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Notice of Appeal.

(Filed January 27, 1938.)

New Jersey Supreme Court

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,

Defendant.

Notice of Appeal from the Supreme Court to the Court of Errors and Appeals.

To Messrs. Lindabury, Depue & Faulks,
Attorneys for Defendant.

Sirs:

TAKE NOTICE that the plaintiff appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above entitled cause.

C. WALLACE VAIL,
Attorney for Plaintiff.

Dated: January 22, 1938.

Service of the within Notice of Appeal is hereby acknowledged this 26th day of January, 1938.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

Grounds of Appeal.

(Filed February 25, 1938.)

NEW JERSEY COURT OF
ERRORS AND APPEALS.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey,
Plaintiff-Appellant,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,
Defendant-Respondent.

Action at Law.
On Appeal.
Grounds of Appeal.

To Lindabury, Depue and Faulks, Esqs.,
Attorneys for Defendant-Respondent.

TAKE NOTICE that the grounds of appeal which the plaintiff-appellant hereby assigns, and upon which he will rely at the hearing, are as follows:

1. Because the court erroneously struck out the complaint on the ground that the same failed to set forth a good and legally sufficient cause of action.

2. Because the judgment against the plaintiff is contrary to law.

3. Because the court erroneously concluded that the defendant had not violated the statutes of this state, as charged in the complaint, as amended.

Grounds of Appeal.

4. Because the complaint having set out a good and sufficient cause of action at law, which was supported by plaintiff's affidavits, it was error for the court to strike it and enter judgment for defendant, on either, or both the grounds of defendant's motion, i. e., that it was sham or frivolous.

5. Because the court erroneously granted defendant's motion to strike out the complaint as sham, and entered judgment for defendant upon the basis of defendant's affidavits, which affidavits were insufficient in law and insufficient in fact to support defendant's motion.

6. Because the court granted defendant's motion to strike the complaint, and entered judgment for defendant when plaintiff's answering affidavits on the motion, raised an issue of fact to be determined by jury, and denied plaintiff his constitutional right of trial by jury on the question of fact.

7. Because there were no facts presented to the court by defendant upon which a conclusion could be based that all doctors of the medical staff of Newark Beth Israel Hospital, (the insured under the policy described in the complaint) were either, in fact or in law, employees of said Newark Beth Israel Hospital.

8. Because from the affidavits presented to the court, by both the defendant and plaintiff, the court should have found that the insured, doctors of the medical staff of Newark Beth Israel Hospital, (the insured under the policy described in the complaint) were not employees of said Newark

Beth Israel Hospital, and the court should not have struck the complaint and entered judgment for defendant.

C. Wallace Vail,
Attorney for Plaintiff-Appellant.

Due and legal service of the within Grounds of Appeal is hereby acknowledged this 25th day of February, 1938.

Lindabury, Depue & Faulks,
Attorneys for Defendant-Respondent.

Judgment Record.

Summons.

(Filed August 29, 1936.)

The State of New Jersey to the Prudential Insurance Company of America, a corporation:

(L. S.) You are summoned to answer the annexed complaint of John Rybasack who sues for himself as well as for the State of New Jersey, in an action at law (in debt) in the New Jersey Supreme Court, Essex County. And take notice that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment will be entered against you.

Witness, Thomas J. Brogan, Chief Justice of the New Jersey Supreme Court, at Trenton, this 21st day of August, Nineteen Hundred Thirty-six.

William Harris,
Attorney for Plaintiff.

Fred L. Bloodgood,
Clerk.

Notice.

This action is instituted by John Rybasack for himself as well as for the State of New Jersey, pursuant to an act of the State of New Jersey entitled "An Act relating to life insurance companies doing business in the State of New Jersey, and to the representatives of such companies," (Chapter 168 of the Laws of 1895, as amended by Chapter 167 of the P. L. of 1927).

Complaint.

(Filed August 29, 1936.)

NEW JERSEY SUPREME COURT,
ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,
Defendant.

Action at Law.
(In Debt.)
Complaint.

Plaintiff, John Rybasack, who sues for himself as well as for the State of New Jersey, residing in the City of Newark, County of Essex and State of New Jersey, says:

1. The Prudential Insurance Company of America is a corporation incorporated under the Insurance Laws of the State of New Jersey, under an act entitled "An Act to Provide for the Regulation and Incorporation of Insurance Companies and to regulate the Transaction of Insurance Business in this State."

2. The said The Prudential Insurance Company of America, the defendant herein, is engaged in the writing of several kinds of insurance, including insurance upon the lives or health of persons.

3. Physicians and Doctors Endowment Fund entered into an insurance contract with the said defendant, The Prudential Insurance Company of America, on or about April 15, 1931, for the purpose of obtaining group insurance for its members.

4. The said contract for group insurance was entered into between the said defendant and Physicians and Doctors Endowment Fund, was executed and delivered and is now in force and effect.

5. The said members of the said Physicians and Doctors Endowment Fund are all physicians and surgeons and no employer and employee relationship exists between the said physicians and surgeons and the Physicians and Doctors Endowment Fund; nor is the Physician and Doctor Endowment Fund a labor union within the purview of the statute in such case made and provided.

6. The said contract of insurance originally insured 175 members of the Physicians and Doctors Endowment Fund, each in the sum of $4,000.00, and subsequently the contract was increased to insure 196 members, so that on April 15, 1936, the said insurance contract was for the sum of $784,000.00.

7. Section 2-a of Chapter 53 of the Pamphlet Laws of the year 1927 for the State of New Jersey provides, among other things, as follows:

"Group life insurance is hereby declared to be that form of life insurance covering not less than fifty employees written under a policy issued to the employer, the premium for which is to be paid by the employer or by the employer and employee jointly, and insuring all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer; provided, however, that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured."

Plaintiff states that no employer and employee relationship exists between the members of the Physicians and Doctors Endowment Fund covered by said contract of life insurance and the said Physicians and Doctors Endowment Fund.

8. The premium charged for the said life insurance to the members of the Physicians and Doctors Endowment Fund is less than the premium charged to individuals who obtained similar life insurance protection without the benefit of a contract such as exists between Physicians and Doctors Endowment Fund and the defendant. The rates charged to the said members of the Physicians and Doctors Endowment Fund are less than regular manual rates as filed with the Commissioners of Banking and Insurance of the State of New Jersey pursuant to the statute in such case made and provided.

9. Chapter 74 of the Pamphlet Laws of 1907, as amended by Chapter 191 of the Pamphlet Laws of 1909, as amended by Chapter 167 of the Pamphlet Laws of 1927, of the State of New Jersey, provides, in part as follows:

"No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes, nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company, or officer, agent, solicitor or representative thereof, pay, allow, or give, or offer to pay, allow or give, directly or indirectly, as inducement to insurance, any rebate or premium payable on the policy, or any special favor or advantage in the dividends or of the benefits to accrue thereon, or any paid employment or contract for service of any kind, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

10. Plaintiff states that by reason of the acts aforesaid, the defendant corporation has violated the aforementioned provisions of the statute in that all of the assureds under the contract between the defendant and Physicians and Doctors Endowment Fund have received distinction or discrimination and special favor or advantage expressly forbidden by the aforementioned statute.

11. Section 2 of Chapter 168 of the Laws of 1895 of the State of New Jersey, provides, in part, as follows:

"Any person or corporation violating any of the provisions of the preceding section of this act shall, for each and every offense, forfeit and pay the sum of one hundred dollars for every twenty-five hundred dollars of insurance or fraction thereof effected by the said policy contract of insurance; such penalty to be sued for and recovered with costs in an action of debt in any court of competent jurisdiction in the county where the offense shall have been committed, or in any county wherein such offender may reside or be served with process, by any person who shall sue for the same; one-half of such penalty shall be for the benefit of the person prosecuting the suit, and the other half shall be paid to the state treasurer for the benefit of the school fund of the state."

12. Plaintiff states that pursuant to the last mentioned statute he is entitled to $100.00 for every $2,500.00 of insurance affected by the aforementioned policy contract of insurance, one-half of said penalty being for the plaintiff's own benefit and the other half to be paid to the State Treasurer for the benefit of the school fund of the State of New Jersey.

Wherefore, plaintiff demands damages in the sum of $31,360.00, of which $15,680.00 is for his own benefit and $15,680.00 is to be paid to the State Treasurer for the benefit of the school fund of the State of New Jersey, together with costs of suit.

William Harris,
Attorney for Plaintiff.

This action was instituted on the 21st day of August, 1936. This endorsement is placed hereon pursuant to Section 219 of the Practice Act.

Notice of Motion to Strike Complaint.

(Filed September 19, 1936.)

NEW JERSEY SUPREME COURT,

Essex County.

John Rybasack, who sues for himself as well as for the State of New Jersey, Plaintiff, *vs.* The Prudential Insurance Company of America, a corporation, Defendant.	Action at Law. Notice of Motion to Strike Complaint.

To: William Harris, Esq., Attorney of Plaintiff, 60 Park Place, Newark, N. J.

Please take notice that we shall apply to the Honorable Newton H. Porter, Judge of the Essex County Circuit Court, and Supreme Court Commissioner, or such other Judge as shall sit as Supreme Court Commissioner, to hear motions in the New Jersey Supreme Court, Essex County, at the Court House, Newark, New Jersey, on Friday, September 25, 1936, at ten o'clock in the forenoon (Daylight Saving Time) or as soon thereafter as counsel can be heard, for an order to strike the complaint filed by you on behalf of the plaintiff in the above entitled cause, for judgment for the defendant, or such other relief as the Court may give, upon the following grounds:

Notice of Motion to Strike Complaint.

1. The allegations in the complaint are untrue in fact and sham.

2. The allegations in the complaint are insufficient in law.

3. The allegations contained in the complaint are frivolous.

4. The allegations contained in the complaint do not state a cause of action against the defendant.

And take notice that upon said application, we shall rely upon the affidavits attached hereto, and such additional affidavits as shall be served upon you four days prior to the hearing on said motion.

And take further notice that we shall apply to the Court to extend the time until five days after the Court has rendered its decision upon said motion, within which to answer said complaint, if an answer is necessary.

Respectfully yours,

Lindabury, Depue & Faulks,
Attorneys of Defendant.

Dated September 11, 1936.

Notice of Motion to Strike Complaint.

Affidavit of James F. Little.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,

Defendant.

Action at Law.

Affidavit.

STATE OF NEW JERSEY,
COUNTY OF ESSEX, } SS.:

I, JAMES F. LITTLE, of full age being duly sworn according to law upon my oath do depose and say:

I am Vice President and Actuary of the Prudential Insurance Company of America, defendant in the above entitled matter, and I was Second Vice President and Associate Actuary in 1931-1932.

I have read the complaint filed by the plaintiff in the above entitled matter. I am familiar with the writing and issuance of the group policy of insurance No. G-3658 issued to the Newark Beth Israel Hospital by The Prudential Insurance Company of America.

In December of 1931, the Newark Beth Israel Hospital, a corporation, made application to The Prudential Insurance Company of America for a group policy of insurance to insure the lives of the employees of the Newark Beth Israel Hospital, which employees were the members of the Medical Staff of said corporation. Pursuant to said application, the Prudential Insurance Company of America issued its group policy of insurance No. G-3658 to the Newark Beth Israel Hospital insuring said employees who were members of the Medical Staff.

Said Group insurance Policy No. G-3658 was issued in consideration of the payment of the premiums on the basis of the standard and regular manual of rates for group insurance, as filed with and approved by the Commissioner of Banking and Insurance of the State of New Jersey, pursuant to the statute in such case made and provided. The Newark Beth Israel Hospital informed and advised the defendant, The Prudential Insurance Company of America, that the lives insured being the members of the Medical Staff of said hospital, were employed by said hospital for the performance of their certain and special duties as doctors, physicians, surgeons and dentists in and about the business and work of said Newark Beth Israel Hospital in ministering to the needs, sickness and physical ailments of the patients of said hospital. The defendant was further advised by the Newark Beth Israel Hospital that the lives insured, being members of the Medical Staff of the Newark Beth Israel Hospital, were under the orders and control of the Board of Directors of the Newark Beth Israel Hospital, a corporation, being appointed by the said Board of Directors of said hospital for a definite term, and subject to dismissal by said Board of Directors and further subject to all the rules and regulations of the said corporation, Board of Directors and the supervising officers or committees appointed by the Board of Directors in conducting and maintaining a hospital in the City of Newark, County of Essex and State of New Jersey.

James F. Little.

Subscribed and sworn to before me this 12th day of September, 1936.

Harry V. Fisher,
An Attorney at Law of New Jersey.

Affidavit of Abram B. Abrams.

NEW JERSEY SUPREME COURT,

Essex County.

John Rybasack, who sues for himself as well as for the State of New Jersey, Plaintiff, *vs.* The Prudential Insurance Company of America, a corporation, Defendant.	Action at Law. Affidavit.

State of New Jersey, County of Essex. } ss.:

I, Arbam B. Abrams, of full age, being duly sworn according to law upon my oath do depose and say:

Notice of Motion to Strike Complaint.

I am a physician and surgeon duly licensed to practice in the State of New Jersey, and have been licensed since the year 1917.

I am a member of the Medical Staff of the Newark Beth Israel Hospital, a corporation, and have been a member of the Staff since 1917.

In December of 1931, being duly authorized by the Board of Directors of the Newark Beth Israel Hospital, I, on behalf of said hospital, made application to The Prudential Insurance Company of America, for a group insurance policy insuring the lives of the employees of the Newark Beth Israel Hospital, being the Physicians and Dentists of the Medical Staff of said hospital. Pursuant to the application so made, a group insurance policy No. G-3658 was issued by The Prudential Insurance Company of America, to the Newark Beth Israel Hospital insuring the employees being the members of the Medical Staff of said hospital.

Abram B. Abrams.

Subscribed and sworn to before me this 14th day of September, 1936.

David E. Marshall,
Master in Chancery of New Jersey.

Service of the within Notice of Motion to Strike Complaint is hereby acknowledged this 14th day of September, 1936.

William Harris,
Attorney of Plaintiff.

Supplemental Notice and Affidavits.

(Filed September 23, 1936.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey, Plaintiff, *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, Defendant.	Action at Law. Notice.

To: William Harris, Esq., Attorney for Plaintiff, 60 Park Place, Newark, New Jersey.

PLEASE TAKE NOTICE that we shall rely upon the attached affidavits of Max Danzis and H. T. Brookins in addition to the affidavits heretofore served in support of the defendant's motion, notice of which has heretofore been given for Friday, September 25, 1936, before the Honorable Newton H. Porter, Judge of the Essex County Circuit Court and Supreme Court Commissioner.

Respectfully,

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

Dated: September 21, 1936.

Service of the within notice and affidavits is hereby acknowledged this 21st day of September, 1936.

WILLIAM HARRIS,
Attorney for Plaintiff.

Affidavit of Max Danzis.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey, Plaintiff, *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, Defendant.	Action at Law. Affidavit.

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

I, MAX DANZIS, of full age, being duly sworn according to law upon my oath do depose and say:

I am a physician and surgeon duly licensed to practice in the State of New Jersey, and have been licensed since the year 1899.

I am the Chief of the Medical Staff of the Newark Beth Israel Hospital, and have been Chief of Staff since the year 1920.

I am insured under a group policy of insurance issued by The Prudential Insurance Company of America to the Newark Beth Israel Hospital, a corporation.

The Chief of Staff as well as all members of the Medical Staff of said hospital are appointed annually by the Board of Directors of the Newark Beth Israel Hospital, and such Board of Directors has the right to suspend and remove any member of the Medical Staff from office on the Staff and/or his position on the Staff.

The members of the Medical Staff are subject to the rules and regulations and orders of the Board of Directors. They are also subject to the rules and regulations, orders and measures for the conducting and managing of the Medical work of said Hospital as formulated and made by the Executive Committee of the Medical Staff, subject to the approval of the Board of Directors.

The members of the Medical Staff are engaged by the Newark Beth Israel Hospital, a corporation, to conduct the medical activities of the institution and perform the services which said corporation renders through its wards, clinics and laboratories, to the individuals of the community who apply to said hospital when in need of medical, surgical and dental attention. The individual members of the Staff are subject to call by the corporation, Newark Beth Israel Hospital, for attendance at the hospital and to serve in any capacity designated by the Board of Directors of said Hospital.

In return for the services rendered to the Newark Beth Israel Hospital by the members of the Medical Staff, such members of the Medical Staff are permitted the full use of all the facilities of the Hospital including its laboratories, instruments, equipment and medical supplies, as well as the use of the Hospital Library. In addition, the members of the Medical Staff receive invaluable experience in diagnosing, treating and ministering to a larger number of cases during the year, with their accompanying individual problems, than such doctors, physicians, surgeons or dentists would receive in private practice. It is only through such experience and the opportunity afforded to study a large number of cases and to solve the innumerable problems that continually arise, together with the benefit of consultation with other members of the Medical Staff, who are specialists in their respective fields, and experienced practitioners of long standing, that advancement and improvement can be made in the science of medicine, surgery and dentistry, and the individual practitioner profits by such training and experience and becomes more learned and valuable as a physician both to himself and the general community he serves.

It is the duty of the Chief of Staff and the members of the Staff to conduct the medical administration, professional and scientific work and needs of the hospital and each department or service thereof, to the end that the medical work and service rendered by the corporation, Newark Beth Israel Hospital, shall be efficiently and scientifically carried on.

MAX DANZIS.

Subscribed and sworn to before me }
this 16th day of September, 1936. }

DAVID E. MARSHALL,
Master in Chancery of New Jersey.

Affidavit of H. T. Brookins.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey, Plaintiff, *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, Defendant.	Action at Law. Affidavit.

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

I, H. T. BROOKINS, of full age being duly sworn according to law upon my oath do depose and say:

I am Manager of the Group Insurance Department of The Prudential Insurance Company of America.

A true copy of Group Insurance Policy No. G-3658 issued by The Prudential Insurance Company of America to the Newark Beth Israel Hospital, which is in force at the present time, is attached hereto.

H. T. BROOKINS.

Subscribed and sworn to before me this 21st day of September, 1936.

RICHARD E. BRITTON,
A Notary Public of New Jersey.

My Commission Expires June 12, 1939.

(Seal)

Group Insurance Policy.

THE PRUDENTIAL

INSURANCE COMPANY OF AMERICA.

(Herein designated as the Company.)

In Consideration of the Application of the Employer for this Policy, which is hereby made part of this contract, a copy of which Application is attached hereto, and of the payment, in the manner specified, of the premium herein stated, hereby insures the life of each of the persons herein designated as the Insured, for the term of one year from the date hereof, subject to readjustment and renewal as hereinafter set forth, for the amount specified herein, payable as provided, subject to the provisions on the second and third pages hereof, which are hereby made part of this contract.

The Insured hereunder are the several persons named in the Schedule of Employees forming part of the Application above referred to, said persons being all the employees of

NEWARK BETH ISRAEL HOSPITAL

herein designated as the Employer, that have agreed to be included in the group or class defined in the Application.

The Amount of Insurance on the life of any person insured hereunder is the amount stated in the Plan of Insurance set forth in the Application, and said amount shall be payable by the Company immediately upon receipt of due proof of the death of such person while the insurance on such life is in force in accordance with the terms hereof, at the Home Office of the Company, in Newark, New Jersey; said amount of insurance being

Payable to the Beneficiary designated by the Employee.

The Premium payable by the Employer shall be the sum of the several premiums for the individual amounts insured hereunder, computed upon the basis of the table of term premiums on the second page hereof for the respective ages, nearest birthday, of the Insured and in accordance with the terms of the Policy.

The first premium hereunder is payable by the Employer on the delivery of this Policy, in exchange for the Company's receipt. Subsequent payments of premium shall be made on the twenty-second day of March, June, September and December of every year while this Policy is continued in force, in exchange for the Company's receipt beginning with the twenty-second day of March, 1932.

In Witness Whereof, the said The Prudential Insurance Company of America, at its office in the City of Newark, New Jersey, has caused this Policy to be signed by its President and its Secretary, and to be duly attested, this twenty-second day of December, one thousand nine hundred and thirty-one.

Edward D. Duffield, President.

William W. Van Nalts, Secretary.

ATTEST............................

Supplemental Notice and Affidavits.

Group Insurance Policy No. G-3658.

Renewable Term. Annual Dividends.

Total and Permanent Disability Provision:

Waiver of Premiums, Payment of Insurance.

General Provisions.

Payment of Premiums.—This Policy is based upon the payment of premiums annually in advance, but premiums may be made payable in monthly, quarterly or semi-annual instalments. All premiums are payable at the Home Office of the Company, but may be paid to an agent of the Company on or before the dates when due, in exchange for official receipts signed by the President or the Secretary and countersigned by an authorized agent of the Company. If any premium be not paid when due, this Policy shall be void and all premiums forfeited to the Company except as herein provided.

If premiums be payable annually, semi-annually or quarterly the premiums or instalments thereof payable during any policy year shall be based upon the total amount of insurance at risk at the beginning of such policy year, in accordance with the table of premiums for such policy year as herein provided. If the average total amount of insurance at risk, determined in the manner hereinafter provided, during any policy year shall exceed the total amount at the commencement of such policy year the premium shall be increased proportionately and the increase in the amount of such premium shall be paid by the Employer at the end of the policy year. In like manner, if the average total amount of insurance at risk during any policy year shall be less than the total amount at the commencement of such policy year the Company shall refund to the Employer a corresponding proportion of the premium paid. The average total amount of insurance for any policy year shall be one-fifth of the amount obtained by adding together the total amounts actually at risk on the first and last days of the policy year and on the days falling respectively three months, six months and nine months after the first day of the policy year.

If premiums under this Policy be payable monthly the first monthly premium payable shall be the sum of the several monthly premiums for the individual amounts to be insured hereunder at the issue of this Policy, for the respective ages, nearest birthday, of the Insured on the date of this Policy, in accordance with the table of premiums herein provided. Each subsequent monthly premium shall be based upon the amount of insurance under this Policy on the due date of such premium and shall be computed at the average monthly premium rate per $1000 as fixed by the first monthly premium. At the option of the Company or the Employer the average monthly premium rate per $1000 shall be recalculated at the end of any policy year upon the basis of the attained ages of the Insured and the individual amounts of insurance at that time and subsequent monthly premiums shall be computed according to such average rate subject to further recalculation as herein provided and subject to the provisions as to adjustment of premium rates contained in the clause headed "Renewal of Policy."

It is understood that the Employer and the Employees shall contribute jointly toward the payment of the premiums, and that the contribution of an individual Employee shall not be more than sixty cents per month for each $1000 of insurance.

Supplemental Notice and Affidavits.

Grace in Payment of Premiums.—In the payment of any premium under this Policy, except the first, a grace of thirty-one days without interest will be allowed, during which time the Policy will remain in force.

Renewal of Policy.—This Policy is issued upon the One-Year Renewable Term plan and may be renewed on each succeeding anniversary of its date for successive terms of one year each, upon the payment on or before the date of each renewal of the premium for the amount of insurance to be renewed. During the first year from the date hereof the premium shall be computed upon the basis of the following "Table of One-Year Term Premiums per $1000 of Insurance," at the respective ages, nearest birthday, attained by the Insured on the date hereof, but at the end of one year from the date hereof and at the end of each year thereafter the Company reserves the right to adjust the premium rates upon the basis of which renewals may be effected. If the number of the Insured hereunder at any time shall be less than seventy-five per cent. of the employees eligible for insurance hereunder or less than fifty the Company shall have the right to decline to renew the insurance under the Policy.

