason that the Casualty Company had breached its contract by refusing to defend. We quote from page 1134:

> ''The next contention is that the court erred in refusing a non-suit. This contention is based on a provision of the policy, viz: 'The company is not responsible for any settlements made or expenses incurred by assured, unless * * * (Such are) * * * first specifically authorized in writing by the company * * *.' This provision can only apply where both parties were proceeding

under and in accordance with the terms of the policy. The defendant's refusal to defend the action against the plaintiff was in direct violation of the terms of the policy, and, of necessity, compelled the plaintiff to protest his interest.''

This case was affirmed on the opinion of the Supreme Court in the Court of Errors and Appeals, 102 N. J. Law, 724.

See *St. Louis Beef Company* v. *Maryland Casualty Company,* 201 U. S. 173.

POINT 2.

The assured, Joseph Roth, violated the policy by assuming a liability in violation of Clause ''D'' of the policy and the company was thereby released.

As a sub-heading we shall argue that the Mendels and any purchaser of their judgments and Minnie Roth, likewise lost any claim they might have under Clause ''C'' the moment this violation of the policy on the party of the Assured was proven.

On April 25, 1923, and May 7, 1923, Judge David obtained assignments of the Mendel judgments to his clerk, Charles L. Bauer (Record, pp. 59-60). Confirmatory assignments to cure a mistake or omission were executed June 8, 1923 (Record p. 60) (Exhibits P. 8 and P. 9). On June 11, 1923, the attorneys of record for the Mendels were substituted by Messrs. Stamler, Stamler & Koestler (Record, p. 49). This firm included Samuel Koestler, who tried this action on behalf of the plaintiffs below (p. 70). Thereupon a brief was filed in the Court of Errors and Appeals by Mr. Koestler (Exhibit D. 3, Record p. 71). That brief asked for the dismissal of

the appeal and the affirmance of the judgments (bottom p. 71).

Notwithstanding that the appellant Roth had been advised by the Casualty Company that it intended to carry the case to the United States Supreme Court, Joseph Roth settled with the Mendels. In order to evade the policy inhibition against settlement, he dictated the form which the transaction took. Not content with this violation of the policy he filed the very brief through which he succeeded in having the judgments against himself affirmed. We vigorously assert that in thus imposing liability upon himself he violated Clause ''D'' of the policy (287 Federal Reporter 484).

> ''The Assured shall not voluntarily assume any liability'' (p. 11).

Analytical speculation often clarifies a dubious transaction. Plaintiffs failed on the trial below to disclose whether general releases were exacted from the Mendels against the contingency of reversal. If so, plaintiff Joseph Roth violated the policy. If not?

Had Mr. Koestler by his respondents' brief failed to avert a reversal, would he have thereafter complied with his duty to his clients of record, the Mendels, to bring the cases to trial anew?

Would not the Courts, on the application of Joseph Roth, spell out a settlement barring the Mendels from another trial? Would the Mendels make restitution of the $14,500?

Upon reversal, would not *Joseph Roth, the Assured,* have become entitled to a credit for that $14,500. payment against the Mendel non-assignable causes of action?

Unless form destroys substance; unless astigmatism cures transparency, the Courts must ultimately find that the policy was flagrantly violated by Joseph Roth.

Making all allowance for difference of opinion and intending no criticism of counsel, for whom we have high respect, we cannot escape the conclusion that the Court of Errors and Appeals should have been advised that Heine, Bostwick & Bradner, attorneys for Joseph Roth, appellant of record, had withdrawn from the appeal, and that the Casualty Company, which had caused those attorneys to start that appeal, had similarly withdrawn because of its disclaimer of liability (right or wrong); that the brief interposed by Stamler, Stamler & Koestler on alleged behalf of the Mendels, respondents of record, was actually interposed on behalf and in the interests of Joseph Roth, the appellant, and would not be replied to because that appellant now sought affirmance.

Roth did two things which constitute the imposition of liability upon himself. He caused $14,500. to be paid to the Mendels, giving his note (in which his wife joined) to the Elizabeth Trust Co. to raise the money and he repaid that note to the Trust Company by payments from time to time. Subsequently through Stamler, Stamler & Koestler, he filed a respondent's brief in the Court of Errors and Appeals and successfully obtained the desired affirmance of the Mendel judgments against himself.

We have already sufficiently pointed out, we believe, that the injured party suing under Clause "C" has only the right to bring suit "to the same extent that the Assured could have had, had he paid the judgment."

Ample authority upon this proposition is contained in the case of *Coleman* v. *New Amsterdam Casualty Company,* 247 N. Y. 271. The opinion of the Court of Appeals of the State of New York was written in that case in February, 1928, by Mr. Chief Justice Cardozo.

In that case because of an alleged failure of the Assured to co-operate, the Casualty Company disclaimed liability. Plaintiff obtained judgment by default, issued execution and then under statutory provision, the equivalent of our Clause "C," brought suit against the Casualty Company. The only defense was the Assured's breach of contract. The plaintiff endeavored to recover irrespective of the alleged violation of the policy by the Assured, and argued that the statute gave an "original obligation" in favor of the injured claimant without reference to any breach of condition as between insurer and Assured.

This was the ruling made by Judge Daly below so that the issue is precisely the same in both cases. The clause in defendant's policy in this case was merely the anticipation of the enactment into the law of New Jersey of a provision already existent in other States.

Mr. Justice Cardozo said:

> " * * * The statute was prompted by a definite mischief (cf. Lunt *v.* Aetna Ins. Co., 254 Mass. 610; Roth *v.* Nat. Auto Mut. Cas. Co., *supra*). Before its enactment, the insolvency of the assured was equivalent in effect to a release of the surety. The policy was one of indemnity against loss suffered by the principal, and loss to him there was none if he was unable to pay. The effect of the statute is to give to the injured claimant a cause of action against an insurer for the same relief that would be due to a solvent

principal seeking indemnity and reimbursement after the judgment had been satisfied. The cause of action is no less but also it is no greater. Assured and claimant must abide by the conditions of the contract.'' (Page 275.)

The Court held that the wilful refusal of the Assured to co-operate with the Company justified disclaimer, and cut off the rights, not of the Assured alone, but also of the innocent injured person. Just so in this case Joseph Roth's violation of the policy cut off the rights of the Mendels and their assignee, his wife.

So also it would seem self-evident that the payment of large sums of money to the Mendels, the proceeds of a loan of the Assured Joseph Roth joined in with his wife, was the assumption of liability within the inhibition of the policy. The Casualty Company had the right to continue to fight the two Mendel administratrices. They were paid off, compromised, settled and dismissed from litigation. They had gotten their money for which they sued in a negligence suit.

It must be borne in mind that there is no question in this case of the right of the Casualty Company to continue the litigation or its good faith in so doing. That is not an issue here. There was no allegation of bad faith in the complaint and no evidence of it.

POINT 3.

The Mendel administratrices had no power to give the assignments and Minnie Roth obtained no title thereby. She neither had right to issue or cause to be issued against her husband, Joseph Roth, the executions nor were the executions properly issued and returned unsatisfied.

