Index.

TESTIMONY.

Complainant's Witnesses:

Witness for Defendants:

Notice of Appeal.

(Filed Dec. 21, 1934.)

IN CHANCERY OF NEW JERSEY.

102/650.

Between: CONTINENTAL CASUALTY COMPANY, Complainant, and ANGELO LANZISERO, *et als.*, Defendants.	On Bill, &c. Notice of Appeal.

The defendants, Frank and Bertha Anzovino, hereby appeal from the final decree and every part thereof made in this Court in the above stated cause by the Chancellor on the advice of Vice-Chancellor James F. Fielder on the 17th day of December, 1934, to the Court of Errors and Appeals to the last resort in all causes except that portion of the said decree which orders that no costs be taxed or counsel fees allowed against the defendants, Helen Frank and Bertha Anzovino.

Dated, December 20th, 1934.

SOLOMON & MILLER,
Solicitors for Defendants, Frank and Bertha Anzovino.
IRVING SOLOMON,
Of Counsel.

I conceive there is good cause for appeal in the above stated cause.

IRVING SOLOMON,
Of Counsel with Defendants, Frank and Bertha Anzovino.

Service of the within acknowledged this 20th day of December, 1934.

McCARTER & ENGLISH,
Solicitors of Complainant.

Petition of Appeal.

(Filed January 15, 1935.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CONTINENTAL CASUALTY COMPANY, Complainant-Respondent, and ANGELO LANZISERO, *et al.*, Defendants-Appellants.	Petition of Appeal of Frank Anzovino and Bertha Anzovino.

To the Honorable, the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Frank Anzovino and Bertha Anzovino, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor, Luther A. Campbell, Chancellor of the State of New Jersey, bearing date the seventeenth day of December, in the year One Thousand Nine Hundred and Thirty-four, in a cause wherein the said Continental Casualty Company was complainant and your petitioners and others were defendants, in this respect, to wit: That the said Chancellor in and by said decree ordered, adjudged and decreed that the policy of insurance #C. A. 1,629,854 issued by the complainant to the defendant Angelo Lanzisero was procured by and issued and delivered to the

said Angelo Lanzisero as a result of fraud on his part; and did further order, adjudge and decree that said policy of insurance #C. A. 1,629,854 issued by complainant to defendant Angelo Lanzisero is void and of no effect and that said policy of insurance be cancelled and that the said Angelo Lanzisero do surrender said policy of insurance to complainant; and did further order, adjudge and decree that your petitioners, defendants in said cause, their agents, attorneys, solicitors and representatives be enjoined and restrained from prosecuting any pending or instituting any future suit at law or in equity against the complainant upon said policy of insurance.

And your petitioners humbly appeal from the said final decree of the said Chancellor, which decrees as aforesaid, and every part and parcel thereof, upon the ground that the same is erroneous, for that, the said Chancellor should have ordered, adjudged and decreed that said policy of insurance was of the kind mentioned in the act entitled, "An Act concerning financial responsibility for damages caused by the operation of motor vehicles," Chapter 116 of the Laws of 1929, as amended by Chapter 169 of the Laws of 1931; and that the liability of the complainant, Continental Casualty Company under said policy of insurance became absolute in favor of your petitioners when the defendant Helen Anzovino was injured on October 24, 1933, by the automobile truck described in said policy of insurance, as recited in said final decree; and should have ordered, adjudged and decreed that any loss or damage sustained by your petitioners, and the said

Helen Anzovino, was covered by said policy of insurance and that said policy of insurance was valid and effective in favor of your petitioners and should have ordered, adjudged and decreed that the said complainant was not entitled to any relief as against your petitioners and should have ordered, adjudged and decreed that the said bill of complaint be dismissed as against them.

And your petitioners therefore pray that the said decree of the said Chancellor may be reversed, set aside and have nothing holden and that your petitioners may have such relief in the premises as this court shall seem meet.

SOLOMON & MILLER,
Solicitors of Appellants,
IRVING SOLOMON,
Of Counsel.

We acknowledge service of the within Petition of Appeal and consent that the said Petition be filed as of within time.

Dated, Jan. 14, 1935.

McCARTER & ENGLISH,
Solicitors of Respondent.

Bill of Complaint.

102/650

IN CHANCERY OF NEW JERSEY.

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey:

The complainant, Continental Casualty Company, a corporation organized and existing under the laws of the State of Indiana, and duly authorized to carry on its business within the State of New Jersey, with its principal place of business in the City of Chicago, in the State of Illinois, and with a New Jersey office in Newark, New Jersey, respectfully shows:

1. At all times mentioned in this bill of complaint it was engaged in the business of insuring against losses from the liability imposed by law upon its assureds for damages on account of bodily injuries and damage to property by reason of the ownership, maintenance or use of automobiles and is still engaged in that business. In carrying on its business it issues policies of insurance to owners of automobiles insuring against such losses. The risk which complainant assumes in any individual case is affected by the personal responsibility of the assured, the nature of his business, his skill and record as a driver and as an owner, the skill and past record of drivers employed by him, the place or places where the particular car is to be used and other considerations. In many cases complainant will and does refuse to insure against risks because of knowledge it has concerning the nature of those risks. In other instances the amount of premiums which

complainant charges and receives is governed or affected by one or more of the considerations already referred to.

2. On October 23, 1933, and prior thereto Angelo Lanzisero was engaged in the business of conducting a fish market and was the owner of a certain Chevrolet one and one-half ton truck which was used by him in connection with his business. On October 23, 1933, and prior thereto said truck was not covered by insurance.

3. On October 24, 1933, at approximately 3:20 o'clock in the afternoon and not later than 4:00 o'clock in the afternoon said Chevrolet truck was being driven by Anthony Genis, the agent or servant of Angelo Lanzisero, at or near the intersection of Johnston and Manning Avenues, in the City of Jersey City, New Jersey. At said time and place the said Chevrolet truck struck Helen Anzovino, a child about six years old and as a result Helen Anzovino sustained injuries.

4. Complainant has learned and charges the fact to be that said Angelo Lanzisero learned of the aforesaid injury to Helen Anzovino within a few minutes after the injury took place. After learning of said injury Angelo Lanzisero immediately went to the office of Abraham Kravetz, at 181 Summit Avenue, Union City, New Jersey, and conferred with said Kravetz for the purpose and with the intent, as the complainant charges the fact to be, of inducing the complainant by means of wilful and fraudulent concealment and misrepresentations to issue to him a policy of insurance for a period

of one year beginning with October 24, 1933. During said conference the said Lanzisero informed the said Kravetz that the said truck had struck and injured Helen Anzovino. As a result of said conference, the said Kravetz, as agent for the said Lanzisero and at the direction of the said Lanzisero, applied on behalf of Lanzisero to J. & J. McMahon, Inc., of 140 Summit Avenue, Union City, New Jersey, authorized agents of the complainant, for a policy of insurance covering the said Crevrolet truck for a period of one year beginning with October 24, 1933.

5. Said application for insurance was made to J. & J. McMahon, Inc., agents of the complainant, on October 24, 1933, at approximately the hour of 6:00 P. M. and not before the hour of 5:30 P. M. Said application was for a policy of insurance insuring said Chevrolet truck for the said period of one year beginning October 24, 1933, and was for insurance against loss from the liability imposed by law upon the said Lanzisero for damages on account of bodily injuries and on account of injury to property within the period of said policy by reason of the ownership, maintenance or use of the said Chevrolet truck.

6. In applying to the complainant as aforesaid for said policy of insurance the said Kravetz, as agent for Lanzisero, requested and instructed that the policy of insurance be issued to cover a period of one year beginning with the date of the application, namely, October 24, 1933. The said Kravetz did not disclose to the complainant nor indicate in any way to

the complainant that the said truck had been involved in an accident at any time and wilfully and fraudulently concealed from the complainant the fact that said truck had been involved in an accident only a short time before the making of said application.

7. As a result of the aforesaid fraudulent misrepresentation and concealment concerning the injury done to Helen Anzovino on October 24, 1933, this complainant, in total ignorance of said injury and in reliance upon the application as made to it on behalf of Lanzisero by the said Kravetz, did issue, execute and deliver to the said Angelo Lanzisero a policy of insurance upon said Chevrolet truck, insuring the said Lanzisero from October 24, 1933, to October 24, 1934, commencing and ending at 12:01 A. M. Standard Time, against loss from the liability imposed by law upon the said Lanzisero for damages on account of bodily injuries and injuries to property within said policy period by reason of the ownership, maintenance or use of the said Chevrolet truck. A true copy of said policy is hereto attached as Schedule A.

8. When said application for insurance was made to the complainant, a binder was immediately executed so that there should be no delay in furnishing to said Lanzisero the insurance protection applied for and thereafter on the following day, October 25, 1933, complainant executed its formal policy of insurance covering the period from October 24, 1933, to October 24, 1934, commencing and ending at 12:01 A. M. Standard Time, which formal policy has already been referred to. Complainant was in

total ignorance of the said injury to Helen Anzovino at the time of the execution of said binder as well as at the time of the issuance, execution and delivery of said policy of insurance.

9. The aforesaid misrepresentation and concealment concerning the injury to Helen Anzovino was material to the risk to be incurred by the complainant in issuing its policy of insurance. Had complainant known of said injury it would not have issued its aforesaid policy or any other policy to said Lanzisero. Immediately upon learning of the facts alleged in the foregoing paragraphs and of the fraud perpetrated upon it, the complainant notified the said Lanzisero that it did not consider itself liable to him under the terms of the policy so obtained and complainant refused to accept premiums on said policy from said Lanzisero and has not received or accepted any premium payments whatever from said Lanzisero on the said policy.

10. On or about November 20, 1933, a suit was brought in the Hudson County Court of Common Pleas by the following plaintiffs: Helen Anzovino, by her next friend, Frank Anzovino, and Frank Anzovino and Bertha Anzovino against Angelo Lanzisero and Anthony Genis, defendants. The complaint in said suit demands damages of $50,000 for injuries allegedly received by Helen Anzovino when struck by the aforesaid Chevrolet truck of Lanzisero. The complaint in said suit also demands damages of $10,000 for the medical and other expenses incurred and to be incurred by the plain-

tiffs, Frank Anzovino and Bertha Anzovino, in connection with the said alleged injuries sustained by their daughter, Helen Anzovino. Said suit has not yet been tried but is at issue and is awaiting trial on the trial list of the Hudson County Court of Common Pleas.

11. Plaintiffs show that any judgment which may be obtained in the aforesaid suit against the defendants, or either of them, may not be paid and if not paid then under the terms of the aforesaid policy of insurance complainant may be claimed to be liable for the payment of said judgment and a suit at law may be brought by Helen Anzovino, Frank Anzovino and Bertha Anzovino, or any of them, against the complainant. And if a judgment is obtained and is paid by Angelo Lanzisero and Anthony Genis, or either of them, they or either of them may bring suit at law against the complainant to recover the amount which they may pay.

12. Complainant charges that the aforesaid policy of insurance was obtained from it by fraud and that it was null and void from the date of its issue and that complainant has no adequate remedy at law and cannot defend properly at law if suits be brought against it as hereinbefore set forth.

Complainant has no adequate remedy at law, and, therefore, prays:

1. That the defendants, who are Angelo Lanzisero, Anthony Genis, Helen Anzovino, Frank Anzovino and Bertha Anzovino, may answer this bill of complaint and each statement therein made.

2. That it may be adjudged and decreed that the policy of insurance hereinbefore described was obtained improperly, wrongfully and fraudulently from the complainant and that said policy of insurance has no binding force and effect from the day of its issue and that the complainant is under no liability under said policy and never was under liability under said policy to the defendants, or any of them.

3. That the defendants and each of them and the agents and attorneys of each of them be enjoined and restrained from instituting any suits at law or otherwise to recover upon said policy of insurance.

4. That the complainant may have such other and further relief as may be agreeable to equity and good conscience.

5. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

McCARTER & ENGLISH,
Solicitors for and of Counsel
With Complainant.

"Schedule A."

Combination Automobile Policy

THE
CONTINENTAL
CASUALTY COMPANY

Incorporated by the State of Indiana as a
Stock Company
Old Line Plan

GENERAL OFFICE: CHICAGO
Hereinafter Called the Company

Premium $111.00

INSURING CLAUSE A. LIABILITY

HEREBY AGREES TO INSURE THE ASSURED NAMED IN THE SCHEDULE AGAINST

Loss from the liability imposed by law upon the Assured for damages arising out of bodily injuries, including death resulting therefrom, accidentally suffered, or alleged to have been suffered, within the policy period by any person or persons, by reason of the ownership, maintenance or use (including loading or unloading) of any of the automobiles described in the Schedule; excluding injuries suffered by any employee of the Assured while operating or caring for the automobiles covered hereby, and also excluding injuries suffered by any employee while in the course of his employment in the usual trade, business or profession of the Assured, and excluding in any event any liability assumed by or imposed upon the Assured to pay Workmen's Compensation.

INSURING CLAUSE B. PROPERTY DAMAGE

Loss from the liability imposed by law upon the Assured for damages on account of injury to or destruction of property of every description, including resultant loss of use thereof, by reason of any accident within the policy period due to the ownership, maintenance or use (including loading or unloading) of any of the said automobiles, excluding (1) property of the Assured; (2) property in the custody of the Assured; (3) property carried in or upon any of the automobiles covered hereby; (4) property which is rented or leased by the Assured.

INSURING CLAUSE C. COLLISION

Actual loss or damage to any of the said automobiles, including attached equipment, resulting solely from accidental collision of such automobile within the policy period with any moving or stationary object, including upsets, excluding (1) loss or damage due directly or indirectly to fire; (2) loss or damage to any tire of any automobile insured hereby due to puncture, cut, gash, blowout or other ordinary tire trouble; (3) loss or damage to any tire in any event, unless caused in an accidental collision which also causes other loss or damage to the insured automobile.

INSURING CLAUSE D. SERVICE

The Company agrees to investigate all reported accidents covered hereby; to defend for the Assured any suits, even if groundless, brought against the Assured to recover damages for which indemnity is payable under this policy, unless the Company shall elect to effect settlement thereof; to pay irrespective of the

limits of liability hereinafter mentioned all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy and all expenses incurred by the Company for investigation or defense, including all costs taxed against the Assured in such suits, and all premiums on appeal bonds required in such suits, and all interest accruing after entry of judgment until the Company has paid, tendered or deposited in Court such part of such judgment as does not exceed the limit of the Company's liability thereon; also expense necessarily paid in money by Assured at time of accident in removing injured person to a suitable place, and such expense so paid for such immediate surgical aid as may then be imperative.

LIMITS

The liability of the Company under this policy shall be limited to the amounts and in the manner provided in the Schedule for each of the foregoing Insuring Clauses A, B and C. The Company shall have no liability under any of said Clauses for which the Company's liability has not been so limited and for which premium has not been designated in the Schedule.

ADDITIONAL ASSUREDS

If the stated and actual use of the automobiles covered by this policy is "pleasure and business" or "commercial" any person or persons while riding in or operating any of such automobiles and any person, firm or corporation responsible for the operation thereof, shall be considered as an additional Assured under this policy. The Coverage afforded by this para-

graph shall not apply unless the riding, use or operation above referred to be with the permission of the Assured named in the Schedule of this policy, or, if such Assured is an individual, with the permission of an adult member of such Assured's household other than a chauffeur or a domestic servant, provided that coverage given by this paragraph shall not apply to a public automobile garage or an automobile repair shop, sales agency, service station, and/or the agents or employees thereof. In the event an automobile covered by this policy is sold, transferred or assigned, the purchaser, transferee or assignee shall not be considered as an additional Assured without written consent of the Company evidenced by endorsement hereon.