Supplemental Notice and Affidavits.

TABLE OF ONE-YEAR TERM PREMIUMS

PER $1000 OF INSURANCE.

Age	Premium	Age	Premium	Age	Premium
15	$5.39	37	$7.11	59	$27.12
16	5.47	38	7.32	60	29.39
17	5.57	39	7.56	61	31.82
18	5.65	40	7.85	62	34.45
19	5.76	41	8.18	63	37.33
20	5.87	42	8.58	64	40.44
21	5.97	43	8.99	65	43.83
22	6.08	44	9.49	66	47.47
23	6.14	45	10.02	67	51.45
24	6.21	46	10.62	68	55.72
25	6.27	47	11.30	69	60.35
26	6.31	48	12.04	70	65.34
27	6.35	49	12.88	71	70.74
28	6.38	50	13.78	72	76.56
29	6.40	51	14.78	73	82.82
30	6.43	52	15.89	74	89.57
31	6.45	53	17.09	75	96.82
32	6.48	54	18.43	76	104.65
33	6.56	55	19.87	77	113.06
34	6.65	56	21.47	78	122.01
35	6.76	57	23.20	79	131.70
36	6.92	58	25.08	80	142.09

If the premium is to be payable semi-annually, quarterly, or monthly, add 1%, 2% or 3%, respectively, to the above rates and divide by 2, 4 or 12, respectively.

Additions to the Number of Insured.—New employees of the Employer eligible for insurance in the group or class insured under this Policy shall upon request from time to time, subject to evidence of insurability satisfactory to the Company, be added to the group or class originally insured hereunder, and, subject to the terms of the Policy, shall be insured in accordance with the plan of insurance set forth in the application for this Policy, provided that no evidence of insurability will be required of employees added within sixty days from the date of eligibility according to the plan of insurance. The Employer shall notify the Company whenever such new employees are to be added and premium adjustments shall be made as provided in the clause headed "Payment of Premiums." The Employer's pay-rolls and other similar records shall be open for inspection by the Company for the purpose of determining the amounts of insurance under this Policy and the premiums therefor.

Termination of Individual Insurance.—Irrespective of any other mode of termination the insurance upon the life of any person insured hereunder shall automatically cease and determine upon termination of the employment of such person with the Employer, except that at the option of the Employer employees temporarily laid off, on leave of absence or temporarily disabled shall during such periods be considered as being in the employ of the Employer.

Change of Beneficiary.—Any person insured hereunder may at any time while insured hereunder change his (or her) Beneficiary or Beneficiaries by written notice through the Employer to the Company at its Home Office, on a form furnished by it. Such change shall take effect when due acknowledgment thereof is furnished by the Company to such person insured and all rights of his (or her) former Beneficiary or Beneficiaries shall thereupon cease.

Incontestability.—This Policy, except for nonpayment of premiums, shall be incontestable one year from its date of issue, but if the age of any person insured hereunder shall have been misstated the amount of the premium actually paid for the insurance on his (or her) life shall be adjusted accordingly.

Supplemental Notice and Affidavits.

Modifications, etc.—No condition, provision or privilege of this Policy can be waived or modified in any case except by an endorsement hereon signed by the President, one of the Vice Presidents, the Secretary, one of the Assistant Secretaries, the Actuary, the Associate Actuary or one of the Assistant Actuaries. No modification or change shall be made in this Policy except such as is in accordance with the laws of the State in which the same is issued. No Agent has power in behalf of the Company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the Company by making any promise, or by making or receiving any representation or information.

Entire Contract Contained in This Policy.—This Policy together with the Application of the Employer, a copy of which is attached hereto, and the individual applications, if any, of the employees insured, contains and constitutes the entire contract between the parties hereto, and all statements made by the Employer, or by the individual employees, shall in the absence of fraud be deemed representations and not warranties, and no statement shall avoid the Policy or be used as a defence to a claim thereunder unless it be contained in the Application and unless a copy of such Application be attached to or endorsed on the Policy.

Dividend Provisions.

Annually, during its continuance in force, the proportion of the divisible surplus accruing upon this Policy shall be ascertained and apportioned by the Board of Directors and credited to this Policy at the end of the policy year as a dividend.

Such dividend shall be (1) paid to the Employer in cash or (2) at the option of the Employer applied to the reduction of the premium then due, if any; or upon written request of the Employer it may be (3) left to accumulate to the credit of the Policy with interest compounded annually at the rate of three and one-half per cent. plus such additional interest as the Company may declare on such funds and withdrawable at any time.

Provisions as to Employee's Certificate and Conversion of Individual Insurance.

The Company will issue to the Employer for delivery to each person insured under this Policy an individual certificate setting forth the insurance protection to which such person is entitled hereunder and to whom such insurance is payable, together with a provision that when the insurance on the life of any person insured hereunder shall terminate by reason of termination of employment, as herein provided, the Company will upon application by such person within thirty-one days after the date of such termination, and upon payment of the premium therefor, without evidence of insurability, issue a policy upon the life of such person on any of the forms customarily issued by the Company, except a policy of Term insurance, for the same amount as such person was insured for under this Policy at the time of said termination of employment. The premium for such policy shall be at the then current rates of the Company according to the occupation of and at the age attained by such person at that time.

Supplemental Notice and Affidavits.

Provisions as to Total and Permanent Disability Before Age 60:

Waiver of Premiums, Payment of Insurance in Instalments.

The disability benefits hereinafter specified will be granted by the Company if any person insured hereunder shall become totally and permanently disabled, from bodily injury or disease, to such an extent as to be incapacitated from engaging in any occupation for remuneration or profit, Provided,

(a) that the Company shall have received due proof that such disability exists and that such disability will continue for the entire after-lifetime of such person, and further, if premium payments on account of the insurance of such person shall have ceased, that such proof shall have been received not later than twelve months after such cessation;

(b) that such disability shall occur while the insurance on such person is in full force and effect and before the sixtieth birthday of such person, and

(c) that such disability shall occur after one year from the date when the insurance of such person became effective, except in the case of any person in the service of the Employer on the date of this Policy whose insurance became effective prior to the expiration of three months from the date of his (or her) eligibility for insurance hereunder, and except, further, in the case of any person included in any group or class consisting of fifty or more employees hereafter added to the groups or classes insured under this Policy, whose insurance became effective prior to the expiration of three months from the date of his (or her) eligibility for insurance hereunder.

Disability Benefits: (1) Waiver of Premiums.—The Company will, during successive renewal periods, waive the payment of that portion of each premium under this Policy applicable to the insurance on the life of such disabled person the due date of which, as specified on the first page hereof, shall occur after receipt by the Company of said proof of such disability.

(2) Payment of Insurance.—The Company will, in addition to waiving the premiums, pay to such person at its Home Office the amount of insurance on the life of such person at the time of the commencement of such continuous total and permanent disability in sixty monthly instalments during five years, each installment to be of the amount of $18.15 per $1000 of insurance payable, provided that if the amount of each of such sixty instalments would be less than $27, a number of months during which monthly instalments shall be paid may be selected from the table in Option 4 of the "Provisions as to Modes of Settlement," the number to be such, however, that the amount of each instalment will not exceed $27. The first of such monthly payments shall be made six months after the commencement of such continuous total and permanent disability or three months after receipt by the Company of due proof of such disability, whichever is the later date to occur, and subsequent monthly instalments shall be paid on the corresponding day of each month thereafter.

Supplemental Notice and Affidavits.

If the person disabled be physically or mentally incapable of personally receiving and receipting for said instalments or any of them, the Company may, at its option, and until claim is made by the duly appointed guardian or committee of such disabled person, make payment thereof to the Beneficiary or Beneficiaries of said person, if any, or to any person or institution then maintaining such disabled person.

The total amount of insurance under this Policy (whether or not the Policy provides for increasing insurance under certain conditions) on the life of such person at any time after one or more of such instalments have been paid shall not exceed the commuted value of such of said instalments as are not then due computed at the rate of three and one-half per cent. interest per annum compounded quarterly.

Any insurance remaining at the death of such person shall be paid to the Beneficiary or Beneficiaries of such person, or if there be no Beneficiary living at that time to the executors or administrators of such person.

Proof of Continuance of Disability.—Notwithstanding the acceptance by the Company of proof of total and permanent disability, such disabled person upon demand by the Company from time to time, but not oftener than once a year after the disability of such person has continued for two full years, for the purpose of verifying that such disability is actually permanent and not temporary, shall furnish due proof that he (or she) actually continues in the state of disability defined above. In case of failure to furnish such proof, no further portion of the premium hereunder on account of such person's insurance shall be waived and no further monthly instalments shall be paid on account of such disability, and any insurance on the life of such person then remaining under this Policy may continue to be renewed subject to the terms of the Policy, but if such person be no longer in the employ of the Employer or if this Policy be no longer in force, such person may, in respect to such reduced amount, make use of the privilege set forth under the heading "Provisions as to Employee's Certificate and Conversion of Individual Insurance."

The regular premium for this Policy includes a premium for these provisions equal to one per cent. of said regular premium.

PROVISIONS AS TO MODES OF SETTLEMENT.

Whenever an amount of insurance shall become payable on account of the death of any person insured hereunder one of the following options may be designated as the manner in which such amount of insurance shall be payable provided that in no event shall Option 4 be available if the amount of each instalment payable thereunder would be less than $10.

OPTION 1. *Payment in One Sum.*

OPTION 2. *Payment Partly in One Sum and the Balance in Instalments in Accordance with either Option 3 or Option 4.*

OPTION 3. *Weekly Instalments for One Year.* —Payment during one year in fifty-two equal weekly instalments of $19.56 per $1000 of amount so payable together with dividends, if any.

OPTION 4. *Payment in Monthly Instalments* for a number of months as selected from the following table, each instalment of the amount specified in the table for the number of months selected, together with dividends, if any:

Number of Months During Which Monthly Instalments Would be Paid	Amount of Each Monthly Instalment Per $1000 of Amount so Payable	Number of Months During Which Monthly Instalments Would be Paid	Amount of Each Monthly Instalment Per $1000 of Amount so Payable	Number of Months During Which Monthly Instalments Would be Paid	Amount of Each Monthly Instalment Per $1000 of Amount so Payable
6	$167.87	25	$41.49	44	$24.15
7	144.11	26	39.84	45	23.70
8	126.28	27	38.46	46	23.20
9	112.41	28	37.17	47	22.73
10	101.31	29	35.84	48	22.27
11	92.23	30	34.72	49	21.88
12	84.75	31	33.67	50	21.46
13	78.27	32	32.68	51	21.05
14	72.79	33	31.75	52	20.70
15	68.03	34	30.86	53	20.33
16	63.87	35	30.03	54	19.96
17	60.20	36	29.24	55	19.65
18	56.94	37	28.49	56	19.31
19	54.02	38	27.78	57	19.01
20	51.39	39	27.10	58	18.69
21	49.01	40	26.46	59	18.42
22	46.85	41	25.84	60	18.15
23	44.88	42	25.25		
24	43.10	43	24.69		

Unpaid Instalments at Death of Beneficiary.—If one or more instalments shall actually be paid in accordance with the provisions above and if the Beneficiary shall die before all instalments shall have been paid, and if there be no contingent beneficiary designated, the unpaid instalments will be commuted at the rate of three and one-half per cent. interest per annum compounded quarterly and paid in one sum to the executors or administrators of the Beneficiary.

Dividends with Instalments.—If an amount of insurance be payable in instalments, monthly or weekly, any dividend from the surplus earnings as ascertained and apportioned by the Board of Directors on account of amounts so payable will be paid in addition to the instalments.

A Copy of the Application Upon Which This Policy is Issued is Attached Hereto.

APPLICATION FOR GROUP LIFE INSURANCE

Application is hereby made to THE PRUDENTIAL INSURANCE COMPANY OF AMERICA for a Group Policy on the One-Year Renewable Term plan, with premiums payable Quarterly, to insure the lives of the employees of Newark Beth Israel Hospital located at Newark, State of New Jersey, herein designated the Applicant, said employees being engaged in the business or work of Medical staff. The said employees are named in the Schedules of Employees attached hereto and made part hereof, and comprise not less than seventy-five per cent. of the employees within the group or class to be insured. Each of said employees is to be insured in accordance with the following

PLAN OF INSURANCE

All doctors of Medical Staff..............$4000

Present employees to be eligible immediately. All new employees will be eligible after three months continuous service.

DATE OF ELIGIBILITY FOR INSURANCE: for present employees date of this Policy or end of waiting period, if any, whichever is the later date; for new employees date of employment or end of waiting period, if any. Any increase in the amount of insurance on the life of any employee which may be provided under the above plan shall not become effective unless the employee is in active service. Where an increase would have become effective if the employee had been in active service, such increase shall become effective one month after return to active service.

Each employee shall contribute toward the payment of the premium under the policy not more than 60 cents per month for each $1000 of insurance on his (or her) life.

This group of employees has not been previously covered for Group Insurance, except by the None.

Said employees are all in good health at the present time to the best of the Applicant's knowledge and belief. All are now working for the Applicant on full time and none is absent temporarily on account of serious illness or continuing poor health. The ages stated are in accordance with declarations made by the respective employees, and judging from the appearance of the persons and from available information are correct.

It is hereby agreed that this application, together with the said Schedule of Employees, shall constitute the application and become part of the contract of insurance hereby applied for, and it is further agreed that the Policy herein applied for shall be accepted subject to the provisions therein contained and said Policy shall not take effect until this application has been approved by the Company.

A. B. Abrams, Chairman
(Signature of Applicant.)
Newark Beth Israel Hospital.

Witness Herbert R. Diamond

Dated at December 22, 1931.

Supplemental Notice and Affidavits.

It is hereby certified that a duplicate copy of this application, signed by the applicant in the place provided, has been attached to the policy herein applied for, of which policy this application forms a part.

A. B. Abrams, M. D.
Applicant's Signature

Witness Herbert R. Diamond

Dated this 8th day of June 1932

Plaintiff's Answering Affidavit.

(Filed January 29, 1937.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,

Defendant.

Action at Law.
(In Debt.)
Affidavit.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } SS.:

JOHN RYBASACK, being duly sworn according to law, upon his oath deposes and says that:

1. He is the plaintiff in this suit.

2. He has read the affidavits of James F. Little and Abram B. Abrams annexed to the notice of motion filed herein by the defendant and the supplemental affidavits of Max Danzis and H. T. Brookins filed herein.

3. The insurance policy which is annexed to the affidavit of Mr. Brookins recites that said policy, together with the application of the employer, a copy of which is annexed to the said policy, contains the entire contract between the

parties thereto. The application annexed to the said policy has the following recital:

> "Said employees are all in good health at the present time to the best of the Applicant's knowledge and belief. All are now working for the applicant *on full time* and none is absent temporarily on account of serious illness or continuing poor health."

4. The doctors, physicians and surgeons who are insured by this group policy are practically all engaged in private practice. Their hospital work is merely incidental to their professional activities. Ninety per cent of the doctors insured have private offices, separate and distinct from the hospital, and the hospital is only used by them for research or for a place to send patients who require hospital treatment. The application is therefore manifestly false for the reason that in the very nature of things these doctors are not full time employees of the hospital by reason of the fact that a master and servant relationship does not exist between them and the hospital. The fact that a doctor belongs to the medical staff of the Newark Beth Israel Hospital does not constitute him an employee of that hospital any more than the fact that a lawyer is on a committee of the Bar Association constitutes him an employee of the Bar Association. The Board of Directors of the hospital may have the right to dismiss members of the staff and to govern the use of the hospital by the various doctors. However, the said Board of Directors does not have this right by reason of the fact that the doctors are employees of the hospital, but by reason of the control which the said Board of Directors has over the hospital building and the hospital grounds.

5. Deponent denies that anything stated in Max Danzis' affidavit constitutes proof that the doctors are employees of the Newark Beth Israel Hospital. The statement in the first full paragraph of his affidavit on page 2 that the individual members of the staff are subject to serve in any capacity designated by the Board of Directors of said hospital cannot be true and is misleading. The entire affidavit of said Dr. Danzis may be a good argument for the necessity and advisability of doctors being on the medical staff of a hospital, but it does not disclose in any way that all the doctors covered by the group insurance policy which is in question are employees of the hospital. Deponent denies that all of said doctors are employees of the hospital.

6. Deponent has read the affidavit of Abram B. Abrams hereinabove referred to. He has no knowledge as to whether or not said Mr. Abrams was authorized to make the application to the said The Prudential Insurance Company of America to insure the lives of the employees of the Newark Beth Israel Hospital. He denies that the physicians and dentists of the medical staff of said hospital are employees of said hospital.

7. Deponent has read the affidavit of James F. Little annexed to the moving papers as aforesaid. He denies any inference or direct statement made in said affidavit that the doctors, physicians, surgeons and dentists covered by the insurance policy mentioned therein are employees of the Newark Beth Israel Hospital. Deponent further states that the said affidavit is of no value for the reason that Mr. Little merely states what

he was informed by the Newark Beth Israel Hospital and the said affidavit is entirely hearsay.

John Rybasack.

Sworn and subscribed to before me this 24th day of September, 1936.
An Attorney at Law of N. J.

Leon J. Lavigne,
Filed, September 25th, 1936.

Stipulation Between Counsel.

Complaint Amended.

It is agreed between counsel for plaintiff and counsel for defendant that the complaint was amended by motion granted in open court by the court below, to conform with the fact that the contract of insurance referred to in the complaint, was entered into between The Prudential Insurance Company of America and the Newark Beth Israel Hospital and was Group Insurance Policy No. G-3658.

C. Wallace Vail,
Attorney for Plaintiff-Appellant.

Lindabury, Depue & Faulks,
Attorneys for Defendant-Respondent.

Opinion.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey,
Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation,
Defendant.

Opinion.

WILLIAM HARRIS, for the plaintiff.

LINDABURY, DEPUE & FAULKS (by Walter F. Waldau), for the defendant.

PORTER, S. C. C.

The defendant moves to strike the complaint, alleging that the same is sham and frivolous. The facts, which do not seem to be in dispute, are that the defendant entered into a contract of insurance with the Newark Beth Israel Hospital and issued a policy in pursuance therewith for group insurance, insuring the lives of the medical staff of the hospital. The complaint charges that the said policy was not one that was permitted under the law for the reason that the doctors whose lives were insured were not, in fact, employees of the hospital, that therefore they received insurance at less cost than they could otherwise have secured it, and that there was thus a discrimination in violation of Section one of Chapter 168 of P.

L. of 1895 as amended; hence this suit which is to recover the penalties provided for in Chapter 74 of the P. L. of 1907, one-half for the individual plaintiff and the other half for the benefit of the State.

The statute which the plaintiff contends was violated in the issuance of this policy, Section 2-A of Chapter 53 of P. L. of 1927, reads as follows:

> "Group life insurance is hereby declared to be that form of life insurance covering not less than fifty employees written under a policy issued to the employer, the premium for which is to be paid by the employer or by the employer and employees jointly, insuring all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer; provided, however, that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured. For the purposes of this act the members of any labor union or association who are actively engaged in the same occupation shall be considered employees of such union or association. No policy of group life insurance shall be issued or delivered in this state unless it shall contain in substance the following provisions * * *."

The defendant contends in support of its motion to strike the complaint that the proofs before the Court show that the said policy was what is known as group insurance and that the premiums thereunder are based upon the standard and regular manual of rates for such class of insurance as filed with and approved by the Commissioner of Banking and Insurance of this state; that all of the individuals insured were, in fact, employed by the hospital for the performance of certain special duties in connection with the work and purposes of said hospital; that said employees were under the control and direction of the authorities of the hospital, being duly appointed by said authorities, subject to be dismissed, and subject also to all of its rules and regulations; that, while they do not receive any compensation for their services, they do receive in consideration thereof the use and facilities of the hospital, including the laboratories, instruments, equipment, supplies, library, as well as an opportunity for study and experience in treating a larger number of patients than they would receive in private practice; that, therefore, there was no discrimination in the issuance of this policy because the beneficiaries thereunder, in fact, were employees within the meaning of the statute.

It is further argued by the defendant that the statute which prohibits discrimination in the issuance of life insurance policies (Sec. 1, Chap. 168 of P. L. 1925 as amended in Chap. 167 of P. L. 1927, *supra*) is a penal statute and should be strictly construed; further, that there is no discrimination because the insured are all of one class, and that the premiums charged are precisely the same as charged to others of like class.

It is conceded by the plaintiff in his brief that the primary question to be decided on this motion is whether or not the relationship of employer and employee existed between the insured and the hospital; that, if they were employees within the meaning of the statute, then the group insurance policy was properly issued and the complaint should be struck because, in that event, there would be no discrimination.

A consideration of this question leads to the conclusion that there was a relationship of employer and employee within the meaning and intendment of the statute. Having reached that conclusion, it becomes unnecessary to consider any of the other legal questions presented and the complaint must be struck.

It seems clear that the status of employer and employee as set forth in the statute did not mean, literally, one who was paid for services in money or who devoted his entire time to his employer and was completely under his control and domination, but in a broader and more comprehensive sense where a relationship existed of a group or association of men engaged in a common purpose under an organization directed and controlled by constituted authorities, either as here under the management of a regularly operated hospital or as the statute specifically points out, "The members of any labor union or association who are actively engaged in the same occupation."

The facts are not disputed that those insured are under the direction and control of the hospital and must conform to the instructions given them, to the rules and regulations, and the failure so to do may result in dismissal. Another factor which establishes the relationship is the fact that there is a consideration moving from the hospital to the doctors. The services are not, it is true, compensated for in money, but they are compensated for in the equivalent of money in the form of experience, knowledge and training, together with the use of the various facilities of the hospital. Because they are members of a profession and necessarily called upon to exercise their individual judgment in the performance of their duties does not, it seems to the Court, render them any the less employees under the facts here present within the meaning of the statute in question.

In the case of *Essex County Country Club* v. *Chapman,* 113 N. J. L. 182, it was held that a caddie who was employed on the golf course and who was paid by the members for whom he performed services, was an employee of the club for the reason that the employment was under the control of the club, which was a determinative factor within the meaning of the Workmen's Compensation Act. It seems to the Court that that reasoning is equally applicable here and makes for a reasonable and proper interpretation of the statute.

Many cases have been cited by the plaintiff which hold that physicians on hospital staffs are not employees, but all of them are actions in tort where the principle of *respondeat superior* applies. That is not the question here and those cases have no application to the case at bar. No case has been cited which seems inconsistent with the views herein expressed.

There being no issue of fact raised but simply questions of law, and the question of law considered above being dispositive of the entire matter, the complaint will be struck as sham.

Newton H. Porter,
Supreme Court Commissioner
and Circuit Court Judge.

Dated January 27, 1937.

Order for Judgment.

(Filed February 4, 1937.)

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey, Plaintiff, *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, Defendant.	Action at Law. Order.