At the common law no right of action would survive Edward and Jacob Mendel on account of their respective deaths caused by the wrongful act of Joseph Roth. *Gross* v. *D. L. & W. R. R. Co.,* 50 N. J. L. 317. The right of an administrator ad prosequendum to maintain such action is created by an act to provide for the recovery of damages in cases where the death of a person is caused by a wrongful act, neglect or default. 2 Comp. Stat. 1907. That act as amended by Chapter 180 of the Laws of 1917 provides that the action ''shall be brought, instituted or made in the name of an administrator ad prosequendum of the decedent.''

The provision for the appointment of an administrator ad prosequendum is by statute and the powers of such administrator are therefore limited to those given him by the statute. His duties and powers are limited to the prosecution of the action and upon a final judgment being obtained he is without further power. The statute expressly provides that ''no payment in settlement of any such claim or in satisfaction of any judgment obtained in any such action * * * shall be made to such administrator ad prosequendum'' and that '' no release by any administrator ad prosequendum and no cancellation of a judgment whether by warrant or otherwise by an administrator ad prosequendum or by his attorney of record or attorney in fact shall release the person making such payment.''

An administrator ad prosequendum is given no power to assign the judgment by this statute and it would appear from the language of the statute that it was not intended that he should be able to make any assignment. Insofar as the assignments of the two Mendel judgments were made by the administratrices ad prosequendum, the assignee therefore received nothing.

The judgments likewise could not be assigned by the general administratrices of the decedents since the title to the judgments were not in them but in the administratrices ad prosequendum. There is no provision in the statute that the judgments may be assigned by the general administrator and since he does not have title to the judgment he cannot dispose of it. The act provides that

> "No payment in settlement of any such claim or in satisfaction of any judgment * * * shall be made to said administrator ad prosequendum but such payment shall be made in such settlement or in such satisfaction only to a general administrator."

Thus the statute creating the survival of a right of action on account of death provides that the action shall be brought and prosecuted by an administrator ad prosequendum and that payment in settlement of the claim or in satisfaction of the judgment shall be made to the general administrator. These are the limits of the rights created by this statute which are contrary to the common law and neither the administrator ad prosequendum nor the general administrator had any right or power to make a valid assignment of the claim or judgment.

We therefore submit that in this case Annie Mendel received nothing through the assignments of these judgments and can maintain no action against the insurance company.

The executions by the wife against the husband were invalid.

The two Mendel judgments were assigned to Minnie Roth under date of April 14, 1925 (p. 63), execution was issued thereon April 17, 1925 and returned April 21, 1925. Even assuming that the assignments conveyed a valid title to the judgments, nevertheless the executions on such judgments were invalid.

That a wife may not sue her husband at law is well established in this state.

Drum v. *Drum*, 69 N. J. Law 557.

Her remedy, if any, is in equity in proper cases.

Bishop v. *Bourgeois*, 58 N. J. Eq. 417.

Section 14 of the Act Concerning Married Women, 3 Comp. Stat. 3237, provides:

> "Nor shall anything herein enable husband or wife to contract with or to sue each other except as heretofore."

We submit that the wife has no more power to issue execution against a husband on these judgments than she would to bring an action against him in an original suit of this kind and that accordingly the issuance of the executions and the return thereof unsatisfied was ineffectual.

30 Corpus Juris 1051.

Williams Appeal, 47 Penn. Stat 307 at p. 312.

The executions were not returned unsatisfied in the manner contemplated by the policy.

The provisions contained in Condition C of the policy to the effect that the judgment creditor may, in the event of execution being returned unsatisfied, have a right of action against the Company was inserted in this insurance policy in

anticipation of the requirement of Chapter 153 of the Laws of 1924 which provides as follows:

> "1. No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee, or other person and for which the person insured is liable * * * shall be issued or delivered in this state * * * unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy. * * *"

It is the intent of the language used in this policy that in the event that an injured person cannot collect the judgment on account of the inability of the Assured to pay then such injured person shall have a right of action against the Company to the extent of the policy.

The two executions in this case were issued on April 17, 1925 and returned four days later unsatisfied by order of the attorneys for the plaintiffs in those actions. This is a common practice and it is well known that in such cases there is no real effort made by the Sheriff to satisfy the executions from the property of the judgment debtor. It should be noted that at this time Joseph Roth had been discharged from bankruptcy and had for two years been making

payments on account of the note held by the Elizabeth Trust Company.

It was the intent of the language used in this policy and the purpose of the statute in 1924 that the right of action by the injured party against the Company should only accrue in the event that there was real inability to satisfy the executions from the property of the judgment-debtor. It was not contemplated that a person carrying insurance could arrange for the settlement of the claims against him in violation of the terms of the policy, take assignments of the judgments in the name of a friend (p. 71), have such friend assign the judgments to the wife of the Assured who would then issue execution thereon, direct that it be returned unsatisfied and thus secure a right of action against the Company.

The ruling of the Trial Court that a right of action accrued because the letter of the policy had been complied with in that execution had been issued and returned unsatisfied was harsh and technical. If technicalities are to control the decision of this case we respectfully ask that this Court make a technical ruling in favor of the Company. The letter of the policy is the following:

> "In the event that an execution on a judgment against the Assured be returned unsatisfied in an action *by a person who is injured* or whose property is damaged the judgment creditor shall have a right of action against the Company." (Clause C, p. 11.)

The two Mendel actions were brought by administratrices ad prosequendum appointed by authority of statute. They were not actions brought by persons who were injured and there-

fore these judgments do not literally come within the language of the policy.

Minnie Roth was not the owner of these judgments at the time of the trial, there had not been a legal and effectual return of the executions unsatisfied as contemplated by the policy and she was therefore not entitled to recover from the Company under Condition C of the policy.

In Conclusion.

The first proposition involved is whether the Trial Court properly ruled that it was bound by two barren facts of record constituting the investiture of the cause of action in Minnie Roth; (a) the execution of formal assignments to her of the Mendel judgments; (b) the subsequent return unsatisfied of executions issued by her on those judgments.

The full ownership of the judgment by Minnie Roth was disproved and it was ineffective as a matter of law. The executions were improperly issued and improperly returned unsatisfied. These defenses were useless to defendant under the ruling of the learned Trial Judge that Minnie Roth had the legal title to the judgments and thus was entitled to recovery under Condition C.

The Trial Court referred to the defendant's claim that Roth's money was really behind the purchase of the judgments and also to the fact that there was some evidence that a mortgage in Minnie Roth's property was given as collateral security. In his opinion, however, the fact that

the assignments were legally in her name determined the matter, for he said at page 104:

> "Be that as it may * * * she was and is the legal holder of these judgments."

Too much importance must not be attached to the fact that the property included in the mortgage to the Elizabeth Trust Company as security for the loan was in the name of Minnie Roth. Part of this property was conveyed to her by deed dated August 8, 1921 from her husband (pp. 61 and 62). It will be noted that this conveyance was after the accidents in which the two Mendels were killed and it was stated in plaintiffs' opening at page 40 as follows:

> "On advice of counsel long before these suits were started he made a deed of I think the one piece of property which was standing in his name and his wife's name to his wife."

