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Complaint.

Filed May 16th, 1930.

NEW JERSEY SUPREME COURT, BERGEN COUNTY.

MAY WERNER and ANTHONY
WERNER, her husband,

Plaintiffs,

vs.

COMMONWEALTH CASUALTY
COMPANY,

Defendant.

Action at Law.

10

Plaintiffs, residing in the Township of Lyndhurst, County of Bergen and State of New Jersey, say:

20

1. On or about the 5th day of December, 1929, plaintiff May Werner was lawfully upon a certain public highway known as Ridge Road, in the Township of Lyndhurst, County of Bergen and State of New Jersey.

2. On the above mentioned date, the plaintiff was struck by an automobile, owned and operated by one Joseph Bongiorno, along the aforesaid highway, in a careless and negligent manner, as a result of which, plaintiff May Werner was seriously injured.

30

3. As a result of the injuries sustained by the plaintiff May Werner, suit was instituted in the Bergen County Court of Common Pleas on behalf

40

Complaint.

of May Werner and Anthony Werner, her husband,
for damages resulting from said accident.

10 4. Said case was tried in the Common Pleas
Court at Hackensack on the 28th day of April,
1930. On said date, judgment was entered in the
sum of Nine Thousand (\$9,000.00) Dollars in favor
of the plaintiff May Werner and Three Thousand
(\$3,000.00) Dollars in favor of Anthony Werner,
her husband, against the defendant, Joseph
Bongiorno.

20 5. Subsequent thereto, execution was issued and
returned unsatisfied by the Sheriff of Bergen
County.

6. Prior to December 5th, 1929, the defendant
company had issued a certain insurance policy to
said Joseph Bongiorno, which was binding on the
aforesaid date, insuring him against suits arising
out of personal injuries sustained by anyone, due
to the operation of his automobile.

30 7. Said policy of insurance was in full force and
effect on December 5th, 1929.

8. Plaintiffs contend that pursuant to Chapter
153 of the Laws of 1924, the defendant company is
liable for the amount of the judgment, to wit,
Twelve Thousand (\$12,000.00) Dollars, obtained in
favor of the plaintiffs and against the defendant,
Joseph Bongiorno, together with the costs of said
suit.

40 9. Proper demand has been made upon the de-
fendant company to pay the judgment mentioned

Answer.

above, but the defendant company has wholly failed to do so.

10. Plaintiffs demand as damages the sum of Twelve Thousand (\$12,000.00) Dollars, plus costs of court.

10

Judgment will be claimed in the sum of Twelve Thousand (\$12,000.00) Dollars, plus interest and costs of court.

BRESLIN & BRESLIN,
Attorneys for Plaintiffs.

20

Answer.

Filed June 4th, 1930.

The defendant, answering the complaint in the above matter, says that:

1. It has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1, 2, 3, 4 and 5.

30

2. It denies paragraphs 6, 7 and 8.

3. It admits paragraph 9.

MORRISON, LLOYD & MORRISON,
Attorneys for Defendant.

40

Reply.

Filed June 10th, 1930.

The plaintiffs by way of reply to answer filed by the defendant, say that:

10 They deny the truth of each and every allegation contained in paragraphs one and two of the answer.

BRESLIN & BRESLIN,
Attorneys of Plaintiffs.

Testimony.

Hackensack, N. J.,
June 26, 1931.

20

Before—Honorable EDWIN C. CAFFREY, Judge.

APPEARANCES:

For the Plaintiffs, Messrs. BRESLIN & BRESLIN, by John J. Breslin, Jr., Esq., and John E. Selser, Esq.

30 For the Defendant, Messrs. MORRISON, LLOYD & MORRISON, by Francis V. D. Lloyd, Esq.

40 Mr. Breslin: In case No. 246 on the present list, May Werner and Anthony Werner, her husband, against the Commonwealth Casualty Company, counsel have agreed that this case shall be tried by the Court without a jury, in view of the fact that both counsel agree that the issue involved is one of law alone, no question of fact being involved. Is that right, Mr. Lloyd?

Testimony.

Mr. Lloyd: Yes, that is so.

The Court: Stipulate your facts.

Mr. Breslin: It is stipulated—

The Court: This is a suit on an insurance policy?

Mr. Breslin: Yes. Suit is brought pursuant to Chapter 153 of the Laws of 1924, incorporated in a certain insurance policy issued by the Commonwealth Casualty Company, the defendant in the present action, to one Joseph Bongiorno. 10

It is stipulated that on the 5th day of December, 1929, the plaintiff, May Werner, was lawfully on a public highway known as Ridge Road, in the Township of Lyndhurst, County of Bergen and State of New Jersey; on that date she was struck by an automobile owned and operated by one Joseph Bongiorno; as the result of the injuries sustained suit was subsequently instituted in the Bergen County Court of Common Pleas, and on April 28, 1930, judgment was entered in the sum of \$9,000, in favor of the plaintiff, May Werner, against Joseph Bongiorno, and in favor of the plaintiff, Anthony Werner, in the sum of \$3,000 against the said Joseph Bongiorno. 20

The Court: Do you want to stipulate as to judgment? 30

Mr. Lloyd: I will just check a record. I have never seen it.

The Court: If there is any dispute, you better call the County Clerk.

Mr. Lloyd: There will not be a dispute, I am sure. That is all right, \$9,000 and \$3,000, as Mr. Breslin said.

Mr. Breslin: And the costs on the judgment amounted to \$65.76. 40

Testimony.

10 Subsequent to the entry of the judgment an execution was issued to the Sheriff of Bergen County, which was returned to the County Clerk on May 19th, said execution being returned unsatisfied because of insolvency, because of the fact that the Sheriff could not find any property of Bongiorno. After the execution was returned unsatisfied this action was brought. Due demand has been made upon the defendant company, and they have refused to pay said sum.

It is further stipulated that the policy which I will now offer in evidence was the one which was issued to Bongiorno.

Mr. Lloyd: All right.

(Policy marked Exhibit P-1.)

20 Mr. Breslin: And it is further stipulated that the plaintiff, May Werner, who recovered a judgment of \$9,000, was and is the wife of Anthony Werner, who recovered a judgment in the sum of \$3,000.

It is further stipulated that the car operated by the said Bongiorno at the time of the accident was the automobile mentioned in the policy.

We rest.

30 Mr. Lloyd: Now, if the Court please, it is stipulated that on October 3, 1929, a notice for cancellation of this insurance policy marked P-1 was mailed by registered mail addressed to Mr. Joseph Bongiorno, 102 Sherman Avenue, Clifton, N. J., which is the address of the assured, as contained in the policy.

The Court: What number is that, 102 Sherman Avenue?

Mr. Lloyd: 102 Sherman Avenue.

40 The Court: Clifton?

Mr. Lloyd: Clifton.

Testimony.

Mr. Selser: And that the letter, which is the one that you are now offering in evidence, was mailed in the envelope accompanying the letter.

Mr. Lloyd: That is it.

Mr. Breslin: I think, in view of the importance of this letter, we ought to have it marked so that there can be no doubt that this particular memorandum is the letter that was enclosed in that envelope, because that letter, in my opinion, is very crucial. 10

Mr. Lloyd: I will offer it in evidence.

Mr. Breslin: All right.

Mr. Lloyd: And I will offer in evidence at this time a copy of the notice of cancellation dated October 3, 1929.

The Court: When did this accident take place? 20

Mr. Breslin: It is conceded that the accident happened subsequent to the alleged cancellation.

Mr. Lloyd: It happened in December.

Mr. Selser: December 5, 1929.

The Court: After the date of the notice?

Mr. Lloyd: After the date of the notice, and after the day within which is the cancellation date of the policy.

The Court: No dispute that the premium was paid? 30

Mr. Lloyd: We come to that next. I am going to offer in evidence at this time Automobile Cancellation Notice No. 40846 of the Commonwealth Casualty Company, Philadelphia, Pa., to Joseph Bongiorno, 102 Sherman Avenue, Clifton, N. J.

The Court: You better do that. I take it the notice was never delivered?

Mr. Lloyd: Yes, sir. We will introduce the 40

Testimony.

envelope which shows that it was returned unclaimed.

The Court: In other words, it was mailed and returned to the company, undelivered?

Mr. Lloyd: Undelivered.

10 The Court: To the addressee?

Mr. Lloyd: Yes, sir, which notice provides, "Please take notice that Policy No. 301374 issued to you by the Commonwealth Casualty Co., Philadelphia, Pa., is hereby cancelled, pursuant to the terms and provisions in said policy contained. Such cancellation to take effect on the 8th day of October, 1929, at noon, standard time, at the place where said policy was countersigned. Please take
20 special notice that all liability of said Commonwealth Casualty Company under said policy will absolutely cease at noon October 8, 1929 unless surrender thereof to said company be sooner made.

Very truly yours, E. W. Cook, Vice President.

Countersigned at Newark, N. J., this 3rd day of October, 1929, by E. W. McDonough & Co., authorized representative."

(Paper marked Exhibit D-1.)

Mr. Lloyd: I offer also in evidence the envelope
30 addressed to Mr. Joseph Bongiorno, 102 Sherman Avenue, Clifton, N. J., containing in the upper left hand corner, "E. W. McDonough Co., Insurance, 17 Academy Street (at Broad Street), Newark, N. J.," containing the rubber stamp mark "Registered," "Personal receipt demanded," and the number, "384501," containing also the number, "21787," and the stamp of the United States Post Office with a hand containing "Return to the writer unclaimed from Clifton, N. J.," and containing the Post Office
40 stamps on the back of the envelope.

Testimony.

The Court: What is the cancellation date on the stamp?

Mr. Lloyd: October 3rd, October 4th, October 7th. I can't tell whether it is October 7th. There is a 7 in there, 1929.

The Court: Can you see the cancellation on the stamp? 10

Mr. Lloyd: No. It is just one of those black blotches.

(Envelope marked Exhibit D-2.)

Mr. Lloyd: And the receipt of the Newark Post Office, acknowledging the receipt from E. W. McDonough & Co., five pieces of registered mail, including the letter in question, addressed to Joseph Bongiorno, 102 Sherman Avenue, Clifton, N. J.

(Receipt marked Exhibit D-3.) 20

(Discussion off record.)

The Court: There is an admission that this policy was issued to the assured?

Mr. Lloyd: Yes, sir.

The Court: And the policy, at the time of its issuance, of course, was in full force and effect?

Mr. Lloyd: Yes, sir.

The Court: Of course it has to be. You cannot very well claim a revocation of something that never existed. 30

Mr. Lloyd: No. And that E. W. McDonough & Co. were the duly authorized agents of the Commonwealth Casualty Company.

Mr. Breslin: In fact, as I remember it, the Commonwealth Casualty was in McDonough's office; they were practically the same.

Mr. Lloyd: Yes.

Testimony.

The Court: It is admitted the premium was paid?