FINANCIAL RESPONSIBILITY

With respect to any motor vehicle described herein this policy is hereby amended to conform with the provisions of the Motor Vehicle Financial Responsibility Law of the State or Province in which such automobile is registered at the time of the accident and/or in which such automobile is operated at the time of the accident during the policy period, to the extent of coverage and limits of liability required by such law, but not in excess of the limits of liability stated in this policy.

CONDITIONS

This insurance is subject to the following conditions and failure on the part of Assured to comply therewith shall forfeit the right of the Assured or of any judgment creditor of said Assured to recovery hereunder.

1. Automobile and Purposes of Use Defined.

(1) Wherever in this policy the word "automobile" is used, it shall be held to mean any type of motor vehicle or trailer as described herein, and when two or more automobiles are insured hereunder the terms of this policy apply separately to each; (2) the term "pleasure and business" is defined as personal, pleasure and family use, including business calls; (3) the term "commercial" is defined as the transportation or delivery and the loading and unloading of goods or merchandise in direct connection with the Assured's business occupation, as stated in the Schedule; (4) the purposes of use as defined in (2) and (3) foregoing shall exclude the renting or livery use of the automobile and the carrying of passengers for a consideration; (5) the automobile shall be insured for renting, livery, carrying passengers for a consideration, the business of demonstrating or testing, or the towing of any trailer, only when such uses are definitely declared and rated; (6) the coverage for any trailer covered herein shall apply only while such trailer is being used in connection with any automobile insured by the Company.

2. Notice, Claims and Suits. The Assured shall give to the Company or to its authorized agent immediate written notice of any accident covered hereby and shall also give like notice of claims for damages on account of such accidents. If any suit is brought against Assured to recover such damages the Assured shall immediately deliver to the Company or to its authorized agent every summons or other process served upon him. The Company shall have the

exclusive right to contest or settle any of said suits or claims. The Assured shall not interfere in any way respecting any negotiations for the settlement of any claim or suit, nor in the conduct of any legal proceedings, but shall, at all times, at the request of the Company, render to it all possible co-operation and assistance. The Assured shall not voluntarily assume any liability for an accident nor settle any claim or incur any expense other than as herein elsewhere provided for, except at his own cost.

3. Exceptions. This policy does not cover any automobile (a) while without the limits of the United States of America or the Dominion of Canada; (b) while being used in any race or speed contest; (c) which is maintained, garaged or driven for any purpose other than as specified in the Schedule; (d) while driven by or in charge of any person under the age limit fixed by law, or under the age of fourteen years in any event; (e) used for commercial purposes in connection with any business other than that of the Assured as stated in the Schedule.

4. Cancellation. This policy may be cancelled at any time by either of the parties hereto upon written notice to the other, stating when thereafter cancellation shall be effective and the date of termination by cancellation shall then be the end of the policy period. If cancelled by the Company, notice mailed to the address of the Assured as it appears in the Schedule shall be sufficient, and the Company shall receive a pro rata premium. If cancelled by the Assured, the Company shall receive a premium to be computed according to the customary short rates as

shown in the table appearing hereon. The check of the Company or its agent mailed to the address of the Assured as given in the Schedule shall be a sufficient tender of unearned premium.

5. Actions. No action shall be maintained against the Company under Clauses A or B of this policy unless brought after the amount of loss shall have been fixed either by a final judgment against the Assured by the court of last resort after trial of the issue or by agreement between the parties with the written consent of the Company. The Company shall be bound, however, as to such final judgment, not exceeding the limits of the policy, to pay and satisfy such judgment and to protect the Assured against the levy of execution issued upon same. Bankruptcy or insolvency of the Assured shall not relieve the Company of any of its obligations hereunder. If any person or his legal representatives shall obtain final judgment against the Assured because of any such injuries, and execution thereon is returned unsatisfied by reason of bankruptcy, insolvency or any other cause, or if such judgment is not satisfied within thirty days after it is rendered, then such person or his legal representatives may proceed against the Company to recover the amount of such judgment, either at law or in equity, but not exceeding the limit of this policy applicable thereto. In no event shall any action be maintained against the Company under any of the insuring clauses of this policy unless brought within two years after right of action accrues, provided, however, that if any time limitation of this policy, with respect to giv-

ing notice or instituting suit, conflicts with the law controlling this contract, the minimum period permitted by such law shall be considered as substituted for such limitation.

6. Other Insurance. If the Assured named in the Schedule carry a policy of another insurer against a loss covered by this policy, such Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount otherwise payable under this policy bears to the total amount of valid and collectible insurance applicable to the said loss. If any person, firm or corporation other than the Assured named in the Schedule is, under the terms of this policy, entitled to be indemnified hereunder and is also covered by other valid and collectible insurance, such other person, firm or corporation shall not be indemnified under this policy.

7. Subrogation. In the event that the Company becomes liable for payment of loss under this policy, the Company shall be subrogated to the amount of such liability to all rights of the Assured against any person, firm or corporation arising out of the accident causing such liability and the Assured shall do everything which may be necessary to secure to the Company such rights. If the Company by reason of any statute, including the Motor Vehicle Financial Responsibility Law of any State or Province, or endorsement required by statute to be attached to this policy, shall pay to an injured person or one claiming under him any sum which except for such statute or endorsement would not be payable by reason of a breach of the terms or

conditions of this policy, the Assured agrees to reimburse the Company for the amount of such payment.

8. Alterations. This policy shall constitute the entire contract between the Company and the Assured, and no assignment of this policy, or of any claim hereunder, nor any change, waiver or extension of its terms shall be valid unless endorsed hereon and signed by the President or Secretary of the Company; nor shall notice to any agent, or knowledge possessed by any agent or other person be held to effect a waiver or change of any part of this policy. But in event of the death, insolvency or bankruptcy of the Assured within the policy period, said policy for the unexpired portion of such period shall except in the event of cancellation cover the legal representative of the Assured; provided that notice in writing is given to the Company within thirty days after the date of such death, insolvency or bankruptcy.

9. Consideration. This policy is issued in consideration of the payment of premium as stated in the Schedule, which Schedule is hereby adopted and made a part of this policy, and of the statements in the Schedule, which statements the Assured by the acceptance of this policy warrants to be full, complete and true.

In Witness Whereof, the Continental Casualty Company has caused these presents to be signed by its President and Secretary; but the same shall not be binding upon the Company unless countersigned by its Authorized Agent.

H. A. BEHRENT
President

E. G. Timme
Secretary

ENDORSEMENT

AUTOMOBILE POLICY

PREMIUM INSTALLMENT

It is hereby understood and agreed that the annual premium of $111.00 due under this policy, shall be due and payable in three installments as follows:

Date Due	P. L.	P. D.	Total
October 24th, 1933	$31.20	$13.20	$44.40
January 23rd, 1934	23.40	9.90	33.30
April 23rd, 1934	23.40	9.90	33.30

This endorsement is attached to and made a part of Policy No. CA-1629854 issued to Angelo Lanziaeri. It takes effect at 12:01 A. M., Standard Time at place of issue October 24th, 1933, expires concurrently with the policy to which it is attached and is subject to all the conditions and provisions of said policy not inconsistent herewith.

In Witness Whereof, the Continental Casualty Company has caused this endorsement to be signed by its President and Secretary; but the same shall not be binding upon the Company unless countersigned by its Authorized Agent.

E. G. TIMME
Secretary

H. A. BEHRENT
President

Countersigned and issued at the office of the Company at Union City, N. J. this 24th day of October, 1933.

By J. & J. McMAHON, Inc.
Agent

R 469411

copy

Schedule.

Statement 1. Name of Assured—Angelo Lanziaeri

Address—719 Graham Street, Jersey City, New Jersey (No., Street, City, State)

The Assured is Individual (Individual, Copartnership, Corporation, Estate or Trustee)

The business or profession of the Assured is Fish Dealer

The automobiles below described are and will be principally maintained, garaged and used in the city or town above named.

Statement 2. The Policy period shall be from October 24th, 1933 to October 24th, 1934 commencing and ending at 12:01 A. M. Standard Time at place of issue.

Statement 3. Purpose for which motor vehicle will be used—Usual to assured's business. (See Condition 1. for definitions of Purposes of Use)

Statement 4. No company has cancelled automobile policy of Assured or refused to issue such a policy to Assured during the past three years, except as follows:

Statement 5. The number and description of the motor vehicles covered by this policy are given in the following table:

Trade Name	Factory or Serial No.	Motor Number	No. Cyls.	List Price	Model and Year of Model	Style of Body (If Truck State Tonnage)	Date Purchased
Chevrolet	2AB-70303	—4604686			1928	1½ ton truck	

Statement 6. The limits of the Company's liability under Insuring Clauses A, B and C and the premiums respectively applicable thereto are as follows:

	Net Premium
Insuring Clause A. For loss from an accident resulting in bodily injuries to or in the death of one person only Five Thousand Dollars ($5,000.00), and subject to the same limit for each person the total liability of the Company for loss resulting from any one accident resulting in bodily injuries to or in the death of more than one person is Ten Thousand Dollars ($10,000) Merit Rating Discount $nil	$78.00
Insuring Clause B. The actual intrinsic value of the property damaged or destroyed at the time of its damage or destruction or the cost of its suitable repair or replacement and the value of the resultant loss of use thereof. The total liability of the Company under this clause on account of one accident, including loss of use, shall in no event exceed Five Thousand Dollars ($5,000.00). Merit Rating Discount $nil	33.00
Insuring Clause C. The actual intrin-	

sic value of the damaged property at the time of the accident or the cost of its suitable repair or replacement but in no event shall the Company's liability exceed the cash value of the automobile at the time of the accident. Claims under Insuring Clause C shall be made separately for each collision and from the amount of each loss when determined, the sum of Not Covered Dollars ($nil) shall be deducted, and the Company shall be liable only for the loss or damage in excess of that amount. nil

Total Premium Payable at Beginning of Policy Period $111.00

Date of Issue Countersigned by

sm 10/25/33.

Answer of Defendants.

Filed July 20/34.

IN CHANCERY OF NEW JERSEY.

102/650.

Between: CONTINENTAL CASUALTY COMPANY, Complainant, and ANGELO LANZISERO, *et als.*, Defendants.	On Bill, &c. Answer of Defendants, Frank & Bertha Anzovino.

These defendants, Frank Anzovino and Bertha Anzovino, answering the Bill of Complaint, say that:

1. These defendants have no knowledge or information sufficient to form a belief as to the statements set forth in paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 11 and 12.

2. They admit paragraph 3.

3. They admit paragraph 10.

SOLOMON & MILLER,
Solicitors of Defendants,
Frank & Bertha Anzovino.

Replication.

IN CHANCERY OF NEW JERSEY.

102/650.

Between:

CONTINENTAL CASUALTY COMPANY,
Complainant,
and
ANGELO LANZISERO, *et als.*,
Defendants.

On Bill, &c.
Replication.

The complainant joins issue with the defendants, Frank Anzovino and Bertha Anzovino, on the answer filed by them herein.

McCARTER & ENGLISH,
Solicitors of Complainants.

Testimony.

IN CHANCERY OF NEW JERSEY.

Docket 102/650.

Between:

CONTINENTAL CASUALTY COMPANY,
Complainant,
and
ANGELO LANZISERO, *et als.*,
Defendants.

Before Honorable James F. Fielder, Vice Chancellor.

December 3rd, 1934.

Appearances:

McCarter & English, by Ward J. Herbert, Esq., Solicitors for Complainant.

Sigmund Auerbach, Esq., Solicitor for Defendant, Angelo Lanzisero.

Solomon & Miller, by Irving Solomon, Esq., Solicitors of Defendants, Frank Anzorvine and Bertha Anzorvine.

CHRIS HENTASCHEL, witness called on behalf of the complainant, being duly sworn on his oath according to law, testifies as follows:

Direct-examination by Mr. Herbert:

Mr. Herbert: I would first like to offer into evidence a policy of the Con-

tinental Insurance Company, number CA1629854, which by its terms insures Angelo Lanzisero for the policy period from October 24th, 1933, to October 24th, 1934.

The Court: From 12:01 A. M.

Mr. Herbert: 12:01 A. M.

Received in evidence and marked Exhibit C-1.

Q. Where do you live? A. 1396 Bergenwood Avenue, North Bergen.

Q. Were you ever associated in business with a man named Abraham Kravitz? A. Yes.

Q. Did you have a place of business? A. Yes.

Q. Where was it located? A. 181 Summit Avenue, Union City.

Q. What kind of business did you conduct there? A. A collection agency.

Q. Any insurance business conducted in connection with that? A. Yes.

Q. Was that conducted by Mr. Kravitz or by yourself? A. Mr. Kravitz.

Q. How long had you been associated with Mr. Kravitz prior to October 24th, 1933? A. Six or eight months.

Q. Do you know the defendant Angelo Lanzisero? A. Yes.

Q. How did you become acquainted with him? A. Mr. Lanzisero used to come in and out of the office quite often, as a client.

Q. Do you recall the date of October 24th, 1933? A. Just can't recall the date. I can recall the time.

Q. Do you recall the day when Mr. Lanzisero came to the office that you and Mr. Kravitz conducted? A. Yes.

Q. And spoke to you about having had an accident, and spoke about insurance? A. Yes.

Q. Tell us just what happened on that occasion. A. We had come back late—

Mr. Auerbach: I think a time should be fixed.

A. It was very late.

Q. What do you mean "late"? A. We had been out most of the afternoon and it was quite dark. It was close around to six o'clock. We came back from being out of the office—

The Court: Who do you mean by "we"?

A. Kravitz and I, and met Mr. Lanzisero down in the hall. Mr. Lanzisero informed us that his truck had had an accident and had hit a little girl. Then we had several words in conversation with one another and went upstairs. It was dark at the time because we had no lights in the place as yet. We were only up there about a month. Then Mr. Kravitz went into the office and got in touch with McMahon and McMahon—

Q. Who are McMahon and McMahon? A. Insurance agents.

Q. Where is McMahon's office? A. About a block away from our office.

The Court: The name of the concern is J. & J. McMahon, isn't it?

A. Yes, sir.

Q. How did Kravitz get in touch with McMahon's office? A. He called McMahon's office up on the phone—at least, got Miss O'Brien, the girl working in the office there at the time.

The Court: Did you hear him call up?
A. Yes.

Q. Did he talk to someone in McMahon's office on the other end of the wire? A. Yes.

Q. Did you overhear what he had to say? A. Part of it.

Q. What did he have to say?

Mr. Auerbach: I object to what he said unless he knew who he was talking to.

The Court: The policy was issued through McMahon.

Objection overruled.

Q. Was Mr. Lanzisero there all this time? A. Yes.

Q. What did Mr. Kravitz have to say? A. Mr. Kravitz read from Mr. Lanzisero's license, got the serial number and read it over the phone to McMahon & McMahon and placed the policy.

Q. Was anything said in explanation of the hour at which the policy was placed? A. Yes. When Mr. Kravitz talked to McMahon and McMahon on the phone he told them he had been out most of the day and when he got back, he found a notation on the desk to place this particular policy.

Q. Did he say anything over the telephone concerning an accident already having happened? A. No, sir.

CROSS-EXAMINATION by Mr. Auerbach:

Q. On this particular day, when did you leave the office? A. I don't remember whether we left around noontime or sometime around two

o'clock; anyway we were out most of the afternoon.