This matter being opened to the court on motion of Messrs. Lindabury, Depue & Faulkes, attorneys of the defendant, to strike out the complaint filed in the above entitled cause, upon the ground that the allegations of the complaint are untrue in fact and sham; that they are insufficient in law; that they are frivolous and that the allegations of the complaint do not state a cause of action against the defendant; and it appearing that due notice of said motion and affidavits in support thereof having been served upon the plaintiff's attorney; and the said plaintiff appearing by William Harris, Esq., his attorney, and the defendant appearing by Messrs. Lindabury, Depue & Faulks, its attorneys; and it further appearing that the plaintiff requested permission of the court to amend the allegations of the complaint to state that the contract of insurance referred to in said complaint was made between the Prudential Insurance Company of America and the Newark Beth Israel Hospital, and said amendment not being opposed by counsel for the defendant, was allowed by the court; and the Court having heard and considered the argument of respective counsel, and having considered all briefs submitted by respective counsel; and it appearing to the Court that the application of the defendant should be granted, and the complaint as filed and as amended stricken upon the ground that is sham;

It is on this 2nd day of February, 1937, Ordered that the complaint filed by the plaintiff be and the same is hereby stricken out with costs on said motion allowed to the defendant.

I do further find that the defendant, The Prudential Insurance Company of America is entitled to the relief prayed for, to wit, a judgment of costs in its favor and against the plaintiff.

Newton H. Porter,
Circuit Court Judge, sitting
as Supreme Court Commissioner of New Jersey.

Entered February 4, 1937.

On Motion of

Lindabury, Depue & Faulks,
Attorneys.

Judgment.

Afterwards upon proceedings duly had according to the Statute and Rules of Court the Court ordered said complaint as filed and as amended stricken out as sham with costs on said motion allowed to the defendant.

Whereupon it is adjudged that the complaint of the plaintiff as filed and as amended be dismissed and that the defendant The Prudential Insurance Company of America, a corporation do recover of the said plaintiff John Rybasack only its costs which have been taxed at the sum of Thirty-eight dollars.

Costs $38.00 against J. R. only.

Judgment entered and signed February 4, 1937.

THOMAS J. BROGAN,
Chief Justice.

Order.

(Filed January 27, 1938.)

NEW JERSEY SUPREME COURT,

Essex County.

John Rybasack, who sues for himself as well as for the State of New Jersey, Plaintiff, *vs.* The Prudential Insurance Company of America, a corporation, Defendant.	Action at Law. Order.

Upon reading and filing the annexed Stipulation and Consent,

It is, on this 21st day of January, 1938, on motion of C. Wallace Vail, Ordered that he, the said C. Wallace Vail, be and hereby is substituted as attorney for the plaintiff in the above entitled action, in the place and stead of William Harris, Esq., as attorney for the said plaintiff.

And it is further Ordered that either a true copy of this order, which may be so certified by the said C. Wallace Vail, attorney, or a notice of this order, be, within five days from the date hereof, served upon the attorneys for the defendant.

Wm. A. Smith, Judge,
Supreme Court Comm. of N. J.

Substitution of Attorney.

NEW JERSEY SUPREME COURT,

ESSEX COUNTY.

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey, Plaintiff, *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, Defendant.	Action at Law. Substitution of Attorney.

It is hereby stipulated and agreed by and between John Rybasack, plaintiff, and William Harris, attorney for plaintiff, and C. Wallace Vail, attorney, that the said C. Wallace Vail be and is hereby substituted in the place and stead of the said William Harris as attorney for the plaintiff, and that an order to this effect may be entered without notice.

JOHN RYBASACK,
Plaintiff.

WILLIAM HARRIS,
Attorney for Plaintiff,

C. WALLACE VAIL,
Attorney.

Dated: January 20, 1938.

Service of the within Order of Substitution is hereby acknowledged this 26th day of January, 1938.

LINDABURY, DEPUE & FAULKS,
Attorneys for Defendant.

New Jersey Court of Errors and Appeals

JOHN RYBASACK, who sues for himself as well as for the State of New Jersey, Plaintiff-Appellant, *vs.* THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a corporation, Defendant-Respondent.	Action at Law. On Appeal from New Jersey Supreme Court, Essex County.

BRIEF FOR PLAINTIFF-APPELLANT.

(Italics ours unless otherwise noted.)

Facts.

1. The Prudential Insurance Company of America, respondent herein, entered into a group insurance contract with the Newark Beth Israel Hospital.

2. The said group insurance policy (S. C., pp. 22-38) covered all the doctors of the medical staff of said hospital.

3. The complaint charges that the said policy issued as a group policy, was not such a policy as respondent is lawfully permitted to issue under Section 2A of Chapter 53 of the P. L. 1927, because the insured thereunder, doctors comprising the medical staff of said hospital, were not "employees" of said hospital within the meaning of said act.

4. The said statute above referred to reads, in part, as follows:

"Group life insurance is hereby declared to be that form of life insurance covering not less than fifty employees, written under a policy issued to the employer, the premium for which is to be paid by the employer or by the employer and employees jointly, and insuring all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection for the benefit of persons other than the employer; provided however, that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than 75% of such employees may be so insured. For the purpose of this Act the members of any labor union or association who are actively engaged in the same occupation shall be considered employees of such union or association."

5. The complaint charges that the issuance of a group policy to persons not entitled thereto constitutes a discrimination under Section 1, Chapter 168, Laws 1895 and therefore the penalty provision of Section 2 of the last mentioned chapter comes into effect.

6. Motion was made on behalf of defendant-respondent to strike the complaint. Affidavits were submitted in behalf of defendant-respondent in support of the motion; answering affidavit was submitted in behalf of plaintiff-appellant. On hearing of the motion before the Honorable Newton W. Porter, Supreme Court Commissioner, the complaint was ordered stricken as sham and judgment was duly entered in favor of the defendant-respondent.

7. Appellant appeals from that judgment.

Foreword.

Appellant has listed eight grounds of appeal. For purposes of argument in his brief, however, he has taken the liberty to group them and treat them under fewer captions.

Grounds One, Three, Four, Seven and Eight allege substantive errors of law; Grounds Five and Six, procedural errors; and Ground Two covers both.

The substantive grounds of appeal are covered in Point One of appellant's brief. They are embraced under the caption—"Plaintiff had established a good and legally sufficient cause of action under the statutes; it was error for the Court to strike the complaint as sham or frivolous and give judgment for defendant on the motion." This, in turn, is subdivided into three sub-captions,

A—"Insured are not 'employees' and not legally eligible for group insurance within the meaning of P. L. 1927, Chapter 53, Section 2-A."

B—"Issuance of the group policy in question to insured not legally entitled thereto, is discrimination and violation of Chapter 168 of the Laws of 1895, as amended."

C—"Defendant is subject to the statutory penalty."

The second ground of appeal is discussed under all three points of appellant's brief.

Ground Six is covered in Point Two and treated under the caption,—"The Court had no power to grant the motion."

Ground Five becomes Point Three—"The Court erred in striking the complaint and ordering judgment for defendant, on the basis of the affidavits filed in support of defendant's motion."

Appellant wishes to make clear to the Court that he neither waives nor abandons any of his grounds of appeal, even though he places greater stress upon some than upon other grounds during argument.

ARGUMENT.

POINT I.

Plaintiff had established a good and legally sufficient cause of action under the statutes; it was error for the Court to strike out the complaint as sham or frivolous and give judgment for defendant on the motion.

A. Insured are not "employees" and not legally eligible for "group" insurance, within the meaning of Section 2-A, Chapter 53, P. L. 1927.

By virtue of the 1927 amendment to our insurance act, a form of insurance at lower rates than the ordinary rates prescribed, was permitted to be written upon the lives of certain limited persons called "employees". This is known as group insurance. The policy in question was such a group policy.

It is appellant's contention that the medical doctors insured under such policy were not employees, and not eligible for the type of policy which defendant has written. The pertinent portion of the 1927 statute is set forth in the complaint (S. C., pp. 7-8).

The members of the medical staff of Newark Beth Israel Hospital, insured under the policy in question, are not "employees" of said hospital, nor are they "members of any labor union or association actively engaged in the same occupation", within the meaning of P. L. 1927, Chapter 53, Sec. 2-A. It was error for the Court below to hold, as a matter of law, that they were "employees" and, therefore, proper subjects for group insurance, and that the issuance by defendant of the group policy in question (wherein said staff doctors obtained as a group, insurance at cheaper rates than they could obtain same as individuals), was not a discrimination and violation of the statute.

What is an employee? What are his distinguishing characteristics? Do doctors on the medical staff possess these characteristics? Are they "employees" of the hospital, as a matter of law? These are questions that this Honorable Court is obliged to answer in order to decide the instant appeal. It is respectfully submitted that the importance of the question warrants the Court in placing its decision squarely upon this issue.

It is of grave public concern that the legal status of doctors who devote a portion of their professional practice as members of a hospital medical staff be decided, in respect to their time so devoted.

It is common knowledge that professional men must pay the ordinary (higher) rates for life insurance and that the same protection in "group" insurance is obtained at a substantially lower rate. The Court below held that the hospital staff doctors in question were "employees", so as to be legally entitled to the lower rates of group insurance. Appellant contends this is discrimination.

If they are "employees", so are lawyers, and so are countless other men who have not heretofore so considered themselves or been regarded as "employees". If the staff doctors are "employees" and eligible for the privileges and cheaper rates afforded by group insurance, it is difficult to see why other professional men must pay more for the same insurance.

The result is that the teeth have been extracted from our Anti-Discrimination Statute, and the protection heretofore guaranteed the general public against partiality in rates rendered nugatory. Insurance companies are, in effect, given license to play favorites, to show partiality in insurance rates between individuals of the same class.

To make effective its general purpose it was necessary to *put teeth into the law:* to provide a penalty for its violation.

Thus far the courts, in the few instances where they have had opportunity to construe the general insurance statute, have interpreted its "shall not" provisions broadly and in the spirit of their protective purpose. They have carefully refrained from jurisdictional legislation; they have refused to allow its prohibitions to be circumvented by finesse, indirection or subterranean attempts.

State v. *N. J. Indemnity Co.*, 95 N. J. L. 308.

In the instant case, defendant has sought to circumvent the statute under disguise of group insurance. It now seeks to escape from the penalty by urging an unusual interpretation be placed upon the only word that can save it. That word is "employee". Defendant urges that the word "employee" be construed to embrace the doctors who serve as members of a hospital medical staff. The Court below so held. Appellant submits that the Court was wrong.

Never before in the history of law have the professional men who hold the honor and privilege of membership as hospital staff physicians been placed in the category of "employees". The term does not fit them. Shall the word be given a strained and unnatural meaning; a construction that upsets and runs contrary to established law?

Is a doctor in private practice, who incidentally thereto, serves, without financial recompense, as a member of the medical staff of a hospital, an "employee" of the hospital? Appellant says "no". The answer, however, rest with this Court.

(1) *Who is an "employee"?*

"Employee" is defined by the Century Dictionary as a person working for a salary or wages; by the Imperial Dictionary as a "clerk, workman or other person working for a salary or wages"; Worcester says the word "servant" is generally synonymous with "employee"; Webster speaks of him as "one who is employed"; Winston says he is "one who works for another for wages or salary". The lexicographers generally agree that an "employee" is a "servant".

A consideration of the cases leads to the same conclusion.

Justice Parker, in the case of *Rongo* v. *Waddington,* 87 N. J. L. 395, in interpreting the meaning of the term as used in the Workmen's Compensation Act, at p. 397 says:

> "Employer is declared to be synonymous with master and includes natural persons, partnerships and corporations; employee is synonymous with servant and includes all natural persons who perform service for another for financial consideration, exclusive of casual employments."

Cochran v. *Baker,* 61 N. Y. S. 724 speaks of an "employee" as one who works for another for hire. Continuity in the rendition of his services and the fact that he gets paid for the same in money are important elements of the relationship.

Employers' Indemnity Co. v. *Kelly Coal Co.,* 149 Ky. 712, 41 L. R. A. (N. S.) 963, 967;

Western Indemnity Co. v. *Pillsbury,* 172 Cal. 807, 159 P. 721.

In discussing the meaning of "employee" 20 *Corpus Juris* 1241 says:

> "* * * In this country it is of such common use that its meaning is not at all uncertain. The term is the correlative of 'employer' and the two are doubtless the outgrowth of the old terms 'master' and 'servant', and have been adopted by reason of and in deference to the exalted position labor has acquired by the education of the masses. * * * "

In other words "employee" is a more polite, more dignified name for "servant"; an alter ego, which in the course of common usage has surplanted the less dignified, more servile-sounding name, just like "kodak" has surplanted "camera" and "tavern" has surplanted "saloon." But just as "kodak" is a "camera" and a "tavern" is a "saloon", so an "employee" is a "servant".

The legal characteristics do not vary and an "employee" is still a "servant" in contemplation of law. This is further borne out by the fact that the Legal Digests have not made any separate classification, and the "employer-employee" relationship is still digested and classified as "master and servant."

The New York Court of Appeals in *Palmer* vs. *Santvoord,* 163 N. Y. 612, has defined an employee as "one who works for an employer; a person working for a salary or wage. The word is applied to anyone so working, but usually only to clerks, workmen, laborers, etc. and but rarely to the higher officers of a government or corporation, or to domestic servants."

See also,

> *11 Am. & Eng. En. Law* (2nd Ed.) P. 5.

In interpreting the term as used in a statute relating to trade unions the English Court gives the meaning of "employee" as "any servant or workman who has entered into a contract of service with an employer."

> *Regina* vs. *Bunn*, 12 Cox Criminal Cases, 316, 319.

This interpretation is peculiarly significant because the statute in question says "member of a trade union or association" shall be considered an "employee."

In a very carefully reasoned opinion a high Canadian Court in the case of *Macfie* vs. *Hutchinson*, 12 Ont. Pr. 167, delves deeply into the derivation and meaning of the word, the Court on page 180 said:

> "The word 'employee' or 'employe' is not a legal term, nor is it an English word, but a word imported in its native pronunciation from the French language, which is frequently used by English speaking people as a convenient commonplace term to designate the relation or situation of a class of persons who are not precisely menial servants, but whose whole time and services are employed and paid for by another person or persons, or by a corporation or by the Government. Our best pronouncing lexicographers treat it as a foreign word and try to import and preserve its native pronunciation by the use of such combinations of letters as they consider most likely to convey to English ears the nearest approximation to the native sounds of its several syllables, but the result coming from English tongues is generally ludicrous to French ears. In Spiers and Surenne's French Pronouncing

> Dictionary (1881) the word 'employee' is defined: '(1) a persont employed, person in any one's employ, quelqu'un; (2) (in public administration) a clerk.' It seems to me too clear for mistake that the term employee cannot in its ordinary acceptation be applied to members of any of the learned professions. As a fact I think it is never in common usage applied by either the learned or the unlearned to a practicing physician, a lawyer, a clergyman, a surveyor or a civil engineer practicing his professional avocation or what pertains thereto."

It is respectfully submitted that the word "employee" is almost universally understood to mean "servant," that the relationship of "employer and employee" is that of "master and servant," and that the term "employee," as used in P. L. 1927, Chapter 53, Sec. 2A, refers to the relationship of "master and servant" and should be understood in its conventional and commonly accepted sense.

> *Rongo* v. *Waddington, supra; Butler* v. *Eberstadt,* 113 N. J. L. 569; *Eisbee Amusement Corp.* v. *Greenhaus,* 114 N. J. L. 492; *Drago* v. *Central R. R.,* 93 N. J. L. 176.

That "servant" is the true meaning and interpretation to be given the word is further borne out by construing "employee" in the light of the surrounding words with which it is associated in the statute. Applying the maxim *"noscitur a sociis"* we find "employee" is found in the same sentence with "labor union". "Labor" means "class of wage-earning workers"; "labor union" is defined as an "association of workers formed for mutual benefit and protection by means of collective bargaining, etc."; as an "organization formed by the members of a certain trade or craft, generally with the object of improving their local wages and working conditions".

Winston Simplified Dictionary (adv. ed); The Modern Encyclopedia.

It follows, therefore, that "employee" means someone performing labor, someone rendering service for hire, a working man, a servant.

The statute explicitly says in part that:

> "For the purpose of this act the members of any labor union or association * * * shall be considered employees * * *."

By virtue of the same maxim, "association" very definitely means "labor association"; by definition "labor union" is "an association" *(Winston, supra)*. "Labor union" and "labor association" are used interchangeably to mean one and the same thing.

"Member of a labor union or association" is understood by lawyer and layman to be a working man or a wage-earner; in other words, a "servant" who hires himself out to and works for another for pay. The phrase was certainly never contemplated to include professional men: doctors who are members of the medical staff of a hospital. If "member of a labor union or association" means "servant", and if, by the very language of the statute, "member of a labor union or association" means "employee", then "servant" must mean "employee", and vice versa. Things equal to the same thing are equal to each other. And, if this be so, the hospital staff doctors are not "employees".

Appellant wishes to point out that it is wholly immaterial in the instant case whether or not said doctors are "members of a labor union or association". That would be important to decide if, and only if, the policy in question had been taken out by such a "labor union or association". This was not so. The policy was taken out by Newark Beth Israel Hospital.

If the staff doctors are "employees" at all, then, within the meaning of the statute, it can only be so if an employee-employer relationship exists between them and the hospital (which took out the policy on their lives). Appellant contends that such relation does not exist.

(2) *The elements and legal characteristics of an "employee".*

Having pointed out to the Court the identity of "employee" and "servant", appellant will next call to the attention of the Court the legal characteristics of an "employee", and how he differs from somewhat similar legal relationships.

The "servant" or "employee" is recognized primarily by the elements of his relationship, by the degree of control his master may exercise over him and by the lack of discretion in himself. An "employee" is engaged primarily to render services. He sells his work measured by time for a financial consideration called salary or wages. During the course of his work he subjects himself to the direction and control of his employer, both as to what he is to do and how he is to do it.

See

> *Restatement of the Law, Agency,* Sec. 220 C.

In *Security Union Ins. Co.* v. *McLeod,* 36 S. W. (2) 449, 451 (Texas) the Court said:

> "To constitute one an employee * there must exist between the parties the relation of master and servant in the broad sense that the one has the right of ultimate control and direction over the other."

In *Clark's* case, 124 Maine 47, 126 At. 18, at p. 19, the court said:

> "*If the employer has authority to direct what shall be done, and when and how it shall be done, and to discharge him disobeying such authority and direction and if the employer would be liable to third persons for misconduct of the worker, the other party to the relationship is an employee.*"

It was the high degree of control over the manner of performing the work thereby making the act of the servant tantamount to the act of the master, which gave rise to the doctrine of *respondeat superior*. Such concept had its genus in the Roman law where the master of the household (*patria potesta*) was responsible for the acts of his slave. If the slave caused injury to another the master was obliged, either to pay a fine or lose the slave. *Qui facit per aliam facit per se.*

Holmes, 4 Harvard Law Review 345.

The chief characteristic of the employer-employee relationship, is the *right* of the former *to direct and control the manner and means* by which the employee does his work, *as well as the result* to be accomplished or the end to be achieved.
See

Quinn v. *Kansas etc. R. Co.*, 30 S. W. (Tenn.) 1036;
Mechem Agency, (2nd Ed.) Volume 1, Sec. 36 and 37.

Secondary characteristics are that he usually surrenders his entire working time to his master's business, and he is paid wages or salary for his services. The fact that he is not paid in money for the work he does is evidence that he is not an employee.

> *Employers' Indemnity Co.* v. *Kelly Coal Co., supra.*

The relation of employer and employee must be distinguished from that of proprietor and independent contractor. They have many points of similarity, but a major point of differentiation—the *degree of control over the manner of performance of the work is the chief point of difference.*

> *Metzger* v. *Western Maryland Ry. Co.,* 30 F. (2nd) 50, 51 (C. C. A. Md.).
> *C. R. L. & P. R. Co.* v. *Bond,* 240 U. S. 449.

The employee sells primarily his services measured by time; the independent contractor, his accomplishments done under his own discretion and guidance. *Singer Manufacturing Co.* v. *Rahn,* 132 U. S. 518.

The independent contractor is responsible for the end to be achieved rather than the manner or means by which it is brought about. *Clark's case, supra; Mechen Agency,* (2nd Ed.) Volume 1, Sec. 40.

To sum up the general characteristics of employee, we find that he is a person *hired to render services,* usually ministerial in nature, and *measured by time.* There is *regularity and continuity* in the rendition of his services and he *usually devotes* his *entire working time* to his employer's business. He is *paid for his work in salary or wages.* He is *subject to the direction and control of his employer, both as to what work he is to perform and as to the manner of performance.* His employer has the *privilege to "hire" and "fire".* The "employee" *works for pay,* and both he and his "employer" *intend* a *commercial relationship* between them.

The principal line of demarcation between the "employee" and "independent contractor" lies in the fact that the latter is responsible for the results he is engaged to accomplish and retains a high degree of discretion in the manner and method whereby he performs or obtains those results. In other words, he is his own boss during the course of his work; the right to direct and control him during performance is absent. This is not so in the case of the "employee".

(3) *The doctors on the Medical Staff of the Newark Beth Israel Hospital do not possess the essential characteristics of "employees".*

The very affidavits submitted by defendant show this to be so. The answering affidavit of John Rybasack makes this conclusion compulsory. Moreover, appellant respectfully submits that the true facts of the relationship are of such common knowledge that the court may, in its discretion, take judicial notice thereof.

Measured by the distinguishing features of the "employer-employee" relationship, the hospital-medical staff relationship is found to be of a totally different size and shape and impossible to squeeze into the legal status of the former. Like the Grand Duke at the servants' ball, the incongruity is only too apparent.

To show wherein the staff doctors do not possess the characteristics of "employees", appellant desires first to compare them in the light of defendant's own affidavits. These affidavits were submitted for the sole purpose of convincing the Court that the doctors were "employees". Though naturally biased and presenting only such facts as defendant believed most favorable to its contention, such affidavits are still insufficient to establish the "employee" relation.

The affidavits of James F. Little (S. C., pp. 13-15) and of Abram B. Abrams (S. C., pp. 15-16) contain only hearsay statements and conclusions of law and are, therefore, palpably insufficient and utterly worthless as affidavits, and have no legal value in this case, and must not be considered.

> *In re McCraven,* 87 N. J. Eq. 28;
> *O'Neill* vs. *Linowitz,* 92 N. J. Eq. 179;
> *Kelly* vs. *Weiner,* 1 N. J. Misc. Rep. 338 (not officially reported);
> *Beugless* vs. *Thomas,* 1 N. J. Misc. Rep. 581 (not officially reported);
> *Hand* vs. *Nolan,* 1 N. J. Misc. Rep. 428 (not officially reported).

The affidavit of H. T. Brookins (S. C., pp. 21-38) merely sets forth the group insurance policy and nothing more.

Respondent may, however, claim that the affidavit of Max Danzis contains matter from which inferences might be drawn that an employer-employee relationship exists between the hospital and the members of its medical staff. Such inferences as can be drawn from the Danzis affidavit, however, do not support this legal conclusion. It states, in substance, that the staff doctors are appointed annually; that they are subject to suspension or removal for misconduct; that they are subject to certain rules and regulations enacted by their own executive committee and by the hospital directors; that they conduct their medical duties and perform services for the members of the community through the medium of the hospital; that they are subject to call and attendance at the hospital; that they conduct the medical professional and scientific work and needs of the hospital; that they have the privilege of using hospital facilities and equipment; and that they have the advantages of consultation, wide practice and opportunities to learn from each other.

Admitting that everything said by defendant's affiants is true, there are not sufficient facts to support the legal conclusion that the doctors are employees. It is evident at once that they carry on their practice according to their own discretion and that the hospital cannot and does not control them in the exercise thereof. They are not "hired", nor do they receive any pecuniary compensation for their services. They do not work for pay; no commercial relationship is intended. There is no regularity or continuity in the rendition of services; they do not devote their entire working time at the hospital. The essential elements of an employer-employee relationship are lacking. (Compare Point I, Section A (1) of this brief.)

