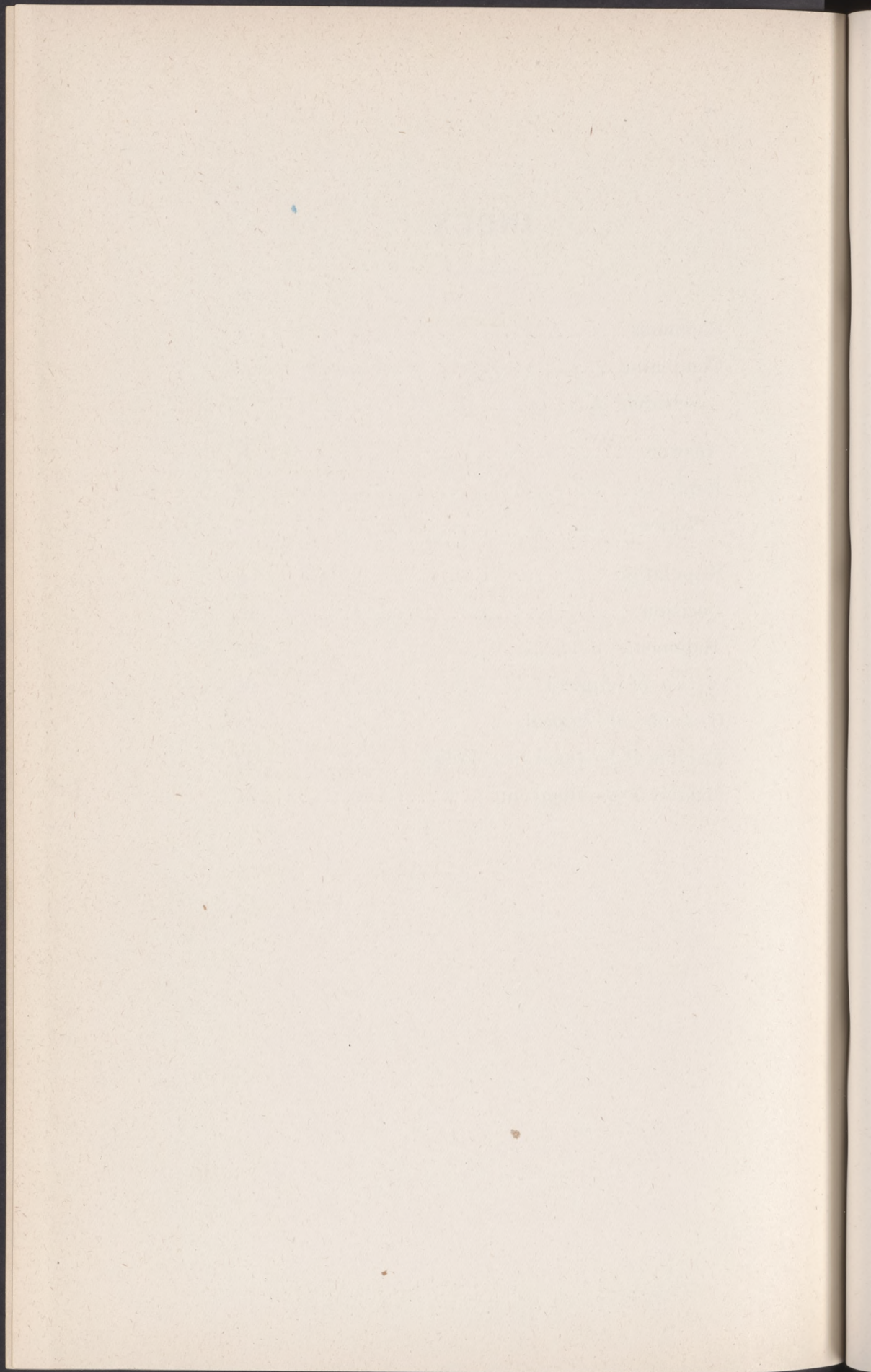


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Summons.

THE STATE OF NEW JERSEY TO NORWICH UNION
FIRE INSURANCE SOCIETY, LTD., 10
a corporation.

(Seal) You are summoned to answer
the annexed complaint of
United Deliveries, Inc., a cor-
poration of New Jersey in an action at law in
the Essex County Circuit Court. And Take Notice
that unless you file your answer to said complaint
with the Clerk of the Essex County Circuit Court,
within twenty days after service upon you of this
writ and the annexed complaint, the plaintiff may 20
proceed in the suit and judgment may be entered
against you.

WITNESS, WILLIAM A. SMITH, Esq., Judge of the
Essex County Circuit Court at Newark, this 20
day of November, Nineteen Hundred and Forty-
three.

RUSSELL C. GATES,
Clerk.

30

FRAZER, STOFFER & JACOBS,
Attorneys of Plaintiff.

40

Complaint.

ESSEX COUNTY CIRCUIT COURT.

10	UNITED DELIVERIES, INC., a corporation, Plaintiff, <i>vs.</i> NORWICH UNION FIRE INSURANCE SOCIETY, LTD., a corporation, Defendant.	} Action at Law. Complaint.
----	---	--------------------------------

20 Plaintiff, United Deliveries, Inc., a corporation, complaining of the defendant, Norwich Union Fire Insurance Society, Ltd., a corporation, says that:

30 1. On or about December 9, 1942, defendant issued and delivered to plaintiff its Motor Carrier's Cargo Liability Policy No. CL-30285, insuring plaintiff against legal liability as carrier, bailee or warehouseman for loss or damage caused by theft, non-delivery or hijacking of shipments of lawful goods or merchandise, the property of others while same are in the custody or possession of plaintiff or in transit on motor trucks owned or operated by or for the plaintiff to the extent of \$7,500.00 on the contents of any one such motor truck.

40 2. On or about May 1, 1943, while the said policy was in full force and effect, lawful goods and merchandise of the value of \$6,882.27, while in the custody and possession of the plaintiff and covered by the said policy, were stolen and plaintiff became legally liable to the owners thereof in said amount.

Schedule A.

3. Immediately after the occurrence of said loss, plaintiff gave notice thereof to defendant and thereafter complied with all conditions and requirements of said policy of insurance.

4. Although plaintiff has demanded payment from defendant of the sum of \$6,882.27, defendant has paid only the sum of \$3,370.08 under an agreement made September 28, 1943, a copy of which is annexed hereto, made part hereof and marked Schedule A, and defendant has wrongfully denied liability for and has refused to pay the balance of \$3,512.19. 10

WHEREFORE plaintiff demands judgment against the defendant in the sum of \$3,512.19 together with interest from September 28, 1943, and costs. 20

FRAZER, STOFFER & JACOBS,
Attorneys of Plaintiff.

Schedule A.

THIS AGREEMENT entered into this 28 day of September, 1943, between United Deliveries, Inc., a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, hereinafter designated as party of the first part, and Norwich Union Fire Insurance Society, Ltd., of Norwich, England, hereinafter designated as party of the second part, 30

WITNESSETH :

WHEREAS, the party of the first part carried a Motor Carrier's Liability Policy with the party of the second part; and 40

Schedule A.

WHEREAS on May 1st, 1943, two trucks owned by the party of the first part loaded with liquor belonging to various customers were stolen from the garage and terminal of the party of the first part located at 482 Washington Street, Newark, New Jersey; and

10 WHEREAS claim was made by the party of the first part on the party of the second part for payment of \$6,882.27, representing the amount of liquor the party of the first part alleges was stolen; and

WHEREAS there is a controversy between the parties as to the interpretation and coverage of policy CL 30285 issued by the party of the second part to the party of the first part, as to part of the claim; and

20 WHEREAS the parties hereto are in agreement as to the part of the claim totaling \$3,370.08, it is mutually understood and agreed by and between the parties hereto that:

1. The party of the second part will pay to the claimants listed in the schedule attached to the proof of loss this day executed by the party of the first part, and the party of the first part, the amounts therein set forth, totaling the sum of \$3,370.08, which the party of the first part agrees to accept in payment of the invoices listed in the schedule referred to above.

30 2. The payment by the party of the second part and the acceptance by the party of the first part of the monies referred to in paragraph one above shall not constitute an admission of liability or compromise or settlement or waiver of any rights either party may have against the other under policy No. CL 30285 as to the balance of the total claim in the amount of \$6,888.27 made by the party of the first part under said policy.

40

Schedule A.

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and attested by its proper corporate officers and their seal to be hereunto affixed the day and year first above written.

UNITED DELIVERIES, INC.
By NORMAN FELDMAN
Vice President 10

Attest:

RUTH JOHNSON
(Seal)

NORWICH UNION FIRE INSURANCE
SOCIETY, LTD.
By W. P. FRINK
U. S. Manager

Attested by: 20
NORWICH UNION FIRE INSURANCE
SOCIETY, LTD.
By EVERARD P. SMITH
Sect.

Sworn to before me this }
22nd day of Oct. 1943. }

WALTER V. NAGEY
Notary Public, Westchester County
Cert. filed in N. Y. Co. No. 189, Reg. No. 120-N-5 30
Commission expires March 30, 1945
(Seal)

Service of a copy of the within Summons and Complaint is hereby acknowledged this 23rd day of November, 1943.

NORWICH UNION FIRE INSURANCE
SOCIETY, LTD.
By GENNET & RAFNER,
Attorneys. 40

Answer.

(Filed March 2, 1944.)

ESSEX COUNTY CIRCUIT COURT.

10

UNITED DELIVERIES, INC.,
a corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE
SOCIETY, LTD., a corporation,
Defendant.

Action at Law.

Answer.

20 The defendant, answering the complaint, says that:

1. The defendant denies that the policy was issued and delivered on or about December 9th, 1942, but admits the balance of Paragraph One.

2. Defendant does not have sufficient information concerning the matters contained in Paragraph Two and puts the plaintiff to its proof.

30 3. Defendant denies the allegations contained in paragraph three.

4. Defendant admits the portion of paragraph four relating to the agreement but denies the balance of the paragraph.

FIRST SEPARATE DEFENSE.

The property which is the subject of the within action was detained in plaintiff's possession or
40 custody for a period in excess of forty-eight hours

Answer.

contrary to the terms, conditions, covenants and exclusions of the policy of insurance referred to herein.

SECOND SEPARATE DEFENSE.

Plaintiff is not legally liable for the alleged loss and liability does not, therefore, attach to the defendant. 10

THIRD SEPARATE DEFENSE.

The within action is contrary to the provisions of the policy referred to herein requiring arbitration of disagreements as to the amount of the loss. 20

FOURTH SEPARATE DEFENSE.

Plaintiff increased the hazards of the risk by failing to have a sufficient number of employees present at the time of the alleged loss contrary to the terms, conditions and covenants of the said policy.

GENNET & RAFNER,
Attorneys for Defendant. 30

Reply.

(Filed March 15, 1944.)

ESSEX COUNTY CIRCUIT COURT.

10

UNITED DELIVERIES, INC.,
a corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE
SOCIETY, LTD., a corporation,
Defendant.

Action at Law.
Reply.

20

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

1. It denies the allegations contained in the first, second, third and fourth separate defenses.

2. It joins issue with the defendant on the answer filed by defendant.

FRAZER, STOFFER & JACOBS,
Attorneys of Plaintiff.

30

Notice.

PLEASE TAKE NOTICE that the plaintiff reserves the right to move at or before the trial of the issues of the cause for an order striking the answer filed by the defendant on the ground that same does not constitute a legal defense to the action and is sham.

40

FRAZER, STOFFER & JACOBS,
Attorneys of Plaintiff.

Stipulation.

ESSEX COUNTY CIRCUIT COURT.

<p style="text-align: center;">UNITED DELIVERIES, INC., a corporation, Plaintiff,</p> <p style="text-align: center;"><i>vs.</i></p> <p style="text-align: center;">NORWICH UNION FIRE INSURANCE SOCIETY, LTD., a corporation, Defendant.</p>	}	<p style="text-align: right;">Action at Law. Stipulation.</p>
		10

It is hereby stipulated and agreed by and between Frazer, Stoffer & Jacobs, attorneys of the plaintiff, and Gennet & Rafner, attorneys of the defendant, that the above entitled cause be submitted to the court for its determination without a Jury on the following statement of facts: 20

1. Plaintiff is a corporation organized under the laws of the State of New Jersey, having its principal place of business as an intrastate common carrier at #482 Washington Street, in the City of Newark, County of Essex and State of New Jersey. Defendant is a British corporation authorized to conduct its insurance business in this state. 30

2. On or about January 21, 1943, the defendant issued and delivered to plaintiff its Common Carriers' Cargo Liability Policy CL 30285 effective as of December 9, 1942. The original policy is herewith submitted to the court as part of this stipulation. By endorsement dated March 9, 1943, which is not attached to the original policy 40

Stipulation.

but which is conceded to have been issued, said policy was amended to cover plaintiff's place of business at #482 Washington street, Newark, New Jersey, to which it had moved from #34 Longworth Street, Newark, New Jersey.

10 3. On May 1, 1943, while the said policy was in full force and effect, plaintiff caused to be loaded on two of its motor trucks a quantity of lawful goods and merchandise, of the value of \$6,882.27, which belonged to others and which had been delivered to it for forwarding. After being loaded with such goods in the early morning hours, the trucks were left standing inside the building occupied by plaintiff in readiness for the arrival of their operating crews at the commencement of
20 business the same day. During this interval of time, the trucks and their contents were stolen, and plaintiff became legally liable to the owners of said contents in the sum of \$6,882.27. Neither of the stolen trucks carried 200 cases of merchandise, but in the aggregate the merchandise on said trucks and in plaintiff's premises at the time of the theft exceeded 200 cases.