Q. Were you in in the morning? A. Yes.

Q. He was in the office that morning when you walked in? A. When I went into the office?

Q. Yes. A. Mr. Kravitz is always in first.

Q. Who else? A. That I can't remember.

Q. You don't know who was there? A. No.

Q. How many rooms did you have at that time? A. Two and a half rooms—another little room there.

Q. There are doors connecting with these rooms? A. Yes.

Q. When was the first time you saw Mr. Lanzisero on October 24th? A. When I met him downstairs late that afternoon.

Q. Late that afternoon? A. Yes.

Q. Then you say you went upstairs and there was a notation on Mr. Kravitz's desk? A. There was no notation on Mr. Kravitz's desk. That was the story he told over the phone to McMahon and McMahon.

Q. Was anything else said about a notation —how long he had been there? A. Only that a notation was on his desk; that he had just come in after having been out all day. That is how he placed the order.

The Court: Did Kravitz go out with you when you left the office?

A. Yes.

The Court: Was he with you all the time?

A. Yes, sir.

The Court: Until he came back with you?

A. Yes.

CROSS-EXAMINATION by Mr. Solomon:

Q. By whom are you employed at the present time? A. I work in New York. I am not employed by anybody. I do radio work.

Q. You don't know whether McMahon's office asked Mr. Kravitz on the telephone whether there was an accident prior to the time he placed it? A. No; I can't tell you that.

Q. Was there someone else in charge of the office during the time you and Kravitz were out? A. The only one there at the time was Miss O'Brien.

Q. She was in charge of the office when you were out? A. Yes.

Q. Does she take orders for insurance when somebody comes in there? A. When she is there she does.

Q. You don't know whether Miss O'Brien took an order for insurance during the time you were out, of your own knowledge? A. Of my own knowledge, no.

The Court: Where is Kravitz now; do you know?

A. Do I know?

The Court: Yes.

A. 181 Summit Avenue, Union City.

The Court: He still has an office there?

A. I believe he has.

Complainant's Witness, Teresa O'Brien, Direct

TERESA O'BRIEN, witness called on behalf of the complainant, being duly sworn on her oath according to law, testifies as follows:

Direct-examination by Mr. Herbert:

Q. Where do you live? A. 240 Arlington Avenue, Jersey City.

Q. By whom are you employed at the present time? A. Harry Wyckoff, Incorporated.

Q. In October, 1933, by whom were you employed? A. State Collection Agency. Mr. Kravitz was manager.

Q. Were you so employed by Mr. Kravitz on October 24th, 1933? A. Yes, sir.

Q. Do you remember that date? A. Yes, sir.

Q. Do you recall Mr. Lanzisero coming to the office? A. Yes, I do.

Q. Will you tell us at what time he came and what happened after he came? A. He came up between five and five-thirty. He asked if Mr. Kravitz was in. At the time he was not in. He seemed rather excited. He went downstairs and he waited for Mr. Kravitz. Mr. Kravitz came in and Mr. Lanzisero came up. There was another party in the office, and Mr. Kravitz took care of her, and then spoke to Mr. Lanzisero. At the time, I didn't know what it was about. I had to go home about five-thirty then.

Q. Where was Mr. Hentaschel during this time? A. Mr. Hentaschel was with Mr. Kravitz.

Q. Did they come in together? A. Yes; I believe they did.

Q. Do you recall making any telephone calls after Mr. Kravitz came back at his request? A. Yes, I called, I believe, McMahon and McMahon, the insurance company first.

Q. Who did the talking after you got that number? A. Mr. Kravitz.

Q. Had you been in the office all that day? A. Yes, sir; I had.

Q. Was anyone else working there except yourself, Mr. Kravitz and Mr. Hentaschel—? A. No one else.

Q. Was Mr. Lanzisero in at any earlier hour during the day? A. No, he was not.

Q. How about lunch hour? A. That was between twelve and one, and I closed the office. There was no one in.

The Court: What time did Mr. Kravitz and Mr. Hentaschel go out; do you know?

A. They were out all day.

The Court: Did they go out together?

A. Yes, I believe they did.

CROSS-EXAMINATION by Mr. Auerbach:

Q. What time did they leave that day? A. In the morning. I think it was about eleven o'clock.

Q. About eleven o'clock? After they had left, you didn't see them again until about five-thirty; is that right? A. That's right.

Q. Who was there during lunch hour? A. No one there. I locked the office.

Q. Was Miss McCabe working there at the time? A. She was not in that day, I believe.

Q. She was working for the company at the time, wasn't she? A. I believe she was. I am not sure.

Q. She also took information in reference to insurance on automobiles when you were not there? A. When I was not there, she did.

Q. Is that right? A. Yes.

Q. You didn't hear the conversation over the 'phone between Mr. Kravitz and Mr. McMahon? A. No, I did not.

Q. Mr. Lanzisero was in the habit of coming in quite often, wasn't he? A. That's right.

Q. And may have been there that day? A. I was in the office all day. He was not there while I was there.

Q. What time did you go out for lunch? A. Twelve and one.

Q. Between twelve and one? A. Yes.

STEPHEN MULLER, witness called on behalf of the complainant, being duly sworn on his oath according to law, testifies as follows:

Direct-examination by Mr. Herbert:

Q. Where do you live? A. 26 West 37th Street, Bayonne.

Q. By whom are you employed? A. J. & J. McMahon.

Q. Where is their office located? A. 140 Summit Avenue, Union City.

Q. What kind of business do they do? A. Casualty insurance; a little real estate.

Q. How long have you worked for the McMahon office? A. About six years.

Q. Do you recall having taken a telephone call from a man named Kravitz in regard to insurance for a man named Lanzisero? A. I do.

Q. Can you give us the date of that? A. October 24th, 1933, about five minutes to six.

Q. Did you write the insurance order, or did

you get someone else to write it? A. I sent out the binder that night. Howling wrote the policy.

Q. Are you sure it was Mr. Howling? A. It was his department. I am not sure whether he wrote it or his assistant.

Q. Mr. Connolly had nothing to do with writing this policy? A. Not that I can remember.

CROSS-EXAMINATION by Mr. Auerbach:

Q. What time did you say you sent out the binder? A. It was five minutes to six when Mr. Kravitz called. I sent it right out when I finished the telephone call.

CROSS-EXAMINATION by Mr. Solomon:

Q. Will you explain to the Court why this policy is effective as of 12:01 A. M. October 24th, 1933? A. All our policies are dated from then.

Q. When you say the policy or binder was issued about six o'clock that night or five minutes to six when you received the call— A. That's right.

Q. —Why was the policy issued or dated as of 12:01 A. M.? A. I don't know.

Q. Isn't that a printed form? A. Yes.

Q. It is not written in. It comes printed in the policy? A. I am quite sure it is.

Q. Why don't you put the true time in when you issue the policy?

Mr. Herbert: I object.

The Court: Objection overruled.

A. We never made a habit of doing that.

Complainant's Witness, Stephen Muller, Re-direct

Examination by the Court:

Q. What is the custom when you write a policy as to the hour you make the policy effective? A. Generally from 12:00 or 1:00 A. M.

Q. When? A. 12:01 A. M.

Q. You always do? A. Yes.

Q. Without regard to the time you get the order for the policy? A. That's right.

CROSS-EXAMINATION continued by Mr. Solomon:

Q. Your premiums begin to run as of 12:01 A. M.? A. Yes.

Q. So that if a policy is issued at six o'clock, the man paying the premium pays from 12:01 A. M. of that morning? A. That's right.

Q. Will you look at that policy, please, and the schedule annexed thereto. Is that the information you obtained from Mr. Kravitz? A. That's right.

Q. Is that all the information you obtained? A. That's all.

Q. You did not ask him for any other information? A. No.

Q. That contains the entire conversation between you and Mr. Kravitz? A. That's right.

Q. You didn't ask him whether there had been an accident prior to six o'clock, did you? A. No, I did not.

RE-DIRECT EXAMINATION by Mr. Herbert:

Q. Did Mr. Kravitz mention the time from which the policy was to run in any way? A. No.

THOMAS CONNOLLY, witness called on behalf of the complainant, being duly sworn on his oath according to law, testifies as follows:

Direct-examination by Mr. Herbert:

Q. Where do you live? A. 85 Liberty Place, Weehawken.

Q. By whom were you employed? A. I am employed by J. & J. McMahon, Incorporated.

Q. Their office is in Union City? A. 140 Summit Avenue, Union City.

Q. How long have you been employed by J. & J. McMahon, Incorporated? A. For over nine years.

Q. What is your position there now? A. I am manager of the insurance department.

Q. In October, 1933, were you manager of the insurance department? A. I was.

Q. Do you recall the occasion on which the policy of insurance was issued for the defendant, Angelo Lanzisero? A. Yes, I do.

Q. Will you tell us what you had to do with taking that order, if anything, and with issuing the policy, if anything? A. I was upstairs in the upper floor of our office—

Q. What time of the day was this? A. I had been engaged shortly before five o'clock. We were discussing a loss matter there that day with Mr. Morrell of the Potomac Insurance Company, who was on from Philadelphia that day. We were discussing a number of matters upstairs. The office generally closes at five o'clock; that is, the entire staff goes home with the exception of one that remains each day in rotation at night, with the exception of myself. Mr. Muller—Stephen Muller was on duty that

night. Mr. Morrell talked a great deal and it was quite late when he was going home. It was shortly before six o'clock as I came downstairs, and Mr. Muller was just having a telephone conversation with someone or was about to finish it; I don't remember which. Anyway, he gave me an order for insurance—to issue insurance for Angelo Lanzisero which he got from Mr. Kravitz over the telephone. It was for liability and property damage. Usually we send out a binder and as a general rule, I don't take care of those matters, but in this particular instance, I mailed out a binder myself to the company that night. It was the Continental Insurance Company.

Q. I believe Mr. Muller said he had written the policy? A. He did. As a matter of fact, I wrote the binder. If any one has it now, it will bear my initials or my name, I believe.

Q. I have what purports to be a copy of the binder. Let me show you that. Is this it? A. Yes, the binder. It is typewritten "J. & J. McMahon, by T. K. C.," which are my initials.

Q. Will you tell us what you did after that with regard to this risk? A. I do not write binders as a general rule, nor do I write policies. As a general rule, that is taken care of by Mr. Howling, who is in charge of our new business. Whether he actually typed it himself the following day after that, or if it was typed by one of the girls, probably Miss Simmons—I don't know.

Q. Who delivered this policy, if you know? A. I am quite certain that I delivered it myself.

Q. To whom did you deliver it? A. Either to

Mr. Kravitz—I would not be sure of that, or to the girl in the office—Mr. Kravitz's office.

Q. What is the connection of J. & J. McMahon with the Continental Casualty Company? A. We are general agents of the Continental Casualty Company.

Q. With the authority to write policies anywhere in New Jersey? A. Our territory is Union City, and we are licensed as general brokers. We write policies throughout the state.

Q. Was any disclosure made to you with regard to the fact that Lanzisero had had an accident?

Mr. Solomon: I object to that as immaterial.

The Court: Objection overruled.

A. No.

The Court: Would you have written the policy if there had been a disclosure?

A. Certainly not.

Q. This policy marked as Exhibit C-1 runs from October 24th, 1933 from 12:01 A. M. to October 24th, 1934, to 12:01 A. M., I believe? A. That is correct.

Q. Can you tell us from your experience whether that is the general custom in the casualty insurance business? A. Yes, it is. It is a printed form of policy and to my personal knowledge, I can remember only one company that typed the time in the binder and in the policy. That was the Consolidated.

Q. Not the Continental Casualty Company? A. No.

Q. After this policy had been delivered, were

any demands made upon you on behalf of the Continental Casualty Company of an accident concerning this accident of October 24th? A. I don't think I quite get that.

The Court: Was a proof of loss made to you as agent of the company?

A. No. We were sent a letter from a firm of attorneys.

Q. Representing whom? A. Representing, I think, the injured girl. It was sent to us by Kravitz as I remember it. I have it in the file here, or rather a copy of it.

Q. Were there any other demands from Kravitz or Lanzisero that the company defend under this policy that you recall? A. Not outside of that letter.

Q. Have you seen Mr. Lanzisero since the policy was written and delivered? A. Yes, I have.

Q. What was his attitude towards the company's obligation? Do you remember what he said?

Mr. Solomon: I object to his atttitude.

The Court: I will admit the question as to what he said.

Mr. Auerbach: I would like to have a time fixed.

A. He said that an order for the insurance had been placed before the time specified by us, and that he was covered.

The Court: When did you see Lanzisero?

A. I saw him perhaps four or five—maybe more days after the date of the accident.

The Court: About a week?

A. About a week.

CROSS-EXAMINATION by Mr. Auerbach:

Q. Did you speak to Mr. Lanzisero or Mr. Kravitz before the policy was issued? A. Did I speak to them?

Q. Before the policy was issued. A. I didn't speak to Lanzisero.

The Court: Did you speak to Kravitz or Lanzisero before the policy was issued, is the question?

A. Not to my knowledge.

Q. This letter that you referred to was a letter sent by Solomon and Miller, if you recall, as the firm of attorneys who represented the injured girl? A. I believe that is correct.

Q. Then when you spoke to Mr. Lanzisero about a week after the policy was issued, he said he had given the order for this insurance sometime before the accident happened? A. He stated that, yes.

Q. He also told you he had gone to the office of Mr. Kravitz and left the order there; is that right? A. Yes.

CROSS-EXAMINATION by Mr. Solomon:

Q. You say this binder was issued somewhere around six o'clock in the evening of October 24th? A. Yes.

Q. The policy bears date as of 12:01 A. M. of that day? A. That's right.

Q. Is Mr. Lanzisero charged a premium from October 24th—

Mr. Herbert: I object to that as immaterial.

The Court: Let him finish the question.

Q. —Until six o'clock when you say the policy was supposed to be issued?

Mr. Herbert: I object to that as immaterial.

The Court: Objection overruled.

A. He paid who the premiums?

Q. Was he charged a premium from that time is what I am asking you? A. Yes.

Q. You refused to accept the premium in this case, didn't you? A. We didn't.

Q. J. & J. McMahon, Incorporated is a general agent; isn't that so? A. Correct.

Q. They issue policies for the company and bind the company? A. They bind the company.

Q. I ask you to look at the policy under paragraph 8. This policy constitutes the entire contract? A. Right.

Q. Is that the wording of your policy there? A. Yes.

Q. Is it so or isn't it so?

Mr. Herbert: I object to that.

The Court: Objection sustained.

Q. You said on direct-examination that if you had known that Lanzisero had had a previous accident, you would not have issued the policy; is that so?

The Court: Yes. He did say so.

Q. I refer you to paragraph 9 of the policy. "This policy is issued in consideration of the payment of the premium—?" A. Yes.

Q. "As stated in the schedule, which sched-

ule is hereby attached and made part of the policy''; is that so? A. Yes.

Q. Is there anything in the schedule which refers to a previous accident or questions referring to a previous accident, or the men's character or ability to pay for an accident if he had one? A. No; I see none.

Q. Is there a statement in the schedule that you know is untrue?

Mr. Herbert: I object to that. That is not an issue.

The Court: Objection sustained.

Q. Are there any questions you asked Mr. Lanzisero or Mr. Kravitz that are in this schedule?

The Court: This witness didn't talk to either one when the policy was issued.

Mr. Solomon: I withdraw the question.

Q. Is there any other information you require other than that in the schedule before issuing a policy?

Mr. Herbert: I object to that.

The Court: Objection sustained.