Mr. Lloyd: But, if the Court please, if they are going to raise the question of the return of premium—

10 Mr. Breslin: We are not raising that. We say that there was a policy of insurance issued, and the sole issue in this case is whether or not it was effectively cancelled.

Mr. Lloyd: The question of cancellation may depend upon the question of the return of premium. That is the only thing. And I want to forestall all those things, and it is only fair to you, so that nobody will come back at a later date and say,

20 “Judge, how about this?”

(Discussion off the record.)

Mr. Breslin: I will call Mr. Lloyd unless he will stipulate that he acted as attorney for the Commonwealth Insurance Company and he made a settlement with Senator Simpson's office whereby a boy by the name of Teffinger received approximately \$4,500 in settlement for an accident which happened prior to October, 1929.

Mr. Lloyd: I think that I can —

30 The Court: Under this policy?

Mr. Breslin: Under this policy, in July. The accident happened in July, 1929, and as a result of that accident suit was started by Senator Simpson's office, and Mr. Lloyd, representing the same defendant company, made this settlement of \$4,500.

Mr. Lloyd: Do not get this in the record because I am not stipulating that until I am sure.

Mr. Breslin: All right.

40 Mr. Lloyd: I will stipulate that Stephen Tef-

Testimony.

finger, an infant, by his next friend, Barbara Teffinger, and W. Teffinger, individually, as plaintiffs, brought suit against Joseph Bongiorno, this defendant; that it arose out of an accident which occurred on the 29th day of July, 1929, and that Joseph Bongiorno was the owner and operator of the automobile, and I defended that case and filed an answer in his behalf on the instructions of the Commonwealth Casualty. 10

Mr. Selser: And that the car involved was the car insured by this policy.

Mr. Lloyd: Yes.

The Court: So, as I take it from that, the policy was in effect from the date of its issuance, and the defendant admits it was in effect up to the time of the cancellation. 20

Mr. Lloyd: Exactly.

The Court: So there is no question about the legality of the issuance of the policy?

Mr. Lloyd: None whatsoever, sir.

The Court: Is there anything else?

Mr. Lloyd: Yes. I will call Mr. McDonough.

EDWARD W. McDONOUGH, called as a witness on behalf of the defendant, being duly sworn, testifies as follows: 30

Direct Examination by Mr. Lloyd:

Q. Mr. McDonough, what is your position with the Commonwealth Casualty Company? A. General agent for Northern New Jersey.

Q. In addition to that are you an officer of the company? A. Resident vice president.

Q. And you were on June 11th of 1929? A. Yes. 40

Edward W. McDonough—Direct.

Q. And you were during the entire month of October, 1929? A. Yes.

Q. Are you familiar with the policy which was issued to Joseph Bongiorno, which is the subject of this suit, calling your attention to Exhibit P-1?

10 A. Yes, I am familiar with it.

Q. Are you familiar with the details of that policy and the cancellation thereof? A. Yes.

Q. Was the premium ever paid on that policy? A. No.

Q. On whose application was that policy written? A. Mr. Eastwood.

Q. What is the name of Eastwood? A. Thomas E., I think it is, Eastwood, Passaic.

20 Q. Who is Thomas Eastwood? A. A broker, a licensed New Jersey broker.

Q. Did you at any time after October 3, 1929, and prior to December 5, 1929, notify Eastwood that this policy had been cancelled?

Mr. Breslin: I object to that, if your Honor please. It is strictly a policy of insurance. Whether or not it was effectively cancelled depends upon the terms of the policy.

30

The Court: I will allow the question.

A. Yes.

Mr. Breslin: I further object, that there is no evidence of any agency that binds Bongiorno, in so far as this witness is concerned.

The Court: Of course that is another question.

40

Mr. Lloyd: That is all.

Edward W. McDonough—Cross.

Cross Examination by Mr. Breslin:

Q. Are you familiar with the claims filed in your office? A. Some of them.

Q. Were you familiar with the Teffinger claim filed under this policy? A. No, I don't recall the claim. 10

Mr. Lloyd: I object to that as immaterial.
The Court: It is not cross examination.

Q. You say the premium was not paid? A. It was not paid to us.

Q. Well, when, if ever, did you demand from Eastwood that he forward to you the premium for this policy? A. Probably on a monthly statement. 20

Q. Probably. Well, the policy was supposed to have been issued in June, wasn't it? A. Right.

Q. When would the next monthly statement go out? A. We would demand the premium approximately 90 days after the issuance of the policy.

Q. And if it was not paid within 90 days you would cancel for non-payment of the premium, wouldn't you, ordinarily? A. Ordinarily, yes. 30

Mr. Breslin: That is all.

Re-direct Examination by Mr. Lloyd:

Q. Did you cancel this policy for non-payment of premium? A. We cancelled the policy by request of the company.

Q. And is that a duplicate original of the bill which you sent to Eastwood for the earned pre- 40

Edward W. McDonough—Re-direct.

mium and to the date of cancellation (handing paper to witness)? A. This is an original.

Q. Sir? A. This writing is original.

Q. Is it a duplicate original? A. Yes, sir.

Q. Was a bill for that amount sent to Eastwood?

10 A. It was.

Mr. Lloyd: I offer it in evidence.

Mr. Breslin: Is that in your handwriting?

The Witness: No, sir.

Mr. Breslin: Did you send the bills out?

The Witness: Personally?

Mr. Breslin: Yes.

20 The Witness: No.

Mr. Breslin: I object.

The Court: Of course that is only a copy anyhow.

Mr. Breslin: He says this is the original.

Mr. Lloyd: He says it is the duplicate original.

Mr. Breslin: Self-serving, no proof of mailing, or anything else.

30 The Court: No, there has been no proof of mailing.

Q. Do you know that Eastwood was billed for this earned premium up to the time of cancellation?

Mr. Breslin: I object to that.

A. Yes, I know.

40 Mr. Lloyd: If he knows.

Mr. Breslin: If he knows.

Edward W. McDonough—Re-direct.

Q. From your knowledge was Eastwood billed for that earned premium up to the time of cancellation?

Mr. Breslin: Well, that would be based upon what someone told him he did. 10

The Court: Unless he knows personally.

A. I know positively. I have a letter in my files, a copy of a letter sent to him.

Mr. Breslin: You did not send the letter?

The Witness: Our office did.

Mr. Breslin: Well, you did not send the letter yourself? 20

The Witness: Sent under my supervision.

Mr. Breslin: Yes, but you did not mail the letter out; you did not sign the letter?

The Witness: Absolutely no. I mail probably a thousand letters a day. I can't mail them all.

Mr. Breslin: That is the point. I object.

By the Court: 30

Q. Can you say personally, Mr. McDonough, of your own knowledge, whether or not you ever mailed that letter, whether that was mailed out?

A. I know personally it was mailed, yes, your Honor.

Mr. Lloyd: Are you satisfied?

Mr. Breslin: Go ahead. 40

Edward W. McDonough—Re-cross.

Mr. Lloyd: The testimony is permitted to stand, your Honor?

The Court: As is.

Mr. Breslin: Yes.

Mr. Lloyd: That is all.

10

Re-cross Examination by Mr. Breslin:

Q. You say the policy was cancelled on orders of the company? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Who gave the order? A. The home office wrote us a letter.

Q. To cancel the policy? A. Yes, sir.

20

Q. Because of the fact that Bongiorno had had this serious accident with young Teffinger, wasn't that the sum and substance of it? A. No; they didn't mention that fact.

Q. What fact did they mention? A. Cancel the policy.

Mr. Breslin: That is all.

Mr. Lloyd: I have the letter, if you would like to see it, Mr. Breslin, instructing him why.

30

Mr. Breslin: That is all.

The Court: Have you any other witness?

Mr. Lloyd: May I have your Honor's indulgence? That is all.

40

Thomas E. Eastwood—Direct.

PLAINTIFFS' REBUTTAL.

THOMAS E. EASTWOOD, called as a witness on behalf of the plaintiffs, being duly sworn, testifies as follows:

10

Direct Examination by Mr. Breslin:

Q. Mr. Eastwood, where do you live? A. My home address?

Q. Yes. A. 576 Madison Avenue, Paterson.

Q. How long have you lived in Paterson? A. 32 years.

Q. What is your business? A. Insurance.

Q. How long have you had business dealings with the Commonwealth? A. I think this enters into my ninth year. 20

Q. With the Commonwealth Company? A. That is right.

Q. Are you still doing business with them? A. Yes.

Q. Has any suit ever been started against you on the Bongiorno policy?

Mr. Lloyd: I object, if the Court please. 30

Mr. Breslin: I will reframe the question.

Mr. Lloyd: There is only one question here, if it please the Court.

Mr. Breslin: What is the question? If you will stipulate the question is cancellation, well and good, we do not have to go into it; but you have brought up a new question this morning, about the premium being paid.

40

Thomas E. Eastwood—Direct.

Mr. Lloyd: That was one question you seemed to have.

The Court: I will sustain the objection to that question.

10 Q. Did you forward the Bongiorno premium to Mr. Eastwood? A. I presume my office did.

Q. To Mr. McDonough? A. My office did, yes.

Cross Examination by Mr. Lloyd:

Q. When was that premium forwarded to McDonough? A. Well, I can't tell you the exact date, but if the—may I make—

20 Q. No, do not make any speeches. When did you forward the premium? A. I don't remember.

Q. You don't remember. Are you sure that you forwarded that premium? A. Yes, positive.

Q. Absolutely positive. And did you get a receipt from the company? A. I presume so.

Q. Well, do you know whether you did or not? A. Well, we always have, but there has been instances when we didn't.

30 Q. Do you remember receiving a bill from the company for \$86.83? A. You must remember, Mr. Lloyd, I receive plenty of bills like this.

Q. Do you remember getting that bill from the Commonwealth for the earned premium, to the date of cancellation? A. I don't remember any particular bill like this, no.

40 Q. Do you remember getting a letter from E. W. McDonough & Company on October 16, 1929, enclosing that statement, showing an earned premium? A. Well, we get bills on various policies for

Thomas E. Eastwood—Cross.

different reasons. I do not deny that this came in. It may.

Q. How was payment made to McDonough? A. My payments are made to McDonough, Mr. McDonough's office. It was customary to mail me or send me a statement, including every item due the company, when it got around 60 days old, and that statement was taken and given to my stenographer, and typed, and a check mailed, well, for whatever the statement was. It might have been \$1,500, \$2,000. 10

Q. When would you say this premium was paid, then? A. Well, I would think that would be paid in my regular June account.

Q. Do you remember writing the company on September 16th, asking them to issue a cancellation notice on the above assured for non-payment of premium, and forward duplicate copy of the same to this office at your early convenience, and oblige? Do you remember that? A. No, I don't. May I see it? 20

Q. Is that your letter? A. It is not my signature.

Q. Is that your letter? Did you dictate that? A. Unquestionably, it went out of my office, but the premium was paid after that date. 30

Q. That is September 16, 1929? A. Yes.

Q. That is your letter sent to McDonough's office? A. That is right.

Q. Requesting them to cancel the premium.

Mr. Lloyd: I offer it in evidence.
(Paper marked Exhibit D-4.)