30 4. The only person present at the time that the trucks and their contents were stolen was Saint Mayo who was employed as a night watchman at the plaintiff's premises. He was 77 years of age and began working for the plaintiff in March of 1943. Saint Mayo was alone at the premises from 5 A. M. until the theft occurred at about 6 A. M., at which time said Saint Mayo was just outside the premises at the office door on Washington Street on his way around to the cellar entrance on
40 Crawford Street. He was attacked just outside of the door and dragged back into the premises

Stipulation.

where he was blindfolded and gagged. Soon thereafter the two loaded trucks were driven out of the garage. Subsequently said Saint Mayo cut the bindings on his arms and called the Newark Police Headquarters. The abovementioned premises had at least one employee in attendance twenty-four hours per day. 10

5. Immediately after the occurrence of said loss, plaintiff gave notice thereof to the defendant and on the 20th day of September 1943, filed a proof of loss with the defendant.

6. Under an agreement made September 28, 1943, defendant paid to plaintiff, on the claim presented by the latter for \$6,882.27, the sum of \$3,370.08 without prejudice to either party in relation to the balance of \$3,512.19 as to which defendant denied legal liability. 20

7. The portion of plaintiff's claim which is the subject matter of this suit represents goods and merchandise which had been retained at the premises abovementioned for periods in excess of forty-eight hours (Sundays and legal holidays excluded) prior to being loaded on the motor trucks which were stolen. 30

8. Submitted herewith to the court as part of this stipulation is a photostatic copy of a plan of the premises occupied by plaintiff, said plan designating the position of plaintiff's vehicles and the physical condition of the premises at the time of the loss in question.

9. Plaintiff occupies the building as the focal point of its business of common carriage. Under 40

Stipulation.

10 its method of operations at the time of the loss plaintiff's customers would send their merchandise to its premises, there to be held until carried by plaintiff's trucks over scheduled routes. At the end of each day's deliveries, plaintiff's vehicles would return to, and enter, the building and be placed next to the loading areas so that during the night time other merchandise could be checked out and loaded into them in preparation for the next day's deliveries. At all times material herein the plaintiff maintained one gasoline pump adjacent to the exit of the building so that fuel could be supplied to the vehicles. None of this fuel was ever resold or used for any purposes other than filling the tanks of plaintiff's vehicles.

20 10. All repairs to plaintiff's vehicles were made by outside mechanics who performed such services at their own places of business and who were paid as independent contractors. Gasoline for plaintiff's vehicles was supplied from the pump on plaintiff's premises abovementioned.

30 11. The value of the stolen merchandise has been undisputed at least since September 28, 1943, when the agreement referred to in paragraph 6 was made. Plaintiff's damages for the balance of the claim involved in this action amount to \$3,512.19 with interest thereon if the court rules that plaintiff is entitled to interest. Counsel for the parties will in their briefs set forth their respective views on the subject of interest.

FRAZER, STOFFER & JACOBS,
Attorneys of Plaintiff.

40

GENNET & RAFNER,
Attorneys of Defendant.

Decision.

ESSEX COUNTY CIRCUIT COURT.

No. 682, SEPTEMBER TERM, 1944.

UNITED DELIVERIES, INC., a corporation, Plaintiff, <i>vs.</i> NORWICH UNION FIRE INSURANCE SOCIETY, LTD., Defendant.	}	10 Decision.
--	---	---------------------

FRAZER, STOFFER & JACOBS (DAVID STOFFER, 20
 of counsel), attorneys for plaintiff.

GENNET AND RAFNER, attorneys for defend-
 ant.

WILLIAM A. SMITH, *Circuit Court Judge:*

This action was submitted to the Court for
 trial on the pleadings and a stipulation of facts,
 and the facts are found to be as stated in the
 stipulation. 30

The suit is brought upon a motor carrier's
 cargo liability policy, consisting of a printed form
 with endorsements, under which policy the plain-
 tiff was the carrier and the defendant the in-
 surer. Recovery is sought under the policy for
 the theft of a quantity of liquor which was stolen
 with two trucks, the plaintiff being legally liable
 to the owner of the liquor. The goods had been
 delivered to the plaintiff for transportation and
 held in the plaintiff's terminal or garage for over 40

Decision.

forty-eight hours; thereafter, on the early morning of May 1, 1943, they were loaded on the trucks preparatory to being dispatched at the commencement of business for that day on the arrival of the operating crews of the trucks, which trucks at the time of the theft were standing inside the terminal of the plaintiff.

There are three defenses set up which will be considered separately.

FIRST DEFENSE.

This defense is that recovery for the loss of the goods in question is excluded by the terms of the policy. The policy consists of a printed form called a "Motor Carriers Cargo Liability Policy", and among the endorsements are four which will be hereinafter discussed.

The contract of insurance was prepared by the defendant and submitted to and accepted by the plaintiff. It is not a coverage for which the legislature has seen fit to prescribe a standard form of policy. I must assume, therefore, that the defendant drafted the policy, and accordingly, any ambiguity in its language must be resolved against the defendant insurance company.

To properly construe this policy I think we must first apply the printed form to the question of the coverage of the loss. The principal purpose of the policy is stated as insuring the plaintiff "on account of legal liability as hereinafter provided in respect to the contents of the vehicles * * *" and then continues: "This insurance is to indemnify the assured * * * by reason of their legal liability as carrier, bailee or warehouseman * * * on account of direct loss or damage caused by perils hereinafter stipulated to

Decision.

lawful goods and merchandise carried for hire, consisting of liquors only while loaded in or on vehicle(s) described below owned and operated by the assured while in due course of transit in the custody and control of the assured."

It will thus be seen that the coverage, without considering the endorsements, would apply to the loss of goods in question while loaded in or on the vehicle while in due course of transit in the custody and control of the assured. Undoubtedly these goods, having been accepted for transportation, would be covered by these terms of the policy because they had been loaded on the trucks preparatory to movement and thus were in due course of transit in the custody and control of the assured. Ordinarily goods are in due course of transit between the time they leave the shipper in the hands of the carrier and the time the carrier delivers them to the consignee. There is no ambiguity as to this coverage under the printed form: The goods were in transit while loaded preparatory to the movement of the truck out of the garage, and the policy primarily covers the contents of the vehicles, although the printed form excludes coverage of the property while on the premises of the plaintiff assured.

Paragraph (g) on page 2 of the printed form under the title "This policy does not insure" reads: "Property in or on the premises of the assured or any garage or other premises wherein the vehicle(s) described are usually kept." This provision, of course, does not refer to goods that have been placed on the vehicles preparatory to being transported in course of shipment.

We now come to the analysis of the endorsements of this policy to arrive at the intention

Decision.

therein expressed with regard to the application of their terms to the property for which coverage is claimed.

10 There is first attached a rider which is of no importance for consideration here; it is headed "Motor Truck Gross Receipts Endorsement," and has to do with the determination of the premium.

The next, or second endorsement, is a rider consisting of four typewritten pages containing paragraphs from one to twenty-one. The pertinent paragraphs are one and two, which we quote as follows:

20 "1. In consideration of the stipulations and premium hereinafter mentioned, this policy insures the LEGAL LIABILITY of the assured as carrier or bailee or warehouseman under tariff, contract, bill of lading or shipping receipt issued by the Assured, for loss or damage directly due to perils hereinafter specified, on shipments of lawful goods or merchandise, the property of others while same are in the custody or possession of the Assured, or in transit on motor trucks or trailers owned or operated by or for the Assured, including motor trucks or trailers
30 owned by others and operated in connection with the business of the Assured, within the Continental United States and Canada.

"2. Insurance hereunder attaches as and when liability of the Assured first begins and continues until safely delivered to consignee at final destination, also attaches in respect of returned shipments or parts of same until safely returned to the shipper."

40

Decision.

In paragraph three the following is pertinent:

“However, in respect to merchandise while on or off vehicles in the terminals of the Assured and/or in any garage while the merchandise is in due course of transportation, this Company shall not be liable to pay more than twenty-five thousand (\$25,000.00) dollars.” 10

We should also consider paragraph five, which states “This policy DOES NOT INSURE the ASSURED’S LEGAL LIABILITY for loss or damage”; and thereafter follows a list of contingencies none of which applies to the present case.

The typewritten rider by its last paragraph provides: 20

“21. It is hereby understood and agreed that the entire contract of insurance is contained in this form and that the printed conditions of this policy are to be considered null and void.”

This rider containing twenty-one paragraphs, is stated to be “attached to and forming a part of Policy No. CL30285” then referring to the printed form of policy. 30

While Paragraph 21 says that the printed conditions of the policy are to be considered null and void, it undoubtedly does not mean just that; it means that they are null and void except in so far as they are necessary to give effect to this rider containing the twenty-one paragraphs, because if this were not so the twenty-one paragraphs would not be sufficient to set forth the policy of insurance. It would have to refer back to the printed form to do this. 40

Decision.

The purpose of this rider was, among other things, to extend the coverage of goods proposed to be transported while in the custody or possession of the assured as distinguished from being on the assured's trucks in transit. Under the coverage endorsement of the twenty-one paragraphs the property in question would still be covered under the plaintiff's claim.

The next is a typewritten endorsement consisting of one page which contains the provision under which defendant claims that the property is not covered. It begins with a paragraph reading as follows:

“Notwithstanding anything to the contrary contained in clause No. 21 of the typewritten form attached to this policy, it is understood and agreed the following clauses of the printed policy form under the heading ‘Conditions’ are and shall be considered in full force and effect.”

Then follows a reference to certain clauses of the printed policy to be considered in full force but which are not of importance to this controversy. After another paragraph which is of no moment, this endorsement contains a paragraph which forms the basis of the first defense and is as follows:

“Also with respect to risk in terminals, this insurance shall cover the liability of the assured (as defined in this policy) while the property insured is temporarily detained in garage or garages (including garages of the assured) for a period of 48 hours, except when a Sunday or Legal Holiday intervenes and then for the extra time of such Sunday or Legal Holiday.”

Decision.

As I have stated, it is my conclusion that the policy, exclusive of the last quoted clause, covers the property while on the trucks. In the present case the property was on the trucks in due course of transit, namely, loaded preparatory to leaving the terminal on its journey.

Now, what effect has the controversial rider? 10
 This is not a clause excluding coverage but one which proposes to cover property insured while temporarily retained in a garage or garages. I think that the property insured is intended to be covered while in the custody of the insured as distinguished from being in transit on motor trucks of the assured. By the use of the words "temporarily detained in garage or garages" it refers to insured property while not on the trucks but while in the garage or garages. The addition of the words in parentheses "including garages of the insured" does not change the meaning so as to apply to insured property while on the trucks. 20

I doubt that effect should be given to the controversial clause limiting the coverage to forty-eight hours where goods insured are in the plaintiff's garage, because the defense is a limitation of the inclusion of the insurance covering goods in the plaintiff's garage and not on trucks. Concluding as I do that the controversial paragraph does not refer to goods on plaintiff's trucks, it is not necessary for me to make a determination as to just what effect the limitation of forty-eight hours has. It certainly is a limitation only of the extent of the inclusion of insurance provided for in the paragraph which contains it. In so far as the facts of themselves are concerned, the interpretation to be put on the last paragraph quoted is that it does not apply to goods when 30 40

loaded on a truck preparatory to its leaving on the opening of the terminal or garage for the commencement of the day's morning delivery.

10 It is also my conclusion that if the period of exclusion of coverage beyond forty-eight hours has any effect on the insured goods in the assured's possession recovery for the loss of which is sought in this case, such exclusion expired when the goods were loaded on the trucks preparatory to their journey.

SECOND DEFENSE.

It is claimed that the plaintiff increased the hazards and risks and therefore is barred from recovery under the policy. Paragraphs 18 and 19 provide as follows:

20 "18. It is hereby agreed that any truck or trailer carrying a shipment of 200 cases of liquors, wines and/or beer at the time of departure from the Assured's terminal, and at all times when 200 or more cases are at risk thereon, shall have at least one employee in addition to the driver, failing which the Company shall not be liable for any loss or damage caused by theft, hi-jack, or non-delivery in respect of such shipment.

30 "19. It is hereby agreed that the terminal of the Assured at No. 34 Longworth Street, Newark, New Jersey, shall have at least one employee in attendance at all times, or if no employee is in attendance shall be equipped with approved Burglar Alarm protection, failing which the Company shall not be liable for any loss or damage caused by theft or burglary during the time of such failure."

Decision.

It is my construction of paragraph 18 that it applies only where 200 or more cases are on a truck and it is immaterial whether the truck is in the plaintiff's terminal or garage or somewhere else.

The last sentence of paragraph 3 of this stipulation reads as follows:

“Neither of the stolen trucks carried 200 cases of merchandise, but in the aggregate the merchandise on said trucks and in the plaintiff's premises at the time of the theft exceeded 200 cases.” 10

It will appear therefore by the stipulation that there were not 200 or more cases on either of the trucks at the time of the loss.

Paragraph 19, which I have quoted, was complied with by the assured and therefore the hazard was not increased in violation of the policy. The stipulation by Paragraph 4 shows that one watchman was on duty at the time of the loss and at least one employee was in attendance on the premises for 24 hours a day. This is a compliance with the provisions of paragraph 19. 20

THIRD DEFENSE.