LAWRENCE HUBER, witness called on behalf of the complainant, being duly sworn on his oath according to law, testifies as follows:

Direct-examination by Mr. Herbert:

Q. Where do you live? A. 1275 2nd Avenue, North Bergen.

Q. By whom are you employed? A. Continental Casualty Company.

Q. I believe you are connected with the claims' office of the company; is that right? A. I am.

Q. Do you recall having a conversation with the defendant, Angelo Lanzisero after October 23rd, 1933? A. I do.

Q. How long after October 23rd did that take place? A. I spoke to Mr. Lanzisero.

The Court: Please answer the question.

A. November 13th.

Q. Where did it take place? A. In Mr. Kravitz's office.

Q. Did you make any request at that time with regard to the surrender of a policy of Lanzisero? A. I did.

Q. What did you ask him to do? A. I told Mr. Lanzisero in front of Mr. Kravitz that the company wanted the policy returned.

Q. What did Mr. Lanzisero say to that? A. He said that he had it and that we would never get it back.

Q. Did you make any statement at that time with regard to refusing to accept premiums on the policy? A. I did inform Mr. Kravitz that we would not accept any premiums in payment of the policy.

Q. Do you know whether Lanzisero had paid Kravitz the premium on the policy? A. Yes. Mr. Kravitz told me he had received 40 per cent of the premium. Mr. Lanzisero informed Mr. Kravitz in my presence that he had paid him something in the neighborhood of $80.00, and that Mr. Kravitz had owed him some money, which in other words, balanced up the entire amount of the policy premium.

CROSS-EXAMINATION by Mr. Auerbach:

Q. You say the first time you spoke to Mr. Lanzisero after October 24th, 1933, was on November 13th, 1933; is that right? A. That's right.

Q. Where did you meet him on that day? A. In Mr. Kravitz's office.

Q. Had you requested him to call at Mr. Kravitz's office? A. I had made arrangements with Mr. Kravitz.

Q. When you got there, he was there with Mr. Kravitz? A. He was.

Q. Was anybody else there? A. Mr. Connolly accompanied me to Mr. Kravitz's office.

Q. What did you say to Mr. Lanzisero when you saw him there? A. I obtained a statement from Mr. Lanzisero.

Q. What did you say to him as to what your purpose in coming was? A. To get a full detailed report of the accident.

Q. Is that all? A. That's all.

Q. Was that the only purpose you were there for? A. I was sent there to make an investigation.

Q. To get a full and detailed report of the accident? Were you sent there to get the policy back? A. I was told to pick that policy up.

Q. Was anything said about the payment of premium back to Mr. Lanzisero? A. None at all.

CROSS-EXAMINATION by Mr. Solomon:

Q. For what purpose did you want a full report of the accident? A. To definitely establish the time.

Q. As to what accident? A. The time the accident occurred, and the issuance and ordering of the policy.

Q. And how the accident happened and who was injured in the accident? A. Yes.

Q. And the extent of the injuries? A. As far as he knew.

Q. In other words, you were investigating this as a regular claim of the company? A. That's right.

Q. In other words, you handled it the same as any other policies that were issued for insurance? A. That's right.

Examination by the Court:

Q. At that time, did you have any information in your possession that led you to believe that the policy may have been issued after the accident occurred? A. I did.

Q. Why didn't you tell him that? You said you were investigating this in the regular routine on a claim that is made? A. We hadn't had a claim made at the time I made the investigation. The first knowledge I had of this accident was from Mr. Connolly of McMahon & McMahon's office, who informed me that he understood from a telephone call he received from the office of Solomon and Miller that one of Lanzisero's trucks was involved in an accident. As a matter of fact, the truck on which the policy was written had been involved in an accident on October 24th at 3:30 A. M., and the policy, I had been informed, was issued on October 25th according to the telephone call, which would not cover the policy ordered on October 25th. Upon realizing all this, I looked

up the police blotter and the accident had occurred at 3:20.

The Court: You don't want all this, do you?

Mr. Solomon: He is answering your Honor's question.

CROSS-EXAMINATION continued by Mr. Solomon:

Q. Do you know whether your company has sent out any notice of cancellation of this policy? A. I don't know.

Q. What else did you do in the investigation of this accident? A. I obtained a copy of the hospital report.

Q. The hospital report would not show anything with relation to the date of the issuance of the policy or the time? A. No; but it shows the time the child was brought to the hospital.

Q. You already had that record from the police blotter? A. I did.

Q. But you went further and got the hospital report? A. Yes.

Q. Did you see the injured infant? A. I did not.

Q. Did you see the parents? A. I did not.

Q. Did you interview any witnesses with reference to the accident? A. I didn't.

Q. Did you interview the driver of Mr. Lanzisero's truck? A. I didn't.

Mr. Solomon: That is all.

Mr. Herbert: There are two other things I would like to state for the purpose of the record. It is admitted in the

answer filed by Mr. Solomon in the suit on behalf of the parents of the little girl that this accident happened between 3:20 and 4:30 in the afternoon.

The Court: Any dispute about that?

Mr. Solomon: No.

Mr. Herbert: It is also admitted in the answer filed by Mr. Solomon or his firm that suit was instituted shortly after the accident on behalf of the little girl and her parents against Lanzisero and the driver of the truck in the Hudson County Common Pleas Court.

The Court: And is still pending?

Mr. Solomon: And is still pending and has been restrained by your Honor's order.

Mr. Herbert: There is no restraint.

Mr. Solomon: I think we held up the suit pending the determination of this case. I wonder if Mr. Herbert will stipulate that the medical bill is $450.00. I have a statement here from the Medical Center of Jersey City.

Mr. Herbert: I don't think that is material.

The Court: How is that an issue?

Mr. Solomon: To show an injury of over $100.00.

The Court: I suppose that will be admitted.

Mr. Herbert: I have no doubt that it is a fairly serious accident that happened to the girl.

Complainant's Witness, Thomas Connolly, Direct

THOMAS CONNOLLY, previously sworn, recalled on behalf of the complainant, testifies as follows:

Direct-examination by Mr. Herbert:

Q. Was Abraham Kravitz on October 23rd, 1934, a subagent or any kind of employee of the office of J. & J. McMahon, Incorporated? Can you answer that yes or no? A. Hardly.

Q. Will you tell us what the fact is as to his connection with that office on that day? A. Shortly before October 24th, 1933—

Q. How long before? A. I don't know. It may have been a week or it may have been a shorter period Abraham Kravitz came into our office and talked to Mr. James McMahon at the counter. Mr. McMahon called me to the counter and introduced me to Mr. Kravitz and Mr. Kravitz explained that he had started business—that he had been in Jersey City and had started business at 181 Summit Avenue, and that he wanted to do an insurance business and he wanted to make arrangements for the writing of replevin bonds. In the course of the conversation, I asked him if he had an insurance broker's license in New Jersey, and he said he did not, and so for that reason, I said we would make him a subagent of one fire company and one casualty company so that it would not be necessary for him to take out a broker's license for the balance of that year 1933. I advised him for his own sake and for our sake to take out a broker's license for 1934.

Q. Did you have him made a subagent after that? A. Yes; I think I did. We never signed any agreement or contract.

Complainant's Witness, Thomas Connolly, Direct

The Court: He was subagent for those particular companies you mentioned? Will you answer yes or no?

A. I had him licensed for these companies.

Q. Was this company one of them? A. Yes.

Q. How long after was that? Have you any office correspondence or anything of the sort which would serve to refresh your recollection when the Continental Casualty Company made this man a subagent, if they did? A. Yes, I have.

Q. Will you refer to it and tell us when the company issued a subagent's license or a contract? A. On or about October 24th or 25th, I first—

The Court: Will you just answer the question? Was he made a subagent before or after October 24th?

A. I don't know unless I figure that first date. The date of the license is the date of the subagency.

Q. Do your figuring and tell us what the date is? A. The license was mailed by the State of New Jersey for Mr. Kravitz to act on November 3rd, 1933.

Q. How about the first subagency's contract with the Continental Casualty Company that you mentioned a moment ago—this subagent arrangement that you mentioned? A. There was never a subagent contract signed by us or between Mr. Kravitz and the Continental Casualty Company.

Q. When did the Continental Casualty Company issue a subagent's contract, if it did issue one? A. It never did issue a written subagency.

Complainant's Witness, Thomas Connolly, Cross

Q. Was any subagent order forwarded from the underwriting office in New York? A. There was.

Q. Under what date was that forwarded to you? A. They forwarded blanks on October 25th, 1933.

The Court: These blanks had to be filled in and returned to the company and then come back again?

A. That's right, but we never did fill them in.

Q. There was no blank then filled in for Mr. Kravitz and sent to New York and returned to you? A. No, sir.

Q. On October 24th, 1933, was Kravitz authorized by McMahon as general agent of the Continental to write policies of insurance for the Continental. Do you understand that? A. He was not authorized to write policies, not for us.

Q. Was he authorized on that date by your office as agent by the Continental to enter into binding contracts by the Continental? A. He was not authorized to bind any policies for our account.

CROSS-EXAMINATION by Mr. Auerbach:

Q. You did accept this policy he asked for on October 24th, 1933? A. We did.

Q. In accordance with his instructions, you wrote that policy?

The Court: Yes. Kravitz didn't write it.

Complainant's Witness, Thomas Connolly, Cross

CROSS-EXAMINATION by Mr. Solomon:

Q. Was Mr. Kravitz to be paid a commission on the issuance of this policy? A. He was.

Q. What sort of commission? A. Seventeen and a half for liability and twenty per cent for property.

Q. In other words, a subagent's commission? A. A subagent's commission? Yes; I would call it that—broker's commission.

Q. Your firm, J. & J. McMahon as general agents, have authority to appoint subagents; is that so? A. I believe we have.

Q. You believe you have? A. Yes.

Q. These agencies do not necessarily have to be in writing, do they? A. I don't know.

Q. In this particular case, you considered Kravitz your subagent, did you not? A. Well, if I understand what you mean by subagent.

The Court: Answer according to your understanding.

A. No.

Q. Will you tell us what you meant when you said you were negotiating to appoint Mr. Kravitz subagent a week prior to the time the accident happened? A. I simply meant as with any other broker, Mr. Kravitz would have authority to offer us business to be placed with the Continental Casualty Company if it was Casualty Company business.

Q. In this particular case, was the understanding that he was to be a subagent of the Continental Casualty Company, one fire company and one casualty company, as I understood you to say? A. Yes.

Q. Was his authority to be to solicit business through these two companies? A. That is correct.

Q. One of those two was the Continental Casualty Company? A. That is correct.

Q. So that when he called you on October 24th regardless of what time it was, you considered it as a call from a subagent to write insurance on the Continental Casualty Company?

Mr. Herbert: I object.

The Court: Objection sustained.

Q. Do you know whether your agency has sent out a cancellation notice on this policy? A. Our agency did not.

Q. Do you know whether or not the home office had sent out any cancellation notice on this policy? A. The home office did not.

Mr. Herbert: That is the complainant's case.

ANGELO LANZISERO, one of the defendants, being duly sworn on his oath according to law, testifies as follows:

Direct-examination by Mr. Auerbach:

Q. Where do you live? A. 719 Grand Street.

Q. Jersey City? A. Yes.

Q. What business are you in? A. Fish business.

Q. On October 24th, 1933, you were in the fish business? A. Yes.

Q. You had a Chevrolet truck? A. Yes, sir.

Q. Do you remember getting insurance on this particular truck? A. That day.

Q. Do you remember? A. No.

Q. You had no other insurance for this particular Chevrolet truck? A. Yes, sir.

Q. When was the first time that you made up your mind to insure this truck?

The Court: How is that material when he made up his mind?

Mr. Auerbach: I will withdraw the question.

Q. When did you first go to obtain insurance on this truck—what date? A. I think the 24th.

Q. Of October? A. Yes, sir.

Q. Where did you go? A. To Kravitz's office.

Q. What time did you get there on the morning of the 24th?

Mr. Herbert: I object.

The Court: Objection sustained.

Q. What time did you arrive there? A. About half past nine or ten o'clock. I would not say sure.

Q. Who was there when you got there? A. The girl in the office.

Q. Do you know who the girl is? A. If I saw her, I know.

The Court: Was it Miss O'Brien who is here and testified?

A. No, I didn't see her at all.

Q. What kind of a girl was she? A. A little older than Miss O'Brien.

Q. Do you know her name? A. (No answer.)

Mr. Auerbach: I withdraw the question.

Q. Had you seen her before in the office of Mr. Kravitz? A. Yes, sir.

The Court: Is she here in court today?

A. No, she ain't here.

Q. When you came up there at that time, what did you come there for? What did you say? A. I wanted one of my trucks insured.

Q. What else happened at that time? A. She said she got to have owner's license, so I show owner's license, and she copied from owner's license.

Q. Anything else happen at that time after you asked her about insurance and you gave her the information? A. No.

Q. You left there, is that right? A. I left there.

Q. Where had you been after you left Mr. Kravitz's office on that morning of October 24th? A. I went out and picked my brother up in Grantwood, and then I went to Paterson. We went out to look for a fish market for my brother.

Q. Who was driving the Chevrolet truck on the day of this accident? A. Tony.

Q. Who? A. Anthony.

Q. He is employed by you? A. Yes.

Q. Were you with him at the time this accident happened? A. No, sir.

Q. When did you first learn there was an accident? A. Nighttime.

Q. About what time? A. Around half past six; seven o'clock.

Q. How did you learn that fact? How did you come to learn about the accident? A. When I went home, I seen my wife all excited. I

said, "What is the matter?" She said, "Don't you know nothing? Your boy ran over today."

Q. What did you do right after you heard that? A. I tried to get the boy out because the boy was locked up.

Q. He was in jail? A. Yes.

Q. Did you go to the jail? A. I went over there; couldn't see the boy.

Q. Then where did you go after that? A. I went to Mr. Kravitz.

Q. When you went there, what time did you get to his office? A. To Kravitz's office?

Q. Yes. A. About half past nine.

Q. Half past nine? A. Half past nine; ten o'clock.

Q. Did you see Mr. Hentaschel on this night? A. No.

Q. You made a report of this accident, did you not, to Mr. Kravitz? A. Yes, sir.

Q. When did you report it to him? A. The day after.

Q. The day after? A. Yes.

EXAMINATION by the Court:

Q. Did you see Kravitz that night of October 24th? A. I seen Kravitz that night when I was coming from Paterson.

Q. What do you mean—coming from Paterson? A. When I was coming from Paterson where the office is there, I always stop at the office.

Q. What time was that? A. Around half past five; five o'clock.

Q. Were you driving this truck then? A. No.

Q. You were in some other automobile? A. My brother's car.

Q. Did you see Mr. Hentaschel there? A. Yes; he was just going upstairs. When I was getting off the car, my brother's car, he was going upstairs.

Q. Where did you see him? A. Downstairs.

Q. Did you go up to the office to see him? A. Yes; went up to the office together.

DIRECT-EXAMINATION continued by Mr. Auerbach:

Q. You saw Mr. Kravitz you say between five and five-thirty—somewhere between that time? A. Yes.

Q. Was Mr. Hentaschel in the room where you were talking to him? A. In the same room?

Q. Yes. A. We were in one room. He got two rooms, so we went in one room; then went into the other room.

Q. What did you speak to Mr. Kravitz about then? A. I spoke about the fire policy I had.

Q. Did you say anything to him about the other policy you had ordered? A. I told him, "Did you get the policy this morning?"

Q. What did he say? A. He said, "Yes, I did."

CROSS-EXAMINATION by Mr. Solomon:

Q. Was your truck involved in an accident prior to this one in which this girl Anzorvine was hurt?

Mr. Herbert: I object to that.