Measured by the standard of characteristics which every "employee" must possess, these doctors fall short. Their characteristics are so vitally different and vary so materially from that standard, that they necessarily must occupy an entirely different legal category from "employees".

Appellant submits that on the basis of defendant's own affidavits, it has not made out a "prima facie case" in support of its motion. Not having shown the staff doctors to be "employees", defendant must fail in its own motion, and the Court erred in deciding otherwise.

Although it was not necessary for him to do so, John Rybasack filed an answering affidavit wherein he takes issue with Dr. Danzis and the other affiants. He shows that their affidavits do not correctly set forth the real facts of the relationship.

Appellant not only categorically denies the statements made in defendant's affidavits, and denies that the medical staff are "employees" of the hospital, but he sets up affirmative facts that clearly and conclusively show these staff doctors are not "employees."

In paragraphs 5 and 6 of the Rysbasack affidavit (S. C., p. 41) appellant challenges and traverses the assertions made by Abrams and Danzis that the staff doctors covered by the group insurance policy, are eligible therefor; he denies that the employer-employee relationship exists between the hospital and its medical staff.

Rybasack emphatically denies (S. C., p. 41, ll. 8-11) that the staff members are subject to serve in any capacity designated by the Board of Directors (an assertion made by Dr. Danzis: S. C., p. 19, ll. 25-27) denies the statements of James Little, and in paragraphs 3 and 4 of his affidavit (S. C., pp. 39-40) Rybasack denounces as "false" the statements contained in the application for the group policy that the doctors are "employees" and working "on full time." Of course such statements are hearsay or mere conclusions of law; Rybasack, however, although not obliged to, has denied them.

In paragraph 4 (S. C., p. 40, ll. 14-21) John Rybasack sets forth fact after fact of the relationship, proving conclusively that said staff doctors are not employees:

> "The doctors, physicians and surgeons who are insured by this group policy are practically all engaged in private practice. Their hospital work is merely incidental to their professional activities. Ninety per cent of the doctors insured have private offices, separate and distinct from the hospital, and the hospital is only used by them for research or for a place to send patients who require hospital treatment. The application is therefore manifestly false * * *."

These are affirmative facts—facts which are diametrically opposed to and take issue with the statements of Max Danzis.

The affidavits show that the doctors were "appointed" to the staff, not hired. (Danzis: S. C., p. 18, l. 38.) They received no salary or wages or pecuniary remuneration whatsoever for their services. This fact is evidence that they are not "employees."

They are "practically all engaged in private practice. Their hospital work is merely incidental to their professional activities. Ninety per cent of the doctors insured have private offices, separate and distinct from the hospital, and the hospital is only used by them for research or for a place to send patients who require hospital treatment." * * * (Rybasack: in S. C., p. 40, ll. 14-25.)

Analyzing these facts in the light of the law relative to "employees" can lead only to the conclusion that the doctors are not employees of the hospital, nor are they employees of anyone else. The fact that they are "appointed annually" is indicative that it is an honor and a privilege rather than employment or a job.

The affidavits indicate that the staff doctors do not devote their entire working time at the hospital. It is common knowledge that they are there a small fraction of the time. The use of the hospital is incidental and supplementary to their own independent private practice. Their visitations and services there are intermittent, irregular and lack continuity. They do not work there; they make occasional visits there to render professional services to certain patients. Nor are the services which they actually render there done at the command of or for the benefit of the hospital, but rather for the patients. In short, these doctors simply utilize the facilities of the hospital where they are privileged to carry on their practice.

Respondent may argue that they are obliged to regularly attend clinics and that this is evidence that they are "employees." The conclusion does not follow. While it may be true that they must devote a portion of their time in attendance at clinics as a condition to the privilege of belonging to the staff, this fact does not make them hospital employees. It is evidence of the opposite conclusion. They are paying the hospital; the hospital is not paying them. The shoe is on the wrong foot.

The element of discretion in the rendition of their services is a most important fact to differentiate them from employees. The hospital cannot and does not direct or control them in the manner in which they render professional services. They would never recognize any attempt on the part of the hospital or of any other person or institution to do so. They are professional men, acting according to their own discretion in diagnosing, treating and operating upon the patients. Unlike internes, they are their own bosses, making and carrying out their own decisions, subject to their own direction and control.

These doctors are a group of professional experts banded together by a common interest, meeting and working together in a common laboraatory—a self-disciplining, self-regulating body of men. As stated in the affidavit of Dr. Danzis, their general duties are to "conduct the medical administration, and the professional and scientific work and needs of the hospital" (Danzis: S. C., p. 20, ll. 19-21).

They may be likened, to a commonly known relationship. Like the patrons of a library, they may make use of its privileges and facilities so long as they abide by the rules, regulations and orders governing the use of same.

Newark Beth Israel Hospital is a large experimental laboratory and graduate school wherein certain doctors, who have met its prescribed requirements and gained entrance, are permitted to carry on their studies, experiments and practice within its walls. They are part of a cooperative project wherein they work together for the mutual advantage of themselves and the patients. They occupy a unique and anomalous status in the law. In relation to the hospital and its facilities they are licensees. They are not "employee", either by intention or by having the characteristics thereof.

The fact that the hospital retains the right to "suspend and remove" them for infraction of regulations or for misconduct is more evidence that the doctors are licensees than that they are employees. Any person who grants to another the privilege of using his facilities, can condition that use upon any terms he sees fit to impose, and can revoke the privilege at will and without cause.

> *Wood* v. *Leadbitter,* 13 M. & W. (Meeson *& Welsby*) 838;
> *Thomas* v. *Sorrell,* Vaughn, 330, 351;
> *Cook* v. *Sterns,* 11 Mass. 533.

The employer, on the other hand, must discharge only for just cause or at the termination of the contract. The hospital, as licensor, can at any time, deny its privileges and use of its facilities to the doctors upon whom it has chosen to confer them. It simply revokes the privilege.

That "licensees" and not "employees" is the true nature of their relationship has been very clearly indicated by Chief Justice Durfee in the widely-cited case of *Glavin* v. *Rhode Island Hospital,* 12 R. I. 411. At page 424 of the opinion (p. 679 of Am. Rep.) he says:

> "It is true the corporation has power to dismiss them, but it has this power not because they are its servants, but because of its control of the hospital where their services are rendered."

Other cases to the same effect are:

> *Hillyer* v. *St. Bartholomew's Hospital*, (1909) 2 K. B. 820;
> *Schloendorff* v. *Society of N. Y. Hospital*, 105, N. E. (N. Y.) 92;
> *Commonwealth* v. *Fitler*, 23 Atl. (Pa.) 568.

Analysis of the affidavits clearly show that the members of the medical staff do not possess the characteristics of employees or servants. They are not paid. They recognize no right in the hospital to direct or control the manner, method or technique exercised by them in performing their professional duties. They do not devote all of their time to the work of the hospital. They do not render their services, measured by time. They do not intend to accept employment when they accept membership on the medical staff, nor is such relationship intended by the hospital.

Their true relationship is that of licensees, privileged to use the hospital and its facilities as a medium to carry on their professional practice, in the advancement of science and in caring for the ills of humanity.

Thus far in his brief, appellant has defined the term "employee", has pointed out its salient and distinguishing characteristics, and has shown that these characteristics are totally absent from the relationship of doctors of the medical staff to the hospital. Appellant submits that since these doctors do not possess the characteristics of employees they are not employees according to law and within the meaning of the statute.

(4) *The hospital staff doctors are not "employees" as a matter of law.*

The cases are legion and unanimously in support of this proposition. In *Wall* v. *Board of Directors, Deaf, Dumb and Blind Asylum,* 145 Cal. 468, 78 Pac. 951, the Court held that, as a matter of law, a hospital staff physician elected by the Board of Directors was not an employee, and hence was not removable under a statute giving the Board power "to remove at pleasure any teacher or employee".

In *Metzger* v. *Western Maryland Railway Co.,* 30 Fed. 2, 50, the Circuit Court of Appeals (Md.) held that a physician engaged by the company to treat its employees, was not an "employee" of the railway within the meaning of the Federal Employers Liability Act, since *"employee does not include an independent contractor or physician exercising his own judgment free from the company's control or supervision."*

In *Hillyer* v. *Governors of St. Bartholomew's Hospital,* (1909) 2 K. B. 820, the English Court of King's Bench (in a jurisdiction where hospitals are liable, *respondeat superior,* in the same manner as individuals), was called upon to decide the very question in issue. In holding that the staff physicians and surgeons were not servants of the hospital, the Court (Farwell, Lord Justice) said at p. 825:

> *"The first question then is, were any of the persons present at the examination servants of the defendant? It is, in my opinion, impossible to contend that Mr. Lockwood, the surgeon, or the acting assistant surgeon, or the acting house surgeon, or the administrator of anasthetics, or any of them, were servants in the proper sense of the word; They are all professional men employed by the defendants to exercise their profession to the

> best of their abilities according to their own discretion; but in exercising it they are in no way under the orders or bound to obey the directions of the defendant. * * * "

The most famous, and most widely cited case on the subject is that of *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, decided in 1879. (This case, also, was decided in a jurisdiction which holds hospitals and charitable institutions responsible for their torts in the same manner as individuals.) In that case the hospital was held responsible to a patient for unskilful surgical treatment rendered by an attending staff physician. The ground, however, was not the fact that the relationship of master and servant existed between the hospital and the physician—it was expressly held it did not—but on the ground that the hospital failed to exercise due care in the selection of the physicians who were privileged to serve upon its staff. At page 679 of the opinion, Chief Justice Durfee said:

> "* * * Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A, out of charity, employs a physician to attend B, his sick neighbor, the physician does not become A's servant, and A, if he has been duly careful in selecting him, will not be answerable to B for his mal-practice. The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. *The relation of master and servant is not established between A and the physician and so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has the power to dismiss them, but it has this power not because they are its servants, but be-*

cause of its control of the hospital where their services are rendered. They would not recognize the right of the corporation, while retaining them, to direct them in their treatment of patients."

The *Glavin* case is cited with approval by the courts of many jurisdictions that have passed upon this point. The authorities are collected in:

> *Schloendorff* v. *Society of N. Y. Hospital*, 105 N. E. (N. Y.) 92, 52 L. R. A. (N. S.) 505 (citing the authorities);
>
> *Hillyer* v. *St. Bartholomew's Hospital*, (1909) 2 K. B. 820.

In *Kellogg* v. *Church Charity Foundation*, 112 N. Y. Sup. 566, the Court held as follows:

> * * * "It may well seem strange that lack of liability in such cases should be so invariably put on the ground that the defendant for being a charitable institution was not subject to the rule respondeat superior, which applies to the relation of master and servant in respect of torts to third persons by the servant; for such relation of master and servant does not exist as to third persons in the employment of physicians and surgeons, architects, and the like (unless, to be sure, by contract). They are not servants but in an independent employment (Laubheim *v.* Steamship Co., 107 N. Y. 228; 13 N. E. 781, 1 Am. St. Rep. 815; Allan *v.* Steamship Co., 132 N. Y. 91, 30 N. E. 482, 15 L. R. A. 166, 28 Am. St. Rep. 556; Burke *v.* Ireland, 166 N. Y. 305, 59 N. E. 914; O'Brien *v.* Steamship Co., 154 Mass. 272, 28 N. E. 266, 13 L. R. A. 329; Quinn *v.* Railroad, 94 Tenn. 713, 30 S. W. 1036, 28 L. R. A. 552, 45 Am. St. Rep. 767; South Flo. R. Co. *v.* Price, 32 Fla. 46, 13 South 638; Eighmy *v.* Un. Pac. R. C., 93 Iowa 538, 61 N. W. 1056; 27 L. R. A. 296; U. Pac. R. Co. *v.* Artists, 60 Fed. 365, 9. C. C. A. 14, 23 L. R. A. 581;" * * * " 'The relation

of master and servant only exists between persons of whom the one has the order and control of the work done by the other. A master is one who not only prescribes to the workman the end of his work, but directs or at any moment may direct the means also, or as it has been put, retains the power of controlling the work; and he who does work on those terms is in law a servant, for whose acts, neglects and defaults, to the extent specified, the master is liable.' Pollock on Torts (4th Ed.) p. 72. The case of Hannon *v.* Siegel-Cooper Co., 167 N. Y. 244, 60 N. E. 597, 52 L. R. A. 429, is not to the contrary. There the defendant went into the practice of dentistry as a business, and thereby had a contract relation with each patient which made it answerable for any negligence or malpractice of its employees in treating him."

In re Agnew's Will, 230 N. Y. Supp. 519, the Court held as follows:

"The relation between the hospital corporation and its medical staff is clear in law. If the hospital has selected its staff with due care, the corporation, in the absence of an express contract to that effect, is under no responsibility for inability or carelessness on the part of a staff surgeon in his hospital work (Schloendorff *v.* Society of New York Hospital, 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N. S. 505, Ann. Cas. 1915C, 581)); nor by reason of such appointment of medical men to its staff does the corporation assume the relation of master and servant as to third persons, whether patients or others. The staff members are neither servants nor agents of the hospital, but those individuals act in an independent employment or undertaking. Kellogg *v.* Church Charity Foundation, 128 App. Div. 214, 112 N. Y. S. 566."

Another case which is a complete answer to defendant's contention that the doctors are employees of the Hospital is *Commonwealth* v. *Fitler,* 23 Atl. (Pa.) 568. There the question was raised as to whether the doctors and surgeons comprising the medical staff of a city hospital were "employees" of the city. The contention was made there, as in the case at bar, that the doctors and surgeons, although not obtaining compensation in money, received compensation "in the consciousness of duty performed to the public, to the sick and the afflicted, and the increase in professional and expert knowledge and skill which is thus acquired." In holding that they were not employees, the Pennsylvania court said at page 570:

> * * * "The medical staff or board of visiting physicians was composed of physicians and surgeons, many of whom were known and recognized in the community and by the profession as specialists or experts in the various departments of medical science, who resided at their several homes, performed their duties as visiting physicians without pecuniary compensation, were divided into classes as specialists, whose duties consisted in visiting the patients at regular intervals, prescribing the proper remedies, and exercising, under established rules, a general medical supervision of their several departments of service. * * *"
>
> "When we make further search for the true legislative intent as it bears on the present inquiry, we find that the twelfth article provides for the appointment of officers, clerks, and employees of the several departments by rules providing for the ascertainment of the fitness of applicants for appointment or promotion to office, and that the legislature excepted from the operation of such rules professional experts, and we are led to the conclusion that the intention was to protect the medical staff from the necessity of becoming applicants for appointment, which would subject them to examinations like those pre-

scribed for officers, clerks, and employes. That this is a reasonable inference becomes apparent, when the fact is recalled that a medical staff was the only association or body of professional experts who at that time, or at any other time, so far as has been brought to our attention, rendered professional expert service to the city. Members of the medical staff did not then, and do not now, obtain their appointment through applications for election or appointment. They were then, and are now, selected on the basis of their special professional fitness, and are substantially invited or requested to take positions on the staff, and render service to those suffering from disease or accident, and who are unable, by reason of their poverty, to procure proper treatment for themselves. The compensation of the members of the staff consisted in the consciousness of duty performed to the public, to the sick and the afflicted, and the increase in professional and expert knowledge and skill which is thus acquired." * * *.

"Accepting this conclusion, it follows that the members of the medical staff are neither officers, subordinate officers, or employees of the city, or of the department under whose government the hospital is placed; which renders unnecessary the further consideration of the views, so earnestly pressed upon the attention of the court by counsel sustaining the contention of the commonwealth. It may, however, be well to add to what we have said a few words upon the prominent points discussed on the part of the commonwealth in support of its application. If the members of the medical board or hospital staff are to be regarded as professional experts, and therefore not subject to examination, the requirement to perform some degree of executive or administrative duty does not alter their standing as professional experts." * * *
"We also hold that, *under no view which can be taken of this question, can the members of the staff be regarded as employees* of the city. An employee of a municipality means a person who is employed as an agent

or servant of the local government, who, by contract, express or implied, is to be paid for whatever service he may perform. *It could not have been intended that professional medical experts, who render charitable aid to the suffering poor under the care of the city, without fee or reward, should be regarded as occupying the position of employees.*"

In defining the word "employee", the Court (O'Connor, *J.*) in the case of *Macfie* v. *Hutchinson,* 12 Ont. Pr. 167, 180 said:

> "As a fact * * * it is never in common usage applied by either the learned or the unlearned to a practising physician, a civil engineer, practising his professional avocation, or what pertains thereto."

The review of the authorities shows that Courts are clearly of the opinion that the doctors who serve upon the medical staff of a hospital are not recognized in law as employees of the hospital.

It is submitted that the present case should not be made an exception. Appellant submits, that the insured in question are not "employees" of Newark Beth Israel Hospital, either in fact or in law or within the meaning of Section 2A, page 53, of the Laws of 1927. The Court below was wrong in holding to the contrary and in striking appellant's complaint as frivolous.

(5) *Comment on Lower Court's Opinion.*

Appellant desires to point out to the Appellate Court certain errors in the reasoning of the Court below, upon which the judgment in question was formulated. The lower Court was of the opinion that the status of employer-employee does not require that the employee be paid in money for his work, that it does not require the devotion of his entire working time to his employer's business, that it does not imply employer control over the employee. (See opinion: S. C., p. 46, ll. 17-22.)

The Court below further said "because they are members of a profession and necessarily called upon to exercise their individual judgment in the performance of their duties does not, it seems to the Court, render them any the less employees * * *" (S. C., p. 47, ll. 6-10). Stripped of these essential elements, little remains of the well-established legal concept of employer-employee, and appellant submits it no longer exists.

It is universally recognized that the high degree of discretion and control which the employer may exercise over the employee in the performance of his work, is the chief attribute of the relationship; and that a person who exercises his own discretion and directs and control the manner in which he carries on his duties, is not an employee. Appellant submits, therefore, that the Court was wrong in its conclusion.

The case of *Essex County Country Club* v. *Chapman*, 113 N. J. Law 132, cited by the Court below as authority for the proposition that the members of the medical staff in question are employees of the hospital is not in point. Moreover, it serves to prove the opposition conclusion for which it was cited. The case holds that a caddy is an employee of the golf club within the meaning of the Workmen's Compensation Act. Appellant does not quarrel with this conclusion. It is sound law and indicates the Court was fully cognizant of the principles of law applicable to the relationship. That case is easily differentiated from the case at bar. The golf club exercises a high degree of control over the manner in which the caddy performs his work. The hospital does not. The caddy is hired to render menial and servile duties, ministerial in nature. The physician on a medical staff exercises discretion in the performance of professional duties. The caddy cannot exercise his own judgment. The physician always exercises his own independent judgment in conducting his practice. The Workmen's Compensation Act includes servants and employees and embraces the caddy in question. The Workmen's Compensation Act has never been construed to embrace a physician, and the Courts have held he is not an employee. (*Metzger* v. *Western Maryland Railway Co.*, 30 Fed. 2, 50 (C. C. A. Md.)).

Appellant submits that the Court arrived at an erroneous conclusion, and that the Court was wrong in holding as a matter of law, that the relationship of employer and employee existed between the hospital and its medical staff.

B. The issuance of the group policy to insured not legally entitled thereto is discrimination and violation of Chapter 168 of the Laws of 1895, as amended.

Pamphlet Laws of 1895, page 334, as amended by Pamphlet Laws of 1907, page 153, and Pamphlet Laws of 1909, page 285 (2 Comp. Stat. 1910, page 2876) as amended by Chapter 167 of the Pamphlet Laws of 1927, of the State of New Jersey, provides, in part, as follows:

> "No life insurance company doing business in this State shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed

in the policy issued thereon; nor shall any such company or officer, agent, solicitor, or representative thereof, pay, allow, or give, or offer to pay, allow or give, directly or indirectly as inducement to insurance, any rebate of the premium payable on the policy nor any special favor or advantage in the dividends or of the benefits to accrue thereon, or any paid employment, or contract for services of any kind, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance.''

Section Two of Chapter 168 of the Laws of 1895, page 334 (2 Comp. Stat. 1910, page 2876, Section 117) of the State of New Jersey, provides, in part, as follows:

> ''That any person or corporation violating any of the provisions of the preceding section of this Act shall, for each and every offense, forfeit and pay the sum of $100. for every $2,500. of insurance or fraction thereof effected by the said policy contract of insurance; such penalty to be sued for and recovered, with costs, in an action of debt in any court of competent jurisditcion in the county where the offense shall have been committed, or in any county where such offender may reside or be served with process, by any person who shall sue for the same; one-half of such penalty shall be for the benefit of the person prosecuting the suit, and the other half shall be paid to the State Treasurer for the benefit of the School Fund of the State; * * *.''

The only exception that has ever been made to the Anti-Discrimination Statute, hereinabove set forth, is that allowing group life insurance to be written covering the lives of certain limited persons known in the law as ''employees'', which exception is known as Section 2-A of Chapter 53 of the Pamphlet Laws of 1927 (S. C., pp. 7 and 8).

The policy in question (S. C., pp. 22, etc.) is admitted by respondent to be a group policy and "was issued in consideration of the payment of the premiums on the basis of the standard and regular manual of *rate for group insurance."* (Affidavit of James F. Little: S. C., p. 14, ll. 12-15.) *The group rates for the same insurance are less than* the *ordinary rates* (S. C., p. 8, l. 22).

The complaint alleges that the rate charged insured should not have been the lesser rate charged to persons who are "employees" and entitled to group insurance, but should have been the ordinary rates. The complaint alleges that the doctors belonging to the medical staff of the hospital do not come within the exception (P. L. 1927, Ch. 53, Sec. 2-A) which permits group insurance (lesser) rates to be charged "employees".

The Anti-Discrimination Statute was passed to avoid discriminatory charges in favor of individuals between the insured of the same class and equal expectation of life. In other words, if a policy of the same kind of insurance is issued to three individuals of the same age and having the same life expectancy and of the same occupational risk, then they must be charged the same premium.

Appellant has proved, in Point One, Section A of his brief, that the members of the medical staff of the hospital are not "employees" and are, therefore, not entitled to the benefits of group insurance. In granting them insurance at group (lesser) rates, the defendant has caused discrimination between individuals of the same class, and has violated the statute. ("Similar" (S. C., p. 8, l. 24) means "like", and, in common usage, is used interchangeably with "same". Plaintiff used the word to express the idea that if you and I are of the same age and occupational risk, and you get a policy like mine, you must pay the same rate therefor.)

An insurance company cannot favor one section of the same class with a policy which it will not give to another section of the same class. Yet in the instant case, for example, Doctors X, Y and Z, who are on the medical staff of the hospital, have obtained a policy (issued under a group life insurance contract), paying a premium of sixty cents per month for each $1,000. of insurance, while Doctors A, B and C of the same age, risk, life expectancy, and doing the same type of work, cannot obtain the same policy at the same low premium. Everything else being equal, Doctors A, B and C must pay a much higher premium for the same insurance. They are discriminated against. Defendant, in issuing the instant policy, has made "a distinction or discrimination in favor of individuals between the insured of the same class and equal expectation of life, in the amount of payment of premiums or rates charged." It has clearly violated the statute.

Respondent will, doubtless, argue that by "class" is meant "type" of insurance, and that "group" insurance is a different "class". This cannot be so. The word "class" as used in the statute, means "occupational classification". For example, the aviator falls in a different class than the bookkeeper; and the lawyer pays a smaller premium for the same policy than would the steeple-jack. This is properly so because the occupational risk is not the same; risk of death of a steeple-jack is much greater, in the exercise of his occupation, than that of a lawyer or doctor in professional practice. It is logical and proper, therefore, that the steeple-jack and aviator be placed in a different "class" than the lawyer or doctor.