Plaintiff is not entitled to interest on its claim. 30

This raises a question whether plaintiff's claim is a liquidated one. It is my finding that it was a liquidated claim and that the plaintiff is entitled to interest from the date on which the payment was due under the policy, which is 60 days after the presentation and acceptance of proof of loss. It is stipulated that the proof of loss was filed on the 20th day of September, 1943, and therefore interest should be figured from November 20, 1943, on the sum of \$3,512.19. Judgment will be 40

Judgment.

entered in favor of the plaintiff and against the defendant in that sum with interest.

WILLIAM A. SMITH,
Circuit Court Judge.

10 December 6, 1944.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

81640.

20

UNITED DELIVERIES, INC.,
a corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE
SOCIETY, LTD., a corporation,
Defendant.

Action at Law.
Tried Without a
Jury.
By Order of the
Court.

Judgment
Entered
December 6
1944.

30

Damage\$3,512.19
Int.
Costs 81.10

JUDGE, WILLIAM A. SMITH.

FRAZER, STOFFER & JACOBS,
Attorneys of Plaintiff.

40

This action was tried before Judge William A. Smith, without a jury, at the Essex Circuit Court on December 6, 1944.

Judgment.

The above case was submitted to the Court for trial on the pleadings and a stipulation of facts and the Court after a consideration of the pleadings and the facts as stipulated finds as follows:

Judgment will be entered in favor of the plaintiff and against the defendant in the sum of Three Thousand Five Hundred Twelve Dollars and Nineteen Cents, with interest from November 20, 1943. 10

Whereupon it is adjudged that judgment be entered in favor of the plaintiff, United Deliveries, Inc. a corporation and against the defendant Norwich Union Fire Insurance Society, Ltd., a corporation in the sum of Three Thousand Five Hundred Twelve Dollars and Nineteen Cents (\$3,512.19) damage with interest from November 20, 1943 and costs of suit which are taxed at Eighty-one Dollars and Ten Cents. 20

Judgment Signed and Entered December 6, 1944.

CHARLES W. PARKER,
J.

Book 133 Page 159
Circuit Court Judgments

30

40

Notice of Appeal.

(Filed March 28, 1945.)

ESSEX COUNTY CIRCUIT COURT.

10

UNITED DELIVERIES, INC.,
a corporation,
Plaintiff,

vs.

NORWICH UNION FIRE INSURANCE
SOCIETY, LTD., a corporation,
Defendant.

Notice of
Appeal.

20 *To Frazer, Stoffer & Jacobs, Esquires,
Attorneys for Plaintiff,
744 Broad Street,
Newark, 2, New Jersey.*

Sirs:

PLEASE TAKE NOTICE that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

30

GENNET AND RAFNER,
Attorneys for Defendant.

Dated: March 22nd, 1945.

Service of a copy of the within Notice of Appeal is hereby acknowledged this 23 day of March 1945.

40

FRAZER, STOFFER & JACOBS,
Attorneys for Plaintiff.

Grounds of Appeal.

(Filed March 28, 1945.)

NEW JERSEY COURT OF ERRORS
AND APPEALS.

<p>UNITED DELIVERIES, INC., a corporation, Plaintiff-Respondent,</p> <p style="text-align: center;"><i>vs.</i></p> <p>NORWICH UNION FIRE INSURANCE SOCIETY, LTD., a corporation, Defendant-Appellant.</p>	}	<p>Action at Law. Grounds of Appeal.</p>	<p>10</p>
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20

*To Frazer, Stoffer & Jacobs, Esquires,
Attorneys for Plaintiff,
744 Broad Street,
Newark, 2, New Jersey.*

Sirs:

PLEASE TAKE NOTICE that the defendant-appellant states the following grounds of appeal:

1. The trial Judge entered a judgment in favor of the plaintiff and against the defendant whereas he should have entered a judgment in favor of the defendant and against the plaintiff. 30

2. The trial Judge found in favor of the plaintiff whereas he should have found in favor of the defendant.

3. The trial Judge entered a judgment in favor of the plaintiff in the amount of \$3,512.19 together with interest from November 20th, 1943, whereas 40

Grounds of Appeal.

he should have entered a judgment on behalf of the defendant.

10 4. The trial Judge entered a judgment in favor of the plaintiff and included therein interest from November 20th, 1943, on the amount of \$3,512.19 whereas he should have entered a judgment in favor of the defendant.

5. The judgment is contrary to law.

6. The trial court failed to non-suit the said plaintiff.

20 7. The trial court found that the merchandise that was stolen was in transit and not in the custody of the plaintiff whereas he should have found that said merchandise was in plaintiff's custody in its garage.

8. The trial court found that the controversial paragraph in the endorsement affixed to the policy does not refer to goods on plaintiff's trucks whereas he should have found that it did and that the defendant's liability was limited to forty-eight hours.

30 9. The trial court construed paragraph eighteen of the endorsement affixed to the policy to cover the situation only where two hundred or more cases were on a truck whereas he should have found that paragraph eighteen covered a situation where two hundred or more cases were in the premises, including merchandise in trucks in said premises.

40 10. The trial court found that plaintiff's claim was liquidated whereas he should have found that it was not liquidated.

Grounds of Appeal.

11. The trial court found that payment was due under the policy on November 20th, 1943, whereas he should have found that the claim was in controversy and was, therefore, unliquidated.

GENNET & RAFNER,
Attorneys for Defendant-Appellant. 10

Dated: March 22nd, 1945.


Service of a copy of the within Grounds of Appeal is hereby acknowledged this 23 day of March, 1945.

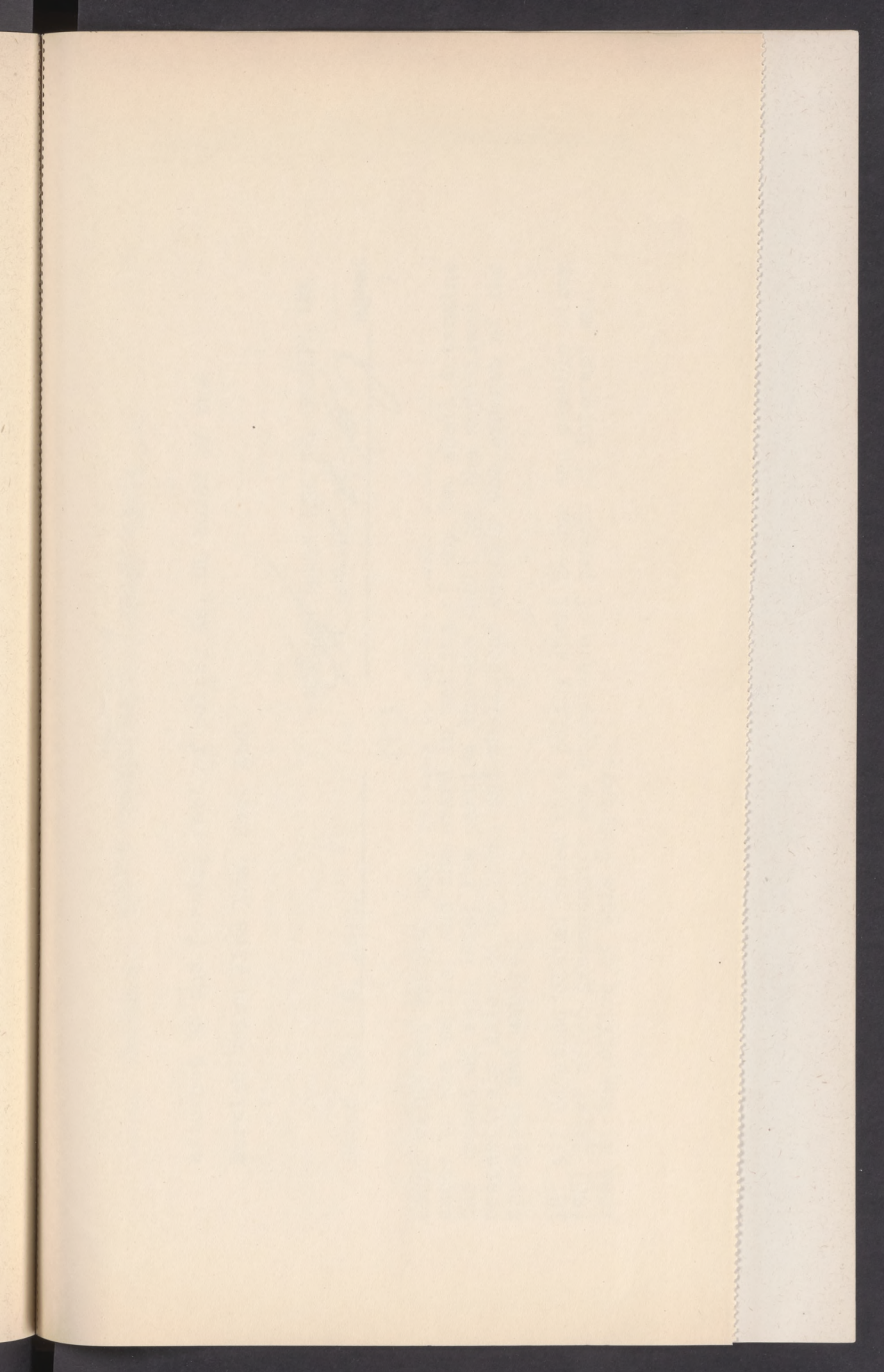
FRAZER, STOFFER & JACOBS,
Attorneys for Plaintiffs. 20

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Exhibit P-1.

(Opposite )



IRELAND MARINE
MOTOR CARRIERS CARGO LIABILITY POLICY

No. CL 30285

No. CL 30285

INLAND MARINE
MOTOR CARRIERS CARGO LIABILITY POLICY

STOCK COMPANY

NORWICH UNION

FIRE INSURANCE SOCIETY LTD.

75 MAIDEN LANE

NEW YORK.



Annual Dep.

Amount \$ As per form Rate As per form Premium \$ 300.00

In consideration of the stipulations herein named

and of THREE HUNDRED AND NO/100 Dollars, Premium

Does Insure UNITED DELIVERIES INC.

of 34 LONGWORTH ST., NEWARK, N. J.

from the 9th day of DECEMBER 1942, to the until cancelled. ~~xx~~ 1943,
beginning and ending noon, Standard Time at place of issuance.

To an amount not exceeding the limit of liability specified below on account of legal liability as hereinafter provided in respect to the contents of the vehicle described and set opposite thereto nor for more than \$ as per form on account of such liability arising out of any one disaster at any one time in respect to the contents of two or more of the vehicles described herein.

This insurance is to indemnify the Assured, subject to the limits of liability stated herein, only to the amount which they are obliged to pay and do pay by reason of their legal liability as a carrier, bailee or warehouseman under tariff, bills of lading or shipping receipts on account of direct loss or damage caused by perils hereinafter stipulated to lawful goods and merchandise carried for hire, consisting of Liquors only while loaded in or on vehicle(s) described below owned and operated by the Assured while in due course of transit in the custody and control of the Assured in the United States and Canada within a radius of miles from the Assured's principal place of business.

This policy is intended only for the protection of the person or persons referred to herein by name as the Assured and shall not inure to the benefit of any other person, firm or corporation.

Schedule of Vehicles and Limits of Liability:

Year and Model	Name	Manufacturer's Motor No.	Manufacturer's Serial No.	Manufacturer's Rated Load Capacity	Type Body	Limit of Liability	Rate
----------------	------	--------------------------	---------------------------	------------------------------------	-----------	--------------------	------

This policy also covers the legal liability of the Assured as provided herein in respect to the contents of vehicles owned and operated by the Assured and substituted for any of those described above, to an amount not exceeding the sum stated herein as applying to the vehicles for which they are substituted. The Assured hereby warrants to report to this Company in writing all such substitutions prior to any loss or damage and within twenty-four (24) hours from the time of loading and to pay additional premium, if required.

Trailers and Detachable Bodies. It is expressly understood and agreed that any trailer or semi-trailer when detached from a truck or tractor and while containing goods or merchandise shall be attended (by the Assured or permanent employee of the Assured or other adult person actually in or on the vehicle, whose sole duty is to attend the vehicle) at all times, failing which this Company shall not be liable in respect to any goods or merchandise contained therein or thereon while left so unattended. In the case of detached truck bodies, this insurance shall not apply until body and contents are actually attached to and loaded on the chassis.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE FOREGOING STIPULATIONS AND CONDITIONS, AND TO THE FOLLOWING STIPULATIONS AND CONDITIONS PRINTED ON THE BACK HEREOF, WHICH ARE HEREBY SPECIALLY REFERRED TO AND MADE A PART OF THIS POLICY, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

In Witness Whereof, this Company has executed and attested these presents, but this policy shall not be valid until countersigned by the duly authorized Agent of the Company.

By their Attorney duly authorized

[Signature] Manager

Countersigned at Brooklyn, NY this 31st day of Jan. 1943.

[Signature] Agent.