The Court: Objection overruled.

Q. Was your truck involved in an accident with someone other than the Anzorvine girl prior to October 24th, 1933? A. You mean before that?

Q. Yes. A. Yes.

Q. Who was it involved with; do you remember the name? A. The American Beef Company.

Q. What was the damage to the other truck? A. It was damage to our truck most; his truck, just the tail board.

Q. Did they claim damage to their truck? Were the cars moving?

The Court: What is that?

Mr. Solomon: Under the Financial Responsibility Act, if this man had been involved in an accident prior and this policy was then issued and an accident occurred, the liability of the insurer becomes absolute and cannot be contested and set aside as far as this defendant Anzorvine is concerned. In other words, if there is a prior accident and the issuance of a policy and another accident, the liability of the Continental Casualty Company in this case becomes absolute, and the policy cannot be set aside or annulled as far as the infant defendant is concerned in this case.

Mr. Herbert: I object to the question.

The Court: Objection sustained.

Q. Was that the American Beef Company you had the accident with? A. Yes.

Q. You are making claim against them? A. Yes.

Q. They are making claim against you?

Mr. Herbert: I object to that.
The Court: I will allow it.

A. Yes.

CROSS-EXAMINATION by Mr. Herbert:

Q. Mr. Kravitz carried your insurance for a good while? A. Yes.

Q. You knew him very well? A. Four years or so.

Q. You went to his office frequently? A. Yes, sir.

Q. Where had he had his office before he moved to Summit Avenue, Union City? A. On Ocean Avenue.

Q. Union City or Jersey City? A. Jersey City. The beginning, he had it at 591.

Q. 591 Summit Avenue? A. No; I think the Dispatch Building.

Q. Did you know all the girls in the office by sight? A. Well, I will tell you. He changes so often, you don't know. There is different ones in there every day. He changes girls.

Q. You knew Miss O'Brien; you saw her this morning? A. Yes.

Q. Did you know any of the other girls that worked there? A. Yes; I knew a few girls.

Q. Did you know another girl there named McCabe? A. Yes.

Q. Isn't she the girl you claim you saw when you went there on October 24th? A. If I see, I know her better.

Q. Is Miss McCabe in court? Is that the young lady? A. No.

Q. Sure about that? A. Yes.

Q. You say you went to Paterson with your brother on October 24th? A. Yes.

Q. Is your brother in court? A. No, sir.

Q. Where is he? A. Working.

Q. Here in Jersey City? A. Yes.

EXAMINATION by the Court:

Q. Is Mr. Kravitz in court? A. No, sir; I don't see him.

Q. When did you see him last? A. The last I seen Kravitz I guess around a month ago.

Q. Did you talk to him about this case? A. No.

Q. Did you ever talk to him about this case since October 24th, 1933? A. No.

Q. You have seen him since October 24th, 1933; haven't you? A. I went up to the lawyer's.

Q. How many times have you seen Kravitz since this accident? A. I seen him a few times since the accident.

Q. At his office? A. Yes.

CROSS-EXAMINATION continued by Mr. Herbert:

Q. How many trucks have you in your business, Mr. Lanzisero? A. One truck.

Q. Whose truck was it that you drove up to Paterson on that day? A. My brother's car.

Q. On October 24th, 1933, didn't you own more than one truck? A. I owned two trucks. One was in the back yard.

Q. Do you recall talking with Mr. Huber who was on the witness stand a while ago and

Mr. Connolly who was on the witness stand a while ago at the office of Kravitz any time? A. Yes. I don't remember the date.

Q. How long after this accident happened? A. Well, I don't know; about fifteen or twenty days. I don't remember the days.

Q. Where did you see these two gentlemen? A. At Kravitz's office.

Q. Did you tell them why you had happened to apply for insurance on October 24th, 1933? A. Yes, sir.

Q. What did you tell them about why you happened to do that? A. They told me, "Where is the policy?" So I said to them—

Q. I asked you what the reason was for applying for insurance on this particular day? What did you tell them was your reason for applying for insurance on this particular day?

Mr. Auerbach: I object to that.

The Court: Objection overruled.

A. I can't understand what you mean.

EXAMINATION by the Court:

Q. You went to Kravitz's office on October 24th, 1933, to apply for insurance? A. Yes.

Q. How long had you not carried insurance on this truck? A. I never had insurance on that truck.

Q. Why did you happen to go there that day? A. I had a bad dream that night. I got up in the morning and I said to the wife, "I am going to insure the truck."

CROSS-EXAMINATION continued by Mr. Herbert:

Q. What did you dream? A. I dreamed an accident.

Q. With this truck? A. Yes, with this truck, too.

EXAMINATION by the Court:

Q. Was Tony driving the truck in the dream? A. Yes.

Q. Was the little girl in the dream? A. You mean in the dream Tony was in the accident?

Q. What was the accident you dreamed about? A. That I was driving.

Q. In the dream, you were driving? A. I was in the car. I got up in the morning and I said to my wife, "I am going to insure the truck"; and I went there about half past nine.

CROSS-EXAMINATION continued by Mr. Herbert:

Q. When you were there on the day that Mr. Huber was there and Mr. Connolly was there, didn't they call in one of the young ladies and ask you if that was the young lady you saw when you went there that morning? A. Yes, sir.

Q. And you said yes? A. I said no.

Q. How many girls did they call into the room at the time you went there? A. I think two girls.

Q. What did you say about those girls? A. No.

Q. That you didn't know either one of them? A. No.

Q. You told us, Mr. Lanzisero, on the way back from Paterson, you stopped at Kravitz's office? A. Right.

Q. And you went upstairs with Mr. Hentaschel, and what happened after you went upstairs? A. Mr. Kravitz was there.

Q. What did you talk about? A. What I said to Mr. Kravitz?

Q. Yes. A. I said that I was over the office this morning. I said, "Did you get the policy?" That is the first thing I told him, so he said, "It is well taken care of."

The Court: He told you it had already been issued, is that what you mean?

A. Yes.

The Court: Or that it had been ordered?

A. He said "taken care of." He said, "You don't have to worry. It is covered."

The Court: This was five-thirty?

A. Yes.

Mr. Auerbach: That is our case.

Mr. Herbert: I have a witness in rebuttal.

MARGARET McCABE, witness called on behalf of the complainant, being duly sworn on her oath according to law, testifies as follows:

Direct-examination by Mr. Herbert:

Q. Where do you live? A. 321 Claremont Avenue.

Complainant's Witness, Margaret McCabe, Direct

Q. On October, 1933, were you employed at Kravitz's office who conducted a collection agency at Summit Avenue, Union City? A. I was not.

Q. Had you ever been employed at the office operated by Mr. Kravitz? A. Yes.

Q. When did your employment there cease? A. I believe in September; around the early part of September.

Q. Did you come back to his office later on? A. I did.

Q. When did you come back? A. In December.

Q. Do you know of your own knowledge whether any other girl was employed there during this period that you were not working there? A. Miss O'Brien.

Q. Was she the only one? A. To my knowledge.

Q. Did you visit the office between September and December? A. I believe I was there once or twice.

Q. No other girl working there then? A. I don't recall seeing anyone but Miss O'Brien.

Q. Were you in the office when Mr. Huber, Mr. Connolly, Mr. Kravitz and Mr. Lanzisero had a talk about this case? A. No, I was not.

Notice.

IN CHANCERY OF NEW JERSEY.

102-650.

Between

CONTINENTAL CASUALTY COMPANY,
Complainant,
and
ANGELO LANZISERO, *et als.*,
Defendants.

On Bill, etc.
Notice.

To:
Solomon & Miller, Esqs.,
Solicitors of defendants,
Frank & Bertha Anzovino,
1 Exchange Place,
Jersey City, N. J.
Sigmund Auerbach, Esq.,
Solicitor of defendant,
Angelo Lanzisero,
591 Summit Avenue,
Jersey City, N. J.

Sirs:

Take Notice that on Monday, December 17, 1934, at 10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we shall apply to the Honorable James F. Fielder, Vice Chancellor, at Chancery Chambers in Jersey City, for the purpose of settling the form of the final decree in the above entitled cause; and take further notice that at the said time and place we shall present to the Court a draft of decree in the form annexed hereto.

McCARTER & ENGLISH,
Solicitors of Complainant.

Final Decree.

IN CHANCERY OF NEW JERSEY.

102-650.

Between CONTINENTAL CASUALTY COMPANY, Complainant, and ANGELO LANZISERO, *et als.*, Defendants.	On Bill, etc. Final Decree.

This cause coming on to be heard on December 3, 1934, at Chancery Chambers in the City of Jersey City, in the presence of McCarter & English, solicitors of the complainant, and Sigmund Auerbach, solicitor of the defendant, Angelo Lanzisero, and Solomon & Miller, solicitors of the defendants, Frank and Bertha Anzovino; and it appearing that the complainant's bill of complaint was taken as confessed against the defendant, Anthony Genis, on the 7th day of September, 1934, and that an order was entered herein on September 4, 1934, assigning and appointing Edward L. Whelan, Clerk of this Court, Guardian *ad litem* for the defendant, Helen Anzovino, and assigning and appointing J. Albert Homan, Esquire, as solicitor for said Guardian *ad litem,* and that the said J. Albert Homan, Esquire, although not appearing at the final hearing of this cause, affixed his consent to the designation herein dated October 11, 1934, and was duly served with notice of the said final hearing;

Final Decree

And the Court having read and considered the pleadings and having taken oral testimony in open court, and having heard and considered the arguments of counsel thereon, and it appearing that by the terms of the policy of insurance described in the bill of complaint, the complainant agreed to insure the defendant, Angelo Lanzisero, against loss from the liability imposed by law upon him for damages arising out of bodily injuries, including death resulting therefrom, accidently suffered, or alleged to have been suffered, within the policy period by any person or persons, by reason of the ownership, maintenance or use of a certain automobile truck, and that the period of said policy is, by its terms, defined as from October 24th, 1933, to October 24th, 1934, commencing and ending at 12:01 A. M. Standard Time; and it further appearing that said policy contains the following provision:

"With respect to any motor vehicle described herein this policy is hereby amended to conform with the provisions of the Motor Vehicle Financial Responsibility Law of the State or Province in which such automobile is registered at the time of the accident and/or in which such automobile is operated at the time of the accident during the policy period, to the extent of coverage and limits of liability required by such law, but not in excess of the limits of liability stated in this policy."

And it further appearing that the defendant, Helen Anzovino, was injured on October 24, 1933, by the automobile truck described in said policy of insurance and that thereafter, but at

a later hour on the same date, the defendant, Angelo Lanzisero, with knowledge of the injury so sustained by the defendant, Helen Anzovino, and without disclosing said injury to the complainant, made application to the complainant for insurance on said automobile truck with the fraudulent intent of inducing the complainant to issue a policy of insurance covering the hour at which said injury was sustained; and it further appearing that the said policy of insurance described in the bill of complaint herein was obtained from the complainant through fraud, and that said policy was not in force when the defendant, Helen Anzovino, was injured by said automobile truck, and that the complainant is entitled to the relief sought and prayed for in the bill of complaint;

It is, on this 17th day of December, 1934, Ordered, Adjudged and Decreed that the aforesaid policy of insurance ♯C. A. 1629854 issued by the complainant to the defendant, Angelo Lanzisero, was procured by and issued and delivered to the said Lanzisero as a result of fraud on his part; and

It is further Ordered, Adjudged and Decreed that said policy of insurance ♯ C. A. 1629854 issued by the complainant to the defendant, Angelo Lanzisero, is void and of no effect and that said policy of insurance be and hereby is cancelled, and that the defendant, Angelo Lanzisero, surrender said policy of insurance to the complainant; and

It is further Ordered, Adjudged and Decreed that the defendants, Angelo Lanzisero, Anthony

Genis, Helen Anzovino, Frank Anzovino and Bertha Anzovino, their agents, attorneys, solicitors and representatives, be and they hereby are enjoined and restrained from prosecuting any pending or instituting any future suit at law or in equity against the complainant upon said policy of insurance; and

It is further Ordered that no costs be taxed or counsel fees allowed against the defendants, Helen, Frank and Bertha Anzovino.

LUTHER A. CAMPBELL,
C.

Respectfully advised,
JAMES F. FIELDER,
V. C.

Service of the within Notice is hereby acknowledged as of December 12, 1934.

SOLOMON & MILLER,
Solicitors of defendants,
Frank & Bertha Anzovino.

Conclusions.

Not to be published in any report.

Dated—January 11, 1935.

IN CHANCERY OF NEW JERSEY.

102-650.

Between

CONTINENTAL CASUALTY CO.,
Complainant,
and
ANGELO LANZISERO, *et als.*,
Defendants.

On Bill, &c.
Conclusions.

Mr. Ward J. Herbert for complainant.

Mr. Sigmund Auerbach for defendant, Angelo Lanzisero.

Mr. Irving Solomon for defendants, Helen Anzovino, *et al.*

FIELDER, V. C.:

At the conclusion of the hearing of this cause I stated I would advise a decree for complainant and, should an appeal be taken, I would file reasons for my decision. Having been advised that notice of appeal has been filed I now state those reasons.

This is a suit to cancel, on the ground of fraud, complainant's policy of casualty insurance issued to the defendant, Lanzisero, insuring him against loss for damages for bodily injury suffered by any person by reason of his

ownership or use of a certain auto truck. The policy bears date Oct. 25, 1933, and the period of insurance therein described is from Oct. 24, 1933, to Oct. 24, 1934, commencing and ending at 12:01 A. M.

About 3:30 P. M. on Oct. 24, 1933, said auto truck was involved in an accident while being operated by Lanzisero's employee, in which accident it is claimed the infant defendant herein, Helen Anzovino, was seriously injured. Suit for damages resulting from such injuries was commenced by said infant and her parents against Lanzisero and his driver and is pending. Prior to the issuance of said policy Lanzisero had carried no casualty insurance on his auto truck and up to the hour of the accident complainant's policy had not been issued, nor had application for it been made to complainant's agent. The evidence leaves no doubt in my mind that Lanzisero learned of the accident a few hours after it had occurred and thereupon, on Oct. 24, 1933, hastened to the office of his friend, Kravetz, who conducted a collection agency and did insurance business, and told Kravetz about it and induced Kravetz to call complainant's agent on the telephone and request the issuance of a policy on Lanzisero's truck, which Kravetz did about 6:00 P. M. on the day of the accident, making no disclosure of the fact that prior to the telephone call the truck had been in an accident. Complainant's agent at once issued a binder which, according to complainant's usual insurance practice, was made effective from 12:01 A. M. of the binder's date and the following day the policy itself was written and delivered to Kravetz, still without

notice to complainant, or its agent, of the accident. Clearly Lanzisero obtained the policy by fraudulently concealing information from complainant that the insured truck had been involved in an accident and he was endeavoring to secure by such fraudulent conduct, financial protection against loss for which he feared he was liable.