Thomas E. Eastwood—Cross.

Q. Now, do you remember receiving that letter from E. W. McDonough & Company (handing paper to witness)? A. Yes, I remember this. I remember my footnote on the bottom of this letter.

10 Q. Your footnote on there, addressed to Miss Black? A. That is right.

Mr. Lloyd: I offer it in evidence.
(Paper marked Exhibit D-5.)

Q. Have you any record here in Court with you—
A. No, I have not Mr. Lloyd.

Q. Wait a moment. A. I beg your pardon.

20 Q. Have you anything here to show that that premium was paid by you to McDonough, of the Commonwealth? A. No, I have not.

Q. Have not anything.

The Court: Could you produce anything at another time?

30 The Witness: Your Honor, I probably could, unless those records have been destroyed. The situation is, if you will allow me to say so, that if the premium was not paid the company would most certainly cancel it for non-payment. That notice—the policy was not cancelled for non-payment of premium. The policy was cancelled as assuming the risk was undesirable.

Q. And you will testify that you paid to the Commonwealth, or to McDonough, the premium on the Bongiorno policy? A. As far as my knowledge,
40 yes.

Thomas E. Eastwood—Cross.

Q. You remember that you paid it? A. Not that one specific item, but it was unquestionably paid.

Q. Do you remember that it is paid, this particular and specific item? A. No, because I am dealing with hundreds of items, Mr. Lloyd.

Q. Then this particular testimony which you gave as to this particular case, that the premium on this particular policy of Bongiorno was paid, is not correct, is it? A. I presume it was paid. 10

Q. Well, do you know whether this particular premium on this particular policy was paid to the Commonwealth or to McDonough? A. I don't know just how to answer that, Mr. Lloyd. I am trying to—for instance, in every account—

Q. Do you know or do you not know? A. I would say that the premium was paid. 20

Q. You are certain of that? A. Positive.

Q. Positive that the premium was paid? A. Yes.

Re-direct Examination by Mr. Breslin:

Q. You say that the policy was cancelled, not for non-payment of premium, but because of the undesirability of Bongiorno? A. Yes, Mr. Breslin. It is even customary now— 30

The Court: No, never mind that.

Q. That is the information you received from McDonough? A. Yes.

Mr. Breslin: That is all.

Defendant's Surrebuttal.

Marie Black—Direct.

MARIE BLACK, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

Direct Examination by Mr. Lloyd:

10

Q. Miss Black, you are employed by McDonough & Company? A. Yes, sir.

Q. In what capacity? Speak up, please? A. As Mr. McDonough's secretary.

Q. I show you Exhibit D-5 and ask you if you received this letter back and the bill, which was contained therein, from Mr. Eastwood? A. Yes, sir.

20

Q. And is that the bill which you sent to him and which he returned in there? A. Yes, sir.

Mr. Lloyd: I ask that it be marked in evidence. It is the original.

(Paper marked Exhibit D-6.)

Q. Now, Miss Black, does this letter contain any memorandums of yours? A. You mean written on there?

30

Q. Yes. A. Yes. I called Mr. Eastwood on it.

Q. On what date?

Mr. Breslin: I object to what she did with Eastwood. There is nothing here to show he is our agent.

Mr. Lloyd: But he has testified that the premium was paid.

The Court: An agent for the purpose of effecting the policy, not for any subsequent acts that would bind—

40

Marie Black—Direct.

Q. Did you talk to Mr. Eastwood on that day, October 18, 1929?

Mr. Breslin: Objected to.

The Court: I will permit this, not as being evidence in the sense that it might be a declaration which would bind Bongiorno, but it might be something now which would affect Eastwood's credit. I will admit it for that purpose only. 10

Mr. Lloyd: That is what the purpose of it is.

A. I called him, according to this memo on here.

Q. Did you talk to him by telephone? A. Yes. 20

Q. You spoke to Mr. Eastwood? A. Yes.

Q. And you had talked to Mr. Eastwood on a number of occasions? A. Yes, many times.

Q. What did he say to you at that time concerning the premium on this policy? A. Well, he told me what he said at the bottom of the letter, that it was out of order, that he personally called up to have it reinstated three weeks ago. He told me that he spoke to Mr. McDonough about it, to have it reinstated. I went in and spoke to Mr. McDonough about this same thing. 30

Q. You spoke to Mr. McDonough about it? A. Yes. I told him I would take it up with Mr. McDonough.

Q. Now, did you write this letter, enclosing this bill to Eastwood? A. No, I gave it to one of the girls to write.

Q. You dictated that to one of the girls? A. Yes.

Q. And was the bill that you enclosed in there, 40

Marie Black—Cross.

the bill for the premium which was due to McDonough or the Commonwealth Casualty Company, as of the date of October 8, 1929? A. Just as it states on the bill.

Q. Just as it states on the bill? A. Yes.

10 Q. Was the premium on this policy paid to McDonough & Company or the Commonwealth, by Eastwood? A. No.

Mr. Lloyd: That is all.

Cross Examination by Mr. Breslin:

Q. Miss Black, you were familiar with this Bongiorno policy? A. Yes, sir.

20 Q. And you know the reason the Home Office cancelled this policy was because of the fact that he was involved in a case in Paterson and was receiving a lot of publicity, isn't that the truth? A. No, I don't know.

Q. You do not know? A. I know they requested the policy to be cancelled.

30 Q. They requested the policy to be cancelled because of the undesirable publicity that he had received in a certain case in Paterson? A. That I couldn't tell you.

Q. You say you got a request from the Home Office to cancel this policy, isn't that correct? A. Mr. McDonough got the request.

Q. What was in that request? A. That Mr. McDonough knows.

Q. Just cancel it? A. Simply a request for cancellation of the policy.

40 Q. No reason given? A. No, sir.

Mr. Breslin: That is all

Victor F. Schmidt—Direct.

Re-direct Examination by Mr. Lloyd:

Q. Did you see the letter which came from the Home Office, addressed to Mr. McDonough, a letter from Mr. Keller? A. No.

Q. Did you ever see that letter requesting cancellation? A. I don't remember, Mr. Lloyd. I couldn't tell you. 10

Mr. Lloyd: That is all.

VICTOR F. SCHMIDT, called as a witness on behalf of the defendant, being duly sworn, testifies as follows:

20

Direct Examination by Mr. Lloyd:

Q. Mr. Schmidt, you are employed by the Commonwealth Casualty Company? A. Yes, sir.

Q. In what capacity? A. Collection Manager.

Q. Are you familiar with the account of Joseph Bongiorno that was carried on the books of your company? A. Yes, sir.

Q. Are you familiar with the books of account of the company? A. That is correct. 30

Q. Can you tell us whether the books of account of the Commonwealth Casualty Company show that the premium on the Bongiorno policy, Exhibit P-1, was ever paid? A. The books of the Commonwealth show that the premium was not paid.

Mr. Lloyd: Was not paid. That is all.

40

Victor F. Schmidt—Cross.

Cross Examination by Mr. Breslin:

Q. Are you working for the Commonwealth now?

A. Yes, sir.

10 Q. How long have you worked for them? A.
Since October 6th of 1930.

Q. October 2nd, 1930? A. October 6th.

Q. Pardon. A. 6th, 6th of October.

Q. In other words, you did not go to work for
the Commonwealth until October 6th, 1930? A.
That is correct.

20 Q. You do not know what happened in June,
1929, at the office in Newark, do you, of your own
knowledge? A. I have the opportunity to verify
the records.

The Court: No.

Q. Where were you in June, 1929? About the
summer of 1929, where were you working? A. In
Jersey City.

Q. Pardon? A. Jersey City.

Q. For whom? A. Hudson Casualty Company.

30 Q. Hudson Casualty Company, not the company
involved in this suit? A. No.

Mr. Breslin: That is all.

Mr. Lloyd: That is the case.

The Court: All right. I will take the papers.
I want all the exhibits.

I would like a memorandum from both sides.

40 Mr. Breslin: May it please the Court, for the
purpose of the record, there is one other issue that
has to be decided by your Honor, and that is the

Victor F. Schmidt—Cross.

amount of the verdict that will be entered in this case, providing we prevail. Under the case of Migatz against The Jersey Mutual Taxicab Company, there was a policy for \$5,000. The policy provided for the loss for any one judgment resulting in bodily injuries to, or in the death of any person, in a sum not to exceed \$5,000, and there were two judgments, and we respectfully hold and are quite confident that we will prevail to the extent of \$12,000 in this case, under that decision. 10

The Court: You know more about that than I do at the present time.

Mr. Lloyd: There is different language in that policy from the policy in question.

I move for a direction of a verdict in favor of the defendant, Commonwealth Casualty Company, and against the plaintiffs, on the ground that the insurance policy mentioned in the complaint was cancelled prior to the 5th day of December, 1929, and that this cancellation was effected by notice to the assured, and also by notice to Thomas E. Eastwood, the agent for the assured, all in accordance with the terms of the policy marked Exhibit No. P-1. 20

(Memorandums to be submitted July 15, 1931.) 30

Exhibit P-1.**AUTOMOBILE POLICY****COMMONWEALTH CASUALTY CO.
PHILADELPHIA, PENNSYLVANIA.**

10 (A Stock Company)

INSURING AGREEMENTS

herein called the Company, in consideration of the premium herein provided, and of the Declarations forming a part hereof, and subject to the EXCLUSIONS and CONDITIONS hereinafter contained, DOES HEREBY AGREE, as respects accidents occurring within the United States of America and
20 Dominion of Canada during the period of this policy, as follows:

LEGAL LIABILITY FOR BODILY INJURIES OR DEATH

(1) To pay all sums which the Assured shall become liable to pay as damages imposed by law for bodily injuries (including death at any time resulting therefrom) caused as the result of the ownership, maintenance or use of any automobile described in said Declarations, but not exceeding the
30 limits of insurance expressed in paragraph 9 of the Declarations;

**LEGAL LIABILITY FOR DAMAGE TO PROPERTY OF
OTHERS**

(2) To pay all sums which the Assured shall become liable to pay for damages imposed by law on account of damage to or destruction of property of any description (including loss of use thereof
40 and damage or destruction by fire) caused by the

Exhibit P-1.

ownership, maintenance or use of any automobile described in said Declarations but not exceeding the limit of insurance expressed in paragraph 10 of the Declarations;

DEFENSE OF CLAIMS AND SUITS

10

(3) To investigate any claim for such damages and to negotiate settlement thereof as may be deemed expedient by the Company; to defend suits for such damages, even if groundless, in the name and on behalf of the Assured, unless and until the Company shall elect to effect settlement thereof;

TAXED COSTS AND INTEREST

20

(4) To pay (a) all costs taxed against the Assured in any legal proceeding defended by the Company according to the foregoing paragraph, and interest accruing upon the judgment rendered in connection therewith, (b) all premium charges on attachment or appeal bonds required in such legal proceedings, and (c) all expenses incurred by the Company for investigation, negotiation and defense; and

FIRST AID

30

(5) To reimburse the Assured for the expense incurred in providing such immediate surgical relief as is imperative at the time of the accident.