The error of the Trial Court lies principally in the fact that he was absorbed with the fact that Minnie Roth held a barren legal title to the judgments and as such was entitled to a right of action under Condition C of the policy. He failed to consider that her right to recover in such suit was barred by the policy violations by the Assured.

Turning to the heart of the matter, the proposition may be plainly stated. Counsel for the policy holder after long continued negotiations for a settlement with the Mendels, arrived at what he considered to be the ultimate figure. Under advice of counsel Joseph Roth determined that such settlement should be effected, the Casualty Company to the contrary notwithstanding. Judge David called the policy of insurance "a bond" and peremptorily insisted that the Company pay the full amount thereof. Had Roth been protected by no insurance, he could

have used his own judgment in contesting or not contesting the Mendel judgments, or the limit of such contest. He could have used his own judgment whether to pay $14,500. or not.

But he could not retain the benefit of that insurance policy and violate its every term. No one knew better than he and his attorney that he was deliberately forfeiting that indemnity by imposing his will upon the Casualty Company. The Company and its counsel labored with him and tried to dissuade him from his mad course. It pleaded with him for that co-operation which it had the legal right to demand. His answer was to pay off the Mendels and then send one of his own attorneys into the Court of Errors and Appeals to fight his own insurance company in the name of the non-existent plaintiffs.

Roth was not entitled to the verdict he obtained as a matter of law; nor was he entitled to a sympathetic verdict. On the other hand, judicial sanction of his wanton breaches of the policy and legal condonation of his flimsy subterfuge would constitute a dangerous precedent in the Insurance Law of this State and a grave injustice to this appellant.

We therefore submit that the judgment against the appellant should be reversed.

Respectfully submitted,

RIKER & RIKER,
Attorneys of Appellant.

IRVING RIKER,
ALVIN C. CASS (of New York Bar).
Of Counsel.

1030CT.7.1928

New Jersey Court of Errors and Appeals

OCTOBER TERM, 1928.

JOSEPH ROTH and MINNIE ROTH,
Plaintiffs-Respondents,

v.

GENERAL CASUALTY & SURETY COMPANY, a corporation,
Defendant-Appellant.

Case #89 and 103.
Action at Law.
On Appeal and Cross Appeal.

BRIEF FOR RESPONDENTS.

(Cross Appellants.)

Judgment was entered in the Supreme Court in favor of the plaintiff Minnie Roth and against the appellant, General Casualty & Surety Company, for the sum of $14,982.35 upon a verdict directed at Circuit by the Honorable PETER F. DALY. From this judgment the Surety Company appeals, claiming that a verdict should have been directed in its favor or that the verdict should have been directed for a lesser amount. The assured was Joseph Roth and the co-plaintiff, Minnie Roth, is the wife of Joseph Roth. She purchased through assignments the judgments recovered against Roth and thereafter issued executions which were returned unsatisfied and under the express provisions of the policy, had a cause of action which resulted in the directed verdict in her favor.

The cross appeal of Mrs. Roth is for the purpose of advancing before this Court that her judgment

should have been for a greater amount and the reason of the cross appeal for Joseph Roth is that if this Court should determine that the verdict should have been entirely in favor of Joseph Roth or partly for Joseph Roth and partly for Minnie Roth, he is before this Court to urge a judgment in his favor.

The facts stated in the brief for appellant are not entirely accurate and, therefore, it will be necessary for us, in a measure, to reiterate some of them and we feel that it will serve a very useful purpose, at the outset, to lay before your Honors the principal instances in chronological order as follows, to wit:

1921

May 1 Policy issued by Surety Company to Joseph Roth (Case, p. 5, line 33).

June 8 Collision resulting in the death of Edward Mendel and Jacob Mendel (Case, p. 6, line 22).

1922

Jan. 27 Original judgments entered for $35,000.00 and $20,000.00 respectively (Case, pp. 49 and 51).

Execution issued and levy made on Roth property (Case, pp. 38-57).

Jan. 31 Rule to Show Cause (Case, p. 49).

Company did not put up bond to stay execution (Case, pp. 45-57).

Feb. 1 Adjudication in bankruptcy (Case, p. 53).

Nov. 14 Rule made absolute on matter of damages only (Case, p. 49).

1923

Feb. 2 New judgments entered for $15,000.00 and $8,666.67 respectively (Case, pp. 49 and 50).

Mar. 15 Notice of Appeal to the Court of Errors and Appeals (Case, p. 49).

Apr. 25 Mrs. Roth borrowed $20,000.00 from the Elizabeth Trust Company on note of husband and herself and gave mortgage securities (Case, pp. 75 and 76).

Apr. 30 Check of Mrs. Roth to Judge David for $14,500.00 (Case, p. 58).

May 1 Checks to attorneys of Mendels and assignments of judgment delivered (Case, p. 59).

June 11 Stamler, Stamler & Koestler, substituted attorneys for plaintiffs-respondents.

June Term Court of Errors and Appeals.

July 19 Surety Company's letter disclaiming liability.

Nov. 19 Court of Errors and Appeals Order of Affirmance and Remittitur (Case, p. 49).

1925

Apr. 17 Executions issued on $15,000.00 judgment and on $8,666.67 judgment (Case, pp. 49 and 50).

Apr. 25 Executions returned unsatisfied (Case, pp. 49 and 50).

1928

June 13 Judgment final entered.

The Facts.

In this case Joseph Roth paid the defendant-appellant premiums for an insurance policy commonly known as a five thousand and ten thousand dollar policy and thereafter accidently killed two men. Their representatives brought suit against him which resulted in the recovery of judgments totalling $55,000.00. Before the Bonding Company could obtain rules to show cause,

plaintiffs had entered their judgments and issued execution and made levy against Roth's business and his household furniture (Case, p. 67, line 3). The appellant, who we will hereafter call the Surety Company, took out a rule to show cause without a stay and without putting up any bond to obtain a stay and thereby did not protect Roth from the effect of any part of the judgments recovered against him. Roth, in order to stay further proceedings on the execution, filed a petition in bankruptcy upon which he was so adjudicated (Case, p. 57) and thereafter the Supreme Court made the rules to show cause absolute as to the question of damages only and on a retrial the total of the two verdicts was assessed at the reduced sum of $23,666.67.

Roth wanted the Surety Company to enter into an arrangement to settle these judgments but nothing ever came of it, although Roth's attorneys obtained a figure of $14,500.00 from the judgment-creditors as the amount they would accept in full satisfaction. The Insurance Company refused to put up its admitted liability of $10,000.00 and took an appeal to this Court raising the point of law that the statute which permitted a retrial limited to damages only was unconstitutional. Thereafter Mrs. Roth borrowed $20,000.00 from the Elizabeth Trust Company and with the money so borrowed from the Elizabeth Trust Company she paid for the assignments of judgments which were taken in the name of Charles L. Bauer and immediately transferred them to the Elizabeth Trust Company and held by said Trust Company until April, 1925, when they were assigned to Minnie Roth who thereupon issued execution which was returned wholly unsatisfied, and she then, under the express clause of the policy, instituted suit against the Surety Company. The cause of action is set forth as the

first count in the complaint (Case, pp. 5 to 9). Her husband joined in the suit on an alleged cause of action which is set forth as the second count in the complaint (Case, p. 9).