There is, however, no rational basis to place doctors who are members of a hospital staff in a different "class" from doctors who are, also, practitioners but do not happen to be members of a hospital staff. Such classification is unreal and illusory. It is an act of discrimination.

The Legislature has spoken in the public interest. There can be no discrimination between two doctors both of the same age, life-expectancy, doing the same general type of work and obtaining the same type of insurance. All must pay the ordinary rates; no favoritism can be given. Since the staff doctors are not "employees" within the meaning of the statute, and not legally eligible for group insurance, then, neither singularly nor collectively, should they be permitted to obtain the same insurance at lesser premiums than others have to pay. All are subject to the ordinary rates and all must pay the same ordinary rates.

Plaintiff set forth these allegations in his complaint. Neither in the affidavits submitted by the defendant nor elsewhere in the record, have they been denied.

It is respectfully submitted that the plaintiff-appellant has established a good and legally sufficient cause of action, clearly showing the defendant-respondent to be guilty of discrimination and violation of the statutes. The action, therefore, of the lower Court, in striking the complaint as frivolous, was error, and appellant prays for a reversal of the judgment entered against him.

C. Defendant is subject to the statutory penalty.

The penalty for the discrimination herein committed by the defendant is clearly and unequivocally set forth in Pamphlet Laws of 1895, page 334; (2 Comp. Stat. P. 2876, Section 117). The pertinent part of the statute is set forth in the complaint (S. C., pp. 9-10). Plaintiff has carefully and fully complied with the statute in bringing this action, and is entitled to succeed.

Respondent will, no doubt, urge that the statute be strictly construed on the ground that it is penal in nature. It is respectfully submitted that the statute involved is composed of two sections. The *portion prohibiting discrimination,* etc. (2 Comp. St. pp. 2875, 2876, Section 116) *is* a *remedial* statute *and must be given a broad and liberal interpretation* to prevent discrimination. That portion of the statute giving the right and setting forth the manner for recovery against an insurance company which has violated the Act (2 Comp. Stat. P. 2876, Section 117), perhaps, should be more strictly construed.

That the anti-discrimination section is a remedial statute is evident from a brief review of the troubled times which gave it birth.

It was during these troubled times that Justice Brandeis conducted his renowned investigation in Massachusetts, and that Chief Justice Charles Evans Hughes carried on his exposure of unsavory insurance company practices in New York. These investigations brought about considerable changes and reforms in the laws regulating insurance companies. The police power was invoked to correct many vicious abuses that were inimical to the public interest and general welfare. One of the most important laws, passed to curb such practices, was the Anti-Discrimination Statute. Written first upon the statute books of New York and Massachusetts, it served as a model for our own Insurance Act.

The statute against discrimination by an insurance company is not penal in its nature but is remedial and should be given a broad construction. It should be interpreted liberally to curb the abuses sought to be remedied and generally to effectuate its purposes.

> *Kennealy* v. *Leary,* 67 N. J. L. 435;
> *State* v. *Freemont,* 34 N. W. (Neb.) 118.

In Kennealy v. *Leary, supra,* a penal statute against gaming was held to be a remedial statute. The Court held that the New York statute in question (which has its counterpart in the laws of this state) was remedial and entitled to liberal and beneficial construction to suppress the mischief at which it was aimed.

In *State* v. *Freemont, supra,* the Court held that a *statute* regulating railroads and *preventing unjust discrimination in railroad rates was remedial and should be given a broad construction* to effectuate its purpose. Appellant submits that the New Jersey statute regulating insurance companies and preventing discrimination in insurance rates is "on all fours" with the Nebraska statute regulating railroads and preventing discrimination in railroad rates, and should be given the same construction.

A state may, in the proper exercise of its police power, regulate the rates to be charged by life insurance companies, to prevent discrimination between insurants of the same class and equal expectation in life. And, a common informer may sue to enforce the penalty for discrimination.

> *People* v. *Hartford Life Ins. Co.,* 252 Ill. 398, 96 N. E. 1049, 37 L. R. A. (N. S.) 779.

An act to prevent unjust discrimination in life insurance rates is valid, although fraternal beneficial societies are excluded from its operation. The statute is constitutional.

> *People* v. *Commercial Life Ins. Co.,* 247 Ill. 92, 93 N. E. 90;

N. J. Fidelity and P. G. Ins. Co. v. *Van Schaick*, 259 N. Y. Supp. 108;
Commonwealth v. *Morningstar*, 144 Pa. 103.

Corpus Juris sets forth the true principles of construction in the following language:

> "Where necessary to effectuate the legislative intent, remedial statutes will be construed to include cases within the reason, although outside the letter, of the statute, and to exclude cases within the letter, but outside *the reason." 59 C. J.* 1109.

It is respectfully submitted that the intention of the legislature was to prevent discrimination by insurance companies, no matter in what subtle form or by what indirect means, or under what name the discrimination might be practiced. The intent was to protect the citizens of this State in their insurance contracts, on the principle that "equality is equity". It is further submitted that our Anti-Discrimination Statute should be construed in the light of its history, in the light of its necessity, in the light of the defects, evils, and mischief to be corrected, abolished and prevented by its enactment. It is a remedial statute, to be liberally and broadly construed.

It is respectfully submitted that the discrimination practiced by the Prudential Insurance Company in the case at bar is not only contrary to the spirit, but is contrary to the letter of the statute. The use of the device called "group" insurance to insure, at cheaper rates, a class of persons, clearly not among the persons embraced and intended by the 1927 amendment, and who would normally be obliged to pay the same ordinary rates for insurance as anyone else, is a patent attempt to circumvent the statute. It is discrimination between insured of the same class and equal expectation of life. Defendant has clearly violated the Act.

It remains for appellant to discuss the penal section of the act. That portion of the statute permitting a citizen who brings to the attention of the Court the evidence of a violation to recover the statutory penalty against the violator is know as Chapter 168, Laws of 1895, p. 334 (2 Comp. St. 1910, page 2876, Section 117). Plaintiff has carefully complied with all the terms and conditions of this section, and submits that he is entitled to recover thereunder.

In *In re Merrill,* 88 N. J. Eq. 261, at p. 274, the Court said (quoting 36 Cyc. 1183):

> "It is a fundamental rule in the construction of statutes that penal statutes must be construed strictly. By this rule, however, *it is not meant that they should be subjected to any strained or unnatural construction in order to work exemption from their penalties.* Such statutes are to be interpreted by the aid of all the ordinary rules for the construction of statutes, and with the cardinal object of ascertaining the intention of the legislature";

and in *In re Bloechl's Estate,* 97 N. J. Eq. 483, our Court said, in substance, that while penal statutes are to be strictly construed, this is subject to the rule that intent and object of the legislature will prevail over the strict letter of the act.

In *State* v. *N. J. Indemnity Co.,* 95 N. J. Law 308, the Court clearly indicates that our insurance act is to be given a broad construction, to prevent and suppress the mischiefs therein prohibited. Said the Court, Mr. Justice Trenchard, at p. 314:

> "Moreover, the insurance act was designed to protect the people of the state against imposition and fraud on the part of insurance companies, no matter what form the particular plan might assume. * * * The inhibi-

> tion against the unlicensed transaction of insurance business was wisely couched in general terms and applies to the defendant, regardless of its singular method and routine of business, * * *."

Justice Trenchard then (p. 316) quotes with approval a renowned excerpt from the case of *State* v. *Alley,* 96 Miss. 720, 51 Southern 467, wherein Mr. Justice Mays says, in part:

> "* * * The main question here to be considered is whether mere language may be so manipulated as to formulate an adroit plan for the operation of an insurance business in this state in violation of its laws. We say not. * * *"

In *32 Corpus Juris 1002, Section 40,* the keynote of construction to be given such a statute is set forth in the following language:

> "Statutes imposing a penalty for a violation of the prohibition against discriminations and rebates are constitutional, and shall be given a reasonable interpretation, and a strict, though not oppressive, enforcement."

Citing

People v. *American Life Ins. Co.,* 267 Ill. 504, 108 N. E. 679;
State v. *N. J. Indemnity Co.,* 95 N. J. L. 308, 113 Atl. 491;
Hilton v. *Commonwealth,* 127 Ky. 486, 105 S. W. 956.

It is respectfully submitted that the statutory penalty in question is *malum prohibitum* and not *malum per se,* and that, therefore, intent to violate the statute is immaterial. "Intent" to violate need not be established because this is a penal, not a criminal, statute. It is competent for the legislature to declare that the doing of an act shall subject the doer thereof to a penalty irrespective of his motive or knowledge, and in such case the courts have no power to require proof of knowledge or motive to be shown.

Vandegrift v. *Meihle,* 66 N. J. L. 92;
State v. *Halstead,* 41 N. J. L. 592 (E. & A.).

It is submitted that appellant has set forth a good cause of action, under the statute, to recover the penalty against the defendant. The statute is explicit in its directions as to the mode and manner of bringing the action and by whom it shall be brought. Appellant has carefully complied with these legislative directions. The act of the Court below in striking out the complaint and entering summary judgment for defendant was error, and appellant prays that the judgment be reversed.

POINT II.

The Court had no power to grant the motion. The Court erred in striking out the complaint as sham and ordering summary judgment for the defendant on the motion. The Court decided a disputed issue of fact that was beyond its power and a jury question.

In his answering affidavit, John Rybasack has not only supported the allegations of the complaint (which it was not necessary for him to do because they were not challenged by defendant affidavits), but he has fully met and controverted all statements and inferences contained in the affidavits offered by the defendant in support of its motion. Appellant has met the burden and created an issue for the jury. It was for the jury to determine whether or not the factual elements of the employer-employee relationship existed, after being properly instructed by the Court as to what elements are necessary as a matter of law to constitute that relationship. The Court, however, had no power to determine wherein the truth lay; that was a jury prerogative.

Court and jury each has its separate function. It is a cardinal principle of our judicial plan that neither shall encroach upon the duties of the other. The Court decides only questions of law and instructs the jury as to the law. The jury decides all questions of fact. In the instant case the Court decided both questions of law and questions of fact. The Court committed error. (26 Cyc. 971.)

Appellant must respectfully challenge the statement of the Court (Opinion: S. C., p. 47, l. 33) that "no issue of fact" was "raised". A careful examination of the affidavits shows the contrary.

The affidavits of James F. Little (S. C., pp. 13-15) and of Abram B. Abrams (S. C., pp. 15-16) contain only hearsay statements and conclusions of law and are, therefore, palpably insufficient and utterly worthless as affidavits, and have no legal value in this case, and must not be considered.

In re McCraven, 87 N. J. Eq. 28;
O'Neill v. *Linowitz*, 92 N. J. Eq. 179;
Kelly v. *Weiner*, 1 N. J. Misc. Rep. 338 (not officially reported);
Hand v. *Nolan*, 1 N. J. Misc. Rep. 428 (not officially reported).

The affidavit of H. T. Brookins (S. C., pp. 21-38) merely sets forth the group insurance policy and nothing more. The Danzis affidavit states, in substance, that the staff members are appointed annually, that they are subject to suspension or removal, that they are subject to the rules and regulations of their own executive committee and of the hospital directors, that they conduct their medical activities and perform services for the members of the community through the medium of the hospital, that they are subject to call and attendance at the hospital, that they conduct the medical administration, professional and scientific work and needs of the hospital, that they have the privilege of using the hospital facilities and equipment, and that they have the advantages of experience, consultation, wide practice and opportunity to learn from each other.

But Rybasack takes issue with Danzis and the other affiants. Rybasack, not only categorically denies the statements made in defendant's affidavits, and denies that the medical staff are "employees" of the hospital, but he sets up affirmative facts that clearly and conclusively show these staff doctors are not "employees."

In paragraphs 5 and 6 of the Rybasack affidavit (S. C., p. 41) appellant challenges and traverses the assertions made by Abrams and Danzis that the staff doctors in question, covered by the group insurance, are eligible therefor; he denies that the employer-employee relationship exists between the hospital and its medical staff.

Rybasack emphatically denies (S. C., p. 41, ll. 8-11) that the staff members are subject to serve in any capacity designated by the Board of Directors, (an assertion made by Dr. Danzis (S. C., p. 19, ll. 25-27)). Moreover, appellant denies the statements of James Little, and in paragraphs 3 and 4 of the Rybasack affidavit (S. C., pp. 39, 40) he denounces as "false" the statements contained in the application for the group policy that the doctors are "employees" and working "on full time" (S. C., p. 37, ll. 15-19). (Since such statements are hearsay, or mere conclusions of law, Rybasack is not obligated to deny them.)

In paragraph 4 (S. C., p. 40, ll. 14-21) John Rybasack sets forth fact after fact of the relationship, proving conclusively that said staff doctors are not employees:

> "The doctors, physicians and surgeons who are insured by this group policy are practically all engaged in private practice and hospital work is merely incidental to their professional activities. Ninety per cent of the doctors insured have private offices, separate and distinct from the hospital and the hospital is only used by them for research or for a place to send patients who require hospital treatment. The application is therefore manifestly false. * * *"

These are affirmative facts, facts which are diametrically opposed to and take issue with the statement of Dr. Danzis. Who is telling the truth when the facts conflict? Is it Max Danzis or is it John Rybasack? Only the jury can determine; the Court cannot.

The Rybasack affidavit, then, not only supported by sworn statements such allegations of the complaint as were challenged, but it created a dispute of fact on the affidavits submitted by defendant. When the facts are in issue, how can the Court determine which facts it shall believe and which facts it shall disbelieve! When opposing facts are contained in sworn statements, the Court cannot pass upon their veracity, cannot decide where the truth lies. The motion, therefore, should have been denied. The law governing this situation was very ably expressed by our Court of Errors and Appeals (Opinon by Wolfskeil, Judge), in *Goldin* vs. *Universal Indemnity Insurance Co.,* 117 N. J. L. 192, 195:

> "These proofs were unchallenged, other than by the general statement in plaintiff's affidavit as to his information and belief, and

> raised a question of fact which could only be determined by a jury after witnesses had been heard in court and had submitted to cross examination. The power to strike out a pleading as sham or frivolous is inherent in the trial court but should not be exercised unless it appears to be clearly, palpably so. *The duty of the court on such a motion is to determine whether an issue of fact is presented and not to try the issue.* A contrary rule would work a deprivation of the constitutional right of trial by jury. Louis Kamm, Inc. *vs.* Flink, 113 N. J. L. 582. It is only where the sworn statements offered in support of an attack on a pleading are not controverted that a court is competent to strike out the pleading."

On motion to strike a complaint as sham or frivolous, the duty of the Court is simply to see whether an issue of fact is presented and not to decide that issue. It cannot usurp the exclusive function of the jury.

> *Eday Fabrics* v. *Seymour Dress Co.,* 116 N. J. L. 251 (E. & A);
> *Goldin* vs *Universal Indemnity Insurance Co.,* 117 N. J. L. 192 (E. & A.).

As was said in the Eday case, at page 253, by Brogan, Chief Justice:

> "All the authorities, both ancient and recent, agree that courts will not exercise the power to strike out pleadings as sham or frivolous unless, upon examination, they appear 'clearly, palpably so.' Hogencamp *vs.* Ackerman, 24 Id. 133-136; Kamm *vs.* Flink 113 Id. 582, 596. It is never within the province of a trial court, on motion to strike out a pleading as sham to determine from the affidavits where the truth lies. It is only where the sworn statements offered in support of the attack on the pleading as sham are not met or controverted that the court is competent to strike out a pleading as false.

It is enough for present purposes, however, to say that the affidavits presented in support of and against the motion in the court below raised issues of fact and it was error in that situation to have struck out the complaint as sham.

The judgment is reversed, with costs."

The law seems clear that the Judge cannot pass upon the truth or falsity of proof on motion to strike a pleading as sham; the affidavits pro and con must be accepted as true for the purposes of the motion. The court's only duty in such instance is to determine whether an issue of fact has been created and if so to deny the motion.

> *Jaeger* vs. *Naef,* 112 N. J. L. 417;
> *Messerole Securities Co.* vs. *Dinterfass, supra;*
> *Barnes* vs. *P. D. Manufacturing Co.,* 117 N. J. L. 156.

Discretion in the exercise of power is just as important as the presence or absence of the power itself. The power to strike out a pleading must be exercised with great caution, and the Court must resolve every reasonable doubt in favor of the pleader. The onus of proving a pleading bad is upon the proponent of the motion.

> *Muhlenbeck* vs. *West Hoboken,* 2 N. J. Misc. 7 (not officially reported);
> *Tuccillo* vs. *Clark,* 129 Atl. 926 (not officially reported).

An order to strike is unwarranted, then, unless the complaint be so palpably false in fact or so insufficient in law as to compel the Court to conclude that the pleader either is trifling with the process of law or is not acting in good faith.

Muhlenbeck vs. *West Hoboken, supra.*

Surely no such inference could be drawn in the instant case. Appellant submits that if any such impression had been in the Court's mind, it would not have failed to point out that fact in its opinion.

A complaint supported by sworn statements as to the allegations in issue, cannot be struck as sham.

Solomin vs. *Salins,* 108 N. J. L. 214;
Eday Fabrics vs. *Seymour Dress Co., supra;*
Louis Kamm vs. *Flink,* 113 N. J. L. 582.

It is respectfully submitted that the complaint in the case at bar could not be struck as sham.

In summary, appellant submits that the Court below had no power to grant the motion. Nevertheless, it undertook to decide the same after answering affidavit had been offered which affidavit raised a bona fide dispute in the facts. In striking the complaint as sham the Court was necessarily obliged to pass upon the veracity of sworn statements; to determine a question of fact as a preliminary step to deciding the question of law. The Court usurped a jury function and committed error. Appellant prays, therefore, that the judgment be reversed and the cause remanded.

POINT III.

The Court erred in striking the complaint and ordering judgment for defendant on the basis of the affidavits filed in support of the defendant's motion.

There were four affidavits filed by the defendant. All of these are deficient in fact and insufficient in law to sustain the motion to strike the complaint as sham or frivolous.

The affidavit of H. T. Brookins (S. C., p. 21, etc.) merely sets forth a copy of the group insurance policy #G-3658, does not affect the situation and contains no facts upon which the complaint may be stricken.

The affidavit of James F. Little (S. C., pp. 13-15) is of still less value since the same situation exists. There are no facts; it is composed of hearsay statements and conclusions of law. He says that the hospital made application to the company for a group policy of insurance "to insure the lives of the employees of the Newark Beth Israel Hospital, which employees were members of the Medical Staff * * *" (S. C., p. 13, l. 41). This is a conclusion of law which the affiant had no power to draw. The remainder of Mr. Little's affidavit to the effect that the "Newark Beth Israel Hospital informed and advised the defendant" that the members of the Medical Staff were employees of the hospital (S. C., p. 14, l. 19) is merely hearsay and has no place in an affidavit which seeks to strike a complaint as sham. It is inadmissible and is to be given no more weight than hearsay testimony given by a witness on a witness stand. As Chancellor Walker said in the case *In re McCraven*, 87 N. J. Eq. 28, at page 31:

> "The rules of evidence which do not permit of leading questions, characterizations,

hearsay, and conclusions, and which require that facts only may be testified to by witnesses, leaving all inferences to be suggested by way of argument and to be decided by the court, apply as well to *ex parte* cases as to litigated ones. In litigated causes counsel representing adverse interests frequently permit testimony of the inhibited character to be given by not objecting to questions the answers to which would elicit that sort of testimony. But in *ex parte* cases the court represents the absent defendant to the extent at least of seeing to it that he is condemned only upon a proper case being made out by legal evidence. A defendant who does not contend against a plaintiff's demand has the right to presume, and to rely upon the presumption, that no judgment will pass against him unless the adversary party shows himself entitled to it by the strict rules of law. Palmer *v.* Palmer, 22 N. J. Eq. 88; Topfer *v.* Topfer, 68 Atl. 1071; Bull *v.* International Power Co., ante p. 1."

Mr. Little would not be permitted to testify at a trial that he was informed by the Newark Beth Israel Hospital that the doctors were employees of the hospital. Neither should he be permitted to make hearsay statements and conclusions of law in his affidavit. He uses the expressions, "Newark Beth Israel Hospital informed and advised the defendant" (S. C., p. 14) and "defendant was further advised by the Newark Beth Israel Hospital" (S. C., p. 14). Such expressions appallant submits are improper and that the affidavit must be ruled out as worthless.

O'Neill v. *Linowitz,* 92 N. J. Eq. 179.
Kelly v. *Weiner,* 1 N. J. Misc. Rep. 338 (not officially reported);
Hand v. *Nolan,* 1 N. J. Misc. Rep. 428 (not officially reported).

This leaves the affidavits of Dr. Abrams and Dr. Danzis to be considered. Dr. Abrams' affidavit contains conclusions of law (S. C., p. 16, ll. 15-17 and 21-22) and is insufficient under the cases hereinabove cited. He gives no facts from which these legal conclusions might be drawn, and, as an affiant, he is not permitted to draw them. Examples are these: "Directors of the Newark Beth Israel Hospital on behalf of said hospital made application to the Prudential Insurance Company of America for a group insurance policy insuring the lives of the employees of the Newark Beth Israel Hospital I on behalf of physicians and dentists of the Medical Staff of said hospital." (S. C., p. 16, ll. 11-17) and "a group insurance policy * * * was issued * * * to the Newark Beth Israel Hospital insuring the employees being the members of the Medical Staff of the said hospital." (S. C., p. 16, ll. 18-22).

Whether or not the Medical Staff were employees is a matter of law to be drawn from many facts, and cannot be drawn by the affiant under any circumstances. This affidavit, also, is worthless.

The only affidavit which even attempts to state that the doctors are employees of the hospital is that of Dr. Danzis and he does not set forth facts sufficient for that conclusion to be drawn as a matter of law. The furthest he goes is to use such expressions as "The chief of the staff as well as all members of the Medical Staff are appointed by the Board of Directors; the Board of Directors has the right to suspend; the members of the Medical Staff are subject to the rules and regulations and orders of the Board of Directors, and the members of the Medical Staff are engaged by the hospital to conduct the medical activities of the institution."

The affidavit is deficient. It does not contain enough facts or the kind of facts from which the Court could decide the very question in issue, the question which defendant evidently intended its affidavits should answer, the question which said affidavits had to answer (and be undisputed) in order for the complaint to be stricken as frivolous; namely, that the staff doctors were made as a matter of law, "employees" of the hospital. (Appellant respectfully refers the Court to the cases cited under Point I, Subdivision "A" of his brief, as to what elements are necessary to establish that relation as a matter of law.)

Dr. Danzis says the Medical Staff is "appointed annually." Employees are never appointed. They are hired. He says that the Board of Directors has the right to suspend and remove any member of the Medical Staff, and that the members of the Medical Staff are subject to the rules and regulations of the Board. This is not evidence that they are "employees". As stated by Justice Cardozo, in *Schloendorff* v. *Society of N. Y. Hospital, supra:*

> "It is true that the corporation has power to dismiss them but it has this power not because they are its servants but because of its control of the hospital where their services are rendered."