ADDITIONAL ASSURED

(6) The insurance granted by the foregoing provisions shall apply to additional assured as follows: (a) any person while riding in any automo-

40

Exhibit P-1.

10 bile described in said Declarations or while operating any automobile described in said Declarations with the permission of the Assured or any adult member of the Assured's household other than a chauffeur or domestic servant, and (b) any person,
20 firm or corporation (except automobile repair shop, garage, automobile sales agency or service station and the agents and employees thereof) for whom said automobile is being operated; provided that should any additional assured be protected by other valid and collectible insurance then no insurance under this policy shall extend to such additional assured. If an automobile covered by this policy is sold or transferred the insurance provided
20 herein shall not extend to such purchaser or transferee unless the interest in the policy is assigned in accordance with condition G hereof.

 This paragraph entitled "Additional Assured" shall not apply to any automobile leased or hired or to any automobile used for carrying passengers for a monetary consideration.

EXCLUSIONS

30 (7) NO INSURANCE IS GRANTED BY THIS POLICY

 (a) While any automobile described herein is operated by any person whose age is less than the age limit fixed by law, or under the age of sixteen years in any event;

40 (b) For bodily injuries or death suffered by employees of the Assured if such injuries or death arise out of or are sustained in the

Exhibit P-1.

course of their employment. This exclusion does not apply to domestic servants whose duties do not include the operation, maintenance or repair of any automobile;

(c) In respect of the obligations imposed upon or assumed by the Assured under any Workmen's Compensation plan or law; 10

(d) For damage to property owned by or in the custody of the Assured, or carried in or upon any automobile described in said Declarations;

(e) While any automobile described in said Declarations is operated in any race or any competitive speed test. 20

THE FOREGOING AGREEMENTS ARE
SUBJECT TO THE FOLLOWING CONDI-
TIONS:

LIMITS OF LIABILITY

A. The Company's limit of liability under Insuring Agreements (1) and (2) foregoing, to one or all Assured's in respect of each automobile described in Declaration 7 is limited to the amounts and as expressed in Declarations 9 and 10. 30

ACCIDENTS, CLAIMS AND SUITS

B. Upon the occurrence of an accident involving bodily injuries or death, or damage to property of others, the Assured shall promptly give written notice thereof with the fullest information obtainable at the time to the Company or to one of its 40

Exhibit P-1.

duly authorized agents. The Assured shall give like notice with full particulars of any claim made on account of such accident. If suit is brought against the Assured to enforce such claim the Assured shall promptly forward to the Company every summons or other process that may be served upon the Assured.

CO-OPERATION OF ASSURED

C. The Assured shall not voluntarily assume any liability, or incur any expense, other than for immediate surgical relief, or settle any claim, except at the Assured's own cost. The Assured shall not interfere in any negotiation for settlement, or in any legal proceeding, but, whenever requested by the Company, and at the Company's expense, the Assured shall aid in securing information and evidence and the attendance of witnesses, and shall co-operate with the Company, except in a pecuniary way, in all matters which the Company deems necessary in the defense of any suit or in the prosecution of any appeal, and pending the prosecution of any such appeal the Company shall not become liable to pay until final judgment has been rendered establishing Assured's liability.

INSOLVENCY OF ASSURED

D. The insolvency or bankruptcy of Assured shall not release the Company from payment of damage sustained or loss occasioned during the life of the policy, and if execution against Assured in an action for damages is returned unsatisfied because of such insolvency or bankruptcy the injured,

Exhibit P-1.

or his personal representative in case of death, may maintain an action against the Company for the amount of the judgment obtained not exceeding the limits of the policy.

SUBROGATION

10

E. The Company upon paying a loss shall be subrogated to the extent of such payment to all right of recovery against any third party, and upon such payment, or upon assuming liability therefor may require from the Assured a transfer of his rights against such third party, and the Assured shall execute all documents properly required by the Company to secure to it such rights.

CONCURRENT INSURANCE

20

F. If the Assured carries a policy of another insurer against a loss covered by this policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid and collectible insurance.

ASSIGNMENT

30

G. No assignment of interest under this policy shall be binding upon the Company unless such assignment is consented to by endorsement signed by its President, Vice-President or Secretary, but in the event of the death, insolvency or bankruptcy of the Assured within the policy period, the policy during the unexpired portion of such period shall cover the legal representative of the Assured, provided that notice in writing is given to the Com-

40

Exhibit P-1.

pany within thirty days after the date of such death, insolvency or bankruptcy.

CANCELLATION

- 10 H. This policy may be cancelled at any time by either of the parties upon written notice to the other party, stating when thereafter cancellation shall be effective and the date of cancellation shall then be the end of the policy period. If cancelled by the Assured, the Company shall receive or retain the short rate premium calculated according to the table of short rates printed hereon. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata.
- 20 tion in writing, mailed to or delivered at the address of the Assured as given herein, shall be a sufficient notice, and the check of the Company, or of its duly authorized agents, similarly mailed or delivered, shall be a sufficient tender of any unearned premium.

INSPECTION

- 30 I. The Company shall be permitted, at all reasonable times during the policy period, to inspect any of the automobiles covered by this policy.

CHANGES

- 40 J. No change in the Agreements, Exclusions, Conditions or Declarations of this policy, either printed or written, shall be valid unless made by endorsement signed by its President, Vice-President or Secretary, nor shall notice to, or knowledge possessed by, any agent or any other person,

Exhibit P-1.

be held to waive any such Agreement, Exclusions, Conditions or Declarations.

SPECIFIC STATUTORY PROVISIONS

K. If the limitation of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which it is claimed that the Assured is liable for any such loss as is covered hereby, such specific statutory provision shall supersede any condition in this policy inconsistent therewith. 10

DECLARATIONS

L. The Assured hereinbefore referred to, is the Assured designated in the following Declarations, of which those numbered one to eight inclusive, the Assured, by the acceptance of this policy, makes and warrants to be true. 20

PASTE ENDORSEMENT HERE

DECLARATIONS

1. Name of Assured Joseph Bongiorno. 30
2. Address of Assured, No. 102 Sherman Avenue. City or Town of Clifton; County of Passaic; State of N. J.
3. The Assured is Individual and the Assured's profession or business is Life Ins. Broker.
4. The automobiles described will be principally used, maintained and garaged in the City or Town of Clifton, N. J. 40

Exhibit P-1.

5. The automobiles are and will be used for the following purposes:

10 A. Truck type automobiles (if any) for transportation of materials or merchandise incidental to Assured's business or occupation, including loading and unloading.

 B. Pleasure type automobiles (if any) for pleasure and family use and business calls.

 C. Business and pleasure.

20 6. The automobiles (a) are owned by the above-named Assured, (b) will not be rented to others or used to carry passengers for a consideration, (c) are not equipped with a trailer, except as follows:

30 7. The automobiles covered by this policy and the premium charge therefor are as follows, it being understood and agreed that the Company will not be liable under either of the first two of the insuring agreements except that agreement or those agreements for which a specific premium is provided in the following table:

Trade Name of Automobile; Cadillac.

Engine Number; 326868.

Model Number of Letter 8670.

Load Cap. of Truck Seating Cap. Bus; "341B".

Kind of Power; Gas.

Year of Model; 1929.

Style of Body; Sedan.

Exhibit P-1.

Date of Purchase where Collision Endorsement Affixed to Policy; Full Coll. End. Att.	\$195.00	
Premium Charge on Account of:		
(1) Insuring Agreement	\$ 57.60	
(2) Insuring Agreement	\$ 13.75	
Total of Premiums for account of Paragraphs 1 and 2 of the Insuring Agreements.		10
Grand Total Premium	\$266.35	

8. No automobile insurance has been declined or cancelled by any company during the past three years, except as follows: No.

9. The Company's liability under paragraph (1) of the Insuring Agreements on account of bodily injuries to, or the death of, one person is limited to the sum of Ten Thousand Dollars (\$10,000) and, subject to the same limit for each person, the Company's total liability on account of bodily injuries to, or the death of, more than one person, as the result of one accident, is limited to the sum of Twenty Thousand Dollars (\$20,000). 20

10. The Company's liability under paragraph (2) of the Insuring Agreements shall in no event exceed the sum of One Thousand Dollars (\$1,000) for any one accident resulting in damage to or destruction of property of one or more claimants. 30

11. The Policy Period shall be from June 11th, 1929, 12:01 p. m., to June 11th, 1930, 12:01 A. M. standard time at the Assured's address, as to each of said dates. As respects any claim hereunder 40

Exhibit P-1.

standard time at place where injury is sustained shall apply.

10 IN WITNESS WHEREOF, THE COMMON-WEALTH CASUALTY COMPANY has this policy to be signed by its President or Vice-President and Secretary, but the same shall not be binding upon the Company unless countersigned by a duly authorized agent of the Company.

T. EASTWOOD (ZCC).

E. W. COOK,
Vice-President.

C. WM. FREED,
Secretary.

20

Countersigned, E. W. McDONOUGH & Co.,
By M. C. BLACK, *Authorized Agent.*

30

40

Exhibit D-1.

CANCELLED AT REQUEST OF BROKER.

COMMONWEALTH CASUALTY COMPANY
Philadelphia, Pa.

AUTOMOBILE CANCELLATION NOTICE

10

No. 40846

Joseph Bongiorno,
102 Sherman Ave., Clifton, N. J.

Please take notice that policy No. 301374 issued to you by the COMMONWEALTH CASUALTY CO., PHILA., PA., is hereby cancelled, pursuant to the terms and provisions in said policy contained, such cancellation to take effect on the 8th day of October, 1929, at noon, Standard Time at the place where said policy was countersigned.

20

Please take special notice that all liability of said Commonwealth Casualty Co. under said Policy will absolutely cease at noon October 8th, 1929, unless surrender thereof to said Company be sooner made.

Yours very truly,

30

E. W. Cook,
Vice President.

Countersigned at Newark, N. J., this 3rd day of October, 1929, by E. W. McDONOUGH & Co., *Authorized Representative.*

40

Exhibit D-2.

(ENVELOPE)

Exhibit D - 2

E. W. McDONOUGH & CO.

INSURANCE

17 ACADEMY ST. (AT BROAD ST.)

NEWARK, N. J.

9-2

803



264
215-6715

Rec
C-16

4421

2178

Mr. Joseph ~~George~~ ~~Henry~~ ~~W. Rich.~~
102 Sherman Ave.,
Clifton, N. J.

UNCLAIMED
From CLIFTON, N.J.

REGISTERED

Personal Receipt Demanded.