Pleadings.

The pleadings are set forth on pages 5 to 29 of the case, the complaint consists of two counts, the plaintiffs being Joseph Roth and Minnie Roth. The first count is the cause of action of Minnie Roth and, after alleging the facts in Paragraph 14, says:

> "By means thereof and the clause of said policy mentioned in the preceding paragraph, a cause of action has accrued to the plaintiff Minnie Roth as against the defendant. To the damage of the plaintiff Minnie Roth in the sum of $25,000.00."

By the second count in Paragraph 3 thereof it is alleged:

> "By reason thereof a cause of action has accrued to the plaintiff, Joseph Roth, as against said defendant and he is entitled to receive from said defendant the aforesaid sum of $10,000.00 together with interest thereon, and costs of suit."
>
> "Judgment will be claimed in the alternative against the defendant on the First Count in favor of Minnie Roth, and on the Second Count in favor of Joseph Roth."

To this complaint the defendant filed an answer, appearing on page 19 of the case, and subsequently an amendment to the answer, appearing on page 24 of the case. The first separate defense is that Roth settled his liability and the liability of the defendant and that the assignments in the name of Minnie Roth are a fraud. The second separate defense is that Roth settled the judgments without

the written consent of the Surety Company contrary to the provisions of Condition D of the policy. The third separate defense is identical but in different language. Under the amended answer a fourth separate defense sets forth the obligation of Roth to cooperate with the company in contesting the suits brought by the Mendels, that this was violated by Roth and thereby the Surety Company was released. The fifth separate defense rests on the disclaimer of liability by the Surety Company under date of July 19, 1923.

Thus, it will be seen that the issues are quite narrow and an inspection of the testimony shows that there were no disputed questions of fact and that the question is solely on those facts one of law as determined by the Trial Court. After argument of respective counsel on a motion for a directed verdict, Judge DALY asked:

> "What facts are undisputed in this case or what facts are disputed in this case? What is there for the jury to pass upon?
>
> "Mr. Riker: I do not think there is anything, your Honor."

The Evidence.

The evidence in this case consisted of the record of the New Jersey Supreme Court in the two suits brought against Roth (Case, pp. 48 and 49). The bankruptcy proceedings against Roth (Case, p. 53), the testimony of Judge Abe J. David (Case, pp. 56 to 74) and the testimony of Harry G. Pflug, the assistant treasurer of the Elizabeth Trust Company, as to the records of said company (Case, pp. 75 to 78), and the statement containing an admission as to what Mr. Cass, general counsel, would have testified to if he had been in court (Case, p. 79, etc.). From all of this it appears upon the

judgments for $55,000.00 execution was issued and a levy made on Roth's property (Case, pp. 38-57). That the Bonding Company, on behalf of Roth, the defendant in said suits, obtained rules to show cause limited to the question of damages only and did not and would not put up any bond or obtain a stay of execution (Case, pp. 39-57-67). In order to prevent the executions being proceeded with to sale, Roth filed a petition in bankruptcy on February 1, 1922, which proceeding was not dismissed until June 4th, 1923 (Case, p. 53). Upon the rules to show cause the Supreme Court granted new trials limited to the question of damages only (Case, p. 38, line 29; p. 45, line 15; p. 49, line 15). Upon the retrial damages were assessed in one case in the sum of $15,000.00 and in the other case at $8,666.67 besides costs (Case, pp. 49 and 50). After the second verdict an appeal was taken to this Court resulting in the opinion found in 99 N. J. L., page 286. Between the rendering of the second verdicts and the determination of the appeal by this Court, repeated efforts were made by Roth and his counsel to show the Surety Company that they were only wasting time and money in taking the case to further appeals, but the Surety Company, fighting hard, was trying by all means, fair or foul, to escape its admitted liability to pay the $10,000.00, and its counsel, Mr. Cass, even went so far, in a conference had in April, 1923, with Judge David, to suggest that Judge David, in order to force a settlement, should take up criminal prosecution of the Mendels (Case, p. 82, line 20). This Surety Company had for a consideration issued a bond and it has admitted, by taking out a rule to show cause limited to the question of damages only, that the only question was, how much the Mendels were to get, and having before it first the verdicts of $55,000.00 and subsequently ver-

dicts of $23,000.00, still tries by technicalities to relieve itself of its obligation without protecting Roth's property. There is not a scintilla of evidence in the case that the Surety Company offered to put up a bond to cover its admitted liability, but the admission of its attorney before the jury was that the Surety Company refused to put up a bond (Case, p. 45). The Surety Company refused to permit of a direct settlement, payment and cancellation of the judgments because this naturally would have defeated its right of appeal. The Surety Company was informed as early as April 28th, at a conference had between Judge David and Mr. Cass that the judgments were to be purchased and held by an interest friendly to Roth (Case, p. 79). Thereafter letters were written by Mr. Cass, as representing the Surety Company, to Judge David, representing the Roths, under date of May 23, 1923, and June 18, 1923 (Case, pp. 108-117), and in none of the conversations or in the letters was any objection made to the taking of such assignments, but the Surety Company filed a brief in this Honorable Court seeking the reversal of the $23,000.00 judgments purely on constitutional grounds. The records show conclusively that Mrs. Roth was the owner of several parcels of land in her own name in April, 1923; that she pledged these properties by way of mortgage to the Elizabeth Trust Company and on a note signed by herself and her husband obtained $20,000.00, which was credited to her own account; that her own check for $14,500.00 was paid to Judge David which was used to purchase the assignments of the judgments (Case, p. 75). See also the testimony of Mr. Harry Pflug from which it appears that Mrs. Roth's property is still pledged to the Elizabeth Trust Company by a mortgage, not only in the sum of $20,000.00, but in the sum of $25,000.00.

By appellant's brief three points are made, and we will consider the same in the order in which they are raised:

POINT I.

The policy was not violated by "settlement of the claim."

A copy of the insurance policy is set forth on pages 10 to 18, inclusive, and the entire litigation depends upon the proper construction of what is therein set forth as Conditions C and D. The first point relates to the construction of Condition D, which reads as follows:

> "The Assured shall not voluntarily assume any liability, nor incur any expense or *settle any claim* unless such settlement or expenditures are first authorized in writing by the Company."

This policy was written on May 1, 1921 (Case, p. 15, line 23), and therefore is not subject to the claim that the clauses were placed therein by reason of the statutory enactment of 1924, P. L. 1924, Chapter 153. It is elementary that the language of this policy must be most strictly construed against the Surety Company. Important words, so far as this case is concerned, are "voluntarily" and "settle any claim" and we contend, firstly, that the assured, Joseph Roth, did not settle but that his wife purchased the judgments with money actually paid by her and that assignments were actually taken of the judgments which are still open of record and uncancelled (Case, p. 50, line 30). If it should be construed as a matter of law that Mrs. Roth's action was her husband's settlement, then we contend it was not a settlement of the claim but a settlement of a judgment and there is nothing in

the policy which prohibits the assured from settling a judgment rendered after a trial in court and that there is a recognized distinction between settling a claim before trial and a judgment after trial as is shown by the cases cited by the appellant. For instance, in

Auerbach v. *Maryland Casualty Co.*, 236 N. Y. 247,

the Casualty Company refused to settle before trial and after trial there was a verdict and judgment and the company paid the full limit of its liability and the Judge who wrote the opinion said:

> "The loss or liability here provided for contemplated the liquidation of a claim by rendition of a judgment,"

and in the language quoted in appellant's brief we find the following clause:

> "It (meaning the Surety Company), however, was under no legal obligation, either expressed or implied, to compromise or settle the *claims prior to the trial*."