Dr. Danzis further states that the Medical Staff is permitted the use of the facilities of the hospital, its laboratories, equipment, etc. Such statements merely show them to be licensees (or, perhaps, bailees) of the hospital facilities; that such is the true conclusion is borne out by the numerous cases cited in Point I, Subdivision "A" *supra.*

The rest of the affidavit tells the advantages accruing to a doctor by being on the staff of the hospital. Such facts, while interesting, in no way prove an employer-employee relationship. In fact, all the statements contained in the affidavits in support of the motion tend to show that the staff doctors are not "employees", but rather that they occupy a unique position in the law, more akin to licensees or independent contractors and having many salient characteristics of both.

The motion to strike a complaint on the ground that the allegations do not state a cause of action amounts to a general demurrer under the common law.

> *Koewing* v. *West Orange,* 89 N. J. L. 539; *Malone* v. *Brotherhood Locomotive Firemen & Enginemen,* 94 N. J. Law 347.

A general demurrer admits the allegations of the complaint. No question of facts can be introduced for the purposes of the motion, the defendant admits the truth of all the facts in the complaint, and all inferences of fact which can be logically drawn therefrom. (*Harris Practice & Pleading,* Section 338.)

Appellant submits that the allegations contained in his complaint were sufficient and stated a good cause of action. Appellant further submits that defendant affidavits cannot support its motion to strike that complaint. They lack the necessary facts to substantiate their very purpose. The effect of defendant's motion, therefore, is nothing more or less than a common law demurrer and the complaint can stand upon its own allegations.

Conclusion.

Appellant has endeavored in the course of his brief to present, in as clear and concise form as possible, the real issues involved in the instant appeal, and to call to the attention of the Court the law applicable thereto. Under Point I of his brief, appellant has presented law and argument to support his contention that the insured in question are not "employees" of the hospital. He has done so by defining the term "employee", by showing the necessary characteristics that an "employee" must possess, by showing that the staff doctors do not possess these characteristics, and, finally, by showing that according to the overwhelming weight of authority they are not "employees" as a matter of law. He submits that the conclusion logically follows, namely, that they are not "employees" within the meaning of the group insurance statute, and, therefore, not entitled to group insurance. *"Lex plus laudatur quando ratione probatur."*

Appellant's second major contention was that, since the insured were not entitled to group insurance (at its cheaper rates for the same protection), the issuance to them by defendant of the group policy in question was discrimination and violation of the anti-discrimination statute. His third contention was that defendant was subject to the penalty for said violation, and that plaintiff is entitled to recover the same.

Under Point II, appellant has argued his contention that the Court had no power to grant the motion, since to do so it was necessary to decide a disputed question of fact that was beyond the province of the Court and a jury prerogative.

Under Point III, appellant has set forth his contention that defendant's affidavits were insufficient in law and deficient in fact to support its motion, and that, therefore, there was no basis upon which the Court could grant the motion predicated upon such affidavits.

Appellant submits that the Court below committed error in giving judgment for defendant and he respectfully prays that that judgment be reversed and the cause remanded for trial upon the merits.

Respectfully submitted,

C. Wallace Vail,
Attorney for and of Counsel with
Plaintiff-Appellant.

To be orally argued by C. Wallace Vail

New Jersey Court of Errors and Appeals

John Rybasack, who sues for himself as well as for the State of New Jersey,

Plaintiff-Appellant,

vs.

The Prudential Insurance Company of America, a corporation,

Defendant-Respondent.

Action at Law.
On Appeal.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

Statement of Facts.

The statement of facts in the plaintiff-appellant's brief, hereinafter called "plaintiff", is not sufficiently complete and the defendant-respondent, hereinafter called "defendant", therefor respectfully submits a brief statement thereof:

The plaintiff appeals from an order striking his complaint and the entry of a judgment in favor of the defendant. The suit instituted by the plaintiff in the Supreme Court was a common informer's action by which the plaintiff claimed damages under a statute, one-half for himself and one-half for the State of New Jersey.

The complaint is in one count and charges that the defendant is an insurance company incorporated under the insurance laws of the State of New Jersey and engaged in the writing of several kinds of insurance, including insurance upon the lives and health of individuals; that the Physicians' and Doctors' Endowment Fund and by subsequent amendment (Case, p. 42), the Newark Beth Israel Hospital, entered into a contract with the defendant for group insurance, and that said contract was still in force and effect (Case, p. 7).

It is also alleged that no employee-employer relationship exists between the said physicians and surgeons and the Newark Beth Israel Hospital and that said doctors are not members of a labor union within the purview of the statute. The statute referred to and partially quoted is Section 2(a), Chapter 53 of P. L. 1927, being a supplement to the Laws of 1902, Chapter 134. This statute makes certain declarations as to group life insurance. In addition, the plaintiff alleges that the premium charged for life insurance to the doctors and surgeons being members of the medical staff of the said Hospital, is less than the premium charged individuals who obtain similar life insurance protection without the benefit of the contract existing by virtue of the issuance of the group insurance policy to The Newark Beth Israel Hospital; and that the rates charged to the members of the medical staff are less than the regular manual rates as filed with the Commissioner of Banking and Insurance of the State of New Jersey.

The plaintiff informer also sets forth in part the anti-discrimination statute as to insurance, being section 1, Chapter 168 of the Laws of 1895 as amended by Chapter 167, P. L. 1927, as well as Section 2 of Chapter 168, Laws of 1895, providing for a penalty upon violation of the anti-discrimination statute. Said provisions now are respectively 17:34-45 and 17:34-46, Vol. 1, Revised Statutes of New Jersey, 1937.

The plaintiff claims to be entitled to damages under Section 2 of Chapter 168 of the Laws of 1895 in the sum of One Hundred Dollars for every

Twenty-five Hundred Dollars worth of insurance. The specific amount claimed by the plaintiff is the sum of $31,360.00, of which amount one-half is to be for the benefit of the plaintiff-informer and one-half to be paid to the State Treasurer for the benefit of the school fund.

The defendant duly moved to strike the complaint and in support of its motion filed with the court four affidavits. The affidavit of H. T. Brookins states that policy No. G-3658 was issued by the defendant to the Newark Beth Israel Hospital (Case, p. 21, line 30). To Mr. Brookins affidavit was attached a true copy of said group insurance policy G-3658 together with the application annexed (Case, pp. 21-38).

The affidavit of the late James F. Little, Vice President and Actuary of The Prudential Insurance Company of America recites that said group insurance policy G-3658 was issued to the Newark Beth Israel Hospital upon the hospital's application in December of 1931 (Case, p. 13); that it insured those designated as employees by the Newark Beth Israel Hospital who were the members of the medical staff (Case, p. 14). It further appears by the affidavit of Mr. Little that said group insurance policy was issued in consideration of the payment of premiums upon the basis of the standard and regular manual of rates for group insurance as filed with and approved by the Commissioner of Banking and Insurance of the State of New Jersey (Case, p. 14). The same affiant further states that the defendant was advised by the Newark Beth Israel Hospital that the lives insured were the members of the medical staff of said hospital and were employed by said hospital for the performance of certain special duties, such as physicians, doctors, dentists, surgeons, nurses, in and about the work of said Newark Beth Israel Hospital, in ministering to the needs, sickness and physical ailments of the patients of said hospital; that the defendant was further advised by said hospital that the lives insured, namely, the members of the medical staff were under the orders and control of the Board of Directors of said Newark Beth Israel Hospital, being appointed by said Board of Directors for a definite term subject to dismissal by said Board of Directors, subject further to all rules and regulations of said Board of Directors and supervising officers or committees appointed by said Board of Directors in conducting and maintaining said hospital (Case, pp. 14-15).

Doctor Abram B. Abrams in his affidavit states that being duly authorized by the Board of Directors of the Newark Beth Israel Hospital he on behalf of said hospital in December of 1931, made application to the defendant, The Prudential Insurance Company of America, for a group insurance policy insuring the lives of the employees of the said Newark Beth Israel Hospital (Case, pp. 15-16).

The affidavit of Doctor Max Danzis recites that he is and has been since 1920, the Chief of Staff of the Newark Beth Israel Hospital. He further states that the Chief of Staff as well as all members of the Medical Staff of the Hospital are appointed annually by the Board of Directors, and that the Board of Directors has the right to suspend and remove any member of the Medical Staff from office on the Staff or his position on the Staff; that all of the members of the Medical Staff are subject to the rules and regulations and orders of the Board of Directors as well as subject to the rules, regulations, orders and measures for conducting and managing the medical work of the Hospital as formulated and made by the Executive Committee of the Staff, subject to the approval of the Board of Directors. Doctor Danzis further states that the members of the Medical Staff are engaged to conduct the medical activities of the institution and to perform the services which the corporation renders, through its wards, clinics and laboratories to the individuals of the community; that the members of the Staff are subject to call by the corporation for attendance at the Hospital to serve in any capacity designated by the Board of Directors (Case, p. 18).

In return for such services rendered to the Newark Beth Israel Hospital, the members of the Medical Staff are permitted the full use of all facilities of the Hospital, including the laboratories, instruments, equipment, medical supplies and Hospital Library, and that in addition, the members of the Medical Staff receive invaluable experience in diagnosing, treating and ministering to a larger number and greater variety of cases than such Doctors would receive in private practice; that by reason of such training and experience in conjunction with other experienced practitioners, and specialists in various fields, the Doctors become more learned and more valuable as physicians both to themselves and to the general community whom they serve (Case, p. 19).

Finally, Doctor Danzis states that it is the duty of the Chief of Staff and the members of the Medical Staff to conduct the medical administration, professional and scientific work and needs of the hospital, and each department or service thereof (Case, p. 20).

The only affidavit submitted by the plaintiff in opposition to the motion to strike the complaint, was the affidavit of the plaintiff himself, John Rybasack.

Without stating the source of his information, nor that the statements to which he has sworn are within his knowledge, the plaintiff asserts that the Doctors, Physicians and Surgeons insured by the plaintiff engage in private practice, and the hospital work is incidental to their professional activities and argues that the application for insurance must be false (Case, p. 40, lines 15-25). The remainder of paragraph 4 of the plaintiff's affidavit is pure argument as is paragraph 5 of his affidavit (Case, p. 41). With the exception of the statement that he denies that the Physicians, and Dentists of the Medical Staff are employees of said Hospital, paragraphs 6 and 7 of the plaintiff's affidavit are argument (Case, pp. 41-42).

The court after considering the briefs of counsel made an order that the complaint be stricken and found that the defendant is entitled to a judgment of costs in its favor and against the plaintiff (Case, pp. 48-49). Judgment for the defendant was duly entered on February 4, 1937 (Case, p. 50).

The defendant moved to strike the complaint upon four grounds:

(1) That the allegations were untrue in fact and sham;

(2) That the allegations were insufficient in law;

(3) That the allegations were frivolous; and

(4) That the complaint does not state a cause of action (Case, p. 12).

An opinion was filed by the Honorable Newton H. Porter (Case, pp. 43-47) and the defendant respectfully submits that the court below was entirely correct in ordering that the complaint be stricken and finding that the defendant was entitled to a judgment upon the ground that the doctors were employees within the meaning of the statute and the allegations of the complaint therefore were sham. The defendant submits that the decision below should be affirmed not only upon the ground relied upon by the trial court but upon all grounds urged by the defendant.

For the purposes of clarity, the defendant will treat under separate points the statute which prohibits discrimination and the statute which defines "group insurance," inasmuch as the penalties for the violation of each statute are entirely separate and independent. These separate penalty provisions have been ignored and confused by the plaintiff.

ARGUMENT.

I. The Anti-Discrimination Statute is not applicable to the policy of insurance issued by the Defendant.

It is respectfully submitted that the so-called anti-discrimination statute, being Ch. 168 of the Laws of 1895, as amended by Ch. 167 of the Laws of 1927, is not applicable to Group insurance policy No. G-3658 issued by the defendant to the Newark Beth Israel Hospital.

Section 1 of that act provides:

> "No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between the insured of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or agent thereof make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon; nor shall any such company, or any officer, agent, solicitor or representative thereof, pay, allow, or give, or offer to pay, allow or give, directly or indirectly as inducement to insurance, any rebate or premium payable on the policy, or

> any special favor or advantage in the dividends or of the benefits to accrue thereon, or any paid employment or contract for services of any kind, or any valuable consideration or inducement whatever not specified in the policy contract of insurance.
>
> No life insurance company doing business in this state, and issuing policies both upon the participating and nonparticipating plan, shall, on or after the first day of January, one thousand nine hundred and ten, make any distinction in the rate of commission or in the compensation paid to an agent based upon the participating or nonparticipating character of any policy issued through said agent."

It will at once appear that that Section places a prohibition upon any distinction or discrimination in favor of individuals between the insured of the *same class* and equal expectation of life, in the payment of premiums or rates charged for life insurance.

The above Act which has been upon the statute books since 1895 was designed to prevent one definite evil, namely, that a different rate of premium was not to be charged to individuals of the same expectation of life, to whom identical policies of insurance have been issued.

In other words, one person shall not have issued to him, e. g., a Five Thousand Dollar Ordinary Life Insurance Policy and pay less or more in premiums for that policy, than any other individual or individuals of the same expectation of life who also receive a Five Thousand Dollar Policy of Ordinary Life Insurance, containing the same provisions for benefits. These individuals to whom the same policy is issued are in the same class. There is no prohibition under the antidiscrimination statute to prevent an insurance company from issuing different types of policies by which is meant policies having provisions for different benefits to persons of the same expectation of life, and charging a different rate of premium.

Three individuals of the same expectation of life may each obtain a life insurance policy and pay different premiums; the first may have a policy of term insurance; the second, an Ordinary Straight Life Policy of Insurance, and the third may have an Endowment type policy of insurance. They are each in a different class. Each pays a different rate of premium, although of the same expectation of life because the provisions of each type of insurance contract differs from each of the other two. This, of course, is the practice of all life insurance companies doing business in this and any other state. A Policy-holder pays a rate of premium in accordance with the benefits which he is to receive under the policy. The examples given are but three of the *various classes* of life insurance.

Group Insurance is but another class. The anti-discrimination statute does not prevent or make unlawful the issuance of different classes of policies of insurance, or of putting insureds in different classes. The charging of different rates for the various types or classes of policies of insurance is a practice which has never been questioned by the Commissioner of Banking and Insurance. Insurance companies are required to file and have approved by the Commissioner of Banking and Insurance the manual of rates for the several classes of insurance.

The affidavit of Mr. Little states that the premiums charged under Group Insurance Policy No. G-3658 issued to the Newark Beth Israel Hospital are based on the standard and regular manual of rates for group insurance, as filed with and approved by the Commissioner of Banking and Insurance (Case, p. 14, lines 12-19). In the complaint, the plaintiff alleges that the premium rate for the individuals insured under said group insurance policy No. G-3658 is less than the premium charged to individuals who obtain "similar life insurance protection", and that the rates charged are less than the regular manual of rates as filed with the Commissioner of Banking and Insurance (Case, p. 8, lines 21-24). This is expressly denied by the affidavit of Mr. Little (Case, p. 14) and is not controverted by any affidavit on behalf of the plaintiff.

Furthermore, as has been pointed out, it would not be discrimination to charge different rates to policy-holders whose policies are alike in some respects but unlike as to the benefits provided, such as cash surrender value, loan value, etc.

The charging of the different rates of premiums on insurance to individuals of the same expectancy of life but who receive different policies or contracts of insurance is not discrimination or distinction prohibited by the anti-discrimination statute. There is no decision in the State of New Jersey upon this question, but it has been the practice of life insurance companies to charge different rates of premiums for different classes of policies of insurance to individuals of the same expectancy of life. This practice is so general, it is respectfully submitted, that the Court may take judicial notice thereof, and the fact that there is no decision in New Jersey holding such practice a violation of the anti-discrimination statute will not permit the inference that every Banking and Insurance Commissioner since the beginning of the statute has been lax and derelict in his duty.

It is a well recognized rule in New Jersey that the interpretation of a statute or even the Constitution made by administrative officers over a considerable period of time, in the absence of judicial construction to the contrary, will be adopted by the Courts. This rule of law is known as the doctrine of practical, contemporaneous construction. It was clearly enunciated by the late Chancellor Walker in the case of *In re Hudson County* (Ct. of E & A 1929), 106 N. J. L. 62, at page 75 where he said:

> "There is another doctrine which is dispositive of the case *sub judice*. It is that of practical, contemporaneous construction. Said Chief Justice Gummere, speaking for this court in *Com. Roof Co.* v. *Riccio,* 81 N. J. Eq. 486 (at p. 488): 'Whenever there is a debatable question as to the proper construction of a statutory provision, the contemporaneous and long continued exposition exhibited in the usage and practice under it requires the construction thus put upon it to be accepted by the courts as the true one. *State* v. *Kelsey,* 44 N. J. L. (15 Vr.) 1; *Fritz* v. *Kuhl,* 51 Id. (22 Vr.) 191, 200; *McNeal Pipe Co.* v. *Lippincott,* 57 Id. (28 Vr.) 540.' And this applies generally to the construction of the constitution.
>
> In State *v.* Kelsey, cited above, Chief Justice Beasley, speaking for the Supreme Court, after stating the facts, said (at p. 21): 'Under this condition of affairs, as this case is to be tried by the court upon its merits as well as the law, this court is obliged to find, and does find, as a matter of fact, that the legislation in question has received a practical construction to the effect stated for a period of time in excess of fifty years. Therefore, to consider the question as to the proper meaning of that legislation as an open one would, in my opinion, be utterly opposed to public policy, precedent and the admitted principles of law. The legal rule is succinctly expressed in the maxim of the civil law "*contemporanea exposito est fortissima.*" The doctrine has such prevalence that it is applicable not only in the exposition of statutes, but in the interpretation of constitutions of governments. Its antiquity with respect to the English law

> is evidenced by the comment of Lord Coke, who says: "Great regard ought, in construing a statute, to be paid to the construction which the sages of the law who lived about that time, or soon after it was made, put upon it, because they were best able to judge of the intention of the makers at the time the law was made.'' ' ''

The question, however, has been litigated elsewhere under almost identical circumstances, with the exception that the suit has not been brought by a common informer who has sought to enrich himself by his own illogical construction of the statute.

In *Greer* vs. *Aetna Life Insurance Company of Hartford* (Sup. Ct. Ala. 1932) 142 So. 393, the insurance company was duly qualified to do business in Alabama. In connection with its Mortgage Loan Department, it proposed to make fifteen-year mortgage loans in Alabama having principal and interest deductions payable monthly. To secure these loans in event of his death, the mortgage borrower was given the privilege of securing the payment of the loan by having issued to him a certificate of insurance referable to a Master Policy. For this, the borrower, *without reference to his age,* was to be charged a flat rate of $1.25 per month, per thousand dollars of insurance, the insurance being reduced each month in the same amount of the loan, so that, at the end of the fifteen-year period both the mortgage indebtedness and the insurance would be extinguished.

The Alabama Code, paragraph 4604, provided as follows:

> "No life insurance company doing business in this state shall make or permit any distinction or discrimination in favor of individuals between insurants (the insured) of the same class and equal expectation of life in the amount of premiums or rates charged

for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes."

Paragraph 8371 provided:

> "No life, nor any other insurance company, nor any agent thereof, shall make any contract of insurance, or agreement as to policy contract, other than is plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow, as inducement to insurance, any rebate of premiums payable on the policy, nor shall any particular policy holder of the same class be allowed any advantage in the dividends or other benefits to accrue thereon, or any valuable consideration or inducement whatever not specified in the policy contract of insurance."

The insurance commissioner of Alabama was enjoined from revoking the Aetna's license and the Court, in holding that the proposed insurance rate did not work a discrimination condemned by the law, speaking through Mr. Justice Gardner said:

> "* * * it appears that as to section 4604, Code 1923, it was the legislative intent to prohibit discrimination by the life insurance companies between 'insurants (the insured) of the same class and equal expectation of life.' It contains no prohibition against discrimination as between individuals of different ages or different life expectancies. Under the proposed plan, all borrowers of the same age will pay the same premiums. It appears, therefore, that the contract offered contains nothing offensive to said section 4604."

Of particular significance is what the Court said in that case with reference to the meaning of the word "Class", which is as follows:

"* * * discussing the statute, the court in the Julian Case, *supra,* said: 'The key word to construction of this provision of the statute is the word "class". As therein employed it has no reference to the individual characteristics of the policy holder. It refers to that number of persons who hold similar policy contracts. * * * The phrase "of the same class" qualifies the term "policy holder," and hence "class" clearly means the holders of like policy contracts.' "

It will appear at once that in that case, the Alabama Supreme Court held that there would be no discrimination if different rates are charged for different classes of insurance. Furthermore, there is no discrimination when the insured under a group policy though of different ages pay the same rate of premium, because obviously, in such a situation all of the same age pay the same premium. It is equally true under our New Jersey anti-discrimination statute that the prohibition is not against making any distinction or discrimination in favor of individuals between insured of different ages or life expectancy, it prohibits merely distinguishing or discriminating between the insured of equal expectancy of life who hold identical types of policies.

In *Banker's Life Ins. Co.* v. *Howland* (1901 Sup. Ct. of Vt.) 48 Atl. 435, a writ of mandamus was brought to compel the insurance commissioner to issue a license to a foreign insurance company. One of the issues raised was whether the issuance of a one-year term policy with the privilege of taking a whole life policy at the end of the year was a violation of the statute prohibiting discrimination between insurants. In rendering a decision for the insurance company, the court held there was no discrimination. The learned Chief Judge Taft, speaking for the court said:

> "In issuing the first-year term policy, with the privilege of taking a whole life policy at the end of the first year, there is no violation of V. S. Sec. 4218, which forbids a company from discriminating between insurants of the same class, in premiums, rates, dividends, other benefits, or terms and conditions. The policy, although it is a term policy if not renewed, *is not in its entirety the equivalent of a simple term policy. The contracts are not the same, and the insured are not of the same class.*" (Italics ours.)

In *Trapp* vs. *Metropolitan Life Ins. Co.* (C. C. A. 8th 1934) 70 Fed. (2nd) 976, affirmed 72 Fed. (2d) 374, cert. denied 293 U. S. 596, in commenting upon the Missouri statute prohibiting an insurer from making any discrimination between insurants of the same class and equal expectation of life, similar to the New Jersey statute, Judge Sanborn, speaking for the court, said:

> "The purpose of the anti-discrimination statute is to secure to the purchasers of life insurance, of the same age and condition of health, equality of treatment with respect to premiums and coverage, to prevent rebates being given and favoritism being shown, and generally to secure to those who buy insurance the coverage which the premiums actually paid entitled them to receive. Such statutes are not intended to prohibit the companies from writing policies which contain inducements to all policy-holders alike to refrain from borrowing upon their policies, or which make some uniform distinction otherwise lawful between those who borrow and those who do not."

It is, therefore, respectfully submitted that upon such occasions as the courts have been called upon to construe anti-discrimination statutes which prohibited discrimination between insurants of the same class and equal expectation of life, the courts have said the statute prohibiting discrimination is not applicable and is not designed to prohibit the issuance of different classes of insurance, having different benefit provisions, and charging different rates of premium.

The statute in question most obviously does not forbid discrimination or distinction between insurants who for one reason or another do not have the same opportunity to obtain the same type or class of insurance. One individual, because of his economic situation, may be able to purchase an insurance contract with certain beneficial provisions, whereas, another individual, not of the same economic standing, could not afford to buy such a policy of insurance. The policy of insurance which the latter individual could purchase with his means would not have the same benefits. However, it could not be said that there was discrimination within the meaning of the New Jersey statute as against the second individual.