384501



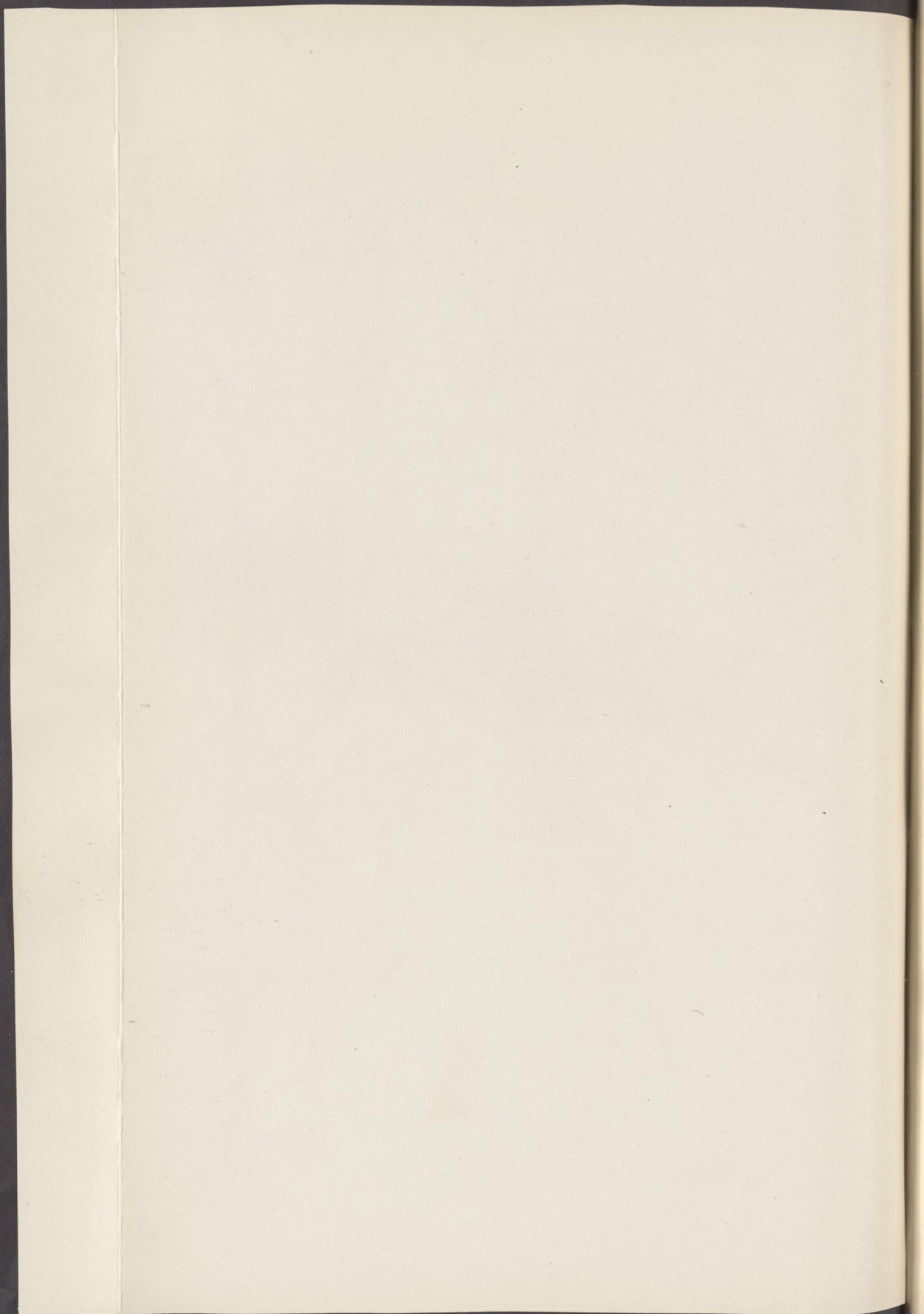


Exhibit D-3.

RECEIVED from E. W. McDonough & Co., the following-described pieces of registered mail:

No. of Article	Name of Addressee, Street, and Post Office Address	
384497	August N. J. Dunner, 13 Baltusrol Rd., Summit, N. J.	10
498	Mabel Fish, Vaux Hall Rd., Millburn, N. J.	
499	Lucy Keyes, 377-9 Main St., E. Orange, N. J.	
500	Nathan Julicy, 45 Melmore Gardens, East Orange, N. J.	
501	Joseph Bongiorno, 102 Sherman Ave., Clifton, N. J.	

Total number of pieces listed by sender, Five. 20
5:10 P. M.

Total number of pieces received at post office,
Five. Postmaster, per Saleman.

Affix stamp here for fee, if ordinary mail

(Stamp)
NEWARK, N. J.
OCT. 3, 1929
REGISTERED

30

Postmark and date of receipt

L. R. BOWDEN,
Vice President

Sept. 16
1929

20 Joseph Bongiorno
301374 Com'wlth
Issued June 11th

Please issue cancellation notice on the above assured for non-payment of premium, and forward duplicate copy of same to this office at your early convenience, and oblige

Your very truly,

THOS. E. EASTWOOD,
Agent,
Per V. D.

TEE:KQ



Exhibit D - 5

TELEPHONES { 5100 MULBERRY,
5100 SO. ORANGE

SUBURBAN OFFICE
65 SO. ORANGE AVENUE
SO. ORANGE, N. J.

E. W. McDONOUGH & CO.

INSURANCE - REAL ESTATE - SURETY BONDS

(GROUND FLOOR) ACADEMY BUILDING, NEWARK, N. J.

October 16th, 1929.

Mr. Thomas E. Eastwood,
160 Market St.,
Paterson, N. J.

Dear Sir:-

Re: 301372 - Joseph Bongiorno.

We are enclosing, herewith, statement showing an earned premium of \$86.83 due on the above captioned policy and we would ask that you kindly forward check in payment of same to this office.

Thanking you in advance, we are

Very truly yours,

M. Q. Black

mcb/cab .

For E. W. McDonough & Co.

Miss Black.
This is entirely out of
order. I personally called up
on this to re-instate over 2 weeks
ago, as we were paid the full
premium. We insure Everything
266.

Exhibit D-5.

(LETTER)

Exhibit D-6.

Telephones
Mulberry 5100
So. Orange 5100

10 To E. W. McDONOUGH & CO., DR.
INSURANCE-REAL ESTATE-SURETY BONDS
(Ground Floor) 17 Academy Street
Newark, N. J.

BRANCH OFFICE
65 So. Orange Ave.
So. Orange, N. J.

TERMS: 60 DAYS
Oct. 10, 1929.

20 T. Eastwood.

Date, Oct. 8, 29. Policy No. 301374. Company,
C. Cas. Bongiorno, E/P. P. R. Com.....
Ret. Prem..... Premium, 86.83.

30

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Opinion.

Filed August 26th, 1931.

CAFFREY, J.:

This case was tried without a jury upon stipulated facts and testimony offered by plaintiffs and defendant.

10

From the evidence, it appears that May Werner was struck by an automobile owned and operated by Joseph Bongiorno on the 5th day of December, 1929. As result of this accident, Mrs. Werner and her husband, Anthony Werner, sued Joseph Bongiorno in the Bergen County Common Pleas Court, and on April 28th, 1930, judgments were entered in favor of May Werner in the sum of \$9,000.00 and in favor of Anthony Werner for \$3,000.00.

20

Pursuant to the judgments, executions were issued against the defendant and returned unsatisfied by the Sheriff because of the insolvency of Bongiorno.

This present cause is against the Commonwealth Casualty Company, pursuant to Public Laws of 1924, Chapter 153, this generally provides that in the event of insolvency of an assured, the insurer must respond in keeping with the terms of the policy.

30

From the evidence, it appears that prior to the happening of the accident, which serves as the basis of this suit, the defendant-company paid \$4,500.00 under this policy. This removes any doubt as to the issuance of the policy and recognition of its force and effect.

The defendant-company contends, however, that at the time of the accident to Mrs. Werner, on December 5th, 1929, the policy had been cancelled pursuant to Clause H, which is the following:

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Opinion.

10 "This policy may be cancelled at any time by either of the parties upon written notice to the other party, stating when thereafter cancellation shall be effective and the date of cancellation shall then be the end of the policy period. If cancelled by the Assured, the Company shall receive or retain the short rate premium calculated according to the table of short rates printed hereon. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata. Notice of cancellation in writing, mailed to or delivered at the address of the Assured as given herein, shall be a sufficient notice, and the check of the Company, or of its duly authorized agents, similarly mailed or delivered, shall be a sufficient tender of any unearned premium."

20

From the testimony offered by plaintiffs and defendant, there is a dispute with respect to the payment of premium, however, I find as a fact that the premium was paid.

At the trial, the defendant offered in evidence, a letter addressed to the assured, Joseph Bongiorno, which reads as follows:

30

"Please take notice that Policy No. 301374 issued to you by the Commonwealth Casualty Co., Philadelphia, Pa., is hereby cancelled, pursuant to the terms and provisions in said policy contained. Such cancellation to take effect on the 8th day of October, 1929, at noon, standard time, at the place where said policy was countersigned. Please take special notice that all liability of said Commonwealth

40

Opinion.

Casualty Company under said Commonwealth Casualty Company under said policy will absolutely cease at noon October 8, 1929, unless surrender thereof to said company be sooner made.

Very truly yours, E. W. Cook, Vice President. 10

Countersigned at Newark, N. J., this 3rd day of October, 1929, by E. W. McDonough & Co., authorized representative."

The envelope marked was addressed to Mr. Joseph Bongiorno, with the following notations:

"Mr. Joseph Bongiorno, 102 Sherman Avenue, Clifton, N. J., containing in the upper left hand corner, 'E. W. McDonough Co., Insurance, 17 Academy Street (at Broad Street), Newark, N. J.' containing the rubber stamp mark 'Registered,' 'Personal receipt demanded,' and the number, '384501,' containing also the number, '21787,' and the stamp of the United States Post Office with a hand containing 'Return to the writer unclaimed from Clifton, N. J.,' and containing the Post Office stamps on the back of the envelope." 20 30

This was dated October 8th, some two months before the happening of the accident, wherein Mrs. Werner was injured.

There was no provision in the policy from the sending of a cancellation notice by registered mail, and the defendant-company by doing this, and asking for a return receipt, assumed the responsibility of personal delivery to the assured. 40

Opinion.

10 The envelope and notice of cancellation were offered in evidence and opened in Court by the counsel for the defendant, in the condition that it was returned to it by the postal authorities, at Clifton, New Jersey, so there was no question as to the non-receipt of same by Bongiorno.

20 While the facts in the case of Fritz v. Pennsylvania Fire Insurance Company, 85 Law 171, are different from those with respect to the matter *sub judice*, the language with respect to notice in order to effectuate the cancellation of policy makes it pertinent, the Court there said: "Notice, therefore, to be efficacious to cancel the policy, must have been brought home to the insured—that is, brought to his personal attention—or, at least such a situation must be brought about as to put the insured upon inquiry."