And again in the case of

Schmidt v. *Travelers Insurance Co.*, 244 Penn. State 286, also reported in 90 Atl. 653,

the very language of the Chief Justice in that case quoted in appellant's brief is:

> "The insurer is under no obligation to pay in advance of trial."

Furthermore, the action of Roth was not voluntary. Executions were issued and levy made under the $55,000.00 judgments. No bond was put up pending the argument on the rules to show cause and after the second judgments the trustee

in bankruptcy had advertised the sale of the automobiles and other personal property of Roth. See Cass statement (Case, p. 80, line 6).

The policy in question does not expressly give the right of appeal but if after a second judgment the Surety Company would be entitled to such an appeal, must not the Surety Company take a complete appeal and protect the defendants' property? This is amply shown by the following cases:

Seessell v. *New Amsterdam Surety Co.*, Tenn. State Court, 204 S. W. 428;

Pacific Coast Casualty Co. v. *General Bonding & C. Ins.*, 240 Fed. Rep. 36, 153 C. C. U. 72;

Rochester Mining Co. v. *Maryland Casualty Co.*, 143 Mo. Appeal, p. , 128 S. W. 204.

In the *Seessell* case the policy was of a limited liability of $5,000.00. There was a judgment of $15,000.00. Assured refused to put up a supersedeas bond. The insurance company took an appeal without staying execution and thereafter in order to save his property settled the judgment for $6,500.00 and costs. In a suit against the insurance company judgment was recovered. The Supreme Court in affirming that judgment said:

> "The law does not release a party to a contract from liability already incurred because in order to remove that liability, it becomes necessary to incur the risk of greater liability.
>
> "It has been held by other Courts, in construing policies containing conditions essentially similar to these, that the obligation was upon the surety when dissatisfied with the judgment obtained against the principal to provide the bond for appeal and protect the insured from execution until the suit is determined."

In the *Pacific Coast Casualty Co.* case (*supra*) the Circuit Court of Appeals, after stating that the policy must be most strictly construed against the Surety Company, said:

> "If the Insurance Company had the right of appeal it had a correlative duty of protecting the Rock Company from injury while the appeal was pending. While the appeal was pending it was not for the Rock Company to stay proceedings by giving the necessary bond, because in giving a supersedeas bond the Rock Company would have been assuming a liability from which it was expressly relieved by the provisions of the policy. It would have been unjust to hold that the Rock Company could not recover unless the judgment against it had been affirmed by the highest Court of the State of Texas and yet to say that the Pacific Company was alone authorized to carry on the defense, and if unsuccessful, to appeal, and the Court held that it was incumbent upon the Pacific Company to give the supersedeas bond."

In the *Rochester Mining Company* case, the Missouri Court of Appeals said:

> "Under a similar policy of insurance the Bonding Company was under the obligation to furnish an appeal bond and having failed to do so and having forced the plaintiff to pay the judgment, the defendant, Bonding Company, waived the rights to have the plaintiff, before suing on the bond, wait until the determination of the appeal."

Appellant also cites the case of *St. Louis Beef Co.* v. *Maryland Casualty Co.*, 201 U. S. 173, and a reading of the case will show that it is not authority in favor of the appellant, but holds that an insured may recover from the Insurance Company where by reason of the denial of liability by the Insurance Company the insured thereafter

makes a settlement and sues to recover the amount paid within the limits of the policy.

It is a conceded fact in the case that the Surety Company in taking the various appeals by rules to show cause or appeal did not put up a supersedeas bond and if an amendment of the complaint is necessary to allege that admitted fact such amendment can now be made in this Court. See case of

> *American Life Insurance Co.* v. *Day*, 39 N. J. L. 89.

The case of *Kennelly* v. *London Guarantee & Accident Co.*, 184 App. Div. 1 (reported also in 171 N. Y. Supp. 423), is cited by appellant to be in point. A reading of it will show that after judgment the Surety Company was willing to give a bond to the extent of its liability under its policy, but that the assured refused to join in such a bond and afterwards against the consent of the Surety Company paid the judgment by settlement. As the result of which the pending appeal taken by the Surety Company in the name of the defendant was dismissed by the Appellate Court solely upon the ground of the settlement of said judgment. That case is not in point for two reasons:

(a) Because here the Surety Company did not agree to put up a supersedeas bond to the extent of its liability, but declined to put up any bond, and

(b) The right of appeal of the Surety Company has never been interfered with by a discharge or settlement of the judgment, as that right was preserved by assignments of said judgments and said judgments are still wholly open of record. The most that can be said on an appeal to this Court

if the Surety Company obtained a reversal, would be that Mrs. Roth had made a bad bargain in purchasing judgments against her husband.

In *McAleenan* v. *Massachusetts Bonding & Ins. Co.*, 159 N. Y. Supp. 401, the cause came before the Appellate Division upon demurrer to a complaint which disclosed that McAleenan had been sued for damages by reason of having killed a man in collision and that the Insurance Company had defended the case and while in process of trial there was an offer from plaintiff to accept $7,500.00 in settlement. The bond which the defendant had was limited to $5,000.00 and the offer was to take $3,750.00 from the defendant and the same amount from the Insurance Company. Defendant was willing to make the payment, but the Insurance Company would not and refused to permit the defendant to make a settlement of excess liability. The trial resulted in a judgment of $12,550.00. The Insurance Company's attorneys told defendant that they would appeal and reverse the judgment and defendant relied upon that promise. The Insurance Company did not perfect an appeal and thereafter, upon execution being threatened, the Insurance Company, *in fact, paid $5,386.38* and the defendant paid the balance and judgment was satisfied.

The first count in the action brought by McAleenan against the Insurance Co. was based upon the refusal of the company to permit defendant, before judgment, to make a settlement and the Appellate Division sustained the demurrer to that action, but on the second count, which pleaded failure to take the appeal, the Court held the cause of action good and permitted the plaintiff to amend his first count, and from such judgment the case was taken to the Court of Appeals which Court also affirmed the decision of the Appellate

Division as set forth in 159 N. Y. S. 104. See 219 N. Y. 563. Upon the amendment of the first count the case came again before the Appellate Division, 166 N. Y. S. 185, and the Court still held that the count set forth no cause of action. The case then came on for trial before the Special Term on the second count and resulted in a judgment in favor of the plaintiff against the Bonding Company and from such judgment an appeal was again taken to the Appellate Division and the determination will be found reported in 180 N. Y. S. 287, where the judgment was affirmed.

Judge Scott in concurring on the determination as to the First Count not constituting a cause of action said:

> "If such payment would not increase the Company's liability, or enhance its difficulties in defending the action, it would not amount to a breach of the contract."