So, in the case at bar, the plaintiff for example may not be eligible as a member of a group to whom a group insurance policy would be issued. That is of no consequence. An insurance company is not required to issue a policy to any or every one who applies. The anti-discrimination statute does not either by express words or by clear intendment or unescapable inference, prohibit the issuance of group insurance. As long as the provisions in regard to the insurance are set forth in the policy and other group insurance certificate holders, subject to the same risk, are not charged a different rate, there is no distinction or discrimination within the prohibition of the anti-discrimination statute.

As heretofore stated, the anti-discrimination statute was designed to prevent one evil, and that evil was that two individuals of the same expectancy of life and of the same class, i.e., obtaining identical policies of insurance with the same provisions as to benefits, were not to be charged different rates of premiums or to be given any secret advantages not expressed within the terms of the policy. The legislature intended that all those who would be subject to the same risk were to be charged alike for identical benefits which they were to receive under the same type of policy of insurance.

It is respectfully submitted that the complaint filed by the plaintiff-informer does not state an offense within the anti-discrimination act. Paragraph 8 of the complaint alleges that the premiums charged for the insurance on the life of the members of the Physicians and Doctors Endowment Fund (members of the Medical Staff of the Newark Beth Israel Hospital) is less than the premium charged to individuals who obtain *similar life insurance protection* without the benefit of a contract such as exists in the instant case (Case, p. 8, lines 21-26). When individuals have different policies, even though they may be of the same age, they are not in the same class. The complaint filed by the plaintiff-informer alleges not that individuals who have identical insurance, or the same contract of insurance, have been charged different rates, but it specifically uses the word "similar". The word "similar" does not mean identical. The definition given by Webster's New International Dictionary, Merriam Ed. 1912, is as follows:

> "Similar—nearly corresponding; resembling in many respects; somewhat like; having a general likeness."

Indeed, that same sentence of paragraph 8 of the complaint refers to the fact that others who are charged different rates of premiums do not have the "benefit of the contract" that is in existence in the instant case—a direct allegation that the different rates of premiums charged are for different policies of insurance, and not for "identical" policies.

The plaintiff on page 34 of his brief attempts to argue that there is discrimination because the doctors who are members of the Medical Staff of the Newark Beth Israel Hospital and insured under group policy G-3658 pay a premium of sixty cents per month for each one thousand dollars of insurance, while other doctors, not members of that Medical Staff, and not obtaining an identical policy are required to pay higher rates. There are two fallacies in this argument.

In the first place, group insurance policy G-3658 does not provide that the premium rate is sixty cents per month per one thousand dollars of insurance for each doctor insured under said policy. As a matter of fact, that policy provides a table showing the rate per one thousand dollars for each age from fifteen years to eighty years (Case, p. 27). The policy further provides that the premium is to be paid by the employer (Case, p. 23, lines 9-25), designated in this case and under this policy, as the Newark Beth Israel Hospital, based upon the table of one year term premiums. A further provision of the policy contemplates that the employer in this case, the Newark Beth Israel Hospital, and the employees, the individual members of the Medical Staff of said hospital, shall jointly contribute but that each individual shall not contribute more than sixty cents per month per one thousand dollars of insurance (Case, p. 25, lines 36-41).

In other words, the rate of the premiums for the individuals insured under this type of policy, which has been approved by the Commissioner of Banking and Insurance, is set up as is the rate for other types of insurance, namely, graduating the rate according to the age of the insured which, when the individuals insured are in the same occupation, profession or type of work and in the same locality, determines the life expectancy.

The point which the plaintiff has failed to recognize is that under group insurance the employer pays the premiums to the insurance company for the individual members. The premium rate is in accordance with the schedule set up in the policy and it varies according to the age of the individual member. The fact that the individual member, by the terms of the policy, is not required to contribute to the employer more than sixty cents per month per one thousand dollars of insurance does not determine the rate of premium for such member. That, as stated above, is determined according to the schedule in the policy and the provision requiring that the employer must pay that rate of premium to the insurance company.

The second fallacy in the argument of the plaintiff on page 34 of his brief arises from the fact that he confuses the meaning of the word "class" with the expression, "expectation of life" as the same are used in the anti-discrimination statute. The word "class" as used in the statute does and can only mean the type of policy of insurance. If it meant "occupational classification" or persons in more hazardous occupations as the plaintiff contends, then the expression "expectation of life" would have no meaning. The life expectancy referred to in the statute is determined (1) by the age and (2) by the risks or hazards to which the individual may be subjected as well as to the condition of his health.

In other words, an aviator or steeple-jack pays a higher premium, not because he is in a different "class" as that term is used in the statute, but because his "life expectancy" is shorter, due to the fact, as the plaintiff realizes in his argument, his risk of death is greater.

The reason, therefore, why those individual doctors not members of the Medical Staff who take out individual policies of insurance pay a higher rate of premium although they may be of the same age as some of the members of the Medical Staff, is because the contract of insurance which they buy contains benefits which are different and more valuable than the benefits which are given under this group insurance policy. Provisions with respect to cash surrender value, automatic extension of insurance and right of converting to paid-up policy are but a few of the benefits not given under group insurance policies.

The defendant respectfully submits that the so-called Anti-Discrimination Act, being Chapter 168 of the Laws of 1895, amended by Chapter 167 of the Laws of 1927 with respect to Section 1 thereof, is a penal statute. That the Act of 1895 is a penal statute is further borne out by the language of Section 2 of said Act, which expressly provides "that any person or corporation violating any of the provisions of the preceding section of this Act shall, for each and every offense, * * *." It further provides that "such penalty" shall be sued for in any court of competent jurisdiction in the county where the offense shall have been committed. Since it is a penal statute, the general rule is that it is to be strictly construed and is not to be extended by construction. This rule needs no great citation of authorities and it has been followed and applied in this state on numerous occasions.

In *Lair* v. *Killmer* (N. J. Sup. Ct. 1856) 25 N. J. L. 522, the informer brought an action for damages under a statute prohibiting obstructions to the navigation of the Delaware River. The court said:

"The crime charged is the creature of the statute. It is neither *malum in se,* nor an offence at common law except as a mere obstruction to navigation, and in that aspect it is punishable by indictment. In defining the crime and the punishment, penal statutes are to be taken strictly and literally. A penal law cannot be extended by construction. The act constituting the offence must be both within the spirit and the letter of the statute. *State* v. *Stimson,* 4 Zab. 30; 1 Bla. Com. 88; *Bacon's Abr. 'Statute' I,* 9; Dwarris on Stat. 736, 737."

In *Allen* v. *Stevens* (Ct. of E & A 1861) 29 N. J. L. 509, the court said:

"This is a penal action, and the act giving the penalty is, by the established rule of construction, not to be extended beyond its words, especially when they have a well-settled technical meaning."

In *State* v. *Woodruff* (Sup. Ct. 1902) 68 N. J. L. 89, the court said:

"Chief Justice Marshall, in *United States* v. *Wiltberger,* 5 Wheat. 7, said: 'The rule that penal laws are to be construed strictly is perhaps not less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative not the judicial department. It is the legislature, not the court, which is to define the crime and ordain the punishment. * * * The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. * * * To determine that a case is within the intention of a statute its language must authorize us to say so.'

"The rule stated by Chief Justice Marshall is the one sustained by all text-writers upon the construction of penal statutes. Bish. Stat.

Cr. Section 191; Suth. Stat. Con., Section 237; Wilberf. Stat. L. 250."

In *People* v. *Mutual Life Ins. Co.* (1897) 72 Ill. App. 569, an action was brought to recover a penalty under an Illinois statute prohibiting discrimination between insurants of the same class and equal expectation of life, by an informer against an insurance company for offering the insured, a citizen of Illinois, a policy of insurance at a lower rate than usually charged. The court sustained a demurrer to the declaration upon the ground that the delivery of the policy had not been averred and said:

> "It will be observed from this act that it is highly penal. * * * To authorize a recovery in this class of actions, it is well settled that the averments of the declaration must bring the case clearly within the prohibition of the statute, and that it must be strictly construed. Every fact necessary to constitute the offense for which the recovery of the penalty is sought, must be averred, and no intendments are allowed in favor of the party for whose benefit the suit is brought. The *People* vs. *Fesler,* 145 Ill. 150 and cases cited."

Plaintiff in his brief (page 37) refers to the case of *Kenneally* v. *Leary,* 67 N. J. L. 435, in an attempted support of his argument that this is a remedial statute. It is to be noted, however, that the statute which was construed to be remedial in that case and not penal was a New York statute which made all wagers or bets void and provided that the loser of such wagers or bets may recover of the winner or of the stakeholder the amount wagered which had been paid to the winner or stakeholder, and Mr. Justice Van Sickle, quoting from a New York case said:

> "A statute which gives a remedy for an injury, against him by whom it is committed,

to the person injured, and to him alone, and limits the recovery to the mere amount of the loss sustained, belongs clearly to the class of remedial statutes." (Italics ours.)

Certainly, by no stretch of the imagination is the complaint in this case filed by one who has been injured and limited to the recovery of the amount of the loss sustained by him.

It is respectfully submitted, therefore, that the anti-discrimination statute, being Section 1, Ch. 168, P. L. 1895, as amended by P. L. 1927, Ch. 167, Rev. Stat. 1937, 17:34-45, does not prohibit the issuance of a contract of insurance such as the one in the case at bar. From the very face of the complaint, it is apparent that the charge made against the defendant by the plaintiff-informer is based upon an alleged discrimination claimed to result from the defendant's charging different rates of premiums for policies of insurance which are "similar" but not "identical". It does appear, however, that different rates are not charged for identical policies of insurance. The statute forbids discrimination only between insureds of the same class, i. e., policy-holders holding identical contracts of insurance who have the same expectancy of life. Therefore, there is and can be no discrimination within the meaning of that statute.

II. The policy of group insurance issued by the Defendant to the Newark Beth Israel Hospital was validly issued, under and in accordance with the provisions of the Statute of New Jersey.

The plaintiff in paragraph 7 of his complaint sets out part of the first paragraph of Section 2(a), Ch. 53, P. L. 1927 (Case, p. 7). This act is a supplement to Chapter 134 of the Act of 1902 which provides for the regulation and incorporation of insurance companies and the regulation and transaction of insurance business. The part omitted by the plaintiff in his complaint, are the last two sentences of that paragraph. The first paragraph of that section reads as follows:

> "Group life insurance is hereby declared to be that form of life insurance covering not less than fifty employees written under a policy issued to the employer, the premium for which is to be paid by the employer or by the employer and employees jointly, and insuring all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer; *provided, however,* that when the premium is to be paid by the employer and employees jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured. For the purposes of this act the members of any labor union or association who are actively engaged in the same occupation shall be considered employees of such union or association. No policy of group life insurance shall be issued or delivered in this state unless it shall contain in substance the following provisions:"

Chapter 134 of P. L. 1902 and the supplemental act, Chapter 53 of P. L. 1927, Section 2(a), known as the Group Insurance provision, are entirely separate from the Act of 1895, Chapter 168 and the amendment thereof, Chapter 167, P. L. 1927, discussed in the previous point. Each of these acts has its own provision for the recovery of a penalty. The statute of 1895 prohibiting discrimination permits a suit by an informer. The 1902 Act supplemented by P. L. 1927, defining group insurance, provides a penalty for its violation, which can be sued for and collected only by the Commissioner of Banking and Insurance. The bearing of the separate penalty provisions of these two separate acts, will be discussed in more detail hereafter. It is important, however, to note that they are two independent statutes.

The defendant respectfully submits that the contract of insurance issued by it to the Newark Beth Israel Hospital is in conformity with the group insurance provision, Section 2(a), Chapter 53, P. L. 1927, quoted above.

The plaintiff claims that there is no employer-employee relationship between the members of the Medical Staff and the Newark Beth Israel Hospital. Uncontradicted affidavits of the defendant show that there is an employer-employee relationship within the meaning of Section 2(a), Chapter 53, P. L. 1927.

As has been stated heretofore, penal statutes must be strictly construed and the primary object is to ascertain the intention of the Legislature by applying the ordinary rules for the construction of statutes.

An examination of the first paragraph of Section 2(a), Ch. 53, P. L. 1927, as above quoted, clearly indicates that the Legislature had in mind a certain relationship which it designated as an "employer - employee" status. The relationship which the Legislature in that Act had in mind is in some respects different from the relationship normally contemplated in the use of those words. In the first full paragraph of Section 2(a), the proviso clause states that "for the purposes of this Act the members of any labor union or association who are actively engaged in the same occupation shall be considered employees of such union or association." It definitely contemplates the issuance of group insurance to insure the lives of individuals who are part of a group, which individuals follow or practice the same calling or work and have certain responsibilities or obligations and are subject to rules and regulations of an organization having an authoritative head. Such organization may be an individual employer, corporation, labor union or association.

In other words, the Legislature was not defining the employer-employee status with respect to the tort liability of the employer to third parties. The Legislature was defining a group of a certain size, more or less permanent, the individual members of which were responsible to an authoritative head.

It is respectfully submitted, therefore, that within the meaning of the group insurance statute, the members of the Medical Staff of the Newark Beth Israel Hospital are employees. This will appear more clearly when one considers certain requisites, one or more of which must necessarily be complied with normally to establish the fact that an employer - employee relationship exists. One requisite is the right to hire and discharge; the second, that the employee is subject to the rules, orders and directions of the employer, and the third, the giving of a consideration, whether money or otherwise, to the employee for the services performed.

The affidavit of Doctor Max Danzis, Chief of Staff of the Newark Beth Israel Hospital, specifically states that he and the members of the Staff are appointed each year by the Board of Directors of the Hospital, a corporation; that the Board of Directors not only appoints the doctors to the staff but to their position on the staff, and that it has the further right of dismissing the doctor from the staff or from his particular position on the staff. Unquestionably, therefore, the right to "hire and fire" exists.

The affidavit of Doctor Danzis also sets forth that he and the members of the staff are subject to the orders, rules and regulations of the Board of Directors, or such rules and regulations as are made by a Committee of the members of the Board of Directors or other Committee designated by them to make rules and regulations. It specifically appears that the doctors who are members of the Medical Staff must comply with the rules and regulations as so made. Here then, is established the second requisite, the giving of orders and directions. It may be true that the Board of Directors does not instruct the individual doctor or surgeon in the manner and technique that he is to employ as to a specific patient. That does not detract from the fact that the Board of Directors exercises control and direction over the Medical Staff. They are, nevertheless, employees within the meaning of the group insurance act just as much as are the members of a labor union or the members of an association.

We find present also the third element of the employer-employee relationship, namely, the giving of a consideration for the services performed. As pointed out in Doctor Danzis' affidavit, the administrative work, the medical and surgical work of the Newark Beth Israel Hospital is performed by the Medical Staff. These doctors conduct the clinics and do the work in the charitable wards. It is through the members of the Medical Staff that the hospital performs its work of ministering to the needs of the indigent sick of the community. The doctors do not receive payment from the patients. However, as Doctor Danzis relates in his affidavit, in return for the duties which the members of the Medical Staff perform and are required to perform, as such members of the Medical Staff, they are rewarded by having the full use of all the hospital facilities, including laboratories, instruments, equipment, medical supplies and the Hospital Library; that the members of the Medical Staff thus gain for themselves an invaluable experience and training by being given the opportunity of diagnosing, treating and ministering to a larger number of cases during the year, with their many accompanying problems, than such doctors would receive in private practice; and he adds further, that it is only through such experience and the opportunity afforded to study such a large number of cases, together with the benefit of consultation with other members of the Medical Staff, specialists in various fields, that the members of the staff each become more learned, more experienced and therefore more valuable as a physician, to himself and of course also to the community he serves.

Under such facts, as set forth in the undenied affidavits of the defendant, the conclusion is inescapable that the doctors of the Medical Staff are employees of the Newark Beth Israel Hospital, when judged by the rules for determining the status of employer-employee.

No great citation of authorities, it is submitted, is necessary to support the above well established rule. A case illustrative of this doctrine and relied upon by the court below, is *Essex County Country Club* v. *Chapman* (Sup. Ct. 1934), 113 N. J. L. 182.

There, an award of the Workmen's Compensation Bureau was affirmed by the Court of Common Pleas. The judgment then came before the Supreme Court on a writ of certiorari. Chapman had been a caddy at the Country Club for thirty-four years. Caddies were selected by the caddymaster and none were allowed to work on the course without a badge issued by him. They were paid sometimes by the players, and sometimes by the club. One of the issues raised by the club was whether Chapman was an employee within the meaning of the Workmen's Compensation Act. In affirming the judgment and holding that he was an employee, Mr. Justice Donges said:

> "There is a California case squarely in point. This is *Clairmont Country Club* v. *Industrial Commission,* 163 Pac. Rep. 209, where the employment was practically the same as in the instant case, and where, in a well reasoned opinion, the employment was held to be established. In discussing the effect of the payment of compensation by the players, instead of by the Club, the court said:
>
> " 'Nor indeed is the method of compensation determinative. Taking the single case of waiters, it is a well-known fact that in some establishments they receive no wage from their employers, and are dependent entirely upon the 'tips' which they receive from the persons they serve, and it is equally a well-known fact that in some instances this system is carried to such an extent that the waiters themselves pay the employers to obtain the employment. So here it is not of consequence that the member should pay to the caddy directly the amount he has earned, or pay it indirectly through the medium of the caddy master. *The employment and discharge of the caddy during all of the time when he is not actually in the service of a member is wholly under the control of the country club, and this is the determinative fact in the matter.*
>
> "It would appear upon reason that a caddy at a golf club, who is selected by a caddy master and is assigned to the various players by the caddy master, as here, even if paid by the players, is an employee of the club within the meaning of the Compensation Act." (Italics ours.)

That case clearly enunciates the rule that the mere method of compensation or the control in all details and at all times is not the essential factor in determining whether or not there is an employer-employee relationship. It is through the right to hire and discharge and the fact that the individual is subject to the general rule and control of the employer which decides whether or not an individual is an employee.

The affidavits of the defendant, therefore, set forth undisputed facts which show that the policy in question was issued by the Newark Beth Israel Hospital a corporation; that the individuals whose lives were insured are the members of the Medical Staff who are subject to the rules and regulations of the Board of Directors of the corporation which has the right to "hire and fire", and furthermore that the members of the Medical Staff are rewarded for their services.

The plaintiff in his brief has cited numerous cases which hold that physicians of a hospital are not employees. The majority of the cases cited by the plaintiff were actions in tort where the court was dealing with the principle of *respondeat superior*. In these cases, the court was not dealing with the matter of determining what group of individuals are entitled to the munificent benefits of an insurance statute.

It is respectfully submitted that the court below was entirely sound in concluding that the determination of what constitutes the employer-employee status within the meaning of Section 2(a), Ch. 53 of the Laws of 1927, does not depend upon whether or not the hospital is responsible in tort for the acts of a staff physician. The statute expressly recites that for the purposes of the act, members of a labor union or of an association engaged in the same occupation shall be considered employees of such union or of such association. Normally, the members of a labor union or members of an association are not considered employees of such labor union or of the particular association.

On page 23 of his brief, the plaintiff cites the case of *Wall* vs. *Board of Directors, Deaf, Dumb & Blind Asylum* (78 Pac. 951), in which the court held that the physician of the asylum was not an employee. It is significant to note, however, that the court in that case decided that the physician was not an employee, by determining the intent of the Legislature from the wording of the statute. The physician in that case was appointed for a definite term of two and one-half years and that provision appeared in a separate section. Another section provided for the removal of teachers and employees who, incidentally, were not appointed for a specific period.

The court applied the doctrine of *ejusdem generis* and stated that within the meaning of the statute the term "teacher or employee" meant an employee who was like a teacher and did not include a doctor. The court in making this construction did not go into the question as to whether or not the physician was an employee because of any responsibility in tort to third parties but arrived at the conclusion that he was not an employee from the wording of the statute and the purpose of the legislation.

The plaintiff also lays great stress on the case of *Commonwealth* vs. *Fitler*, 23 Atl. 568, on pages 27 and 28 of his brief. In that case an information in mandamus was brought against the heads of the departments constituting the Civil Service Board and the Board of Charities of the City of Philadelphia, to show cause why they should not make and promulgate rules and regulations touching the Medical Services at the Philadelphia Hospital, and why they should not appoint physicians of the Philadelphia Hospital pursuant to and in accordance with an Act which provided that:

> "* * * all officers, clerks, and employees, except the assistants of the city solicitor, in the

> several departments and subdivisions thereof, or of any board attached thereto, shall be appointed by the head of the said department; but, from and after the passage of this act, no such appointment or promotion of any subordinate official, *excepting* only of assistants or laborers employed for special or temporary purposes, and *professional experts* and such others as are specially excepted by this act, shall be lawful except when made under and in pursuance of rules and regulations providing for the ascertainment of the comparative fitness of all applicants for appointments or promotion by a systematic, open, and competitive examination of such applicants, which rules and regulations it shall be the duty of the mayor and the heads of departments to make and promulgate within sixty days after the passage of this act.'' (Italics ours.)

The return filed on behalf of the respondents set forth that the physicians of the Philadelphia Hospital were experts and not employees, officers or subordinate officials, and therefore were exempt from the operation of the Civil Service features of the Act requiring systematic, open and competitive examination as a pre-requisite to appointment. It will be noted that the act by the part italicized specifically excepts professional experts. The court in considering the matter concluded that physicians and surgeons were professional experts within the meaning of the statute and therefore exempt. The court there specifically said:

> ''Members of the medical staff did not then, and do not now, obtain their appointment through applications for election or appointment. They were then, and are now, selected on the basis of their special professional fitness, and are substantially invited or requested to take positions on the staff, and render service to those suffering from dis-

ease or accident, and who are unable, by reason of their poverty, to procure proper treatment for themselves."

That case aptly illustrates the contention which the defendant has been making, namely, that the determination of what individuals are included within a statutory classification must be made from the wording of the act and the intent and purpose of the Legislature as expressed in the act. In the *Fitler* case, the inquiry was whether the Pennsylvania Legislature in enacting the statute had intended that doctors were to be subject to Civil Service examinations for appointment and promotion in the same manner as subordinate officials and lay members. The court held that since the act specifically excepted professional experts, since doctors did not make application for appointment and promotion as other subordinate officials or lay members, and further that since doctors, because of their schooling and special training, were invited to serve upon the staff, therefore, that act did not apply to them.

So, in the case at bar, the Act of 1902 as supplemented by P. L. 1927, Ch. 53, Section 2(a), is not an act to regulate the activities of doctors who are the members of the Medical Staff of a hospital, nor yet, to regulate a hospital in the conduct of its work, but on the contrary, is an insurance act designating the individuals who may be covered by group insurance. The Legislature of the State of New Jersey has not limited the benefits of group insurance to such as are within the employer-employee relationship as ordinarily conceived for the purposes of tort liability, but has broadened that status by the Act of 1927 to include members of labor unions and members of associations.

Because physicians and surgeons may not be employees or subordinate officials of a city within the terms of a Civil Service act, which expressly excepts professional experts, does not mean that such physicians and surgeons are not employees within the meaning of an insurance act, such as the one here in question.

The defendant furthermore respectfully submits that the doctors whose lives are insured under the group policy in question are members of an association and as such are within the express provisions of the statute authorizing the issuance of group insurance.