30 As this matter presents itself to this Court insofar as the assured Bongiorno is concerned, he had no notice of the gesture on the part of the defendant-company. I, therefore, find it as a fact that at the time of the happening of the accident on December 5th, 1929, the policy was in full force and effect subjecting the defendant-company to liability under it.

Judgment will be entered in favor of plaintiffs in the sum of \$10,000.00, with taxed costs issue, together with interest from April 28, 1930.

EDWIN C. CAFFREY,
Judge.

Postea.

Filed August 5th, 1931.

This case was tried before the Honorable Edwin C. Caffrey, without a jury in the Bergen Circuit, on the 26th day of June, 1931, and the Court entered a verdict in favor of the plaintiffs, May Werner and Anthony Werner, her husband, in the sum of Ten Thousand Sixty-five Dollars and Seventy-six (\$10,065.76) Cents, with lawful interest from April 28th, 1930. 10

EDWIN C. CAFFREY.

Dated, July 30th, 1931.

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30

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Judgment.

10 This case was tried before the Honorable Edwin C. Caffrey, without a jury in the Bergen Circuit, on the 26th day of June, 1931, and the court entered a verdict in favor of the plaintiffs, May Werner and Anthony Werner, her husband, in the sum of Ten Thousand Sixty-five Dollars and Seventy-six (\$10,065.76) Cents, with lawful interest from April 28th, 1930.

20 Whereupon it is adjudged that the plaintiffs, May Werner and Anthony Werner, her husband, do recover of the said defendant, Commonwealth Casualty Company, the sum of ten thousand and sixty-five dollars and seventy-six cents damages with interest from April 28, 1930, together with their costs, which have been taxed at the sum of , making in the whole the sum of .

Damages, \$10,065.76
Costs,
Int. on Damages
from Apr. 28, 1930.

Judgment entered and signed August 6, 1931.

30

WM. S. GUMMERE,
C. J.

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Notice of Appeal.

Filed August 6th, 1931.

To Breslin & Breslin, Attorneys for Plaintiffs:

TAKE NOTICE that the defendant, Commonwealth Casualty Company appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause. 10

MORRISON, LLOYD & MORRISON,
Attorneys for Defendant.

Service of the foregoing notice of appeal is hereby acknowledged this 5th day of August, 1931.

BRESLIN & BRESLIN,
Attorneys for Plaintiffs. 20

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3. Because the trial court erred by denying a motion made at the close of the case in behalf of the defendant, for a direction of a verdict in favor of the defendant and against the plaintiffs on the ground that the proofs disclosed that the insurance policy mentioned in the complaint had been cancelled prior to the fifth day of December, 1929, on which day the plaintiff's cause of action arose and consequently there could be no recovery by the plaintiffs against the defendant, to which denial the defendant prayed and was allowed an exception.

40

MORRISON, LLOYD & MORRISON,
Attorneys for and of Counsel with
Defendant-Appellant Common-
wealth Casualty Co.

New Jersey Court of Errors and Appeals

MAY WERNER and ANTHONY WERNER, her husband, Plaintiffs-Respondents, vs. COMMONWEALTH CASUALTY COM- PANY, Defendant-Appellant.	} On Appeal from Supreme Court.
---	--

BRIEF ON BEHALF OF PLAINTIFFS-RESPONDENTS.

Facts.

This case was tried in the Bergen County Circuit before the Honorable Edwin C. Caffrey, without a jury. The facts briefly, are as follows:

On the 5th day of December, 1929, the plaintiff, May Werner, was lawfully on a public highway known as Ridge Road, in the Township of Lyndhurst, County of Bergen and State of New Jersey; on that date she was struck by an automobile owned and operated by one Joseph Bongiorno; as the result of the injuries sustained, suit was subsequently instituted in the Bergen County Court of Common Pleas, and on April 28th, 1930, judgment was entered in the sum of \$9,000, in favor of the plaintiff May Werner, against Joseph Bongiorno, and in favor of the plaintiff Anthony Werner, in the sum of \$3,000, against the said Joseph Bongiorno.

After the entry of said judgment, suit was

brought pursuant to Chapter 153, Laws of 1924, (see p. 5, State of Case, lines 10 to 30). Subsequent to the entry of the judgment, execution was issued to the Sheriff of Bergen County, and returned unsatisfied, because of insolvency.

Now demand was made to the defendant company under a certain liability policy, issued to one Joseph Bongiorno. The company admitted the issuance of the policy, but refused to pay on the theory that the policy in question had been cancelled on October 3rd, 1929.

It was conceded that the accident happened on December 5th, 1929. The plaintiff contended that the defendant company had not effectually cancelled the policy in question, and the trial court so found.

Judgment was entered in favor of the plaintiffs May Werner and Anthony Werner, her husband.

The pertinent part of the policy involved in this case, concerns cancellation, and reads as follows:

“Cancellation

H. This policy may be cancelled at any time by either of the parties upon written notice to the other party, stating when thereafter cancellation shall be effective and the date of cancellation shall then be the end of the policy period. If cancelled by the Assured, the Company shall receive or retain the short rate premium calculated according to the table of short rates printed hereon. If cancelled by the Company the Company shall be entitled to the earned premium pro rata. Notice of cancellation in writing mailed to or delivered at the address of the Assured as given herein shall be a sufficient notice and the check of the Company, or of its duly authorized agents, similarly mailed or delivered, shall be a sufficient tender of any unearned premium” (Exhibit P-1, Case, pp. 28-38 at p. 34, lines 10-25).

POINT ONE.

The return of the unearned premium was a condition precedent to the effective cancellation of the policy. The Court found as a matter of fact the premium had been paid (see State of Case, p. 46 line 27). It was admitted that no tender of the unearned premium was made. The company relied on a letter of cancellation (page 8, lines 10 to 20).

In the case of Lattan vs. Royal Insurance Company, 45 N. J. L. 453, the Court held as follows:

“The refunding by the company of a ratable proportion of the premium for the unexpired term of the policy is made a condition precedent to the cancellation of the policy.”

The Court in that case, uses the following strong language:

“But the obligation of the insurer to repay or tender the ratable proportion of the premium is an essential part of the condition to be performed and a pre-requisite to the termination of the policy. Notice without repayment or an actual tender of payment is no compliance with the condition. Unless there be a waiver of repayment notice and actual cancellation by the insurer will amount to nothing.”

The policy in the Lattan case reads as follows:

“The insurance also may be at any time terminated at the option of the company, by giving notice to that effect and refunding a ratable proportion of the premium for the unexpired term of the policy.”

The policy in the instant case reads *substantially* the same. It provides:

“Notice of cancellation in writing mailed to or delivered at the address of the assured as given herein shall be a sufficient notice and a check of the company or of its duly authorized agents similarly mailed or delivered shall be a sufficient tender of any unearned premium.”

The natural and logical interpretation of this language especially when the word *and* is used, without any punctuation setting it off from the rest of the sentence, necessarily places the duty of refunding of the unearned premium by the company as an essential element to the effective cancellation of the policy. Words are to be construed according to their natural meanings. The language is clear and concise, and contains no ambiguities. The case of Davidson vs. German Insurance Company in 74 N. J. L. 487, is not in point. The policy in that case reads differently than the one under consideration. That policy provides as follows:

“This policy shall be cancelled at any time at the request of the insured or by the company by giving five days’ notice of such cancellation. If this policy is cancelled as herein before provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on the surrender of this policy or last renewal.”

The Court correctly held that the company was not obligated to return the unearned premium until the policy was surrendered. But there is no such language in the present policy. The Davidson case merely deals with the situation where notice of cancellation is the only condition precedent to the cancellation of the policy. But in the

present case, there are two conditions precedent contained in clear language in the same sentence, to wit: Notice of cancellation plus the tender of the unearned premium.

POINT TWO.

The notice of mailing was ineffective to cancel the policy: The policy provided:

“Notice of cancellation in writing mailed to or delivered at the address of the Assured as given herein shall be a sufficient notice and the check of the Company or of its duly authorized agents, similarly mailed or delivered, shall be a sufficient tender of any unearned premium” (Exhibit P-1, Case, pp. 28-38 at p. 34, lines 10-25).

The undisputed evidence is that the company forwarded a registered letter to the last known address of Joseph Bongiorno.

The respondent respectfully calls the courts attention to the following cases: “Wapnick vs. Bankers and Shippers Insurance Company of New York, and Kamille vs. Home Fire & Marine Ins. Co. of California.”

The first case, Wapnick vs. Bankers and Shippers Insurance Company of New York, was tried before the late Judge Newman, a most able and distinguished Circuit Court Judge. His opinion follows *in toto*:

“In this case the plaintiff seeks to recover the value of his interest in an automobile alleged to have been stolen, which was covered by a policy against theft issued by the defendant company. All of the facts have been stipulated in open court, excepting upon the question of whether or not the

car of plaintiff was stolen. Upon that question testimony was taken, and I find, as a fact, that it was stolen on June 8, 1924. The policy of the defendant ran from July 7, 1923, to July 7, 1924.

The defense is that the liability of the company on said policy had been cancelled prior to the date of the theft. The policy contained the following provisions:

"this policy shall be cancelled at any time at the request of the Assured, in which case the Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rate premium for the expired term. This policy may be cancelled at any time by the Company by giving the Assured a five (5) days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired term, 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. Notice of cancellation mailed to the address of the Assured stated in this policy shall be a sufficient Notice."

On May 9, 1924, the company caused to be placed in the mails, at New York, the following notice:

" *Notice of Cancellation.*

Bankers and Shippers Insurance Company
of New York
118 William Street,
New York.

May 9, 1924.

"Mr. A. M. Wapnick,
Garfield, N. J.

Dear Sir:

We hereby desire to give notice, in accord-

ance with the terms and conditions of policy No. B-239 Cert. 72946, covering your Studebaker automobile, that all liability on the part of this Company will cease five days after receipt of this registered letter, in accordance with the clause of our policy authorizing such cancellation as stated below.

The excess of paid premium above the pro rata premium for the expired term hereunder will be refunded on demand.

Very truly yours,

Banker & Shippers Insurance Company of New York,
By L. K. Franklin, Underwriter."

The notice was placed in the registered mail, the envelope addressed:

"Mr. A. M. Wapnick,
63 Harrison Ave.,
Garfield, N. J."

The envelope also contained the following:

"If not delivered in 5 days
return to
L. K. Franklin,
P. O. Box 116,
New York City.
Return Receipt Demanded."

The letter was returned to defendant.

On May 21, 1924, a notice in all respects similar was placed in the mails at New York, registered mail, addressed:

"Mr. A. M. Wapnick,
37 Lucille Place,
Passaic, N. J."

The envelope contained similar notices. It was

returned to defendant with the following notation in pencil:

"No response 5/22/24 C 60

"No response 5/23/24 Left notice to call."