(a)

(b)

THIS POLICY INSURES
(except as hereinafter excluded)

Legal liability as above provided for direct loss of or damage to the property described herein caused by:

- (a) Fire and lightning including explosion of the conveyance;
- (b) Flood (meaning rising navigable waters);
- (c) Cyclone, tornado and windstorm excluding loss occasioned by hail, rain, sleet or snow whether driven by wind or otherwise;
- (d) Accidental collision of the vehicle(s) described herein with any other vehicle or object (the coming together of trucks or trailers in shifting or coupling or uncoupling or contact with any portion of the roadbed or rails or ties or with any stationary object while backing, or contact of cargo with a bridge or any other object, shall not be deemed a collision within the meaning of this policy);
- (e) Overturning of the above described vehicle(s);
- (f) Collapse of Bridges (except when the total weight of vehicle(s) and cargo exceeds the indicated capacity of the bridge);
- (g) Stranding, sinking, burning or collision of the vessel with another vessel or object while in transit by a regular ferry.

THIS POLICY DOES NOT INSURE

Legal liability of the Assured in respect to loss of or damage to:

- (a) Accounts, bills, evidence of debt, securities, money, notes, currency, specie, bullion, jewelry and similar valuable articles;
- (b) Furs, raw silk, silk piece goods, cigars, cigarettes, tobacco, wines, spirits or alcoholic beverages for more than ten per cent. (10%) of the limit of liability stated unless otherwise specifically provided for herein;
- (c) Eggs, resulting from breakage unless caused by a peril specifically insured against and then only if amounting to fifty per cent. (50%) of all eggs contained in the shipping package and in no event for more than \$200. in any one shipment;
- (d) Paintings, statuary, other works of art, and articles of virtu, except against absolute total loss if caused by a peril insured against, but not to exceed actual cash value, nor in any event for more than \$250. unless specifically insured hereunder;
- (e) Property described herein due to inherent vice or defect or loss of time or delay, whether consequent upon a peril insured against or otherwise;
- (f) Animals, unless endorsed hereon in writing, in which event the Company shall only be liable for claims arising from death or from injury rendering death immediately necessary, in consequence of a peril insured against hereunder;
- (g) Property in or on the premises of the Assured or any garage or other premises where the vehicle(s) described are usually kept;
- (h) Property described herein caused by strikers, locked out workmen or persons taking part in labor disturbances, or arising from riot, civil commotion, capture, seizure, or detention, or from any attempt thereat, or the consequences thereof, or the direct or remote consequences of any hostilities, or arising from the acts of any government, people, or persons whatsoever (ordinary piracy excepted) whether on account of any illicit or prohibited trade, or any trade in articles contraband of war, or the violation of any port regulation or otherwise. Also free from loss or damage resulting from measures or operations incident to war, whether before or after the declaration thereof.
- (i) Loss or damage caused by the neglect of the Assured to use all reasonable means to save and preserve the property at and after any disaster insured against.

CONDITIONS

Valuation Clause. All goods and merchandise for which Assured's liability is insured hereunder are, by agreement, valued at amount of invoice or if not under invoice, then at cash market value on date and at place of shipment, except however, the liability of this Company shall not exceed the value as shown in shipping list or bill of lading, if any, nor shall the Company's liability in any event exceed what it would then cost to repair or replace the property lost or damaged with other of like kind and quality. In any event this Company shall not be liable for a greater proportion of the Assured's liability for loss or damage than the limit of liability specified for the vehicle(s) involved bears to the value (as provided in this paragraph) of the contents.

Other Insurance. If there is any other legal liability insurance, or fidelity insurance, whether prior, subsequent to, or simultaneous with this insurance, which in the absence of this insurance would cover the loss, damage or liability hereby covered then this Company shall not be liable hereunder for more than the excess over and above such other insurance.

Benefit of Insurance. It is warranted by the Assured that this insurance shall not inure, directly or indirectly to the benefit of any carrier, bailee or other party, and any breach of this warranty shall render this policy null and void.

Concealment and Misrepresentation. This entire policy shall be void if the Assured, or his agent, has concealed or misrepresented or shall conceal or misrepresent any fact or circumstance concerning this insurance or the subject thereof; or if the Assured or his agent has been or shall be guilty of a fraudulent action or attempted fraud or has sworn falsely in reference to any matter or subject relating to this insurance, whether before or after a loss.

Machinery. In case of legal liability as covered hereunder for loss of or damage to any part of a machine or any other article consisting when complete for sale or use of several parts, this Company shall not be liable for more than the proportionate value of the part lost or damaged.

Pair or Set Clause. In case of legal liability as covered hereunder, for loss of or damage to property which consists of articles in a pair or set, this Company shall not be liable for more than the proportionate value of the part or parts of such pair or set which may be lost or damaged without reference to any special value which such articles may have as part of such pair or set.

Labels. In case of legal liability as covered hereunder for loss or damage affecting labels, capsules or wrappers or other containers, this Company shall not be liable for more than the cost of new labels, capsules or wrappers or other containers and reconditioning the goods.

Reinstatement. Every claim paid hereunder reduces the specified limit of liability on the vehicle(s) in respect to which the disaster occurred by the sum so paid, unless the same be reinstated by payment of additional premium thereon at pro rata rates.

Sue and Labor. In case of any loss or misfortune it shall be lawful for the Assured, his or their factors, servants and assigns to sue, labor and travel for in and about the defense, safeguard and recovery of the aforesaid subject matter of this insurance or any part thereof without prejudice to this insurance, the charges whereof the Company will bear in proportion to the sum hereby insured. And it is expressly declared and agreed that no acts of Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

Abandonment. It is expressly agreed by the Assured that in the event of disaster the contents or cargo of the vehicle(s) shall not be abandoned or left without a responsible person in charge.

Loss Procedure. Every loss or damage or any suit or other proceeding brought against the Assured, which might constitute a claim under this policy shall be reported immediately in writing with full particulars to this Company or to its Agent and a detailed sworn Proof of Loss shall be filed with the Company or its Agent within ~~thirty~~ ⁶⁰ days following the date of determination of Assured's liability. A failure by the Assured to either report loss or damage as required or file such Proof of Loss shall relieve this Company of any liability for such loss or damage. The Assured shall not admit any liability for loss or damage to property described herein without the written consent of this Company and the Company hereby reserves the right to adjust, settle and compromise or contest, at its option, on behalf and in the name of the Assured but without expense to the Assured, any and all claims against the Assured for such loss or damage.

The Assured shall cooperate with the Company in facilitating the investigation and disposition of claims and suits and, upon the Company's request, shall attend hearings and trials, assist in the conduct of suits and in securing and giving evidence and in obtaining the attendance of witnesses.

The Assured, as often as may be reasonably required, shall submit and so far as is within his or their power shall cause all other persons interested in the subject matter of this insurance, and members of their households and employees to submit to examinations under oath by any person named by the Company, shall produce for examination all documents, books of accounts, bills, invoices, and other vouchers or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by the Company or its representatives, and shall permit extracts and copies thereof to be made. No such examination under oath or examination of books or documents, nor any other act of the Company or any of its employees or representatives in connection with the investigation of any loss or claim hereunder, shall be deemed a waiver of any defense which the Company might otherwise have with respect to any such loss or claim, but all such examinations and acts shall be deemed to have been made or done without prejudice to the Company's liability.

Subrogation Clause. Upon payment of any loss, or advancement or loan of moneys in connection with any loss, the Assured will make claim upon, and at the request and expense of the Company and through such counsel as the Company may designate, institute legal proceedings against, any carrier, bailee or other parties believed to be liable for such loss, and will use all proper and reasonable means to recover any such loss, advancement, or loan, for the benefit of this Company.

Impairment of Recovery. Any agreement, act or omission of the Assured or their representatives prior or subsequent to the inception date of this policy without the written consent of this Company, which waives, transfers, releases, impairs or tends to defeat or decrease any claim against any person or persons, bailee, carrier, vessel, firm, corporation, town or government shall render this policy null and void in respect to liability of this Company for the loss, damage, average or expense claimed and all sums paid, loaned or incurred by this Company in respect thereto shall be recoverable from the Assured.

Agent of Assured. If any party or parties other than the Assured have procured this policy, or any renewal thereof; or any endorsement thereon, they shall be deemed to be the agents of the Assured and not of this Company on any and all transactions and representations relating to this insurance.

Automatic Cancellation for Non-Payment of Premium. In case the premium on this policy shall not be paid in full to the Company or its duly authorized agent within sixty (60) days after the date of attachment, this policy shall automatically terminate upon such sixtieth (60th) day at noon, and it is agreed by the Assured that no further notice of the termination and/or cancellation of this policy is or shall be necessary; that proportional part of the premium, however, which shall have been earned up to the time of such termination shall be due and payable.

Cancellation. This policy shall be cancelled at any time at the request of the insured, in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by the Company by mailing to the insured at the address specified in this policy or at any later address known to the Company, written notice of cancellation (such cancellation to be deemed accomplished five days from date of mailing) with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Attached to and forming part of Policy No. CL 30285

of the Norwich Union Fire Ins. Soc. Ltd.

Notwithstanding anything herein contained to the contrary, this insurance is warranted free from capture, seizure, arrest, restraint, detainment, confiscation, preemption, requisition or nationalization, and the consequences thereof or of any attempt thereat, whether in time of peace or war and whether lawful or otherwise; also warranted free from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

All other terms and conditions remain unchanged.

NORWICH UNION FIRE INS. SOCIETY, Ltd.

Date Dec. 9, 1942.

Form 648B
Printed in U. S. A.

687

W. H. H. H.
Agent.

Notwithstanding anything to the contrary contained in clause #21 of the typewritten form attached to this policy, it is understood and agreed the following clauses of the printed policy form under the heading "Conditions" are and shall be considered in full force and effect;

"Other Insurance"
"Benefit of Insurance"
"Machinery"
"Pair or Set Clause"
"Sue and Labor"
"Abandonment";
"Loss Procedure"
"Agent of Assured"
"Automatic Cancellation"

Further, clause number 7 of the typewritten form attached hereunder is amended to read as per the printed terms and conditions of the "Motor Truck Gross Receipts Endorsement" attached to this policy.

Also with respect to risk in terminals, this insurance shall cover the liability of the assured (as defined in this policy) while the property insured is temporarily detained in garage or garages (including garages of the assured) for a period of 48 hours, except when a Sunday or Legal Holiday intervenes and then for the extra time of such Sunday or Legal Holiday.

It is specifically understood and agreed the term "Approved Burglar Alarm" shall be deemed to mean a Burglar Alarm installed by a Company approved by the National Bureau of Casualty and Surety Underwriters and for which the assured holds an unexpired certificate issued by the Underwriter's Laboratories Inc.

All other terms and conditions remain unchanged.

Attached to and forming part of policy No. CL 30285 of the
Norwich Union Fire Ins. Soc. Ltd.

NORWICH UNION FIRE INS. SOCIETY, Ltd.

Dated Dec. 9, 1942.

W. H. H. H.
Agent.

(C)

(d)

- ⊗ 1. In consideration of the stipulations and premium hereinafter mentioned, this policy insures the LEGAL LIABILITY of the assured as carrier or bailee or warehouseman under tariff, contract, bill of lading or shipping receipt issued by the Assured, for loss or damage directly due to perils hereinafter specified, on shipments of lawful goods or merchandise, the property of others while same are in the custody or possession of the Assured or in transit on motor trucks or trailers owned or operated by or for the Assured, including motor trucks or trailers owned by others and operated in connection with the business of the Assured, within the Continental United States and Canada.
- ⊗ 2. Insurance hereunder attaches as and when liability of the Assured first begins and continues until safely delivered to consignee at final destination, also attaches in respect of returned shipments or parts of same until safely returned to the shipper.
- ⊗ 3. This Company shall not be liable for more than SEVEN THOUSAND FIVE HUNDRED (\$7,500.00) DOLLARS on the contents of any one motor truck or on any one trailer at any one time, nor for more than TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS, in any one disaster at any one time. (However, in respect to merchandise while on or off vehicles in the terminals of the Assured and/or in any garage while the merchandise is in due course of transportation, this Company shall not be liable to pay more than TWENTY-FIVE THOUSAND (\$25,000.00) DOLLARS.)
- ⊗ 4. This policy insures the ASSURED'S LEGAL LIABILITY for all physical loss or damage to cargo entrusted to it's care including all loss or damage caused by theft, non-delivery, or hi-jacking.
- ⊗ 5. This policy DOES NOT INSURE the ASSURED'S LEGAL LIABILITY for loss or damage:
- (A) DUE to neglect of the Assured to use all reasonable means to save and preserve the property at and after any disaster;
 - (B) To bills, currency, evidences of debt, securities, money, notes, jewelry or similar valuables;
 - (C) To paintings, statuary, or other works of art or articles of virtu, except against absolute total loss in specie, such loss having been caused by a peril insured against;
 - (D) To goods by spoilage, delay, wet, dampness, or by being spotted, discolored, mouldy, rusted, frosted, rotted, soured, steamed; or changed in flavor except the same is the direct result of:
 - (a) Fire, self-ignition, internal explosion, lightning, cyclone, tornado or cloudburst;
 - (b) Overturning or collision of the conveyance;
 - (c) Collapse or subsidence of bridges or culverts;
 - (d) Perils of the sea, lakes, rivers, or inland waters while on any ferry or similar conveyance;
 - (e) Theft or hi-jacking.
 - (E) To animals, except for claims arising from death and/or injuries rendering death immediately necessary.