In the case of *St. Louis Screw Co.* v. *Mastin* (decided by the Mo. Court of Appeals in 1923), 253 S. W. 96, it was held:

> "That the plaintiff had a legal right to pay a judgment without the consent of the defendant Surety Company although it would have been different had he merely settled a claim before any judgment was rendered and having actually paid the judgment did make tender."
>
> "No matter what the motive was for the payment the only question is whether the payment was actually made or whether it was a subterfuge resorted to for fraudulent purposes."

Cases to the same effect are

> *Kinnan* v. *Charles B. Hurst Co.*, 317 La. 251; 148 N. E. 12;

Griffin v. *General Casualty & S. Co.*, 231 Mich. 642; 204 N. W. 727;
U. S. Fidelity & G. Co. v. *Williams*, Md. ; 129 Atl. 660.

It has been held that the insured can make a settlement of the excess of his limited indemnity without interfering with the right of the insurer to control the matter.

See:

General Accident Co. v. *Louisville Home Teleph. Co.*, 175 Ky. 96 L. R. A. D., page 952; 193 S. W. 1031;
New Amsterdam Casualty Co. v. *E. Tennessee Teleph. Co.*, 139 Fed. Re. 602;
Powers v. *Wilson*, 139 Minn. 309; 166 N. W. 401.

In *Powers* v. *Wilson, supra,* the Court said:

> "As the policy required the Casualty Company to defend the action at its own expense and contained no provision requiring defendant to furnish a supersedeas bond in case of an appeal and the Company accepted and used a bond for costs his failure to furnish a supersedeas bond did not release the Company from liability."

It appeared that the plaintiff agreed with the defendant and her attorney on terms of settlement conditioned upon payment by the Company of the full amount of its policy and it was held that such tentative settlement did not interfere with continuing the litigation to the end.

In *Mayor* v. *Commercial Casualty Co.*, 155 N. Y. Supp., page 75, it was held:

> "That the clause in the policy providing that no settlement shall be made without the written consent must be limited to cases wherein

> the Company performs its contract by defending the action."

In *N. Y. C. R. Co.* v. *Mass. B. & I. Co.*, 184 N. Y. Supp. 243, it was held:

> "When a Casualty Company, to protect itself from liability, assumes the defense of an action, to the entire exclusion of the defendant on the record, it should be held to a strict rule of good faith in conducting the defense (Brassil *v.* Maryland Casualty Co., 147 App. Div. 815, 133 N. Y. Supp. 187, affirmed 210 N. Y. C. 235, 104, N. E. 622, L. R. A. 1915-A, 629), and when in its own interest, it deprives the defendant of a substantial advantage in the course of the trial, it should be held liable for the damages naturally resulting thereby."

In *Brunswick Realty Co.* v. *Frankfort Insurance Co.*, 166 N. Y. Supp. 36:

> "Complainant, in an action by holder of policy of insurance indemnifying it against any loss from any claim against it for damages for personal injuries, and giving the insurer the right to control the defense, alleging its refusal to consent to a settlement of the claim after knowledge that plaintiff had no defense, whereby a judgment was recovered against the insured for an amount greater than the policy, and which it had paid, sufficiently alleges defendant's bad faith in permitting such judgment. The powers of settlement given the insurer cannot be used for the purpose of fraud or oppression, and the Courts in so far as they have passed upon the question hold that the power conferred must not be exercised in bad faith * * * While the defendant had the right to consult what it deemed to be its own interest in making a settlement, it could not abuse the power vested in it and recklessly and contumaciously refuse to settle if it was apparent that in all reasonable probability its conduct would not only result in damages to the plaintiff, but

> also in loss to itself. Neither could it exercise the right conferred for the purpose of perpetrating a fraud on the plaintiff."

In the case of *Campbell* v. *London & Lancashire Indemnity Co.*, 168 N. Y. Supp. 300, judgments were recovered against the insured and it borrowed the money to pay the judgments, giving its note to the lender and afterwards took up the note by assigning the cause of action against the insurer and it was held:

> "The insurer could not escape its liability although the insured had no property out of which the judgments could have been satisfied."

The Court further held that:

> "The term, 'loss by reason of the liability imposed by law,' was shown by proof of the recovery of the judgment."

It is claimed by the appellant that the testimony of Judge DAVID shows a settlement by Joseph Roth in violation of Condition D of the policy. We contend while the word settlement was used it was not intended to mean such a settlement as would have deprived the Surety Company from appealing if under its contract it had that right. The testimony of Judge DAVID is quoted at length in appellant's brief (Case, pp. 64 to 70) and must be taken in conjunction with his other statements. On page 66 of the case, he says:

> "It turns out the Bank insisted on making the loan to Mrs. Roth on her security, which they did."

and, again, on page 67 of the case, he says:

> "I never knew the detail of how the Bank handled the transaction. The Bank insisted

> on Mrs. Roth, it appears, giving her property, and making the loan to her, and she gave me her check."

This is corroborated by the documentary evidence produced by the Elizabeth Trust Company and sworn to by its assistant secretary, Harry G. Pflug, on page 75, etc., of the case, so that it appears from the undisputed evidence that there was no settlement of a claim, but that there was in fact a purchase of two judgments by Mrs. Roth; that by taking an assignment of the judgments the wife, Minnie Roth, relieved her husband, Joseph Roth, from the stress of the threats of the judgment-creditors that they would at any time dispose of such assets of Joseph Roth as might be able to be taken under the executions. The Surety Company complains that its right of appealing to the United States Supreme Court was interfered with. It must be remembered that the only question which the Surety Company desired to take to this Court was the constitutionality of P. L. 1912, page 377, under which Supreme Court Rule 132 was adopted.

First let us cite that under the decisions of the United States Supreme Court in

> *Brown* v. *New Jersey*, 175 U. S. 172;
> *Maxwell* v. *Dow*, 176 U. S. 581;
> *Walker* v. *Sauvinet*, 92 U. S. 678;
> *Sanford* v. *Poe*, 165 U. S. 194;
> *Lacey* v. *Armour Packing Co.*, 200 U. S. 226;
> *Montana* v. *Rice*, 204 U. S. 291;

the Seventh Amendment to the United States Constitution has no application to trials in State Courts and, secondly, that question of constitutionality, after it has been decided by the highest

State Court, cannot be successfully reviewed in the United States Supreme Court.

Appellant, in its brief, also refers to a non-suit granted by Judge DALY in a previous action brought by Joseph Roth against the Surety Company; your Honors have not before you the testimony in that case nor the theory upon which it was pleaded and tried and it is sufficient to say that the evidence in the instant case is entirely different; that the evidence in the former suit warranted an entirely different conclusion. It has been frequently decided that a non-suit decided nothing.

> *Penrose* v. *Absecon Land Co.*, 94 N. J. Eq. 438.

Therefore we feel that it is a gross impropriety upon the part of counsel to refer to something which is not on the record in this case.

POINT II.

Roth did not assume any liability voluntarily in violation of the policy.