It is alleged in the complaint in paragraphs 6 and 7 (Case, p. 7) that the lives insured are members of the Physicians and Doctors Endowment Fund. The only reasonable inference from such allegation is that the Physicians and Doctors Endowment Fund is an Association. In addition, it is not denied that the Doctors are members of the Medical Staff of the Newark Beth Israel Hospital. It is admitted in the plaintiff's brief on page 20 that the Doctors "are a group of professional experts banded together by a common interest, meeting and working together in a common laboratory".

Such allegations and admissions of the plaintiff clearly establish that the physicians and surgeons insured are members of an association "who are actively engaged in the same occupation".

Section 2(a) does not limit the issuance of a policy of group insurance only to an employer or to a labor union for the benefit of employees or members of the labor union who under the Act are also considered employees, but it permits the issuance of group insurance to any association which has not less than fifty members and where these members are actively engaged in the same occupation. It would, of course, be ridiculous to contend that physicians and surgeons are not actively engaged in the same occupation.

The defendant submits that it needs no extensive argument to establish that by Section 2(a) of Ch. 53, P. L., 1927, the Legislature intended that group insurance could be issued to fifty or more persons engaged in the same occupation provided the master policy is issued in the name of an employer, labor union or association. The Act would not be constitutional were it limited just to employees and members of labor unions and did not include any or all other associations. It would be unconstitutional for the reason that it would be an express violation of the New Jersey Constitution, Article 4, Section 7, Paragraph 11, which provides:

> "The legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say:
>
> * * * * * *
>
> "Granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever."

Chapter 53, P. L., 1927, which supplements the Laws of 1902, Chapter 134, is part of the General Insurance Law of the State of New Jersey, and it was not passed in conformity with the provisions necessary for local or special laws. If it is limited to grant the privileges and benefits of group insurance merely to employees and labor unions and its members, it would be within the prohibition of the constitution granting exclusive privilege to an association or individual. An act of course is to be construed to be constitutional rather than unconstitutional. By construing that act to include any and all groups of individuals actively engaged in the same occupation who have banded themselves into an association, it would be constitutional. Under the latter construction, it would be a fair and reasonable classification and it has been repeatedly held in New Jersey that a general law must be reasonable in its classification, so that the benefits of the statute are available to all citizens and does not exclude some merely because the legislature has arbitrarily drawn the line.

As a general insurance law, Section 2(a), must be applicable to all who may reasonably wish to take out insurance in the State of New Jersey. It, of course, is apparent that it is violating the constitutional prohibition against special laws, if, as part of the general Motor Vehicle Law of the State of New Jersey, the Legislature passed an act that all members of a labor union may be permitted to drive their motor vehicles upon the highways at sixty miles an hour, leaving the provisions as to forty miles per hour now on the statute books, applicable as to all others.

It is respectfully submitted that it is equally an unreasonable classification and therefore prohibited by the constitution for the Legislature to pass an act permitting a certain type of insurance to be issued to labor unions only. On the other hand, however, construing the act to mean that it permits the issuance of group insurance to insure the lives of individuals who are members of any organization of fifty or more members, engaged in the same occupation, is a reasonable classification because the benefits of the statute are open generally to the citizens of the state desirous of this type of insurance.

In *Wanser* v. *Hoos* (Ct. of E & A 1897) 60 N. J. L. 482, the Court held an act to be invalid on the ground that "population" was not a legitimate classification for the purposes of the act. Mr. Justice Depue said at p. 525:

> "The courts, in a series of cases too numerous to be cited, have given to this constitutional provision a fixed construction. In the first case in which this provision came before

the court, a general law, as contra-distinguished from a special or local law within the meaning of the constitution, was defined to be a law that embraced a class of subjects or places and did not omit any subject or place naturally belonging to such a class. *Van Riper* v. *Parsons,* 11 Vroom 1.

"The test of the generality of a law adopted is that it shall embrace all and *exclude none whose conditions and wants render such legislation equally appropriate to them as a class.* It is also equally well settled by decisions of our courts that, although population may be made the basis of classification in statutes relating to municipal bodies, such a classification cannot be made the means of evading the constitutional interdict of local or special laws. The question whether any particular statute is local or special must be determined not upon its compliance with a legislative classification, but upon whether, having regard to the character of the legislation and the limitation upon it contained in the act, the statute is or is not a general law as defined by the courts.

The Supreme Court of the United States has likewise proceeded upon this principle in deciding upon the validity of statutes under the equality clause in the fourteenth amendment to the federal constitution. In *Gulf, Colorado and Santa Fe Railway Co.* v. *Ellis,* 165 U. S. 150, the court held that there might be classification for the purposes of legislation, but that the mere fact of classification was not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not merely that a classification has been made, but also that it is based upon some reasonable ground—something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection; and in the application of that principle the court set aside an act of state legislation as in violation of the constitutional provision." (Italics ours.)

In the case of *Budd* v. *Hancock, Comptroller* (Sup. Ct. 1901) 66 N. J. L. 133, the court said:

> "A law is special in a constitutional sense when, by force of an inherent limitation, it *arbitrarily separates some persons,* places or things from others upon which, but for such limitation, it would operate. The test of a special law is the appropriateness of its provisions to the objects that it excludes. It is not, therefore, what a law includes that makes it special, but what it excludes. If nothing be excluded that should be contained the law is general. Within this distinction between a special and a general law, the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply. If the only limitation contained in a law is a legitimate classification of its objects it is a general law. Hence, if the object of a law have characteristics so distinct as reasonably to form for the purpose legislated upon, a class by itself, the law is general, notwithstanding it operates upon a single object only; for a law is not general because it operates upon every person in the state, but because every person that can be brought within its predicament becomes subject to its operation.
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> * * * * * *
>
> "If any system of classification can be suggested, or, what is the same thing, if any excluded object, can be pointed out, there will be at least ground for argument as to the special character of this law. If, on the contrary, this act is special only in the sense that its object is single, the question of its special character in a legal sense does not arise." (Italics ours.)

The general insurance law is passed for the benefit of all citizens of the State who desire insurance. To exclude such persons who are not employees or not members of a labor union but are members of an association whose membership is fifty or more, and whose members are engaged in the same occupation, would be an arbitrary and capricious classification.

Not only is an arbitrary or elusive classification under a statute void under the State constitution, it is also void under Section 1 of Article 14 of the Federal Constitution which prohibits the making or enforcing of a law which abridges the privileges or immunities of citizens or denies any person within its jurisdiction the equal protection of the laws.

In the case of *In re Van Horne* (Ch. 1908) 74 N. J. Eq. 600, an act of 1898 made it a misdemeanor to admit children under sixteen years to theatres but exempted from its operation entertainments held on public piers. The defendant was apprehended for the violation of the statute, and brought a writ of habeas corpus. The Court held that the statute violated the Fourteenth Amendment to the United States Constitution because it made an arbitrary distinction between places of entertainment. The learned Vice Chancellor Garrison said:

> "I have reached the conclusion that the statute is in conflict with the fourteenth amendment of the federal constitution, and is, therefore, unconstitutional, at least so far as respects the section in question.
>
> " 'Equal protection of the laws' must certainly mean equal security or burden, under the laws, to every one similarly situated.
>
> A statute to escape condemnation as infringing the rights guaranteed by this amendment, *must bear alike upon all individuals and classes* and districts that are similarly situated, *in a similar manner,* and with uniformity; otherwise, there would be unjust discrimination, which this constitutional mandate prohibits.
>
> The purpose of the constitutional amendment must have been to prevent that which

> was arbitrary or capricious, and to require uniformity and equality under like conditions.
>
> The so-called police power of the legislature which enables it to make regulations and restrictions to protect the health, morals, safety and welfare of the people undoubtedly justifies the enactment of many laws which interfere with and regulate the conduct of the individual in his relations to the public, and the judgment of the legislature is to be given great, if not controlling, weight as to what conduct on the part of individuals constitutes a menace to the health, morals, safety or welfare of the general public, and its determination will rarely if ever be interfered with by the courts. But this does not justify a legislative enactment which discriminates where there is no basis for discrimination." (Italics ours.)

In *Weimar Storage Co.* v. *Dill* (Ch. 1928) 103 N. J. Eq. 307, Vice Chancellor Buchanan held unconstitutional the 1921 Act which imposed a tax on the use of state highways by common carrier motor vehicles, exempting all other vehicles, including carriers, not "common carriers", upon the ground that it denied the complainant equal protection of the laws under the United States Constitution. The learned Vice Chancellor said:

> "It may also be pointed out that the statute in question is invalid because of contravention of the federal constitution in another respect. By section 1 of the fourteenth amendment, no state may 'deny to any person within its jurisdiction the equal protection of the laws.' The legislative powers of a state are thereby limited to the extent that it may not enact laws which do not have equal application to all who are in the same situation or circumstances.
>
> A statute may distinguish between different situations and circumstances; it may operate differently upon such persons as are classified together because of one set of circumstances

from its operation on the persons coming under another classification. But it must 'operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases,* 115 U. S. 321, 337. Hence, it must operate equally and uniformly on all persons in each class, and classifications may not be made by arbitrary selection so that persons who are actually in similar circumstances are placed in different classifications.

The classification made by the statute 'must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed.' *Southern Railway Co.* v. *Greene,* 216 U. S. 400 (at p. 417). The classification must be 'reasonable, not arbitrary,' and must 'rest upon distinctions having a fair and substantial relation to the objects sought to be accomplished by the legislation.' *Atchison &c. Railway* v. *Vosburg,* 238 U. S. 56 (at p. 59). So, also *Power Mfg. Co.* v. *Saunders,* 274 U. S. 490; *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389."

In the case of *Gulf, Colorado & Santa Fe Railway Company* v. *Ellis* (1897) 165 U. S. 150, the United States Supreme Court said in part:

"The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

* * * * * *

"* * * It is apparent that the mere fact of classification is not sufficient to relieve a stat-

> ute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained."

To construe the Group Insurance Statute as applying only to employer-employee relationships and members of a labor union and not any and all other associations, would be to make a classification that is arbitrary and unreasonable, because by "arbitrary selection" persons who are actually in similar circumstances are placed in different classifications, as was said by Vice Chancellor Buchanan. It would also make a distinction which would not be any proper basis for the attempted classification, and the exclusion of members of associations having fifty or more members engaged in the same occupation from the benefits accorded the employees of an employer and the members of a labor union under an act, would be to create a difference which, in the words of the United States Supreme Court, bears no "reasonable and just relation to the act in respect to which the classification is proposed", namely, the benefits of group insurance to the individuals of the State of New Jersey.

It may not be remiss at this point to state generally what constitutes group insurance. The wording of the Group Insurance Statutes throughout the country is more or less the same in that it includes not merely an employer-employee relationship, but other organizations of a given size, usually fifty or more lives to be insured. A master policy is issued to the employer or to the organization and the lives insured are the employees, which as has been above set forth, under such statute means also the members of an association. The premium is paid partially by the employer and partially by the employee. The administrative work in the collection of the premiums and maintaining the list of the lives insured is all performed by the employer, be he the master or be it an association.

The expense of such administration is then shifted from the insurance company to the master, employer or association, and in consequence a lower rate of insurance may be charged. There is a further reason why the rate of insurance under such contracts can be lowered, and that is, that the insurance company is, by this form of contract, assured that there shall be always at least fifty or more lives covered by insurance for which the premium is paid.

Under the ordinary type of policy issued to an individual, when he dies the death benefits are payable and the insurance company, through its agents, must continually canvas for another life so that its risks, based upon the insurance tables shall be widely distributed. Under the group insurance arrangement, however, if an employee dies, the employer usually engages another employee who automatically becomes insured under the master policy, being a safeguard to the insurance company that there will always be at least fifty lives insured paying premiums.

This saving of administrative expense and the spreading of the risks over a constant definitely known number of lives within the same risk field is equally true whether such policy is issued to an employer or to a labor union or to an association, where the employee-members are actively engaged in the same occupation.

III. No right of action is given to a member of the general public under the provisions of the Statutes relating to group insurance.

This action was instituted by the plaintiff as a common informer pursuant to the provisions of Chapter 247 P. L. 1903, title 2, Revision of 1937, 2:46-1 to 6. That act requires the plaintiff to endorse upon the process issued the title of the statute upon which the action is founded. The statute endorsed on the process by the plaintiff is "Laws of 1895, Ch. 168, as amended by P. L. 1927, Ch. 167" (Case, p. 5). This is the statute which prohibits discrimination and is discussed under Point I of this brief.

As has been pointed out under Point I, there is no discrimination unless identical types of policies are issued to two or more individuals of the same life expectancy, at *different* rates of premium. The uncontradicted facts in the case at bar show that the rates charged for the group insurance issued to the doctors is according to the standard manual of rates filed with and approved by the Commissioner of Banking and Insurance.

The plaintiff, however, in his complaint (Case, p. 7, lines 32-40) and in his argument refers to P. L. 1927, Ch. 53, which defines group insurance and is a supplement to the Act of 1902, Ch. 134. The 1895 act provides in Section 2 that a person who violates the provisions of Section 1, which is the discrimination section shall forfeit and pay for each offense the sum of $100.00 for every twenty-five hundred dollars of insurance or fraction thereof, which is to be sued for and recovered with costs in an action at law.

The Act of 1902, Chapter 134, as supplemented by P. L. 1927, Ch. 53, known as the group insurance statute, does not give a right of action to an informer. The penalty for the violation of the 1902 Act and the supplements is to be found in Section 89, Ch. 134, of the Act of 1902, and the penalty for the violation of the group insurance act is $500.00. It is a penalty, however, which Section 89 expressly provides can be sued for and collected only by the Commissioner of Banking and Insurance.

The separate penalty provisions for the two acts in question have remained intact and have been carried into the Revised Statutes of 1937. Title 17 has three sub-titles, the third of which deals with insurance. The provisions as to distinctions and discriminations are found in 17:34-45. The penalty for the violation of the discrimination section is found in 17:34-46, which states in part:

> "A person who violates any of the provisions of Section 17:34-45 of this title shall for every offence forfeit, etc."

This latter section is the one which entitles an informer to maintain a suit.

The provisions with respect to group insurance are to be found in 17:34-31. The provisions with respect to the violation of that provision are found in 17:33-2, this latter paragraph being the one which requires the Commissioner of Banking and Insurance to sue for the penalty of $500.00 for violation.

A violation, if any, of Ch. 53, P. L. 1927, the group insurance provision, a supplement to the act of 1902, Ch. 134, does not mean that there has been discrimination or distinction between insureds of the same class and equal expectation of life.

The defendant, therefore, respectfully submits that the issuance of the group policy in the case at bar does not violate the anti-discrimination statutes because the uncontradicted proof clearly establishes that different rates of insurance have not been charged for insureds holding the same type of policy and having the same life expectancy. The defendant further contends that the members of the Medical Staff of the Newark Beth Israel Hospital are a proper group eligible for group insurance within the meaning of the group insurance statute, and thirdly, the defendant respectfully submits that the plaintiff has no standing to bring an action questioning the compliance with the group insurance act, because that right is given only to the Commissioner of Banking and Insurance.

IV. A motion to strike a pleading upon the ground of sham which is supported by affidavits will be granted when the opposing party does not submit affidavits stating facts which are competent proof to make an issue of fact.

The defendant respectfully submits that the action of the trial court was entirely proper in striking the complaint upon the affidavits submitted by the defendant, and in holding that the affidavit of the plaintiff did not make an issue of fact, because such affidavit did not state facts which were competent proof.

The plaintiff in opposition to the defendant's motion submitted only one affidavit. It was the affidavit of John Rybasack, the plaintiff. No other affidavits were submitted by the plaintiff.

The affidavit of John Rybasack does not allege any facts which could in any sense of the word be considered competent, relevant and material proof or evidence. Paragraph 3 of John Rybasack's affidavit is irrelevant and immaterial (Case, pp.

34-40). Paragraph 4 in its most favorable aspect is merely argument (Case, p. 40). The plaintiff states neither the source of his information nor does he show that the statements to which he has sworn are within his knowledge. Besides being merely argument, the statements therein made are hearsay.

An issue of fact is not created by the opposing party stating in an affidavit that the statements made in the moving party's affidavits cannot be true, or by a mere denial of what the affiants have said. Particularly is this so when it is obvious from the affidavit of the opposing party, as it is in the case of John Rybasack, that he has no knowledge or information, or is not in the position to have any knowledge or information on the facts of the case. Mere denials are all that the plaintiff John Rybasack has set up in paragraphs 5, 6 and 7 of his affidavit (Case, p. 41).

This court, in the case of *Hegerty* v. *Frazier* (Ct. of E & A 1936), 116 N. J. L. 406, affirmed a motion to strike a complaint for the reasons expressed by Judge Lawrence who had heard the motion. Judge Lawrence said in part:

> "* * * That (affidavit) of the plaintiff states that the part of defendants' affidavits stating that no one but Lewis Butler had anything to do with the operation of the automobile and that Alma Frazier and Letha Muttrie, did not control the operation of it or exercise dominion over it is *untrue. The source of his knowledge is not given nor are any facts or circumstances within his knowledge given which would justify his statement.* The concluding paragraph of his affidavit is as follows: 'Deponent further states that to the best of his knowledge and belief the said Alma Frazier, Lewis Butler and Letha Muttrie on the night in question were engaged in a joint enterprise.' Again *no facts or circumstances are given* which would be received

in evidence at the trial and as to which he would be permitted to testify." (Italics ours.)

In *Bayles* v. *Eaton* (Ct. of E & A 1931), 108 N. J. L. 172, a motion had been made to strike an answer and counterclaim. The striking of the answer and counterclaim was affirmed and although the defendants had submitted affidavits, the court gave the following reasons for affirmance, in the course of its opinion:

> "The affidavit contains nothing in the way of proof upon these fundamental questions, and we think the Circuit Court therefore was right in striking out the counter-claims in each of the cases and that the judgments under review should be affirmed."

Previously the court had said:

> "There is nothing whatever in the defendant's affidavit which was submitted on the argument of the motion to strike out, which impeaches the validity of the plaintiff's cause of action, and the affidavits submitted by plaintiff fully support his claim.
>
> * * * * * *
>
> "* * * *We find nothing in defendant's affidavit in the way of proof of the facts upon which the counter-claim is based.*
>
> * * * * * *
>
> "In the case *sub judice,* the *defendant did not by his affidavit or other proof show facts* deemed by the judge hearing the motion sufficient to entitle him to sustain his counterclaim and his conclusion that they were not sufficient should not be set aside by this court unless the sufficiency clearly appears.
>
> We are of the opinion that such sufficiency does not clearly appear.
>
> An examination of the pleadings and the affidavit of the defendant clearly shows that *the statements contained in defendant's affidavit were not within his own knowledge but based upon hearsay.*" (Italics ours.)

The defendant submits that the affidavit of the plaintiff John Rybasack contains nothing in the way of proof, no statement as to the source of his knowledge or any facts or circumstances within his knowledge. As to the whole affidavit, it could be said, as the court stated in *Heggerty* v. *Frazier, supra,* "no facts or circumstances are given which would be received in evidence at the trial, and as to which he would be permitted to testify."

In contrast to the affidavit of the plaintiff, the defendant had submitted affidavits which recited facts within the knowledge of the particular affiants: Mr. Little, that the policy was issued upon the application of the Newark Beth Israel Hospital; that the rates of premiums were in accordance with the manual of rates on file and approved by the Commissioner of Banking and Insurance; that the hospital represented to the defendant that the doctors of the Medical Staff were employed for the performance of the medical, surgical and dental functions of the hospital (Case, pp. 13-14).

Doctor Abrams' affidavit recited that he, as a member of the Medical Staff, was authorized by the Board of Directors of the Newark Beth Israel Hospital to make application on behalf of the hospital for the insurance under a group insurance policy (Case, p. 16).

The affidavit of Mr. Brookins recited that the policy attached to his affidavit is a true copy of the policy issued together with the application attached thereto (Case, p. 21).

The affidavit of Doctor Danzis, Chief of Staff of the Newark Beth Israel Hospital, recites in detail the duties and obligations of the members of the Medical Staff, the control exercised by the Board of Directors, and the reward received by the members of the Medical Staff, who are the employees, for the performance of their duties (Case, p. 18).

Conclusion.

It is respectfully submitted that the anti-discrimination statute of 1895 as amended by Chapter 167 of the Laws of 1927 has no application to the contract of insurance issued in the case at bar. That act prohibits merely distinction or discrimination in favor of individuals between insureds "of the same class". Insureds of the same class are those who have the same identical policies. That act says nothing about what classes of insured there shall be. Being a penal statute, it of course, must be construed strictly and not extended or enlarged by construction.

Nor does that act recite directly or by any proper inference that only certain designated classes are permitted. The act has reference merely to such classes as are created by the various types of policies as are issued, and it states that there shall be no distinction between the individuals of any class, i. e., as between the insured —policyholders—of the same, identical contracts or policies of insurance.

The complaint itself under its most favorable construction alleges not that there is a different rate charged for other contracts of group insurance issued by the defendant, but, on the contrary, the direct allegation is that the rates charged under the contract in the case at bar are different than those charged under different types of contracts of insurance. The word "similar", used in the complaint, does not mean "identical" but only "resembling in some respects."

There is no denial that the rate of premiums is based upon the Standard Manual Rates for Group Insurance, as filed with the Commissioner of Banking and Insurance.

Furthermore, the complaint was properly stricken as sham because as appears by the uncontradicted affidavits of the defendant, this policy of group insurance was issued to the Newark Beth Israel Hospital, a corporation, and that there is an employer-employee relationship between the doctors of the medical staff who constitute the individual insured under the policy of group insurance involved, and the Hospital, within the meaning of Section 2(a) of Chapter 53 of the Laws of 1927, which is a supplement to the Act of 1902, Ch. 134.

The Newark Beth Israel Hospital has the right to hire and discharge the members of the Medical Staff whose lives are insured under the policy of group insurance. It makes rules and regulations for their conduct and the manner in which they are to perform the work of the Hospital, and the doctors of the medical staff receive a reward or compensation, for the services which they render. It is obvious that a violation, if any, of the group insurance provision of the 1902 General Institute Statute as supplemented is punishable under the penalty provisions of that act only, and the suit for the penalty cannot be instituted by a common informer. An informer may only bring a suit for the violation of the 1895 anti-discrimination statute and its provisions, as amended.

The allegations of the complaint are, therefore, definitely sham.

The allegations of the complaint are also frivolous and do not state a good, legal and sufficient cause of action because even under the complaint as it stands, considered in its most favorable light, the allegations are that a contract of insurance was issued insuring the lives of the members of an association. Clearly, this is permitted by the Group Insurance provisions of the General Insurance Act of 1902 as supplemented which provides that for the purposes of that act, the members of a labor union or of an association who are actively engaged in the same occupation shall be considered employees of such association. If that act is not construed to mean any and all associations having fifty or more members who are engaged in the same occupation, it would be unconstitutional, both by the provisions of the New Jersey Constitution prohibiting special and local laws, because this would be an unreasonable classification, and under the United States Constitution, because it violates the Fourteenth Amendment of the Federal Constitution which prohibits the making or enforcing of any law which abridges the privileges or immunities of citizens.

Finally, the only affidavit of the plaintiff did not raise an issue of fact because such affidavit does not state the source or knowledge of the plaintiff as an affiant, nor does it set forth any facts or circumstances which would be competent, material and relevant evidence on a trial.

It is respectfully submitted that the trial court did not err in striking the complaint and in ordering the entry of a judgment in favor of the defendant and against the plaintiff.

It is, therefore, respectfully submitted that the judgment below should be affirmed.

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To Be Orally Argued by Walter F. Waldau.

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