If he alone were concerned with the policy protection, I could have no doubt that the relief of cancellation sought by complainant should be granted, but on behalf of the injured infant and her parents, all of whom are defendants herein, it is argued that notwithstanding Lanzisero's fraud, chapter 169 of the laws of 1931, amending an act entitled "An act concerning financial responsibility for damages caused by the operation of motor vehicles" (P. L. 1929, p. 195) applies to make the policy enforceable in favor of said defendants. The act, as amended, provides generally that the Commissioner of Motor Vehicles shall require from every person holding a license for the operation of a motor vehicle who shall have been concerned in any motor vehicle accident resulting in injury to person or damage to property to the extent of $100, proof of financial responsibility to satisfy any claim for damages, which proof may be by a certificate of an insurance agent that a policy against public liability has been issued to the operator and section 2 of the act, as amended, provides that the policy so issued shall not be cancelled except after ten days' written notice to the Commissioner. Section 10 of the act, as amended

(P. L. 1931, p. 343), provides that such policy shall be subject to the following provisions:

"(a). The liability of any company under a motor vehicle liability policy shall become absolute whenever loss or damage covered by said policy occurs * * *. No such policy shall be cancelled or annulled as respects any loss or damage by any agreement between the carrier and the insured after the said insured has become responsible for such loss or damage and any such cancellation or annullment shall be void. Upon the recovery of a final judgment against any person for any such loss or damage if the judgment-debtor was at the accrual of the cause of action insured against liability therefor under a motor vehicle liability policy, the judgment-creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment * * *."

Lanzisero's motor truck was concerned in an accident resulting in damage, prior to the accident here in question but complainant's policy was not obtained pursuant to a demand by the Commissioner because of such prior accident. Nevertheless I think that a policy such as complainant's, taken out voluntarily by an owner of a motor vehicle who is liable to be called upon for one, comes within the provisions of the act. Such an owner may anticipate such call and provide himself with a policy which would come within the terms of the act (Steglia v. Metropolitan Casualty Ins. Co., 113 N. J. L. 101), but the mere fact that such a policy exists, does not make the insurer liable to an injured third person in all events. It cannot

be believed that our legislature intended to deprive an insurer of every legal defense which might be interposed against liability on the policy (Lorando v. Gethro, Mass. 117, N. E. 185; Stacey v. Fidelity & Casualty Co., Ohio, 151 N. E. 718; Guerin v. Indemnity Ins. Co., Conn., 142 Atl. 268).

When complainant learned of the fraud practiced on it, it could not be required to continue possible liability under the policy by waiting ten days after giving notice to the Commissioner, before cancelling it. It was entitled to refuse at once to be bound by a policy contract fraudulently obtained.

Section 10 purports to make the liability of an insurer absolute when loss or damage covered by the policy occurs. When the loss or damage in this case occurred, there was no policy in existence or even contemplated. True, an insurer may assume a risk to commence previous to the date of the policy and will be liable for a loss occurring before the actual policy date, but only in case there is no fraud or concealment of the loss by the insured (Hallock v. Insurance Co., 26 N. J. L. 268, affd. 27 N. J. L. 645). The section bans cancellation or annullment of a policy by agreement between insurer and insured after the insurer has become responsible for loss or damage under it, which indicates that at the moment the loss occurs there must be a policy in existence covering the loss or damage. The further provision of the section is that if the infant defendant and her parents should obtain a judgment in their damage suit against Lanzisero, they would

be entitled to collect from his insurer, if Lanzisero was insured at the accrual of the cause of action. Accrual of the cause of action means the time of the happening of the accident but Lanzisero was not then insured. He held no policy when the loss or damage occurred to which the injured persons could look for indemnity and to hold, as I do, that the infant defendant and her parents should have no standing in a court of equity to object to the cancellation of complainant's policy, will not deprive them of any right they had at the time their cause of action against Lanzisero accrued.

Notice of Argument.

Filed Feb. 18/35.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CONTINENTAL CASUALTY COMPANY, Complainant-Respondent, and ANGELO LANZISERO, *et als.*, Defendants-Appellants.	On Bill, &c. On Appeal From Decree in Chancery. Notice of Argument.

To: Messrs. McCarter & English, Solicitors of Respondent:

Sirs:

Please Take Notice that the argument of the appeal in the above entitled cause will be brought on at the next term of the New Jersey Court of Errors and Appeals, to be held at the State House, at Trenton, on Tuesday, the twenty-first day of May next, at eleven o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Dated, February 15th, 1935.

Yours respectfully,

SOLOMON & MILLER,
Solicitors for Appellants.

Sat below:

LUTHER A. CAMPBELL, Chancellor.

On advice of James F. Fielder, Vice-Chancellor.

Service of the within notice of argument is hereby acknowledged this 15th day of February, 1935.

McCARTER & ENGLISH,
Solicitors for Respondent.

Stipulation.

Filed Feb. 18/35.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

CONTINENTAL CASUALTY COMPANY,
Complainant-Respondent,

and

ANGELO LANZISERO, *et als.*,
Defendants-Appellants.

On Bill, &c.
On Appeal
From Chancery.
Stipulation.

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that the argument on appeal in the above entitled cause shall be submitted upon briefs.

Dated, February 15th, 1935.

McCARTER & ENGLISH,
Solicitors of Respondent.
SOLOMON & MILLER,
Solicitors of Appellants.

New Jersey Court of Errors and Appeals

Between CONTINENTAL CASUALTY COMPANY, Complainant-Respondent, and ANGELO LANZISERO, *et als.*, Defendants-Appellants.	On Appeal from a Decree of the Court of Chancery, Advised by James F. Fielder, V. C.

BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS.

Outline and Index of Argument.

Statement of Facts.

The respondent, CONTINENTAL CASUALTY COMPANY, through its agents, issued a policy of insurance covering the automobile truck of the defendant, ANGELO LANZISERO (Schedule "A" annexed to the bill of complaint—Case, p. 12). The policy period being from October 24, 1933, to October 24, 1934, commencing and ending at 12:01 A. M., standard time, at place of issuance, which place of issuance was in New Jersey (Case, p. 22, l. 21).

The facts as to the issuance of this policy and custom are best disclosed by the following testimony of STEPHEN MULLER, complainant's witness (Case, p. 36, l. 21):

> *"CROSS-EXAMINATION by Mr. Solomon:*
>
> "Q. Will you explain to the Court why this policy is effective as of 12:01 A. M., October 24th, 1933? A. All our policies are dated from then.
>
> "Q. When you say the policy or binder was issued about six o'clock that night or five minutes to six when you received the call— A. That's right.
>
> "Q. Why was the policy issued or dated as of 12:01 A. M.? A. I don't know.
>
> "Q. Isn't that a printed form? A. Yes.
>
> "Q. It is not written in. It comes printed in the policy? A. I am quite sure it is.
>
> "Q. Why don't you put the true time in when you issue the policy?
>
> "Mr. Herbert: I object.
>
> "The Court: Objection overruled.

"A. We never made a habit of doing that" (Case, p. 37, l. 1).

"EXAMINATION by the Court:

"Q. What is the custom when you write a policy as to the hour you make the policy effective? A. Generally from 12:00 or 1:00 A. M.
"Q. When? A. 12:01 A. M.
"Q. You always do? A. Yes.
"Q. Without regard to the time you get the order for the policy? A. That's right.

"CROSS-EXAMINATION continued by Mr. Solomon:

"Q. Your premiums begin to run as of 12:01 A. M.? A. Yes.
"Q. So that if a policy is issued at six o'clock, the man paying the premium pays from 12:01 A. M. of that morning? A. That's right" (Case, p. 37, l. 40).

"RE-DIRECT EXAMINATION by Mr. Herbert:

"Q. Did Mr. Kravitz mention the time from which the policy was to run in any way? A. No."

Lanzisero had been in a previous accident and this policy was of the kind as required by an act entitled "An Act Concerning Financial Responsibility for Damages Caused by the Operation of Motor Vehicles," P. L. 1929, p. 195, as amended by Laws of 1931, p. 343 (Conclusions, Case, p. 74, l. 26).

It is admitted by the respondent (Case, p. 49, l. 35) that Helen Anzovina, an infant, six

years of age, was seriously injured on October 24, 1933, between 3:20 and 4:30 P. M. (Case, p. 49, l. 1), being approximately fifteen to sixteen hours after the policy period began to run, so that by law the policy was subsisting and valid as to the public at the hour and date of this accident and that the damage or injury was covered by the policy.

Section 10, Subdivision A, of the act as amended P. L. 1931, p. 343, provides that such policy shall be subject to the following provisions:

> The liability of any company under a motor vehicle liability policy shall become absolute whenever loss or damage COVERED by said policy occurs.

The policy of insurance contains the following (Case, p. 15, line 22):

> FINANCIAL RESPONSIBILITY
>
> With respect to any motor vehicle described herein this policy is hereby amended to conform with the provisions of the Motor Vehicle Financial Responsibility Law of the State or Province in which such automobile is registered at the time of the accident and/or in which such automobile is operated at the time of the accident during the policy period, to the extent of coverage and limits of liability required by such law, but not in excess of the limits of liability stated in this policy.

The policy further contains the provision (Case, p. 19, l. 24):

> If the Company by reason of any statute, including the Motor Vehicle Financial Responsibility Law of any State or

> Province, or endorsement required by statute to be attached to this policy, shall pay to an injured person or one claiming under him any sum which except for such statute or endorsement would not be payable by reason of a breach of the terms or conditions of this policy, the Assured agrees to reimburse the Company for the amount of such payment.

All of which follows the wording of P. L. 1931, p. 343, which reserves to the insurer, in this case the CONTINENTAL CASUALTY COMPANY, its right of action against its assured, LANZISERO, for any breach of the terms or conditions of the policy and making the assured liable to the insurer for any payments it may be obliged to make to an injured person.

The respondent notwithstanding the provisions of its policy that "the policy period shall be from October 24, 1933, to October 24, 1934, commencing and ending at 12:01 A. M., Standard Time," and the further fact that the premiums are charged from 12:01 A. M. of October 24, 1933 (Case, p. 37, ll. 19 to 23), contend that the policy was void, having been procured by LANZISERO at about 6 P. M. on October 24, 1933, by fraud practised on the respondent.

This, the defendant, LANZISERO, denied. The testimony of STEPHEN MULLER, complainant's agent and witness, on this point is (Case, p. 37, l. 24):

> "Q. Will you look at that policy, please, and the schedule annexed thereto. Is that the information you obtained from Mr. Kravitz? A. That's right.
>
> "Q. Is that all the information you obtained? A. That's all.

"Q. You did not ask him for any other information? A. No.

"Q. That contains the entire conversation between you and Mr. Kravitz? A. That's right.

"Q. You didn't ask him whether there had been an accident prior to six o'clock, did you? A. No, I did not.

"RE-DIRECT EXAMINATION by Mr. Herbert:

"Q. Did Mr. Kravitz mention the time from which the policy was to run in any way? A. No."

The appellants, parents of the injured child, admittedly in ignorance of the controversy between the insurer and assured, instituted an action in the Hudson County Court of Common Pleas, which action is still pending.

Thereafter the respondent instituted this suit in Chancery, seeking a cancellation of its policy issued to LANZISERO, joining the appellants as parties defendant and seeking to determine the rights of these appellants under the policy it had issued to LANZISERO. The Court decreed that LANZISERO had obtained the policy through fraud and enjoined the appellants from instituting any suit on the policy.

Argument.

We respectfully urge that the learned Vice Chancellor misconceived the law applicable to the rights of these appellants in these particulars.

We further urge that the damage was covered by the policy and that the policy was valid and subsisting to the public and the appellants.

POINT A.

The policy of insurance being of the kind mentioned in the act entitled "An act concerning financial responsibility for damages caused by the operation of motor vehicles," Chapter 116, Laws of 1929, as amended by Chapter 169 of the Laws of 1931, the liability of the complainant, Continental Casualty Company, under its policy of insurance became absolute in favor of the appellants, Frank and Bertha Anzovina, and the policy cannot be cancelled so as to affect their rights, though it may have been obtained by fraud between the insurer and insured.

We respectfully urge that the main object of the act, P. L. 1931, Chapter 169, is to protect careful travelers on the highway injured by negligence in the operation of motor vehicles and to afford them redress for such injury where the policy of insurance is of the kind mentioned in the act.

The Court found (Conclusions, Case, p. 74, l. 25):

> "That LANZISERO's motor truck was concerned in an accident resulting in damage, prior to the accident here in question but complainant's policy was not obtained pursuant to a demand by the Commissioner because of such prior accident. Nevertheless I think that a policy such as *complainant's,* taken out voluntarily by an owner of a motor vehicle who is liable to be called upon for one, comes within the provisions of the act."

It is correctly stated by the learned Vice Chancellor that our legislature did not intend

to deprive an insurer of every legal defense which might be interposed against liability on *every policy,* but it is equally correct that our legislature did intend to make the liability of an insurer to an injured person absolute *when the policy was of the kind mentioned in the act and loss or damage covered by said policy occurs,* notwithstanding that between the insurer and assured there may be some defense, *i. e.,* as in this case, fraud.

See:

Ocean Accident, &c., Corp. v. Peerless Cleaning, &c., 10 Mis. 1185.
McLaughlin v. Central Surety, 11 Mis. 440.

As between the insurer and assured, if the policy was of the kind mentioned in the act and by force of that act, the liability of the insurer becomes absolute and it is obliged to pay, it can seek reimbursement from its assured, P. L. 1931, Chapter 169, Section 10, Subdivision A.

The complainant well recognizes this by inserting in its policy (Case, p. 19, l. 34) the following:

> If the Company by reason of any statute, including the Motor Vehicle Financial Responsibility Law of any State or Province, or endorsement required by statute to be attached to this policy, shall pay to an injured person or one claiming under him any sum which *except for such statute* or endorsement would not be payable by reason of a breach of the terms or conditions of this policy, the Assured agrees to reimburse the Company for the amount of such payment.

A similar provision as the above, which is part of our statute, has been held to be constitutional in the State of Massachusetts.

In *re* Opinion of the Justices Supreme Judicial Court of Mass., 147 N. E. 681, on p. 699, Sect. 23:

> The main object of the bill is to protect careful travelers on the highway injured by negligence in the operation of motor vehicles and to afford them some redress for such injuries. The legislative question involved in this aspect is this: When a financially irresponsible owner or operator of a motor vehicle, insured by a policy or bond procured by some material misrepresentation, negligently injures another traveler on the highway in the exercise of due care, which of two innocent persons must suffer, the injured traveler, or the insurer or surety? The legislature may believe that the opportunities open to the insurer or surety for inquiry and investigation before issuing the policy or signing the bond are such as to afford it substantial protection against harm. The insurer or surety may be thought to be in much better position to defend itself in these particulars than is the injured innocent traveler. The proposed bill leaves to the insurer or surety its full rights against the registrant of the motor vehicle.

We again urge that the learned Vice Chancellor erred in his determination by failing to distinguish the rights of an injured person under an ordinary policy of insurance and a policy of the kind mentioned in the act, P. L. 1931, Chapter 169.

In the former (an ordinary policy) the insurer may set up any defense it may have

against the assured in an action by an injured person. In the latter, however (Financial Responsibility Policy), it cannot set up its defenses against the injured but must look to reimbursement from its assured for any breach of the terms or conditions of the policy. P. L. 1931, p. 343.

It must be remembered that the issuance of the policy on the part of the respondent was a voluntary act and it chose voluntarily to commence its liability as of 12:01 A. M. October 24, 1933 (Case, p. 36, l. 21) (already quoted at length in this brief in the Statement of Facts).

On this point the language of the Massachusetts Supreme Court *in re* Opinion of the Justices (*supra*) is very pertinent:

> "The Legislature may believe that the opportunities open to the insurer or a surety for inquiry and investigation before issuing the policy or signing the bond are such as to afford it substantial protection against harm. The insurer or surety may be thought to be in much better position to defend itself in these particulars than is the injured innocent traveler."

The insurer in our case could well have protected itself by fixing the time, from which its liability shall commence, at 6 P. M., the time it alleges it received the request for the insurance. This it did not do, but chose to issue its policy to commence as of 12:01 A. M. and charged its premium from 12:01 A. M. (Case, p. 37, l. 19).