It is attempted by the appellant to draw a parallel with the case of *Thacher* v. *Aetna Accident & Liability Co. of Hartford,* 287 Fed. Rep. 484, in holding that by reason of Roth, while he was in bankruptcy, having signed together with his wife the note upon which the Elizabeth Trust Company loaned the wife $20,000.00 on her mortgage security assumed voluntarily a liability prohibited by the policy. In other words this is tantamount to stating that while a suit or appeal is pending arising out of an accident the assured could not go to his Bank and borrow money for any purpose.

In the *Thacher* case we find that the insured was Arthur Thacher; that while the judgment was recovered against him and his daughter, upon an appeal the judgment was reversed as to him but affirmed as against the daughter. The policy of insurance did not insure the daughter but what Thacher did was after the reversal of the judgment against him, he settled the judgment against his daughter and took an assignment of it and then brought an action against the Insurance Company endeavoring to be reimbursed for the moneys which he thus spent. The Court commenting upon the policy said:

> "The contract did not give the assured the right to assume liability and settle the claim, any more than to settle after suit was brought. He had no right, under the contract, to decide that he would relieve his daughter from the judgment and assume to compromise it, and then hold the Company responsible for his voluntary act.
>
> "It is clear that the plaintiff in error voluntarily assumed liability for the judgment against his daughter and paid the same before any *liability as to him* had been established in a suit instituted by his daughter against him."

Under Point II appellant also urges that there can be no recovery because the violations of the policy by Roth defeated the right of recovery to either the judgment-creditor or to the assignee of the judgment-creditor and cites the case of *Coleman* v. *New Amsterdam Casualty Co.*, 247 N. Y. 271, which is based solely upon the construction of the New York Statutes relating to insurance which is incorporated in and made a part of the policy. The principal facts in that case are that an insurance policy was issued which required the assured to co-operate and when the agents of the Insur-

ance Company went to the assured, which was a Drug Company to ascertain in what way the prescription was improperly compounded the officers of the Drug Company refused to give any information from which the Insurance Company could determine whether there was any liability which they should defend. The New York Statutes expressly requires co-operation; that clause was in the policy. The Insurance Company therefore refused to defend the case and the Court of Appeals of New York held there was no obligation in such event for the Surety Company to defend the action and that it was relieved from all liability.

In the instant case Roth co-operated and assisted the Insurance Company at both trials. The only question which was taken to the Court of Errors and Appeals was a question of law relating to the constitutionality of the Act upon which he could have had no effect in any manner. The constitutionality of the Act was determined adversely to the claim of the Surety Company in the case of *Robinson* v. *Payne,* 99 N. J. L. 135. The filing of a brief cannot serve to make the statute constitutional or unconstitutional. The situation was that when briefs were submitted to this Honorable Court on July 9, 1923, the attorneys for the Surety Company evidently knew that their brag of having the 1912 Statute declared unconstitutional and taking the case to the United States Supreme Court was not in good faith. They knew from the briefs submitted in the *Robinson* case on July 9th that they had no hope of sustaining their point of unconstitutionality and therefore ten days later wrote with much heraldry the letter of disclaimer which appears on page 118 of the case.

Counsel certainly should know that the filing of briefs with this Honorable Court cannot have any effect upon or control the decisions of this Court

on any question, particularly a question of the constitutionality of the law. As Roth stood by the company through two trials whatever was done by him or in his interest could not possibly have prejudiced the rights of appeal of the Surety Company on any point of law. There was no interference with the Surety Company proceeding with its appeal but it merely used its letter of July 19th as a subterfuge for further litigation in the event of demand being made upon it to pay its $10,000.00 liability.

POINT III.

The assignments of the judgments.

It is conclusively proven that Minnie Roth's money purchased the judgments and those judgments are on the same plane as any other judgment and readily assignable and transferable. While it is true that the cause of action for death is statutory that has no bearing upon the assignability of the judgment once entered. All of these various assignments are offered in evidence in the case but upon each instrument being offered Mr. Riker, the attorney representing the Surety Company, at trial said:

"No objection."

(See Case, p. 60, line 3; p. 61, line 35; p. 63, line 23.)

This point was not raised at the Trial Court and is not now properly available to the appellant. In fact there is no foundation for this complaint, as will be seen from an inspection of one of the assignments which we take the liberty of printing in full as an addenda to our brief.

POINT IV.

Under Point III, page 25, appellant raises two sub-points, to wit:

> That the execution by a wife against the husband is invalid, and
>
> That the execution was not returned as required by the policy.

The cases cited do not bear out this contention and an examination of the *Williams Appeal,* 47 Penn. State 307, page 312, will disclose that there was a confessed judgment by the husband in favor of his wife and upon sale of the husband's property under the prior lien it was decreed that the wife's judgment be paid. Exceptions were filed to such findings and the Court in sustaining the payment to the wife said:

> "Law and equity protecting the estate represented in the judgment, we will not lend the power of the Court to inquire into the fact of marriage and thus destroy the fruits of the judgment in the absence of fraud.
>
> "Where fraud is alleged, the burden of proof lies on her to show the soundness of the debt by showing the separate estate upon which it is founded."

And that is exactly what Mrs. Roth did. She showed title in various pieces of real estate in her own name, one of which ran back to 1911 and the other to 1917 and the third parcel to 1921 (Case, p. 62), and these properties she pledged to the Elizabeth Trust Company in order to obtain $20,000.00, of which $14,500.00 was paid for the assignment of the judgments. Here Roth paid the Surety Company its premium for protection, stood by the company through two trials and then when

liability was definitely fixed by the Surety Company does not pay its admitted liability as was done in every case cited by the appellant.

The second sub-point is that the execution was not returned in the manner contemplated by the policy, and in order to show that counsel does not print the language of the policy but prints a new clause which they have concocted merely for the purpose of making argument. On page 27 of their brief they purport to quote a clause, but that clause is not in the policy and it has been doctored up by language in an attempt to meet the particular case. Again counsel for the appellant in comment upon the return of the execution, at the bottom of page 26 of their brief, says:

> "This is a common practice."

We say it is the usual practice. It is the practice followed in all cases where the liability of the bondsmen is to be fixed by the return of an execution unsatisfied.

CONCLUSIONS.

It is apparent from the undisputed facts that Mrs. Roth on or about April 25, 1923, pledged her real estate by mortgage to the Elizabeth Trust Company and borrowed $20,000.00 of which $14,500.00 was handed over by her to Judge David to obtain the assignment of the judgments for the protection of Mrs. Roth and the bank; that she might pledge her property and stand in the place of a creditor has been settled in the cases of

Baldwin v. *Flagg,* 36 N. J. Eq. 48;
Handford v. *Bockee,* 20 N. J. Eq. 101.