6. The liability of this Company shall in no event exceed the amount for which the Assured is legally liable in respect of merchandise lost and/or damaged, nor shall it exceed the market value thereof at the time and place of intended delivery (such value to be determined by the amount of shipper's invoice, if any be issued), plus freight charges whether included in shipper's invoice or not; the foregoing provisions subject, however, to the limits of liability stipulated elsewhere herein.
- ⑦ 7. The Assured agrees to keep an accurate record of all gross receipts (either collected or uncollected, but excluding receipts paid to connecting carriers) from its trucking business during the term of this policy and to report to the Company on or before the 30th day of each calendar month succeeding the month in which this policy is issued, the full amount of gross receipts (either collected or uncollected) from its trucking business during the preceding month or such time thereof as is within the policy period, and pay to the Company on or before the 30th day of each calendar month an earned premium equal to \$2.00 per \$100. of such receipts. All records pertaining to such receipts shall at any reasonable time be open to inspection by any duly authorized representative of the Company.
8. In case the Assured be legally liable for loss affecting labels, capsules or wrappers (through a peril insured against) the loss shall be adjusted on the basis of an amount sufficient to pay the cost of new labels, capsules or wrappers, and reconditioning the goods, and subject to the limits of liability as stipulated elsewhere herein.
9. This policy shall be cancelled at any time at the request of the Assured; or by the Company by giving thirty (30) days' notice of such cancellation. Notice of cancellation mailed to address of the Assured, as stated herein, shall be a sufficient notice; the check of this Company, or its Agents, when similarly mailed shall be a sufficient tender of any unearned premium.
10. In all cases of loss the Assured shall, at the request of this Company or its agents, assign and subrogate all its rights and claims against others to this Company at time of payment, to an amount not exceeding the sum paid by this Company; and permit suit to be brought in the Assured's name, but at this Company's expense, and the Assured further agrees to render all reasonable assistance in the prosecution of said suit or suits. This Company is not liable for any loss, which, without its consent, has been settled or compromised with others.
11. In case of any agreement by the Assured, prior or subsequent hereto, whereby any right of recovery of the Assured for loss of or damage to any property insured hereunder, against any person or persons or corporation, is released, impaired or lost, which would on acceptance of an abandonment or payment of a loss by this Company have inured to its benefit, but for such agreement or act, This Company shall not be bound to pay any loss, but its right to retain or recover the premium shall not be effected.
12. Upon the occurrence of any loss or damage to any goods and/or merchandise for which the insured's liability is hereby insured the Assured shall give written notice within thirty (30) days' thereof and detailed sworn proof of loss shall be filed within ninety (90) days' of the date of loss. Failure by the Assured either to give such notice or to file such proof of loss within the time prescribed, shall invalidate the claim.
13. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless the Assured shall have

fully complied with all the requirements of this policy, nor unless commenced within twelve (12) months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then, and in that event, no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State.

14. In case of claim for loss of merchandise through perils insured hereunder, in respect to which the Assured's LEGAL LIABILITY is covered by this policy, this Company reserves the right to adjust such loss with the owner or owners of the merchandise, and the payment to such owners of the amount due from this Company for goods lost or damaged shall be in full satisfaction of any claim of Assured for said property. It is mutually understood and agreed between this Company and the Assured, however, that any act on the part of this Company or its agents, in ascertaining the facts, circumstances or amount of a loss (either direct or through adjusters or surveyors) shall be deemed without prejudice to the liability of this Company hereunder. If suit is brought against the Assured to enforce a claim for loss or damage covered by this policy, he shall immediately forward to this Company every summons or other process as soon as the same shall have been served on him, and this Company will, at its own cost, defend such suit in the name and on behalf of the Assured. The Assured whenever requested by the Company shall aid in effecting settlement securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement or in legal proceedings, or incur any expenses, or settle any claim, except at his own cost, without the written consent of the Company being previously given.

15. In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the assured and this Company each selecting one, and the two so chosen shall select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately the sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraisers respectively selected by them, and shall bear equally the expense of the appraisal and umpire.

16. All adjusted claims under this policy shall be due and payable sixty (60) days' after presentation and acceptance of proofs of interest and loss at the office of this Company.

16a As between the Assured and this Company, the terms of this policy shall govern as though endorsements prescribed and required under the provisions of any General or Special Laws applying to the carriage of goods, wares and merchandise by trucks in the State wherein this Assured's trucks may operate, were not attached; and in consideration of the attachment of said endorsements at the request of the assured, the assured agrees that if the Company shall be obliged to pay any claims which it would not have been required to pay except for said endorsements, the Assured shall reimburse the Company for any and all sums and disbursements of every kind including loss payments, costs and expenses which it shall have paid in connection with such claim.

17. The initial premium for this Policy shall be Three Hundred Dollars

④

\$300.00) which shall be held by the Company to apply to the last report made at the termination or cancellation of this policy, or in the event all premiums are paid upon the termination or cancellation of the policy, the Company shall refund said initial premium in full to the Assured through his agent.

18. It is hereby agreed that any truck or trailer carrying a shipment of 200 cases of liquors, wines and/or beer at the time of departure from the Assured's terminal, shall have at least one employee in addition to the driver, (failing which the Company shall not be liable for any loss or damage caused by theft, hi-jack, or non-delivery in respect of such shipment) and at all times when 200 or more cases are at risk thereon

19. It is hereby agreed that the terminal of the Assured at No. 34 Longworth Street, Newark, New Jersey, shall have at least one employee in attendance at all times, or if no employee is in attendance shall be equipped with approved Burglar Alarm protection, failing which the Company shall not be liable for any loss or damage caused by theft or burglary during the time of such failure.

20. It is hereby agreed that upon each anniversary of this policy, the losses paid and outstanding shall be reviewed, and if such losses for the expired year do not exceed thirty-five (35%) percent of the premiums earned under the policy for such year, then the Company will return and forthwith pay to the assured a sum equal to 25¢ per \$100. of the gross revenue reported for that year.

21. It is hereby understood and agreed that the entire contract of insurance is contained in this form and that the printed conditions of this policy are to be considered null and void.

Attached to and forming part of Policy No. CL30285 of the NORWICH UNION FIRE INSURANCE SOCIETY LIMITED.

NORWICH UNION FIRE INS. SOCIETY, Ltd.

INLAND MARINE

Motor Truck Gross Receipts Endorsement

Attached to and forming part of Policy No. CL 30285 of the Norwich Union Fire Ins. Soc. Ltd. Assured United Deliveries Inc.

1. The charge for this policy is a deposit premium based on an estimate of \$ 15,000.00 of gross receipts, (collected or uncollected) made during the term of this insurance, and the Assured warrants that not later than the thirtieth (30th) day of each month they will report to this Company the full amount of gross receipts, (collected or uncollected) of all shipments covered hereunder during the preceding month, and upon the total of all gross receipts exceeding the said estimate, the Assured agrees to pay this Company additional premium at the rate of \$2.00 per \$100 of gross receipts in excess of said estimate, such additional premium to become due and payable to this Company thirty (30) days from date of the last day covered by each report; it being understood that in consideration of this endorsement, the reinstatement clause in the policy is hereby waived.

2. Regardless of anything to the contrary expressed in this policy it is mutually agreed that should any monthly report not be rendered and the premium applying thereto not be paid to the Company or its duly authorized agent on or before the due date stipulated in this policy, this policy shall automatically terminate upon such date at noon, and it is agreed by the Assured that no further notice of the termination and/or cancellation of this policy is or shall be necessary; the premium, however, which shall have been earned up to the time of such termination shall be due and payable.

3. In the event of cancellation the Return Premium shall be the amount by which the paid deposit premium exceeds the premium due to the Company as determined by the reports as hereinbefore required to be rendered, up to and including the date of cancellation. If the premium thus determined exceeds the deposit premium, the amount in excess thereof or the whole amount thereof, if the deposit premium is unpaid, shall be immediately due and payable by the Assured.

4. The Assured agrees to keep an accurate record of all gross receipts, (collected or uncollected) and the Company through its authorized representative and at all reasonable times shall have access to the Assured's books and records for the purpose of determining the actual premium due, and any evasion or attempted evasion by the Assured in the matter of rendering such reports hereinbefore required, or payment of premium hereunder, shall be an absolute defense to any suit or action brought under this policy.


5. All other terms and conditions remain unchanged. NORWICH UNION FIRE INS. SOCIETY, Ltd. Dated Dec. 9, 1942. Agent.

(85)

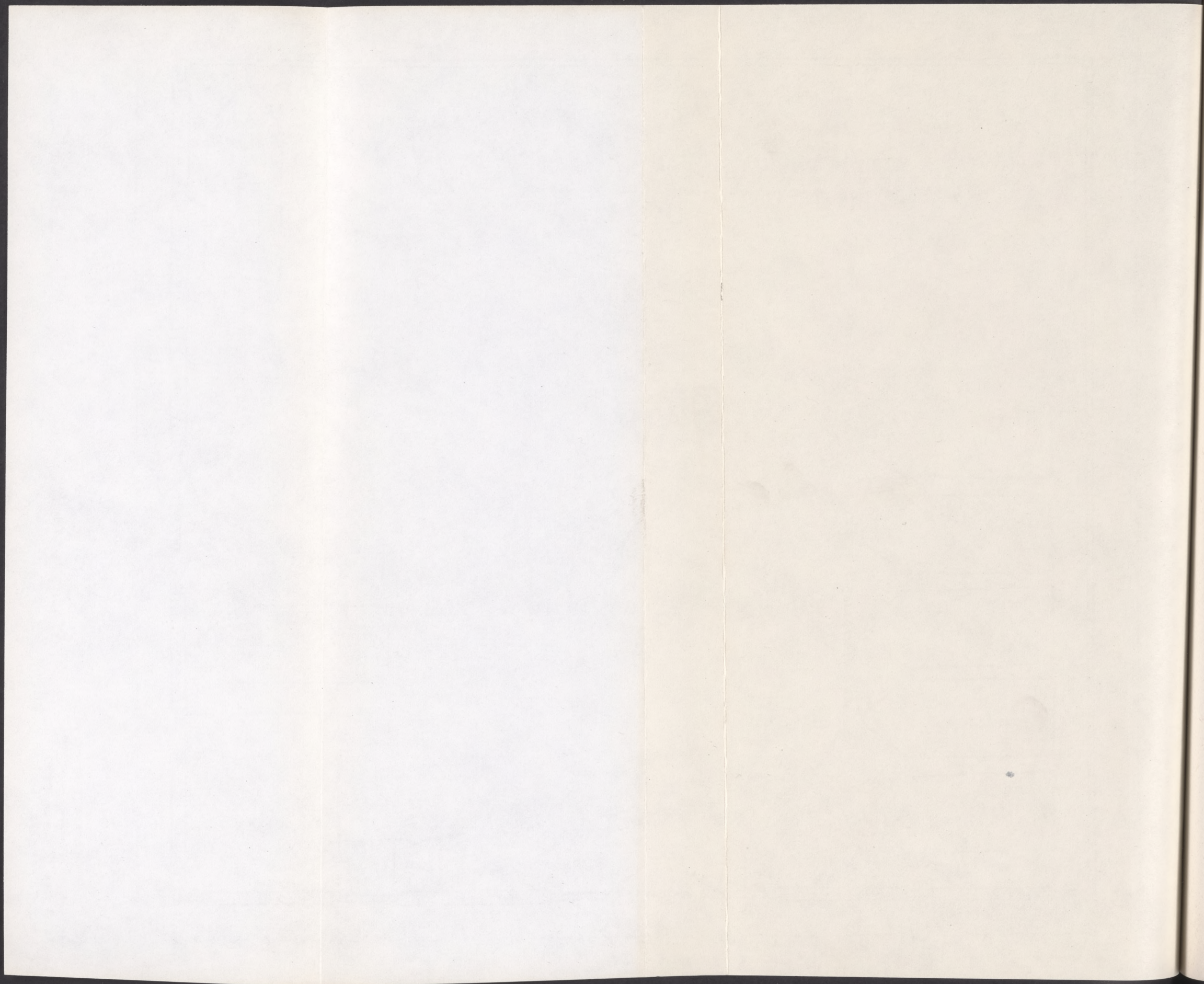
Table 9.2

1990-1991

Exhibit P-2.

(Opposite )

PLAN OF UNITED DELIVERIES, INC. PREMISES - NEWARK, N.J.



New Jersey Court of Errors and Appeals

UNITED DELIVERIES, INC., a corporation,
Plaintiff-Respondent,

vs.

NORWICH UNION FIRE INSURANCE
SOCIETY, LTD., a corporation,
Defendant-Appellant.

Action at Law.
On Appeal from
Essex County
Circuit Court.

Sat Below:
William A.
Smith, C. C. J.

**BRIEF ON BEHALF OF
DEFENDANT-APPELLANT.**

Preliminary Statement.

This action was submitted to the Essex County Circuit Court for trial on the pleadings and a stipulation of facts.

The appellant issued to respondent a motor carrier's cargo liability policy consisting of a printed form with several endorsements. Two trucks loaded with liquor owned by shippers were stolen from respondent's premises on May 1st, 1943. It is claimed that said merchandise was valued at \$6,882.27. On September 28th, 1943, the parties herein agreed upon liability for liquor of the value of \$3,370.08. The appellant paid said money but denied legal liability as to the balance of the claim amounting to \$3,512.19. The latter amount is the basis of the within action.

There were four separate defenses contained in the answer but only the first and fourth were pressed in the court below.