Section 10 of the act of P. L. 1931, p. 343, makes the liability of an insurer absolute when

loss or damage *covered by the policy occurs.* From the reading of the policy (Case, p. 12) we fail to find the least suggestion or expression therein that this accident was not intended to be covered by the policy. The learned Vice Chancellor in construing the words *"covered by the policy occurs"* goes beyond the wording of the policy itself to determine from the testimony that there was no policy in existence or even contemplated.

We think it was not the intention of the legislature to go beyond the express wording of the policy itself to determine whether the damage was *covered by the policy,* whether by a policy actually in existence or subsequently issued to assume a risk commencing previously to the date of the policy. It is sufficient if at a later date there is a policy which, on its face, *covers* the period at which the loss or damage occurred. This was the test applied to a similar policy in the case of

> *Kenny v. Indemnity Ins. Co. of North America,* 10 Mis. p. 346.

At page 348, Lawrence, C. C. J.:

> "The policy appears, therefore, to have been subsisting and valid as to the public on the date of such accident."

The insurance carrier was held liable on the policy by force of the statute even though it had never received payment of the premium.

The case of

> *Hallock v. Insurance Co.,* 26 L. p. 268 (affd. 27 L. p. 645),

cited by the learned Vice Chancellor, could, of course, not involve the Laws of 1931, Chapter

169, which statute creates for the benefit of the public generally, a right not involved in the above case, yet the language of the Court may well be cited.

26 L. at pages 274 and 275. VREDENBURGH, J.:

> "So far as appears by the case, when the policy was signed both parties were equally ignorant of the fire; even if the plaintiff knew, and the defendants were ignorant of it, it was so in both cases by a physical necessity. *Or even if the plaintiff had known of it, and could have telegraphed it to the defendants in time to have reached them before they signed the policy (neither of which appears), he was, in the circumstances then existing, under no legal or moral obligation so to do.* There can be no doubt but that the policy, in its terms, is precisely as both parties intended it should be. The application was for insurance from the 10th; the defendants had held it under advisement from the 2d to the 13th, thereby preventing the plaintiff from applying elsewhere, and then, by express terms, insured from the 10th for one year. They *intentionally* made the year's risk commence from the 10th. If the fire had occurred on the 13th March, 1856, instead of 1855, under this policy, the defendants could not have been held liable. When they filled up the policy, they elected to take the premium from the 10th. *They took their pay for the very time during which the fire occurred, and thus say now, in effect, this is a very good policy from the 10th to the 13th, if no fire occurs, but a void one if there does.* The question, therefore, is, is a contract to insure against fire from a time past, void in law. No decision, or authority, or principle, sustaining such a doctrine

> has been referred to before us. It is every day's practice in both marine and fire insurance. A contract is good, unless shown to be against good morals or sound policy. I do not see how this contract contravenes either, or what difference in principle there can be between insuring from a time past and a time to come. Many cases will be found recognizing the validity of such contracts."

So, too, in our case. The respondent intentionally make the risk commence from 12:01 A. M. October 24, 1934 (Case, p. 37, l. 1):

> *"EXAMINATION by the Court:*
>
> "Q. What is the custom when you write a policy as to the hour you make the policy effective? A. Generally from 12:00 or 1:00 A. M.
> "Q. When? A. 12:01 A. M.
> "Q. You always do? A. Yes.
> "Q. Without regard to the time you get the order for the policy? A. That's right."

So, too, in our case, they took their pay covering the very time during which the injury occurred (Case, p. 37, l. 19):

> *"CROSS-EXAMINATION continued by Mr. Solomon:*
>
> "Q. Your premiums begin to run as of 12:01 A. M.? A. Yes.
> "Q. So that if a policy is issued at six o'clock, the man paying the premium pays from 12:01 A. M. of that morning? A. That's right."

Can the respondent sincerely urge that if the injury complained of had occurred at 1 A. M. October 24, 1934, it would be liable because

the policy had been issued at 6 P. M. October 24, 1933, and disregard the period of commencement as stated in the policy?

It contracted for the benefit of the public by force of the Laws of 1931, Chapter 169, to take a risk that was retrospective as well as prospective. They contracted on the 24th of October, 1933, to be found from 12:01 A. M.; they charged the premium from that time; clearly it must be construed that they intended to include the risk from that time. No other possible construction can be given to the contract without altering its terms, and that the Court cannot do.

See:

Alcamo v. Motorists Casualty Co., 11 Mis. 350.
Naumberg v. Young, 44 L. 341.

The Court of Errors and Appeals in affirming the judgment of the Supreme Court in the case of *Hallock v. Insurance Co.*, 27 L. p. 645, at p. 647, speaking by ELMER, J.:

> "Had they only undertaken to insure from and after the making of the policy, no action could have been maintained for a prior loss; but upon referring to its terms, it appears that they expressly engaged to insure the premises from the 10th of March, which was before the fire."

In our case, which of the two must suffer? The insurer, who could have protected itself from the force and effect of the laws of 1931, Chapter 169, by inserting the actual time of delivery, but instead sought the premium from 12:01 A. M.; or these appellants, who seek

to recover for injuries of a serious nature sustained to their infant of tender years? Was it not the real intention of our legislature, when it enacted Chapter 169 of the Laws of 1931, to prevent what the respondent is now attempting to do?

The respondent could have protected itself in the manner set forth in the case of

> *Alcamo v. Motorists Casualty Co.*, 11 Mis. 350 (*supra*),

where the insurer was careful to insure only from the actual date and time of the issuance of the policy.

Thomas Connolly, on behalf of the complainant, upon being recalled, testified briefly (Case, p. 50, l. 10):

> "It may have been a week or it may have been a shorter period Abraham Kravitz came into the office of J. & J. McMahon, Incorporated, the general agents of the respondent, and spoke to Mr. McMahon, who introduced Kravitz to the witness."

And during the course of the conversation (Case, p. 50, l. 34):

> "I said we would make him a subagent of one fire company and one casualty company so that it would not be necessary for him to take out a broker's license for the balance of that year, 1933. I advised him for his own sake and for our sake to take out a broker's license for 1934.
>
> "Q. Did you have him made a subagent after that? A. Yes; I think I did. We never signed any agreement or contract."

He further testified upon examination by the Court (Case, p. 51, l. 1):

> "The Court: He was subagent for those particular companies you mentioned? Will you answer yes or no? A. I had him licensed for these companies.
> "Q. Was this company one of them? A. Yes."

On cross-examination he further testified that Kravitz was to be paid a subagent's commission on the issuance of *this policy* of 17 1/2%, and that Kravitz's authority was to solicit business for the complainant, CONTINENTAL CASUALTY COMPANY (Case, p. 54).

We, therefore, respectfully submit that if a fraud had been perpetrated by LANZISERO, it was with the assistance of the respondent's agent and subagent. Surely the infant and her parents should not be penalized for the fraud of the respondent's agents.

We respectfully urge that the decree of the Court of Chancery, so far as it affects these appellants and infant, should be reversed and for nothing holden, with costs to be taxed and the record be remitted to the Court of Chancery with instructions to dismiss the bill of complaint.

Respectfully submitted,

SOLOMON & MILLER,
Solicitors of Appellants,
Frank & Bertha Anzovina.

M. T. ROSENBERG,
Of Counsel with Defendants-Appellants.

New Jersey Court of Errors and Appeals

CONTINENTAL CASUALTY COMPANY, Complainant-Respondent, *vs.* ANGELO LANZISERO, *et als.*, Defendants-Appellants.	On Appeal from a Decree of the Court of Chancery.

BRIEF FOR COMPLAINANT-RESPONDENT.

This appeal brings up for review a decree of the Court of Chancery (p. 67) cancelling a policy of automobile liability insurance issued by the complainant to the defendant, Angelo Lanzisero. The policy by its terms insured Lanzisero against liability for injuries which might be inflicted by a Chevrolet truck owned by him (p. 12, l. 30; p. 23, l. 10). The coverage provided was "from October 24th, 1933 to October 24th, 1934, commencing and ending at 12:01 A.M. Standard Time" (p. 22, l. 22). Fraud was the ground for cancellation. That Lanzisero perpetrated a fraud to obtain the policy is not disputed by the present appellants. Their sole contention is that by virtue of Chapter 116 of the Laws of 1929 as amended by Chapter 169 of the Laws of 1931 (commonly called the Financial Responsibility Act), the policy cannot be cancelled as to them, they being persons damaged as a result of the operation of the insured automobile (brief, p. 7). Although the finding of fraud is not questioned, the facts supporting that finding bear upon whether the statute is applicable or not, and we shall undertake to state them briefly.

On October 24, 1933, about 3:30 in the afternoon, a Chevrolet truck owned by the defendant Lanzisero struck Helen Anzovino, the child of the present appellants, and injured her. This happened near Johnston and Manning Avenues in Jersey City. Anthony Genis, employed by Lanzisero, was driving the truck at the time (p. 6, ll. 18-30; p. 25, l. 30; p. 48, l. 40 *et seq.*). The truck was not covered by insurance when the accident occurred, and no application for insurance had been made (p. 72, l. 20). Subsequent events are described in the Vice Chancellor's conclusions as follows:

> "The evidence leaves no doubt in my mind that Lanzisero learned of the accident a few hours after it had occurred and thereupon, on Oct. 24, 1933, hastened to the office of his friend, Kravetz, who conducted a collection agency and did insurance business, and told Kravetz about it and induced Kravetz to call complainant's agent on the telephone and request the issuance of a policy on Lanzisero's truck, which Kravetz did about 6:00 P. M. on the day of the accident, making no disclosure of the fact that prior to the telephone call the truck had been in an accident. Complainant's agent at once issued a binder which, according to complainant's usual insurance practice, was made effective from 12:01 A. M. of the binder's date and the following day the policy itself was written and delivered to Kravetz, still without notice to complainant, or its agent, of the accident" (p. 72, l. 25 *et seq.*).

It is not surprising that the Trial Court took little stock in the reason Lanzisero gave for suddenly deciding to obtain insurance. He testified he had a bad dream the night before Helen Anzovino was injured and saw his truck have an accident; that he got up in the morning and said to his wife, "I am going to insure the truck" (p. 62, l. 37 *et seq.*).

Shortly after the accident, suit was started in the Hudson County Court of Common Pleas against Lanzisero and Genis, his driver, by the injured girl and her parents (p. 49, l. 10). All the parties to that suit were named as defendants in the present suit (p. 10, l. 38) but only the parents of the injured girl are appealing from the decree cancelling the policy.

I. The Financial Responsibility Act does not apply to the present policy of insurance.

A. The Act by its terms applies only to insurance in force at the time an accident occurs.

First enacted in 1929 (P. L. 1929, Chapt. 116; 1930 Supp., p. 1056), it has been amended in large part by Chapter 169 of the Laws of 1931. It generally provides that the Commissioner of Motor Vehicles shall require from any person who has been convicted of certain violations of the traffic laws or who has been concerned in any motor vehicle accident resulting in the death, or injury to, any person, or damage to property to the extent of at least $100, proof of financial responsibility to satisfy any claim for damages arising out of future accidents. If the motorist then fails to furnish such proof of financial responsibility, the Commissioner shall revoke his operator's license or suspend the registration of the motor vehicle involved. Section 2 of the Act, as amended, provides that the proof of financial responsibility may be a certificate of the insuring of the person in question against public liability and property damage in the required amounts. This certificate is to be signed by any duly licensed agent of the company issuing the policy of insurance. It is further provided in this section that such policy "shall be non-cancellable except after ten days' written notice to the commissioner."

But the significant portion of the statute for present purposes is found at page 343 of the Laws of 1931, being part of section 10. It reads as follows:

> "Such motor vehicle liability policy shall be subject to the following provisions which need not be contained therein:
>
> "(a). The liability of any company under a motor vehicle liability policy shall become absolute whenever loss or damage covered by said policy occurs and the satisfaction by the insured of a final judgment of such loss or damage shall not be a condition precedent to the right or duty of the carrier to make payment on account of such loss or damage. No such policy shall be cancelled or annulled as respects any loss or damage by any agreement between the carrier and the insured after the said insured has become responsible for such loss or damage and any such cancellation or annullment shall be void. *Upon the recovery of a final judgment against any person for any such loss or damage if the judgment debtor was at the accrual of the cause of action insured against liability therefor under a motor vehicle liability policy, the judgment creditor shall be entitled to have the insurance money applied to the satisfaction of the judgment.* The policy may provide that the insured or any person covered by the policy shall reimburse the company for payments made on account of any accident, claim or suit involving a breach of the terms, provisions or conditions of the policy; and, further, if the policy shall provide for limits in excess of the limits designated in this section the insurance carrier may plead against such judgment creditor, with respect to the amount of such excess limits of liability any defenses which it may be entitled to plead against the insured. Any such policy may further provide for the prorating of the insurance thereunder with other applicable valid and collectible insurance."

We have italicized the key sentence of the foregoing quotation. "At the accrual of the cause of action" Lanzisero was not insured. He obtained his insurance, by fraud, 2½ hours later. This sentence is the only portion of the statute which confers upon the injured third person the right to reach the judgment-debtor's policy. That right is limited to insurance in force at the accrual of the cause of action.

The same result is reached by considering other provisions of the same section. The appellants seek to hold the complainant absolutely liable on its policy. But the statute provides:

> "The liability of any company under a motor vehicle liability policy shall become absolute whenever loss or damage occurs covered by said policy."

The liability of the complainant could not become absolute when the damage involved in the present case occurred because the policy had not even been applied for.

It is argued for the appellants that the provision of the statute referred to in the preceding paragraph requires nothing more to make the liability of the complainant absolute than a policy "which, on its face, covers the period at which the loss or damage occurred" (Brief, p. 11). This argument overlooks the significance of the word "whenever." When does the liability of an insurance carrier become absolute? "Whenever" loss or damage occurs. Such loss or damage must, of course, be of the type covered by the policy. But if there is no insurance and no insurance carrier when the loss or damage occurs, then the statute can have no effect. *Kenney* v. *Indemnity Ins. Co. of America,* 10 Misc. 346, cited by the appellants (Brief, p. 11), does not support a contrary view. The case is not in point, the insur-

ance policy there involved having been issued long before the accident happened.

That portion of Section 10 of the statute which is quoted above also provides:

> "No such policy shall be cancelled or annulled as respects any loss or damage by any agreement between the carrier and the insured after the said insured has become responsible for such loss or damage * * *."

As the Vice-Chancellor pointed out in his conclusions (p. 75, l. 32), this provision also indicates that the policy contemplated is one in existence at the moment the loss occurs.

B. The Financial Responsibility Act is applicable only to policies which, by its terms, have been required or which may be required.

As already stated, the Commissioner of Motor Vehicles, under the statute, is to demand proof of financial responsibility after an automobile has been involved in an accident injuring a person or injuring property to the extent of $100. Lanzisero's truck was concerned in a prior accident with a truck of the American Beef Company. Apparently the damage was only slight and there is not a word of proof that property was injured to the extent of $100 (p. 58, ll. 38 *et seq.*). Lanzisero was not required by the Commissioner of Motor Vehicles to obtain insurance as a result of this prior accident, nor could he have been required to obtain such insurance, assuming as we must that the prior accident did not do $100 worth of damage. On this phase of the case the Vice-Chancellor said in his conclusions:

> "Lanzisero's motor truck was concerned in an accident resulting in damage, prior to the accident here in question but complainant's policy was not obtained pursuant to a demand by the Commissioner because of such

> prior accident. Nevertheless I think that a policy such as complainant's, taken out voluntarily by an owner of a motor vehicle who is liable to be called upon for one, comes within the provisions of the act'' (p. 74, l. 26).