The real complaint of the Surety Company is that the action in taking these assignments of judg-

ments interfered with it in obtaining the determination of this Honorable Court that the Statute of 1912 was unconstitutional. We start out with the presumption as determined by this Court in

McGrath v. *Bayonne*, 83 N. J. L. 224,

that the Statute is constitutional. Therefore, where the Statute has been on the books for over ten years and the Insurance Company attempted to declare it void, it assumed full risk and responsibility. The Insurance Company for a money consideration issued its policy to Roth. Upon the entry of the first verdicts of $55,000.00 its liability to pay $10,000.00 was established and by taking out the Rules to Show Cause limited to damages only, the Insurance Company admitted its liability to pay and when judgment final was entered for $23,000.00, the Insurance Company did not come forth and pay its $10,000.00 liability, but by every means tried to avoid and evade that liability. It is not in a position to ask this Court for any favorable consideration. In all of the cases cited the Insurance Company was sought to be held for damages in excess of the limit of its liability as written in the policy, and in those cases the fact appears that the Insurance Company always paid its liability to the extent of the limit written in the policy. Here the Insurance Company has not paid one dollar. Judgments were recovered and are still open and after the repudiation of liability Roth reduced the indebtedness to the Elizabeth Trust Company incurred by his wife and either he or his wife come clearly within the ruling of the United States Supreme Court in the case of

St. Louis Dressed Beef Co. v. *Maryland Casualty Co.*, 201 U. S. 173,

in which Mr. Justice HOLMES said:

> "That upon denial of liability by the Insurance Company, the Insured could have a cause of action by reason of the fact that the provision against the insured settling was released by the denial of liability."

In this case by reason of appeal and cross-appeal of the two Roths all of the parties are before this Court, so no matter what determination is made, harm cannot be done to the Surety Company under its contract with Roth to pay liability up to $10,000.00 and its sole attempt is to avoid that liability. That liability accrued on February 1, 1923, when judgment final was entered for $23,666.67 and it seems to us that the only question in fact arising is what amount of money should the Insurance Company have paid to either one or both of the Roths. The policy in express language says:

> "The expense incurred by the Company in defending the suit, including Court costs and *all interest accruing* after entry of judgment will be borne by the Company irrespective of the limit of the liability expressed in the policy."

The term

> "All interest accruing after entry of judgment"

certainly should mean exactly what it says. Judgment was entered for $23,666.67 and interest accrued thereon from the moment of the entry until paid. Therefore, we contend that the amount of money for which the Insurance Company was liable under its policy was its limited liability of $10,000.00 plus interest on $23,666.67, to wit, $7,612.56, plus the costs of suit in the sum of $234.05 so that judgment should have in fact been directed in favor of Minnie Roth for $17,846.61 instead of $14,898.21. This latter amount was ar-

rived at by Judge DALY by allowing interest only on the amount expended by Mrs. Roth for the purchase of the judgments, to wit, $14,500.00. It is claimed by the appellant that the clause merely means interest on $10,000.00 and if that is the correct interpretation and construction of the language then the judgment should have been for $13,450.72, but in the printed brief submitted by appellant it does not question the amount of the judgment as entered. On behalf of the respondents cross-appellants, we claim that the total amount which should be directed to be paid by the Insurance Company is the sum of $17,846.61. A full recovery should be made and allowed to Mrs. Roth under the First Count and her judgment should be for $17,846.61. If on the other hand Roth is entitled to full recovery on the Second Count it should be in his favor for the full amount, but if both Mr. and Mrs. Roth are entitled only to partial recovery, then the amount should be split up between them.

We respectfully urge that the judgment in favor of Minnie Roth, after being increased to the amount of $17,846.61 should be affirmed, but we have no objection if your Honors should determine that both of the plaintiffs have a cause of action for part of the money, that the judgment be divided proportionately, and that is the reason that both Roths have taken cross-appeals so they shall be properly before this Court to receive any awards which shall in the final analysis be determined to be their just due. We want to strenuously urge that there has been no breach of the policy by Roth, that the action of the parties in taking an assignment of the judgments was honest and that Mrs. Roth truly pledged her property and obtained money which was paid for the assignment of the judgments, that the judgments are

open of record and if the Surety Company had been sincere it could have carried out its program of taking the case to the United States Supreme Court no matter how futile that attempt would have been. Here we have a case where a premium was paid for the bond. The Bonding Company admitted its liability and after judgment against it endeavored in every possible way to evade payment. There has been no error committed and upon the entire case, as presented to your Honors, we insist that the judgment after being raised to the proper amount of $17,846.61 should be affirmed with costs.

Respectfully submitted,

ABE J. DAVID,
Attorney and of Counsel
with Respondent.

STAMLER & KOESTLER,
SAMUEL KOESTLER,
Of Counsel.

ADDENDA.

Exhibit P-7—6-11-28.

JW

THIS INDENTURE Made the seventh day of May in the year of Our Lord One Thousand Nine Hundred and Twenty-three, between ANNIE MENDEL, General Administratrix of the Estate of Jacob Mendel, deceased, of the City of Newark, County of Essex and State of New Jersey, party of the first part, and CHARLES L. BAUER, JR., of the City of Elizabeth, County of Union and State of New Jersey, party of the second part.

Whereas, the said party of the First Part, on the second day of February in the year of Our Lord One Thousand Nine Hundred and Twenty-three recovered a judgment in the New Jersey Supreme Court, Essex County, against Joseph Roth, for the sum of Fifteen Thousand ($15,000.00) Dollars and no Cents, damages and Seventy-eight ($78.72) Dollars and Seventy-two Cents, costs of suit, as by the record thereof will appear: Now this INDENTURE WITNESSETH, That the said party of the first part, in consideration of Seven Thousand Five Hundred and Forty-five Dollars and Forty-eight Cents ($7,545.48) to her duly paid, has sold, and by these presents does assign, transfer and set over unto the said party of the second part, and his assigns, the said judgment and all sum and sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon, AND the said party of the first part, does hereby constitute and appoint the said party of the second part, and his assigns, her true and lawful attorney irrevocable, with power of substitu-

tion and revocation, for the use and at the proper costs and charge of the said party of the second part, to ask, demand and receive, and to sue out executions, and take all lawful ways for the recovery of the money due or to become due on the said judgment; and on payment to acknowledge satisfaction of, or discharge the same. And attorney one or more under him for the purpose aforesaid, to make and substitute, and, at pleasure, to revoke; hereby ratifying and confirming all that his said attorney or substitute shall lawfully do in the premises. AND the said party of the first part does covenant, that there is now due on the said judgment the sum of Fifteen Thousand and Seventy-eight Dollars and seventy-two Cents ($15,078.72) and that she will not collect or receive the same or any part thereof, nor release or discharge the said judgment, but will own and allow all lawful proceedings therein, the said party of the second part, saving the said party of the first part harmless of and from any costs in the premises.

IN WITNESS WHEREOF, the party of the first part has hereunto set her hand and seal the day and year first above written.

ANNIE MENDEL (L.S.)
General Administratrix of the Estate
of Jacob Mendel, deceased.

Signed, Sealed and Delivered
in the presence of

L. P. KIRSTELLER

State of New Jersey,)
County of Essex,) ss.:

BE IT REMEMBERED, That on this ninth day of May in the year of our Lord One Thousand Nine Hundred and Twenty-three, before me, the subscriber, A Master in Chancery of New Jersey personally appeared Annie Mendel, general administratrix of the Estate of Jacob Mendel, deceased, who, I am satisfied is the assignor in the within Deed of Assignment named; and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes herein expressed.

LIONEL P. KIRSTELLER,
A Master in Chancery of New Jersey.

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