The grounds of appeal filed by appellant divide themselves into three groups. The first group consists of grounds No. 1, 2, 3, 5, 6, 7 and 8 and relate to the first separate defense in the answer. The second group consists of grounds Nos. 4, 10 and 11 and relate to the question of interest on the claim of the assured. Ground No. 9 stands alone and relates to the fourth separate defense in the answer.

ARGUMENT.

POINT ONE.

The property in question was detained in respondent's custody for a period in excess of 48 hours and appellant is, therefore, not liable under its policy.

The first separate defense is based on the following paragraph contained in the endorsement as set forth on page 29 (c) of the State of Case herein:

“Also with respect to risk in terminals, this insurance shall cover the liability of the assured (as defined in this policy) while the property insured is temporarily detained in garage or garages (including garages of the assured) for a period of 48 hours, except when a Sunday or Legal Holiday intervenes and then for the extra time of such Sunday or Legal Holiday.”

There is no ambiguity in the language of the above paragraph. It is merely a question of application of the same to the premises from which the merchandise was stolen. If applicable, appellant is not liable to its assured, since admittedly, the merchandise in question was detained for more than 48 hours.

The general rule as to ambiguities in New Jersey is well established by a long line of cases. There must, however, first be a finding that there is an ambiguity in the language which is the subject matter of the controversy. Then there must be a finding that the assured is the innocent party and had no responsibility for the ambiguous language.

The policy in question insures respondent for legal liability as carrier, bailee or warehouseman on account of loss of liquors while loaded in or on vehicles while in due course of transit. The second endorsement, in paragraph 1 (p. 29(d) of the State of Case), extends the coverage to include loss of merchandise while in the custody or possession of assured as well as in transit. Paragraph three of said endorsement refers to the limit of liability for merchandise "while on or off vehicles in the terminals of the assured and/or in any garage while the merchandise is in due course of transportation." There is no ambiguity thus far.

In order to determine whether the premises from which the merchandise was stolen were included under the paragraph quoted at the beginning of this point, it is necessary to look to the intention of the parties. Was it intended to have the 48 hour limitation directed to garages or buildings other than the premises in question? If it was, why was reference made to risk in terminals? The intention of the parties was to limit to 48 hours the retention of liquors at any one location, whether at a terminal or a garage. The reason for the limitation is obvious. Storage of large quantities of liquor at any one location, especially one protected only by an old man of 77 years of age would have been bait for all of the liquor hi-jackers in the country. The increased

risk would have required a substantially increased premium. The assured agreed to the limitation imposed by the policy in order to avoid that increase.

The court in the case of *Independent Fire Insurance Co. vs. Coss County*, 154 ^{U.S.} Fed. 452, 14 ^{U.S.} Supreme Court, 379, said:

“Contracts of insurance are contracts of indemnity upon terms and conditions specified in policy or policies, embodying the agreement of the parties. For a comparatively small consideration, the insurer undertakes to guarantee the insured against loss or damage, upon terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer’s liability and in order to recover, the assured must show himself within those terms.

It is immaterial to consider reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms and conditions on which their contract shall continue and terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made.”

It is evident from the form of the policy that it is not one that was drawn by the insurance company in *toto* and submitted to the assured, but rather was the result of negotiations between the parties. The endorsements were added six weeks or more after the date of issuance of the policy.

The policy was delivered to the assured, the long endorsement was delivered and the one containing the clause in controversy was delivered. The assured had an opportunity of examining and inspecting the same. Your Honors have ruled that the assured had a duty to thoroughly examine the policy and refuse to accept it if it was dissatisfied with the same. *Crescent Ring Co. vs. Travelers Indemnity Co.*, 102 N. J. L. 85, 132 Atl. 106. If there were an ambiguity which did not clearly state the agreement between the parties, the controversial endorsement could have been amended or re-written. The policy, however, appears to be the result of a meeting of the minds of the parties and the assured should be bound by the terms to which it agreed in accepting the same. The fact that the appellant is an insurance company does not mean that the court should be called upon to make a better contract for the assured than it made for itself. *Krieg vs. Phoenix Insurance Co.*, 116 N. J. L. 467, 185 Atl. 21; *Kupersmith vs. Delaware Insurance Co.*, 84 N. J. L. 271, 86 Atl. 399; *Marone vs. Hartford Insurance Co.*, 114 N. J. L. 295, 176 Atl. 320; *Smith vs. Fidelity & Deposit Co. of Maryland*, 96 N. J. L. 534, 120 Atl. 322.

As to the application of the paragraph in question, we feel that it applies to the premises of the assured from which the merchandise was stolen. Were the premises a terminal or a garage or both? Respondent will argue, as it did in the court below, that the premises were a terminal rather than a garage and the paragraph did not apply to terminals but only to garages.

The paragraph, however, begins "also with respect to risks in terminals." Were it intended to exclude the premises of the assured by distinguishing it from a garage, the paragraph could

have started "also with respect to risks in garages (not including terminals of assured)." Instead, it referred to terminals and added "(including garages of the assured)." This surely must refer to the terminal of the assured since assured had no other garage where it stored its trucks.

The building (a floor plan of which is included in the State of Case, p. 31), is both a terminal and a garage, in which were stored seven trucks and which contained a gasoline pump for supplying its trucks with fuel. Part of the floor space is labeled "merchandise loading and receiving area." Part of that area is used for the storing of trucks. The inclusion of a gasoline pump in and of itself does not make the property a garage but is additional indication that it is such. The use of the premises is the determining factor.

What is the definition of the word "garage"? The New Standard Dictionary defines it as "a building for storage of automobiles." In *Diocese of Trenton vs. Toman*, 74 Eq. 702, 70 Atl. 606, the court said, "A garage is to an automobile what a stable is to a horse."

The stipulation in paragraph three, page 10 of the State of Case and paragraph nine, page 11, indicates that the trucks of the assured were stored in the building in question every night from the time they were brought in by the drivers until they were taken out again. There is nothing to indicate that the trucks were stored in any other garage at any time. The floor plan referred to above depicts seven trucks of the respondent stored in said building. The building in question, therefore, is covered by the paragraph in controversy.

Neither of the parties hereto argued the point in the lower court upon which it based its de-

cision on this separate defense. The court held that the merchandise was in transit once it was loaded on the trucks and the paragraph in question did not apply to goods in transit. There is nothing in the paragraph which lends itself to the distinction made. The mere loading of the merchandise does not remove it from assured's custody nor does it remove it from the garage where it had been detained for more than forty-eight hours. There is no reference made in this paragraph to goods on or off the trucks as there was made in paragraph three of the endorsement, page 29(d) of the State of Case.

There are no cases in New Jersey which hold that loading merchandise on a truck places it in transit.

The case of *J. G. Ries & Sons, Inc. vs. Automobile Insurance Co.*, 121 N. J. L. 493, 3 Atl. 2nd, 610, deals with the definition of "in transit" and holds that property once in transit continues to be so until delivered to its final destination. It is illogical to hold that the merchandise was in transit because it was placed on a truck for future transportation.

The first separate defense should be sustained and the assured barred from recovery.

POINT TWO.

The assured increased the hazards and risks and the company is thereby not liable.

This defense rests on paragraph eighteen of the endorsement, page 29(g) of the State of Case. The paragraph provides that at all times when 200 or more cases of liquor, wine and/or beer are at the risk, there shall be at least one employee

in addition to the driver, failing which the company shall not be liable for any loss caused by theft, hi-jacking or non-delivery. The stipulation in paragraph three, page 10 of the State of Case, proves that there were more than 200 cases at the risk thereon at the time of the theft. In paragraph four of the stipulation, it was agreed that there was but one employee on the premises at the time of the theft.

There is no question of interpretation of the language of said paragraph although the lower court in its opinion construed it to apply only where 200 or more cases were on a truck. The paragraph clearly states "at all times when 200 or more cases are at the risk thereon" (assured's premises). The stipulation in paragraph three, page 10 of the State of Case, asserts that there were in excess of 200 cases on the trucks and at the assured's premises.

Under the case of *J. G. Ries & Sons, Inc. vs. American Automobile Insurance Co., supra*, the assured is barred from recovery because it did not have two employees at the risk at the time of the theft, but instead increased the hazards.

Your Honors also held in the *Smith vs. Fidelity & Deposit Co. of Maryland* case, *supra*, that the trial court's direction of a verdict was not error where a guard required in the policy was not on the premises at the time of the theft.

POINT THREE.

The assured is not entitled to interest on its claim.

The lower court found that the claim was liquidated and that respondent was entitled to

interest from November 20th, 1943, on the sum of \$3,512.19.

It is our contention that the claim was not liquidated on that date. The proof of loss referred to by the Circuit Court Judge and which is mentioned in paragraph five of the stipulation, page 11 of the State of Case, covered only that portion of the claim which was paid under the agreement between the parties made on September 28th, 1943, but did not cover the amount in controversy in this action. We are sure that the respondent will admit that that is the fact.

The claim was not liquidated except by reason of the agreement referred to above which provided for the payment of part of the claim without prejudice to either party in relation to the balance. The company, therefore, should not be prejudiced and forced to pay interest, if it is determined that assured is entitled to a recovery, until the entry of judgment. The stipulation as to the amount of assured's claim is in lieu of proof by it but is not a liquidation of the claim as of any date.

Respectfully submitted,

GENNET & RAFNER,
Attorneys for Defendant-Appellant.

SAMUEL A. GENNET,
Of Counsel.

This cause is to be argued orally
by SAMUEL A. GENNET.

The first part of the report deals with the
 general situation of the country and the
 progress of the work during the year.
 It is followed by a detailed account of
 the various projects and the results
 achieved. The report concludes with
 a summary of the work done and
 the prospects for the future.

The second part of the report deals with
 the financial statement for the year.
 It shows the income and expenditure
 and the balance sheet at the end of
 the year. The financial statement is
 followed by a statement of the
 assets and liabilities of the
 organization.

The third part of the report deals with
 the personnel and the work done by
 the staff. It shows the number of
 staff members and the work done by
 each of them. The report concludes
 with a statement of the work done
 by the staff during the year.

The fourth part of the report deals with
 the general administration of the
 organization. It shows the work done
 by the various departments and the
 results achieved. The report concludes
 with a statement of the work done
 by the various departments during
 the year.

The fifth part of the report deals with
 the general administration of the
 organization. It shows the work done
 by the various departments and the
 results achieved. The report concludes
 with a statement of the work done
 by the various departments during
 the year.

New Jersey Court of Errors and Appeals

UNITED DELIVERIES, INC., a corporation, Plaintiff-Respondent, <i>vs.</i> NORWICH UNION FIRE INSURANCE SOCIETY, LTD., a corporation, Defendant-Appellant.	}	Action at Law. On Appeal from Essex County Circuit Court. Sat Below: William A. Smith, C. C. J.
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**BRIEF ON BEHALF OF
PLAINTIFF-RESPONDENT.**

Preliminary Statement.

This cause was submitted for determination by the Essex County Circuit Court without a jury on an agreed statement of facts signed by counsel for the parties. Respondent's *prima facie* case was established by the following facts set forth in the stipulation (S. C., p. 9):

(1) The issuance by appellant to respondent of the policy on which this action is based insuring among others, against the hazard of theft of merchandise from respondent as a common carrier. (Par. 2).

(2) The theft of two loaded trucks from respondent's premises on May 1, 1943, on account of which respondent became legally liable to the owners of the merchandise for \$6,882.27. (Par. 3).

(3) On September 28, 1943, appellant paid respondent the sum of \$3,370.08 without prejudice

to either party in relation to the balance of \$3,512.19 as to which appellant denied legal liability.

Respondent having thus made out its *prima facie* case the burden was upon appellant to establish the affirmative defenses upon which it grounded its denial of legal liability.

The Second and Third Separate Defenses in the Answer of appellant were eliminated as a result of the stipulation of facts. The trial Court ruled against appellant on the remaining issues which may be summarized as follows:

(1) Appellant's First Separate Defense (S. C., p. 6) rests flatly upon an interpretation of the policy absolving it from liability for any merchandise in respondent's possession or custody for a period in excess of 48 hours. Respondent admits that the unpaid portion of the loss resulting from the theft represents merchandise which had been in respondent's possession at its receiving and loading terminal more than 48 hours, but denies that the policy provisions reasonably indicate or require the construction urged by appellant. The Court below properly ruled (S. C., p. 19) that the limitation of 48 hours was not applicable to goods loaded on respondent's trucks preparatory to leaving the premises.

(2) The Fourth Separate Defense (S. C., p. 7) pleads that "Plaintiff increased the hazards of the risk by failing to have a sufficient number of employees present at the time of the alleged loss contrary to the terms, conditions and covenants of the said policy." The relevant policy provisions are not pleaded. The policy in suit does not contain an increase of hazard clause such as is found in the standard form of fire insurance policy. Appellant has attempted to support this

defense by reference to clause 18 (S. C., p. 29, g) of the long typewritten form attached to the policy. Respondent contends that cause 18 clearly has no application whatever where, as here, neither truck contained 200 or more cases and the lower court so found (S. C., p. 21).

(3) Appellant asserts that respondent's claim is not liquidated and, therefore, if respondent prevails in this cause there should be no award of interest. It is respondent's contention, and the Court below so ruled (S. C., p. 21), that the claim is liquidated. When appellant made part payment of the claim and denied legal liability as to the balance there remained no factual issue as to the amount outstanding, the sole question being as to whether appellant was legally obligated to pay anything.

ARGUMENT.

POINT I.

Respondent is entitled to favorable interpretations of all ambiguities in the policy.