We respectfully submit that the learned Vice-Chancellor erroneously classed Lanzisero as an owner liable to be called upon to furnish proof of financial responsibility in the shape of a policy of insurance. He could not have been called upon to do so unless the prior accident had injured a person or had resulted in $100 worth of damage to property.

It has been held in New York that the similar statute existing there applies only to required policies. *Cohen* v. *Metropolitan Casualty Insurance Co.,* 252 N. Y. Supp. 841, 233 App. Div. 340; *Letson* v. *Sun Indemnity Co.,* 264 N. Y. Supp. 519; *American Lumbermens Mutual Casualty Co.* v. *Trask,* 266 N. Y. Supp. 1. Our courts have applied the same rule. *Ocean Accident, etc., Corp.* v. *Peerless Cleaning and Dyeing Works,* 10 Misc. 1185 (Second District Court of Paterson); *McLaughlin* v. *Central Surety & Insurance Corp.,* 11 Misc. 440 (Brown, S. C. C.). A more recent and more authoritative case extends the rule somewhat, but not far enough to include the present case. *Steglia* v. *Metropolitan Casualty Ins. Co.,* 113 N. J. L. 101, Sup. Ct., Lloyd, J., Affd. on opinion, 114 N. J. L. 156. In that case suit was brought on a policy by one who had obtained a judgment against the policyholder. The judgment was for injuries inflicted by the insured car. There was proof that in a prior accident the insured car had damaged property to the extent of $175. There was no proof that the Commissioner of Motor Vehicles had actually required the car owner to obtain the policy, but the Court said, at page 103:

> "Presumably it was in consequence of this prior accident that the insurance policy was applied for and issued with the terms of the act incorporated therein."

Later, on the same page, the Court said:

> "It is urged that because the policy was not issued at the demand of the commissioner of motor vehicles, it therefore had no legal status. We do not agree with this proposition. It is true the act directs that the commissioner shall require proof of responsibility in such cases, but it does not make such action a condition precedent to the validity of insurance effected in accordance with its terms. The insured, being in the class requiring such proof, was not obliged to wait until the commissioner should act before complying with the terms of the act by establishing through insurance the proof of responsibility which the law required. It was likewise optional with the company to assume such liability, but if it did so it could not escape the responsibility thus undertaken."

The case is distinguishable from the present case in this: Lanzisero has not been shown to have been in the class requiring proof of financial responsibility; there is no proof that the prior accident resulted in property damage to the extent of $100; and complainant's policy was not applied for and issued as a consequence of the prior accident.

The provision in the complainant's policy relating to financial responsibility reads as follows:

> "With respect to any motor vehicle described herein this policy is hereby amended to conform with the provisions of the Motor Vehicle Financial Responsibility Law of the State or Province in which such automobile is registered at the time of the accident and/or in which such automobile is operated at the time of the accident during the policy period,

> to the extent of coverage and limits of liability required by such law, but not in excess of the limits of liability stated in this policy" (p. 15, l. 24).

This language was obviously inserted for purposes of convenience, to make the policy useful in jurisdictions having such laws to any policyholders who might be or become subject to the requirements thereof. The policy conforms to the statute only "to the extent of coverage and limits of liability required" thereby. The purpose of the statute obviously is to give third persons protection against motorists who have already acquired bad records, bad to the degree defined by the statute. This purpose should not be extended to include car owners whose prior records have not brought them into conflict with the statute.

II. The Financial Responsibility Act, if applicable to the complainant's policy, does not deprive the complainant of the right to relief against fraud.

The brief for the appellants asserts that the statute does eliminate fraud as a basis for relief. No authorities are cited and no argument is advanced in support of the proposition that the statute has this drastic effect. The portion of the statute relied upon by the appellant is the following sentence, particularly the word "absolute":

> "The liability of any company under a Motor Vehicle Liability Policy shall become absolute whenever loss or damage covered by said policy occurs and the satisfaction by the insured of a final judgment of such loss or damage shall not be a condition precedent to the right or duty of the carrier to make payment on account of such loss or damage."

Other jurisdictions have decided to the contrary on statutes containing language almost identical to that just quoted. The cases are cited in the Vice-Chancellor's conclusions (p. 75, l. 8) and show that the words "absolute liability" have not been given the meaning for which the appellants contend. Examining these cases we find that in *Lorando* v. *Gethro,* (Mass. 1917) 117 N. E. 185, the statute was attacked as unconstitutional. It reads in part as follows (p. 186, note 1):

> " * * * the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, occasioned by said casualty. No such contract of insurance shall be cancelled or annulled by any agreement between the insurance company and the assured after the said assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.
>
> " 'Sec. 2. Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment.' "

It will be noticed that this is almost identical with the New Jersey statute. (See p. 343 of P. L. 1931,

quoted *supra*). Chief Justice RUGG said for the Massachusetts Court, at page 187:

> "The contention is untenable that the words 'the liability of the insurance company shall become absolute' mean that the insurance company thereafter shall have no ground of defense open to it. It is almost inconceivable that the Legislature would attempt to make an insurance company unconditionally liable to pay for a loss without giving it an opportunity to require any notices of loss or of actions at law and thus to ascertain the circumstances out of which the loss arises and its nature and extent at or near the time when the event occurs, or to make reasonable conditions as to the establishment of its liability under the insurance contract."

In *Stacey* v. *Fidelity & Casualty Co.*, (Ohio, 1926), 151 N. E. 718, the insurance company claimed that its assured had failed to give notice of the accident and the institution of suit as required by the terms of the policy. There was a demurrer to this defense on the ground that the following statute, quoted in the opinion at page 719, made it worthless:

> " 'Whenever a loss or damage occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage or death occasioned by such casualty.' "

Commenting on the statute Chief Justice Marshall said for the Ohio Supreme Court, page 720:

> "There are so many conceivable reasons why the same defenses should be made against the injured party as against the assured that it requires no elaborate course of reasoning to reach the conclusion that any

> effort to place the injured person in a favored position, contrary to the terms of the policy contract, would be in contravention of the due process clauses of the state and federal Constitutions. Section 16, article I, of the Ohio Constitution, requires that 'all courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law,' etc. It would be a strange measure of justice which would open the courts to a plaintiff and at the same time close them against a defendant who has a perfectly good defense. The reasonable interpretation to be put upon the language of section 9510-4 is that the injured party should be substituted for the assured and subrogated to all of his rights but only such rights as the assured might have been able to maintain against the insurance company when seeking to be indemnified.
>
> "Our attention has been called to the case of Lorando *v.* Gethro, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374, construing a very similar statute and upon similar facts. Much of the reasoning of the court in that case may be adopted by this court in disposing of the instant case."

Practically the same statute exists in Connecticut and in *Guerin* v. *Indemnity Ins. Co. of N. A.*, (Conn. 1928) 142 Atl. 268, it was held not to deprive an insurance company of the opportunity of defending on the ground that its assured had failed to cooperate. The following are significant quotations from the opinion (pp. 269 and 270);

> "Chapter 331 of the Public Acts of 1919 provides that every insurance company which shall issue a policy insuring against loss by reason of liability for bodily injury or death by accident, or damage to property 'shall, whenever a loss occurs under said policy, become absolutely liable, and the payment of said loss shall not depend upon the satisfac-

tion by the assured of a final judgment against him for loss, damage or death occasioned by said casualty.' It further provides that no such policy shall be canceled or annulled by any agreement between the company and the assured after the latter has become responsible for any such loss, and that a judgment creditor in an action against the assured for such loss or damage shall be subrogated to the rights of the assured under the policy, if the judgment is not satisfied within 30 days after it is rendered."

* * * * * *

"The 'loss' for which the company is to become absolutely liable is a loss 'under said policy,' that is, such a loss as it would be bound to pay the assured, provided all the terms and conditions of the policy are complied with—the effect of the act being, however, to prevent the insertion in the policy of a clause making payment conditional upon satisfaction by the assured of the judgment against him. The intention of the act is to give the injured person the same rights under the policy as the assured, and to prevent his being deprived of those rights by a cancellation of the policy after the assured's liability to him has accrued. The act does not however, give the injured person any greater rights under the policy than the assured himself has and does not for his benefit, deprive the company of any defenses ordinarily open to an insurer in an action by the assured. This is the construction which has been placed upon similar statutes by the courts of Massachusetts and Ohio. Lorando *v.* Gethro, 228 Mass. 181, 117 N. E. 185, 1 A. L. R. 1374; Stacey *v.* Fidelity & Casualty Co., 114 Ohio St. 633, 151 N. E. 718."

The New Jersey Legislature made an addition to the provisions found in the Massachusetts, Connecticut, and Ohio statutes. It added, "The policy may provide that the insured or any person covered by the policy shall reimburse the company

for payments made on account of any accident, claim or suit involving a breach of the terms, provisions, or conditions of the policy; *and, further,* if the policy shall provide for limits in excess of the limits designated in this section, the insurance carrier may plead against such judgment creditor, with respect to the amount of such excess limits of liability, any defenses which it may be entitled to plead against the insured." Nowhere does our statute say directly that the insurance carrier is deprived of the defenses which it would otherwise have in a suit on the policy. The clause just mentioned is the only one which can possibly be regarded as making our statute more drastic than those of Massachusetts, Connecticut and Ohio. It may be argued that when a policy provides that the policyholder shall reimburse the company for payments made on account of any accident, claim or suit involving a breach of the terms, provisions or conditions of the policy then that presupposes that the insurance carrier must pay the insured person in spite of such a breach. That argument has no application here. Lanzisero did not commit a breach of the terms, provisions or conditions of the policy. He committed a fraud in obtaining the policy. If the complainant should be compelled to pay the loss sustained by the appellants it would have no remedy against Lanzisero under the provision just referred to, nor under the language inserted in the policy in accordance with that provision, the policy language being as follows:

> "If the Company by reason of any statute, including the Motor Vehicle Financial Responsibility Law of any State or Province, or endorsement required by statute to be attached to this policy, shall pay to an injured person or one claiming under him any sum which except for such statute or endorsement

> would not be payable by reason of a breach of the terms or conditions of this policy, the Assured agrees to reimburse the Company for the amount of such payment'' (p. 19, l. 35, *et seq.*).

If the legislature had intended to prevent insurance carriers from avoiding policies for fraud, it would have provided for reimbursement from the insured, as was done with breaches of policy terms and conditions.

The provision that the insurance carrier, as to excess over the statutory limits, may plead any defenses which it would have against the insured, is linked with the provision that there shall be reimbursement where ''a breach of the terms, provisions or conditions'' of the policy is involved and makes no independent addition to the scope of the statute. It also is significant that the statute speaks of pleading defenses. Fraud may be asserted affirmatively, as in the present case. That this is so is another indication that the legislature never meant to deprive insurance carriers of the right to relief against its effects nor to deprive the Court of Chancery of the power to cancel policies because of fraud in their procurement. As the Vice-Chancellor forcefully concluded:

> ''It cannot be believed that our legislature intended to deprive an insurer of every legal defense which might be interposed against liability on the policy'' (p. 74, l. 42 *et seq.*).

In 1925 the Massachusetts legislature was considering the adoption of a statute requiring all automobile owners to carry insurance, and in accordance with the Massachusetts practice the Supreme Court of the State was asked for its advisory opinion concerning certain phases of the legislation. The opinion of the Justices is reported in 147 N. E. 681. One of the questions

was whether legislation would be constitutional providing—

> "That no statement made by the insured or on his behalf and no violation of the terms of the policy shall operate to defeat the claim of any judgment creditor of the insured proceeding under the provisions of section one hundred and thirteen of chapter one hundred and seventy-five of the General Laws and clause ten of section three of chapter two hundred and fourteen of the General Laws, so as to bar a recovery within the limits of indemnity provided in the policy?" (see p. 685).

Concerning this question the Judges said, page 699:

> "The legislative question involved in this aspect is this: When a financially irresponsible owner or operator of a motor vehicle, insured by a policy or bond procured by some material misrepresentation, negligently injures another traveler on the highway in the exercise of due care, which of two innocent persons must suffer, the injured traveler, or the insurer or surety? The legislature may believe that the opportunities open to the insurer or surety for inquiry and investigation before issuing the policy or signing the bond are such as to afford it substantial protection against harm. The insurer or surety may be thought to be in much better position to defend itself in these particulars than is the injured innocent traveler. The proposed bill leaves to the insurer or surety its full rights against the registrant of the motor vehicle. The insurer or surety is a corporation conducting a business largely under the control of the Legislature, as already pointed out. General legislation to the effect that contracts shall be binding upon the parties notwithstanding misrepresentation and fraud entering into their making, or infraction of their

material provisions, doubtless would be an invasion of fundamental rights. The present bill does not go to that extent. The power is reserved to the insurer or surety to cancel the policy or bond on reasonable notice. A contract induced by fraud or deceit is voidable and not a nullity. No liability can arise out of a void contract.

"Statutes rendering irrelevant, even as between the parties, misrepresentations not materially increasing the risk and not made with intent to deceive, have been recognized as valid. *Everson* v. *General Accident, Fire & Life Assurance Corp., Ltd.,* 202 Mass. 169, 88 N. E. 658; *McDonough* v. *Metropolitan Life Ins. Co.,* 228 Mass. 450, 452, 117 N. E. 836; *Foss* v. *Mutual Life Ins. Co.,* 247 Mass. 10, 141 N. E. 498. See, also, *Colonial Development Corp.* v. *Bragdon,* 219 Mass. 170, 106 N. E. 633.

"This provision is but a slight extension of the principle already established that the rights of a mortgagee under a policy of insurance shall not be affected by defaults of the mortgagor. *Palmer Savings Bank* v. *Insurance Co. of North America,* 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 Am. St. Rep. 387; *Commonwealth* v. *Kaplan,* 238 Mass. 250, 254, 130 N. E. 485; *Commonwealth* v. *Cali,* 247 Mass. 20, 24, 141 N. E. 510.

"Giving due weight to all of these factors and not singling out one as decisive, we are of opinion, though with some hesitation, that it cannot be said that section 4 of the proposed bill, in amending G. L. c. 175 by the additions of section 113A (4), exceeds the constitutional power of the Legislature."

The great difference between the proposed compulsory insurance law of Massachusetts and the present statute is obvious: the Massachusetts law expressly includes fraud. Even so, the Court expressed hesitation and it should be kept in mind that it was rendering an advisory opinion rather

than a binding decision. It appears most doubtful that even the strong and explicit terms of the proposed Massachusetts legislation should be construed to cover a case in which the insurance was obtained by fraud after the accident occurred.

There is a suggestion at the very end of the brief for the appellants that since the fraud of Lanzisero was perpetrated with the assistance of the complainant's "sub-agent," there should be no cancellation against innocent parties. We do not concede that Lanzisero's friend and accomplice Kravetz had any authority to bind the complainant, but if he had been a duly authorized agent of the complainant, the appellants could not take advantage of his fraud. *New York Life Insurance Co.* v. *Fletcher,* 117 U. S. 519; *Henson* v. *John Hancock Mutual Life Ins. Co.,* 261 Mich. 693, 247 N. W. 102.

On all of these grounds it is respectfully submitted that the decree appealed from should be affirmed and this appeal dismissed.

McCarter & English,
Solicitors of Complainant-Respondent.

Ward J. Herbert,
Of Counsel.

May Term, 1935.

(2792) Pandick Press, Inc., 22 Thames St., New York, U. S. A.