The first part of the provision as to cancellation by the company is identical with the policy dealt with by the Court of Errors and Appeals in *Fritz vs. Penna. Fire Ins. Co.*, 85 L. 171; and on the question of cancellation, so far as affected by that clause, that case is dispositive of the contention of defendant in this case. In that case the insured received the letter containing the card of an insurance company with which the insured had had no dealings and therefore refrained from opening it. In the case at bar the letter contained a card of a stranger to the insured, and, furthermore, he did not receive the letter into his actual possession.

But the defendant in this case relies upon a further provision of the policy, as follows:

"Notice of cancellation mailed to the address of the assured stated in this policy shall be sufficient notice."

From that provision, counsel for defendant argues that the mailing of the notice was sufficient to cancel the policy, and that the cancellation was effective regardless of whether the insured received the notice or not.

Any efficacy which could arise from the mere mailing alone, must come from the presumption arising as to its receipt. It is settled that where a notice has been properly addressed and mailed, there is a legal presumption that such notice was received by the person to whom it was addressed. *New York Central Railroad Co. vs. Petrozzi*, 72 L. 425; *Rosenthal vs. Walker*, 111 U. S. 185.

It is unnecessary to determine what legal situation would have been presented if the company had contented itself with mailing the notice by ordinary mail, addressed to plaintiff at his address mentioned in the policy. The question here arises as to whether his failure to receive the notice into his possession was the result of any conduct on the part of the company, for, if it was, it would follow that it could take nothing by such presumption if by its own conduct it defeated the fulfillment of the very presumption upon which it relies.

Now, in mailing the notice by registered mail, with the endorsement thereon, "Return Receipt Demanded," the company in effect said to the Post Office Department, "take this letter to the plaintiff at the address indicated thereon, but do not leave it at such address unless someone authorized by the addressee to do so shall sign a receipt for it, acknowledging the receipt thereof, nor deliver it even to him personally unless he shall do likewise."

There is no evidence that such an opportunity was ever afforded the plaintiff, or anyone else, at the address designated on the envelope. As to the notice of May 21, 1924, the only one upon which there is any evidence as to its attempted delivery, the evidence shows it was returned to the sender, "No response, 5/22/24 C-60; No response, 5/23/24, Left notice to call."

There is no evidence to show that the notice ever came to the attention of the insured, and it needs no argument to demonstrate that the insured should not be bound by a notice, delivery of which was withheld by the letter carrier at the request of the sender, nor could it impose upon the insured the duty of going to the Post Office and signing a receipt for the letter, assuming that he had received the notice to call.

In connection with the mailing, however, the notice mailed must also be taken into consideration in determining the date upon which the cancellation would, if ever, become effective. This notice does not undertake to fix any definite date upon which the cessation of liability would become effective, but notifies the insured that "all liability on the part of the company will cease five days after receipt of this registered letter." Does the word "receipt," as here used, denote an actual receipt, or was the plaintiff chargeable with notice of its contents although not delivered into his possession? If the notice means actual receipt, then there was no cancellation, because the notice was never actually delivered to the insured as it came back to the defendant and was produced by it in evidence.

The registered letter contained the card of the sender, as follows:

"If not delivered in 5 days, return to
L. H. Franklin,
P. O. Box 116,
New York City."

a person not the insurer and a stranger to the transaction so far as the insured was concerned, so that he would not have been put on inquiry, if it had come to his notice and refrained from receiving or opening it at the peril of being charged with knowledge of its contents. *Fritz vs. Penna. Fire Ins. Co., Ibid.*

There being no actual receipt by the insured, and no facts appearing by reason of which he would be chargeable with knowledge of its contents, there was no cancellation and the defendant, was, therefore, liable. It was stipulated that the value of the interest of the insured in the stolen car was \$1,050.00 for which amount, with costs, judgment

should be entered in favor of the plaintiff and against the defendant.

Judge.

In the second case, Kamille vs. Home Fire & Marine Ins. Co. of Calif., Justice Mahoney wrote the following opinion:

Plaintiff claims \$2,800 damages against the defendant under a policy of theft insurance issued by defendant to plaintiff. Plaintiff's automobile apparently was stolen on July 21, 1922, and notice thereof, followed by proof of loss, was duly given to the defendant, Defendant rejected plaintiff's claim and disclaimed liability for loss on the ground that the said policy of insurance was cancelled the month previous, viz., on June 27, 1922, by a notice of cancellation mailed, registered June 22, 1922. Defendant therefore claims that the policy was not in effect at the time of plaintiff's loss nor at the time of receipt by defendant of plaintiff's notice of loss. The facts in the case are stipulated and therefore is no question about facts. Defendant's defense to the claim is based upon the cancellation clause of the policy, which provides as follows: "Cancellation—This policy shall be cancelled at any time at the request of the assured in which case the company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rate premium for the unexpired term. This policy may be cancelled at any time by the company by giving to the assured five (5) day's written notice of cancellation with or without tender of the excess of paid premium, above the pro rata premium for the unexpired term which excess, if any, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be

refunded on demand. Notice of cancellation mailed to the address of the assured stated in the policy shall be a sufficient notice. The cancellation clause is quoted on page 4 and at the top of page 5 of defendant's brief. The plaintiff admits that on June 22, 1922, the defendant duly and properly mailed to the plaintiff at No. 1750 Fifty-seventh Street, Borough of Brooklyn, a due notice of cancellation of said policy as provided for by the terms of said policy, said cancellation notice reading as follows: "Home Fire & Marine Insurance Company of California Automobile Branch, Eastern Department. Notice of Cancellation. Mr. Irving L. Kamille, 1750 Fifty-seventh Street, Brooklyn, N. Y. Dear Sir: The Home Fire & Marine Insurance Company of California hereby gives you notice that the Automobile Policy No. 55858, issued through its New York City agency to Irving L. Kamille on 1921 Lexington Automobile is hereby cancelled in accordance with the printed conditions thereof, to take effect in five days after date of this notice at which time all liability of said company thereunder will cause and terminate. The unearned premium due, if any, will be refunded on demand. Kindly return the policy to the address below. Dated at New York City this 22nd day of June, 1922. Greene & Goetschius, Inc., General Agents, 83 Maiden Lane, N. Y. City. By Secretary. By registered mail DM." In the written stipulation the plaintiff admits "5. That the said notice of cancellation mailed as hereinbefore stated reached the Brooklyn Post Office (as appears from the post mark thereon) on the 22nd of June, 1922; that the notations made by the United States postal authorities on the notice of cancellation herewith offered in evidence indicate that said notice was unclaimed

by Kamille; that efforts were made to deliver said notice to Kamille by the postman and that at least two notices were sent from the Post Office in Brooklyn to Kamille to claim the letter, failing in which the post office authorities returned the notice as unclaimed to the defendant, the said notice leaving Brooklyn on the 18th day of July and being received at the office of defendant in the morning of the 19th of July." The plaintiff, however, now claims that in view of the fact that he never received any actual notice of cancellation the policy was in full force and effect at the date of his loss and that he is therefore entitled to judgment. He further points out that upon the outside of the envelope which was addressed to him by the defendant, containing the notice of cancellation, the following printed notice appeared: "Personal receipts of addressee required," and that by reason of the envelope containing such printed notice there never was mailed to plaintiff the notice of cancellation provided for in the policy. Plaintiff claims that the mode of mailing the notice was insufficient in that the postal carrier was obliged to return the original notice to defendant for failure to obtain the personal signature of the plaintiff, to whom the notice was addressed. It would appear to me that but for the printed notice, viz. "Personal receipt of addressee required," printed on the face of the envelope addressed to the plaintiff defendant would be entitled to judgment. It does indeed seem, however, that the notice of cancellation did not permit or authorize the mailing of an envelope to the plaintiff bearing the written notice in question. Such written notice simply meant that if the addressee was not at home the time the postman called, the envelope containing the notice of cancellation could not be left at plain-

tiff's address. In this particular case it is apparent that there exists no presumption of actual receipt of the notice of cancellation by reason of the mailing of the letter in the manner above described. If the letter had been left at plaintiff's address the same might have been forwarded to him wherever he might reside. In other words, the written notice in question appearing on the envelope provided for a delivery of the letter only in case the addressee was found to personally receipt for the same. I am of the opinion, therefore, that the notice of cancellation was not mailed in the manner required by the cancellation clause of the policy. For these reasons a verdict is directed in favor of the plaintiff for the amount claimed and interest.

Justice Mahoney.

Furthermore, the logic and theory enunciated in both of these decisions is expressed in the case of *Fritz vs. Penna. Fire Ins. Co.*, 85 L. 1171. That case holds:

"Notice therefore to be efficacious to cancel the policy must have been brought home to the insured—that is—brought to his personal attention, or at least such a situation must be brought about as to put the insured upon inquiry."

In view of these decisions, it is respectfully urged that there was no effectual compliance with the terms of the policy regarding cancellation.

The case of *Raiken vs. Commercial Casualty Insurance Co.* 135 Atl. Rep. 479, cited by the defendant is not in point.

In the *Raiken* case, the failure to receive notice was caused through the negligence of the plaintiff in failing to notify the company of her change of

address. In the instant case the failure to receive notice was caused solely by the act of the defendant company in sending the notice by "Registered Mail Personal Receipt Demanded."

Furthermore in the Raiken case "personal receipt" was not demanded and hence the Supreme Court did not discuss the effect that these words would have had upon their decision.

For the reasons expressed above, it is expressly urged that the judgment be affirmed.

BRESLIN & BRESLIN,
Attorneys for Plaintiffs-Respondents.

JOHN J. BRESLIN, JR.,
Of Counsel.

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New Jersey Court of Errors and Appeals

MAY WERNER and ANTHONY
WERNER, her husband,
Plaintiffs-Respondents,

vs.

COMMONWEALTH CASUALTY
COMPANY,
Defendant-Appellant.

On Appeal.

BRIEF FOR DEFENDANT-APPELLANT.

The only question presented by this appeal is, whether the sending by registered mail (see Exhibit D-2, Case, p. 40) instead of by ordinary mail of a notice of cancellation of a policy of insurance issued by appellant, Commonwealth Casualty Company was a sufficient compliance with the following provision of its policy:

"Cancellation

H. This policy may be cancelled at any time by either of the parties upon written notice to the other party, stating when thereafter cancellation shall be effective and the date of cancellation shall then be the end of the policy period. If cancelled by the Assured, the Company shall receive or retain the short rate premium calculated according to the table of short rates printed hereon. If cancelled by the Company the Company shall be entitled to the

earned premium pro rata. Notice of cancellation in writing mailed to or delivered at the address of the Assured as given herein shall be a sufficient notice and the check of the Company, or of its duly authorized agents, similarly mailed or delivered, shall be a sufficient tender of any unearned premium" (Exhibit P-1, Case, pp. 28-38 at p. 34, lines 10-25).

to relieve it from liability to the respondents.

This question was presented at the trial before the Circuit Court, sitting without a jury, by appellant's motion for a direction of a verdict in it favor (Case, p. 27, lines 20-29). This motion was denied. The Insurance Company has appealed.

Statement.