It is the general rule, well established in New Jersey, that contracts of insurance not on standard forms prescribed by the legislature and containing ambiguous wording will be most strongly construed against an insurer rather than the insured. This proposition is founded upon sound public policy since the party responsible for the uncertain language employed has himself brought on any controversy arising therefrom. In applying the doctrine of *verba chartorum fortius accipiuntur contra proferentem* in the case of *Stone's Adm'rs. v. United States Casualty Co.*, 34 N. J. L. 371 (Sup. Ct. 1871), Chief Justice Beasley stated at page 375:

“A qualification of the agreement so restrictive of the rights of the party insured ought not to be admitted, unless the terms of this endorsement will bear no other rational interpretation. If the terms used are imperfect or ambiguous it is the fault of the defendants; it is their contract, and the construction of it must be most strongly against them—*contra proferentes*.”

The Court of Errors and Appeals has repeatedly followed this doctrine. In *Smith v. Fidelity and Deposit Co.*, 98 N. J. L. 534 (E. & A. 1923) this court stated at page 536:

“It is a settled rule in the construction of contracts of insurance, that policies of insurance will be liberally construed in favor of the assured so as to uphold the contract; *Snyder v. Dwelling House Insurance Co.*, 59 N. J. L. 544; *Rickerson v. Hartford Fire Insurance Co.*, 149 N. Y. 313.

“So in the event of an ambiguity in the terms of the policy, a meaning should be given which is most favorable to the assured. *Rickerson v. Hartford Fire Insurance Co.*, *supra*; *May Ins.*, P. 175; *1 Joyce Ins.*, P. 221 (2d ed.); *9 Corp. Jur.* 1096, P. 205.”

The *Smith* case dealt with a private contract of insurance in relation to which the legislature had not seen fit to prescribe a standard form. That is the type of policy involved in this action as distinguished from the standard form of fire policy as to which the Court of Errors and Appeals pointed out the applicability of a different rule of construction in a case decided at the same term of court as the *Smith* case. In *Del Guidici v. Importers Ins. Co.*, 98 N. J. L. 435 (E. & A. 1923), Chancellor Walker stated for the court concerning the construction of a standard fire policy (at 436-437):

“This is but the assertion of the familiar doctrine that a policy of insurance is to be construed most strongly against the company writing it. But, with reference to the policy in this case, we have a somewhat different situation. The State of New Jersey has enacted that fire insurance policies shall conform in all particulars as to contract, provisions, agreements and conditions, with a certain standard, and that no other or different provisions, agreement, condition or clause shall in any manner be made a part of such policy, &c. See the act of April 3d, 1902, concerning insurance. 2 *Comp. Stat.*, p. 2862, § 77. And the policy in the case before us is a standard policy. This makes pertinent the doctrine of *Mick v. Corp. of Royal Ex., &c.*, 87 N. J. L. 607, in which it was decided that where a policy of fire insurance is written in a standard form approved by governmental authority, as is this one, the maxim *Verba chartarum fortius accipiuntur contra proferentum* has no special application.”

To use the language of Justice Depue “no rule of law is more salutary than that conditions in these instruments (policies of insurance) expressed in terms ambiguous and capable of misleading, shall not be allowed to avoid the contract.” *Snyder v. Dwelling House Ins. Co.*, 59 N. J. L. 544, 550 (E. & A. 1896). The basic principle has for the same underlying reasons been carried into other fields of insurance. *Mackinson v. Fidelity & Casualty Co.*, 72 N. J. L. 29 (Sup. Ct., 1905); *Clayton v. General Accident*, 104 N. J. L. 364 (E. & A., 1928); *Prahm v. Prudential*, 97 N. J. L. 206 (E. & A., 1922); *Shapiro v. Metropolitan Insurance*, 114 N. J. E. 378 (E. & A., 1933).

Appellant has asserted at page 5 of its brief that the policy was evidently the result of negotia-

tions between the parties and that the "policy was delivered to the assured, the long endorsement was delivered and the one containing the clause in controversy was delivered." The record is entirely devoid of any proof upon which such an assertion may properly be grounded. Appellant's contention is presumably based on the fact that the countersignature by appellant's agent appearing at the foot of the first printed page (S. C., p. 29, a) shows it to have been formally issued January 21, 1943, whereas the insuring clause at the top of the same page and several of the riders are dated December 9, 1942. There may have been many reasons for this, viz, the policy could have been made retroactive to December 9th because on that date a binder had been issued and about six weeks elapsed before the policy itself was formally issued.

In any event, however, if appellant considered the alleged negotiations material to the issues of this case, the lower Court should have been afforded in the stipulation of facts a recital of the evidence on this subject. The stipulation is entirely silent on this subject. The case is, therefore, in the posture of the many cases in our reports in which assureds brought actions on policies not in forms prescribed by legislation and in which our courts applied the rule of construction set out at the beginning of this point. A policy is unlike the usual form of bilateral contract signed by both parties thereto. The policy in suit contains only signatures of appellant's agent. In the absence of evidence to the contrary in the stipulation of facts the policy must be considered as the product of appellant through its underwriters and agents, in the matter of the phraseology.

Appellant on pages 4 and 5 of its brief urges that it was the duty of the insured to examine

the policy and to reject if it did not like any of its terms. The general doctrine of *Crescent Ring Co. v. Travelers Indemnity Co.*, 102 N. J. L. 85 (E. & A., 1926) cited by appellant is not material to the facts of this case because here the respondent is not claiming that a provision which appellant's agent orally represented would be in the policy was not actually there. The assured in that case did not examine the policy until a loss occurred about a year and a half after its issuance. The insurance company denied the authority of the agent to promise terms not in the written contract. Accordingly, the *Crescent* case is clearly distinguishable because the assured there attempted to hold the company to an agent's verbal promise whereas in this case the assured says merely that a limitation introduced by appellant does not have the limiting effect on liability which appellant claims. A question of construction of an ambiguity in the written instrument is not affected by the retention of the instrument by either party.

Accordingly, any ambiguity this Court may find in the language of the policy of the instant case must be resolved against the appellant insurance company because, under the authorities cited above, it is considered the party who drafted the policy and was responsible for the ambiguity. Under such circumstances, the respondent as the innocent party having no responsibility for the ambiguous language should have the benefit of a favorable construction which will retain the effectiveness of the insurance coverage.

POINT II.

The trial court properly found that the reasonable construction of the policy as written does not support the first separate defense. In any event, however, the rule of construction of any ambiguities against appellant so as to uphold rather than defeat the contract supports the judgment below.

The original policy which will be available for inspection by the Court during argument of this appeal is disorderly in form and makeup. The photostatic copy included at page 29 of the State of Case affords by merger of various endorsements a more orderly appearance than the original. To avoid the confusion which still persists the following analysis of the surviving printed conditions and the six pages of riders and endorsements is submitted for the guidance of the Court.

(a) In the introductory printed provisions (S. C., p. 29, a) which customarily define the liability undertaken we find the language used that "This insurance is to indemnify the Assured * * * only to the amount which they are obliged to pay by reason of their legal liability as a carrier, bailee or warehouseman * * * on account of direct loss or damage caused by perils hereinafter stipulated to lawful goods and merchandise carried for hire, consisting of liquors only while loaded in or on vehicles described below owned and operated by the Assured while in due course of transit in the custody and control of the Assured * * *."

(b) The subject of coverage is further dealt with in the first three paragraphs of the long un-

dated rider (S. C., p. 29, d) the first paragraph of which expands the underwriter's liability by making the policy apply "* * * on shipments of lawful goods or merchandise, *the property of others while same are in the custody or possession of the Assured* or in transit on motor trucks or trailers owned or operated by or for the Assured, including motor trucks or trailers owned by others and operated in connection with the business of the Assured, within the Continental United States and Canada." (Italics ours throughout.)

(c) Paragraph 2 of the rider is significant on the breadth of the coverage in stating that "Insurance hereunder attaches as and when liability of the Assured first begins and continues until safely delivered to consignee at final destination * * *." Under this paragraph the assured was entitled to believe that from the moment liquors came into its possession it was insured against the specified hazards until safe delivery to the consignees.

(d) Paragraph 3 of the rider deals with maximum limits of liability. The second sentence, however, contains the first mention of terminals and garages, the language being that "in respect to merchandise while on or off vehicles *in the terminals of the Assured and/or in any garage while the merchandise is in due course of transportation*, this Company shall not be liable to pay more than TWENTY-FIVE THOUSAND (\$25,000.00) Dollars." The reasonable construction of this sentence is that stopovers at garages were contemplated, whether for repairs or for other reasons, and that in such event the specified limit of liability should apply to merchandise on or off the vehicles in such garages or at the assured's terminals.

(e) Paragraph 4 confirms the breadth of coverage by specifically mentioning the hazards of theft, non-delivery or hi-jacking.

(f) The controversial portion of the policy is found in that clause of the rider dated December 9, 1942 (S. C., p. 29, c) which reads as follows:

“Also with respect to risk in terminals, this insurance shall cover the liability of the assured (as defined in this policy) while the property insured is temporarily detained in garage or garages (including garages of the assured) for a period of 48 hours, except when a Sunday or Legal Holiday intervenes and then for the extra time of such Sunday or Legal Holiday.”

Appellant seeks to have this provision interpreted as an exclusion clause. Had that been the intention of the parties the proper place for this clause would have been in clause 5 of the long typewritten form (S. C., p. 29, d) which lists certain types of assured's legal liability which were excluded from the policy coverage. The provision in question if intended as an exclusion of appellant's liability would normally have been inserted by way of an amendment to clause 5 and would have read substantially as follows:

“To goods in possession of the assured for more than 48 hours, not counting Sundays or Legal Holidays.”

This would at least have had the merit of clarity. The assured would have been put on notice that in effect it had coverage for a period of 48 hours from the time of receipt of merchandise, and it could then have made an intelligent decision either to accept or reject a policy so strictly limited.

As a further aid to the Court in construing the intention of the parties with respect to coverage, attention is directed to the fact that the policy is of the reporting variety. Under the terms of paragraph 7 of the undated rider (S. C., p. 29, e) supplemented by the "Motor Truck Gross Receipts Endorsement (S. C., p. 29, g) (printed form 654, dated December 9, 1942), premiums are determined by a formula for making monthly payments to the appellant of \$2.00 per \$100 of respondent's gross monthly receipts (whether collected or uncollected). Thus, every shipment received by respondent for delivery entered into the calculation of its gross receipts and in turn of the premium due appellant; but appellant, nevertheless, argues that although it became entitled to the premium thereon it was relieved of all liability on merchandise in the possession of respondent for more than 48 hours. So drastic a limitation should have been clearly expressed in the policy.

If the construction advanced by appellant were adopted it would defeat the very purpose of the policy by severely curtailing the coverage. Is the necessary or reasonable construction of the controversial provision the one urged by appellant? A negative answer is required for several reasons.

(1) The foregoing analysis of the policy indicates that the coverage provisions are broad and that the controversial clause added by the short rider of December 9, 1942, had a limited purpose.

(2) To arrive at the purpose of the clause it must be borne in mind that appellant's form of Motor Carriers Cargo Liability Policy was written to cover various kinds of common carrier operations. It contemplates carriers whose opera-

tions do not require the trucks to return daily to the principal or home terminal. Such carriers might have subsidiary terminals at which trucks might be required to pick up additional merchandise or spend the night pending the completion of a given route or set of deliveries. Moreover with the hazards to which automotive vehicles are subject it might become necessary for the driver of a truck either fully or partially loaded with merchandise to take it to a garage for repairs. It is the latter contingency which the provision in controversy was intended to cover. That this is the reasonable construction of the provision is indicated by the words "while the property insured is *temporarily detained* in garage or garages (including garages of the assured) for a period of 48 hours * * *." This limitation of liability while the insured property was in such garages was obviously grounded upon the greater danger of theft or hijacking while a truck with insured merchandise was undergoing repairs or was stored in a place open to the general public, some of whom might be tempted by the nature of the commodities carried.

(3) As evidenced by the stipulation of facts in the instant case, the premises occupied by respondent were used for the collection and distribution of traffic and did constitute an end point in its pattern of delivery routes. All the facilities and appurtenances were integral parts of a terminal and did not change the essential character of the premises. The first reference in the policy to terminals is in the second sentence of paragraph 3 of the undated rider (S. C., p. 29, d) which speaks of "merchandise while on or off vehicles in the terminals of the Assured and/or in any garage while the merchandise is in due course of transportation." In connection with respondent's business of common carriage, the reasonable

meaning of this phrase is that it referred to merchandise in two stages, i. e., (1) goods which were on the regular loading platforms, vehicles or in the storage areas of the assured's terminal and (2) goods which were in the process of being delivered after leaving the terminal but which were on a vehicle that had stopped at a garage en route.

"Terminal" is again mentioned in paragraph 18 of the undated rider (S. C., p. 29, g) which refers to any truck or trailer "at the time of departure from the Assured's terminal," and again in paragraph 19 of the same rider which speaks of "the terminal of the Assured at No. 34 Longworth Street, Newark". There is no room for doubt that appellant, in writing the policy, knew that the premises at 34 Longworth Street were in fact a terminal. Since the endorsement of March 9, 1943 (Stipulation, par. 2, S. C., p. 9) changed the address of respondent to 482 Washington Street without altering the coverage of the policy, the latter was substituted as respondent's principal terminal.