Appellant issued a policy of insurance to Joseph Bongiorno (Exhibit P-1, Case, pp. 28-38) providing for the payment of such sums as he should become liable to pay as damages imposed by law for bodily injuries including death resulting therefrom, caused as the result of the ownership of his automobile described in the policy (Exhibit P-1, Case, p. 28, lines 23-31. The limit of the appellant's liability was \$10,000 on account of bodily injuries to, or the death of one person, and \$20,000 on account of bodily injuries to or the death of more than one person, as the result of one accident (Exhibit P-1, Case, p. 37, lines 19-27). The term of the policy was to begin on June 11, 1929, and continue to June 11, 1930 (Exhibit P-1, Case, p. 37, lines 35-38). The policy contained a provision permitting its cancellation by the Company or the Assured, which provision is quoted above (Exhibit P-1, Case, pp. 28-38, at p. 34, lines 10-25).

In accordance with the right given it under the policy, the defendant by its general agent for Northern New Jersey, E. W. McDonough & Co. (Case, p. 11, lines 36-40) on October 3rd, 1929, deposited in the United States Post Office in Newark, New Jersey (Exhibit D-3, Case, p. 41) an envelope with postage prepaid thereon, registered mail (Exhibit D-2, Case, p. 40) addressed to the insured at the address as given in the policy (Exhibit P-1, case, p. 35, lines 31-33) which envelope contained a notice of cancellation informing the insured that the policy of insurance was cancelled and that the company's liability thereunder would cease at noon, October 8th, 1929, unless sooner surrendered to the company (Exhibit D-1, Case, p. 39). The envelope and enclosure were returned to appellant's agent by the post office with the notation on the envelope "Return to the writer unclaimed from Clifton, N. J." (Exhibit D-2, Case, p. 40). On December 5th, 1929, plaintiff-respondent, May Werner was struck by the automobile of Joseph Bongiorno, and sued and on April 28, 1930, recovered judgment against Joseph Bongiorno in the Bergen County Court of Common Pleas for \$9,000 and her husband, Anthony Werner in the same action recovered judgment for \$3,000 (Case, p. 5, lines 15-29). Execution on these judgments was returned unsatisfied and suit was thereupon begun against defendant-appellant, pursuant to Chapter 153 of the Laws of 1924 (Case, p. 6, lines 1-19). The only question for the trial court to determine was whether there had been a cancellation of the insurance policy.

At the close of the case a motion was made on behalf of the defendant for a direction of a verdict in favor of the defendant (Case, p. 27, lines 20-29). The trial court decided that notice of can-

cancellation given by registered mail did not comply with the provisions of the policy and denied the motion and judgment was entered in favor of the plaintiffs and against the defendant (Judgment, Case, p. 50). Defendant appeals.

I.

The insurance policy was cancelled before the plaintiffs-respondents cause of action arose:

It was stipulated that a notice of cancellation of the insurance policy sued on was mailed by registered mail to Joseph Bongiorno at his address as contained in the policy (Case, p. 6, lines 30-37) and the notice of cancellation (Exhibit D-1, Case, p. 39), the envelope in which it was contained (Exhibit D-2, Case, p. 40), and the receipt therefore of the United States Post Office at Newark (Exhibit D-3, Case, p. 41) are in evidence.

By the terms of the policy, cancellation became effective upon notice of cancellation in writing mailed to or delivered at the address of the assured as given in the policy (Exhibit P-1, Case, pp. 28-38, at p. 34, lines 10-25).

The fact that the mailed notice was not actually received by the assured would not make the cancellation inoperative. *Raiken v. Commercial Casualty Insurance Company*, 5 N. J. Adv. Rep. p. 16 (No. 2 January 8, 1927) Reported also in 135 Atl. Rep. 479. The cited case is similar to the present case in that although notice of cancellation was mailed, the assured never received it. The Supreme Court, reversing the lower Court, held in the cited case, that the policy was cancelled. Nor is the rea-

son, or a mis-statement of the reason for cancellation material. *Pearson v. General Casualty &c. Co.*, 9 N. J. Adv. Rep. p. 301 (No. 22, May 30, 1931) nor is the return of unearned premium a condition to effective cancellation. *Davidson v. German Insurance Co.*, 74 N. J. L. 487.

Whether cancellation in the present case was effective depends solely on whether the mailing of the notice by registered mail to the address of the assured as given in the policy was compliance with the terms of the policy. In the case of *Raiken v. Commercial Casualty Insurance Co.* (supra), the provisions as to cancellation of the policy there in question were practically identical with those of the policy in the present suit. Mr. Justice Lloyd said at page 17:

“It appeared from the plaintiff’s own proofs that the insurance company on the 24th of November, 1923, caused a stamped and addressed envelope, duly sealed to be mailed to Bessie Raiken at the address named in the policy. In the envelope was enclosed a notice of cancellation of the policy for the non-payment of premiums and demanding the premium already earned of \$4.07. Mrs. Raiken did not live at No. 719 South Eleventh Street and the notice never reached her but was returned to the insurance company * * *.”

In the present case the same state of fact present themselves, except that there is no evidence in the present case that Bongiorno did not live at the address as given in the policy.

While it does not appear from the opinion in *Raiken v. Commercial Casualty Insurance Co.*

(supra) that the envelope containing the notice of cancellation was sent registered mail, an examination of the state of case in that matter discloses that the envelope was sent registered mail (State of Case—Bessie Raiken, plaintiff-appellee v. Commercial Casualty Insurance Company, Wolf Brotter, Anna Brotter, Isador Feldman and Zlotta Feldman, defendants-appellants, page 90, Exhibit P-4), a copy of Exhibit P-4 in that case being as follows:

“(Cut) Commercial Casualty Insurance
Company.
Newark, N. J.

Return to
Newark Branch Office
22 Clinton Street

(Postage Stamp)

(Stamp) Commercial Casualty Insurance
Company. Dec. 11 1923 received Newark, N. J.
G.P. 114498

(Stamp) Registered Receipt Desired 3985

(Stamp) No. 26 1923

(Two Stamps) Unclaimed.

36987

72

Registered 5961

Not there 93X 11/26/23

(Back of envelope, two stamps) Newark, N. J.,
Registered Nov 24 1923.”

It is therefore, respectfully submitted that the present case is “on all fours” with *Raiken v. Commercial Casualty Insurance Company* (supra), notice of cancellation in both cases having been sent by registered mail, and having failed to reach the insured. Therefore the notice of cancellation of

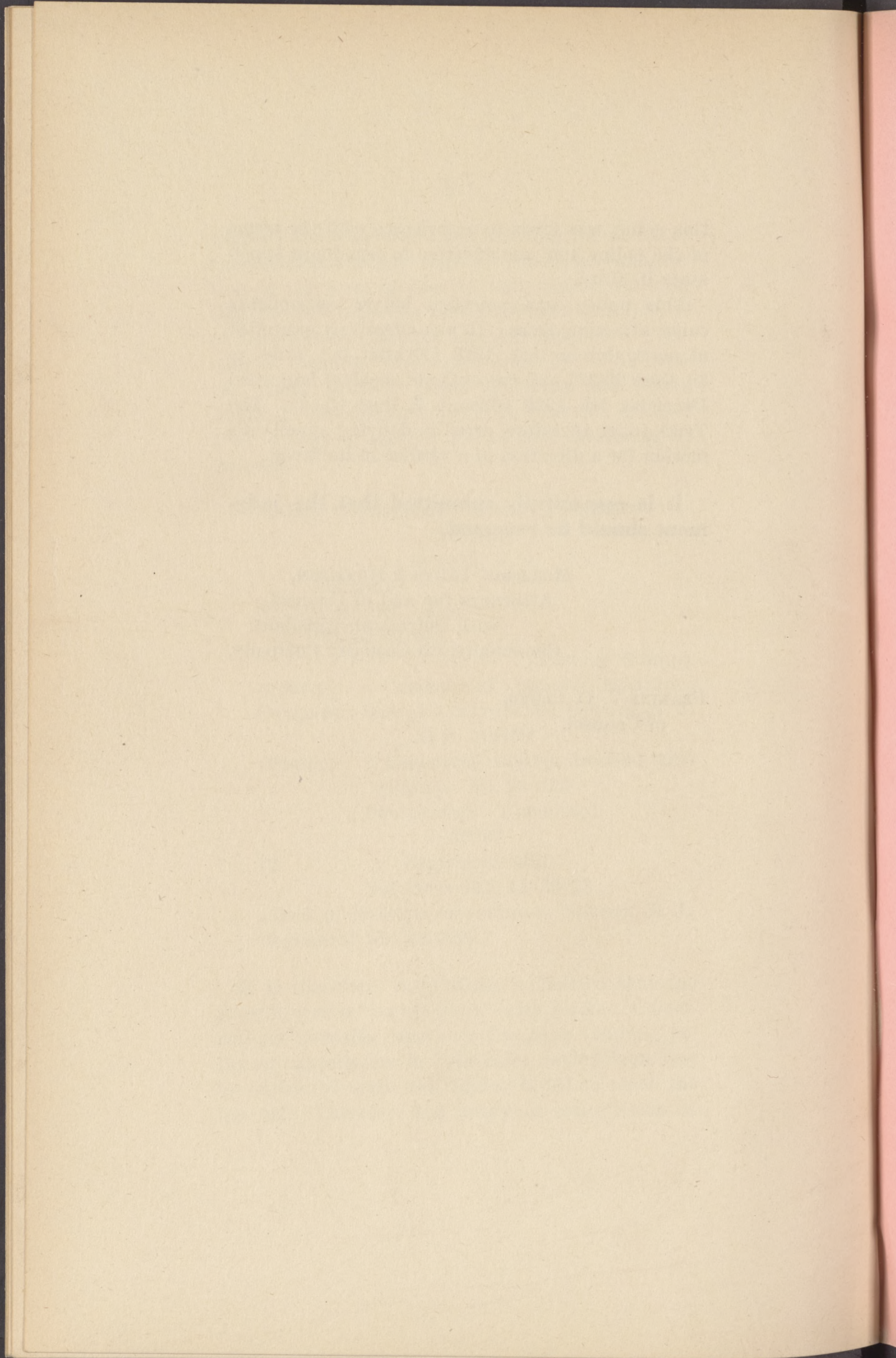
this policy was given in accordance with the terms of the policy and was effective to terminate appellants liability.

This policy was cancelled before respondents cause of action arose. It was effectively cancelled at noon, October 8th, 1929 (Exhibit D-1, Case, p. 39, lines 20-22) and respondents accident happened December 5th, 1929 (Case, p. 5, lines 15-16). The Trial Judge therefore, erred in denying appellant's motion for a direction of a verdict in its favor.

It is respectfully submitted that the judgment should be reversed.

MORRISON, LLOYD & MORRISON,
Attorneys for and of Counsel
with Defendant-Appellant,
Commonwealth Casualty Company.

FRANCIS V. D. LLOYD,
of Counsel.



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