(4) The only reasonable reconciliation of the policy provisions would appear to be as follows:

Clause 1 of the long typewritten form provides broad coverage of merchandise "in the custody or possession of the Assured or in transit on motor trucks * * *."

Clause 2 broadly states that insurance attaches throughout the Assured's period of liability, including its liability for returned shipments "until safely returned to the shipper."

Clause 3, when read with the references to assured's terminal in clauses 18 and 19, recognizes the premises described as a unit different from, and independent of, what is contemplated by the phrase "and/or in any garage while the mer-

chandise is in due course of transportation." The assured's home terminal was obviously not regarded as a garage within the meaning of clause 3, but as the starting point for the reception and loading of merchandise on trucks which might "in due course of transportation" for one reason or another have to enter a "garage."

The controversial addition is obviously an after-thought, as is the entire rider dated December 9, 1942. What did the draftsman acting for appellant mean by the introductory language "Also with respect to risk in terminals"? It was probably his way of connecting the addition with clause 3 of the long typewritten form, which mentions (a) terminals and (b) garages in which insured merchandise is located while "in due course of transportation." Clause 3 fixed a limit of monetary liability at such locations. The draftsman apparently wished to add a limit of time during which appellant would be liable for merchandise which had left the assured's terminal but was "temporarily detained in garage or garages" while, as stated in clause 3, it was "in due course of transportation." It is significant that the word "terminals" is not again mentioned in the addendum, the restrictive language of which refers to temporary detention in garages.

Appellant has argued the phrase in parentheses "including garages of the assured" imports also the home terminal of respondent if that be a garage (which is denied and dealt with *infra*). A more reasonable interpretation of this language is that where the assured "in due course of transportation" orders its vehicles carrying insured merchandise to stop at its own or another's garage, whether for repairs or to receive additional cargo if such garage was also a subsidiary terminal used by the assured, then the policy would

continue to cover the merchandise for 48 hours during such temporary detention while en route. The words "*temporarily detained in garage or garages*" furnish the key to the problem of construction. There was no temporary detention of anything at respondent's home terminal. Merchandise was received there to be transported by respondent. It had to be loaded on a vehicle and placed "in due course of transportation" in order to be in a position where it could thereafter be "temporarily detained in garage or garages."

Notwithstanding the reasonableness of this construction appellant has pleaded that it is not liable under the 48 hour addendum, which means that it considers respondent's home terminal as a garage. The stipulation of facts has attached to it a photostatic copy (S. C., p. 31) of a plan of respondent's premises at the time of the theft (par. 8) and recites the facts pertinent to this question in paragraphs 9 and 10. One gasoline pump was maintained to supply respondent's vehicles with fuel, which was never sold to others. All other servicing of respondent's vehicles was done by independent contractors at their own places of business. Assuming the relevancy of the question, it is submitted that the single pump did not convert respondent's terminal into a garage within the meaning of the 48 hour addendum.

The term "garage" has been adopted into the English language from the French, and in a fashion similar to its predecessor, the livery stable, has been taken to mean a place where motor vehicles can be sheltered, stored, repaired and made ready for use, *Woods v. Kiersky*, 14 S. W. (2d) 825; *Northern N. J. Oil Co. v. Newark*, 6 N. J. Misc. R. 698 (Sup. Ct. 1928) or as a place where vehicles are kept for hire. *Grimes v. State*, 200 S. W. 378.

It has been held that the mere physical structure of a building is not the determining factor in deciding whether it is a garage; rather, it is the primary intention of the occupant as manifested by his user which becomes the guide to any such classification. Thus, in the case of *Woods v. Kiersky, supra*, a municipal ordinance required that all private garages be built at the rear of the lot upon which they were erected. The defendant prepared to build a structure which would not be at the rear of his lot, with the intention of using the ground floor for his automobiles and to have servants' quarters overhead. In granting an injunction against the further development of the building, the court held that it was a garage and then said at page 828:

“The mere fact that a part of the building is to be used for servants' quarters, or sleeping apartments, would not prevent the building from being a private garage within the meaning of the ordinance, if its essential character and dominant features are those of a garage.

“As a consequence of what we have said, it follows also that the mere fact that a building, whose essential character and dominant features are for purposes other than those of a garage, that may contain places or apartments for the storage of motor cars, such, for instance, as private residences containing such features, would not be garages * * * .”

In *Bourgeois v. Miller*, 89 N. J. Eq. 285 (1918) which disposed of a restrictive covenant alleged to prohibit the construction of a public garage, our Court of Chancery recognized this rule by stating that “the restriction relates solely to the nature of the business and not to the type of the building.”

In applying the definition of a garage as a place where motor vehicles are sheltered, stored, repaired, made ready for use or kept for hire, care must be taken to determine whether such services represent the principal feature of the occupant's business or whether they are merely incidental to a regular business of another nature. In *Red Arrow Garage Co. v. Carson City*, 225 P. 487 (1924), the defendant was engaged in the general garage business and in connection therewith he sold gasoline. Although a local ordinance had levied a license fee upon all garages and a second fee on all sales of gasoline, the defendant refused to pay the latter on the ground that such sales were part of his garage business and that to pay would in effect subject him to double taxation. The court unequivocally ruled that the sale of gasoline is no more a part of the garage business than it is of the grocery business. The same case holds that repair work is one of the determining characteristics of garages as they are known today.

In the instant case there never was any sale of gasoline on the premises of respondent nor any repair work. The gasoline pump as such did not represent a source of income, nor was it available for general use. It was employed solely as an incident to the respondent's business of common carriage and was there as a matter of convenience so that fuel could be supplied the trucks while loading operations were continued. The hazards incident to garage operations were either admittedly absent or appellant would not have recognized the premises as respondent's terminal in lieu of the one at 34 Longworth Street (Stipulation, par. 2, S. C., p. 9).

At page 7 of its brief appellant has questioned the soundness of the trial court's conclusion that

the controversial paragraph was not governing in this case. In ruling upon the first separate defense, the trial court held that (1) the printed provisions of the policy covered the loss of goods while loaded in or on a vehicle while in due course of transit and (2) the typewritten endorsements extended the coverage to goods intended to be transported but not yet on the assured's trucks. The court then found that the property was on the trucks in due course of transit, namely, loaded preparatory to leaving the terminal on its journey.

It is submitted that the court did not err in its conclusion. The second paragraph of the introductory printed provisions of the policy (S. C., p. 29, a) provides for the indemnification of the assured on account of loss to goods "while loaded in or on vehicle (s) * * * owned and operated by the assured while in due course of transit in the custody and control of the assured." Appellant would have us believe that the phrase "while in due course of transit" is applicable only to vehicles which are actually in motion en route to a given destination. To adopt this narrow construction would be against sound public policy since it would preclude otherwise valid claims for loss by every assured whose vehicles had come to rest momentarily. This Court has already refused to follow so strict a rule. See, *J. G. Ries & Sons, Inc. v. Automobile Insurance Co.*, 121 N. J. L. 493, 497 (E. & A. 1939). Other jurisdictions have also liberally interpreted the phrase "in transit". *Loesch v. Union Casualty & Surety Co.*, 176 Mo. 654, 75 S. W. 621 (1903); *Hailey v. Oregon Short Line R. Co.*, 253 Fed. 569 (D. C. Idaho, 1918). In the latter case, the ruling of the court (at page 571) is eminently pertinent to the issue involved herein:

“To say that the phrase ‘in transit’ is applicable only while a shipment is actually moving is to give it an unusual and strained construction. Ordinarily a shipment is understood to be in transit from the point of origin until it reaches the point of destination. So long as it is in the course of being delivered to the place to which it is being shipped, it is in transit. A piece of baggage billed from New York to Boise is in transit all the time it is in the possession of the carrier for delivery at Boise—just as much when it is upon a car standing at a station, pursuant to or awaiting orders, or upon a truck or station platform for transfer to another car, en route, as when it is upon a car moving 40 miles an hour. Not only would we do violence to the ordinary meaning of the phrase if we hold that here it is to be understood as equivalent to ‘while actually moving’, but such a construction would necessarily result in absurd distinctions.”

In the instant case the finding by the court below that the goods were in transit is clearly sustained by the facts. Paragraph 3 of the stipulation showed that the goods were removed from the loading platforms by the assured during the early morning hours and placed in the trucks in readiness for the operating crews. Even assuming that there could be some doubt as to whether goods standing on the loading platforms were in transit, such doubt cannot reasonably attach to goods which were segregated, prepared for delivery and placed on board the vehicles so that no delay would ensue when the operating crews appeared on the scene.

It is respectfully submitted, therefore, that even without the aid of the principle of strict construction against appellant discussed under Point I, the reasonable construction of the policy is that merchandise was covered at respondent's

terminal from the time it was received by respondent until it was delivered to the consignees or returned to the shipper (clauses 1-3) irrespective of whether it remained there longer than 48 hours. Should the Court find the controversial addendum ambiguous, the analysis of the policy and the addendum as set forth in this Point should be applied to uphold the contract against the party which required premiums to be paid on gross income and sought at the same time to limit its entire liability at respondent's home terminal to 48 hours by a clause which neither laymen nor lawyer would so read.

POINT III.

The defense of increase of hazard cannot properly be asserted under the facts of this case.

Appellant's fourth separate defense rests upon clause 18 of the long typewritten rider (S. C., p. 29 (g)) which, as set forth in the policy, reads as follows:

"18. It is hereby agreed that any truck or trailer carrying a shipment of 200 cases of liquors, wines and/or beer at the time of departure from the Assured's terminal, * shall have at least one employee in addition to the driver, failing which the Company shall not be liable for any loss or damage caused by theft, hi-jack, or non-delivery in respect of such shipment

* and at all times when 200 or more cases are at risk thereon."

Appellant would have us believe that this is an increase of hazard clause such as is contained in the standard form of fire insurance policy which provides that "This entire policy shall be void * * * if the hazard be increased by any means

within the control or knowledge of the insured". Such is not the case, since the clause in question merely required the attendance by one employee in addition to the driver upon "any truck or trailer carrying a shipment of 200 cases". Appellant can have no justification for claiming that this condition applied to this loss since paragraph 3 of the stipulation (S. C., p. 10) clearly states that "Neither of the stolen trucks carried 200 cases of merchandise".

Appellant, however, seeks to stretch the meaning of clause 18 by asserting that the phrase "and at all times when 200 or more cases are at risk thereon" refers to the assured's premises, thereby embracing merchandise not only on the vehicles but on the loading platforms and storage space as well. When the clause is read as a whole, the argument is utterly without basis. It was the purpose of this provision to assure adequate protection to each individual large shipment by a driver's helper not only at the moment "of departure from the Assured's terminal" but also while the vehicle was upon the public highways and 200 or more cases were still at risk thereon. Were this not so, why would the clause require one employee "in addition to the driver"? Obviously, if the clause referred to 200 or more cases in assured's terminal a driver would not necessarily be the person selected to stand guard with the additional employee.

Furthermore, if appellant's interpretation were ascribed to clause 18, it would render superfluous clause 19 which required only "one employee in attendance at all times" at assured's premises. In relation to this clause let it be said that, notwithstanding appellant's reference to the fact that the watchman employed by respondent was 77 years of age, there was no requirement

in the policy as to the age of any employee in attendance. The last sentence of paragraph 4 of the stipulation (S. C., p. 11) reads: "The above mentioned premises had at least one employee in attendance 24 hours a day". This satisfies the requirements of clause 19 and distinguishes on its facts the instant case from *J. G. Reis & Sons, Inc. v. Automobile Insurance Co.*, 121 N. J. L. 493 (E. & A. 1939) cited on page 8 of appellant's brief since in the latter case it appeared that although the policy had required one attendant at all times the property was protected merely by periodic inspection of the outside doors by a watchman in the joint employ of the carrier and other business concerns. It is respectfully submitted, therefore, that there is no basis in the policy or in fact for the so-called increase of hazard defense.

POINT IV.

The trial court did not err in awarding interest to respondent.

It is well settled by this Court that the question of interest is resolved entirely upon whether the claim involved was liquidated or unliquidated. Paragraph 6 of the stipulation of facts (S. C., p. 11) establishes that appellant paid respondent \$3,370.08 on a claim of \$6,882.27 and that as to the balance "defendant denied legal liability". The entire claim was one of a liquidated nature from the date of the theft because its ascertainment depended merely upon the totalling of the invoices covering the merchandise on the stolen trucks. Certainly, however, when appellant made part payment and denied legal liability as to the balance of the claim, that balance was liquidated and appellant is liable for interest thereon. *J.*

Jacob Shannon v. Continental Casualty Co., 106 N. J. L. 200, 206 (E. & A. 1930); *Bohles v. Prudential Insurance Co.*, 84 N. J. L. 315 (E. & A. 1913); *Ciccione v. Colonial Life Ins. Co.*, 110 N. J. L. 276 (E. & A. 1933).

Conclusion.

It is respectfully urged for the reasons set forth above that the judgment in favor of plaintiff-respondent be affirmed, with costs.

Respectfully submitted,

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NATHAN L. JACOBS,
Of Counsel

This cause is to be argued orally
by NATHAN L. JACOBS.

1. The first part of the paper is devoted to a
description of the material used in the experiments.
The material is a mixture of ...
The results of the experiments are given in ...
The following table shows the results of the experiments.

Conclusions

The results of the experiments show that the ...
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Acknowledgments

The author wishes to thank ...

Received ...

The work is to be published in ...

