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Notice of Appeal

(Filed January 29, 1932)

ESSEX COUNTY CIRCUIT COURT

HARRY ASNIS, *Plaintiff*, *v.* BANKERS INDEMNITY INSURANCE COMPANY, a corporation *Defendant.*	Action at Law Notice of Appeal

To:

AARON VAN POZNAK,
Attorney of Plaintiff

TAKE NOTICE, that the defendant, Bankers Indemnity Insurance Company, hereby appeals to the New Jersey Court of Errors and Appeals from all of the judgment entered herein on behalf of the plaintiff and against the defendant on January 20th, 1932.

FRANK G. TURNER,
Attorney of Defendant.

Grounds of Appeal

(Filed)

NEW JERSEY COURT OF ERRORS AND APPEALS

HARRY ASNIS,
Appellee,
v.
BANKERS INDEMNITY INSURANCE COMPANY,
Appellant.
Grounds of Appeal

To the Plaintiff and his attorneys.

TAKE NOTICE that the following are the grounds of appeal that will be urged by the defendant-appellant on the argument of the above entitled appeal:

1. The trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff.

2. The trial Court erroneously refused to order a judgment of nonsuit in favor of the defendant and against the plaintiff because it appeared that the accident was caused by the proprietor and employee of a garage and that the car was being used by the garage chauffeur at the time of the accident. Under the terms of the policy there is a strict exclusion of an Automobile Garage Repair Shop, Automobile Sales Agency or Service Station or the agents or employees thereof.

Grounds of Appeal

3. The trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the same grounds as a motion for nonsuit.

4. The trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the ground that there was no liability on the part of the defendant to the plaintiff.

5. The trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the ground that the policy of insurance in this case was obtained by fraud.

6. The trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the ground that there was no meeting of the minds in the issuance of this policy and there was no legal contract existing between the assured Ralph Schmidt and the defendant.

7. The trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the ground that the plaintiff in this case is barred by the fraud by which the policy was obtained.

FRANK G. TURNER,
Attorney and of Counsel
with Defendant-Appellant.

Complaint

(Filed)

ESSEX COUNTY CIRCUIT COURT

HARRY ASNIS, *Plaintiff*, *v.* BANKERS INDEMNITY INSURANCE COMPANY, a corporation *Defendant.*	Action at Law Complaint

The plaintiff, Harry Asnis, residing in the City of Newark, County of Essex and State of New Jersey, complaining of the defendant, says that:

1. At all times mentioned herein, the defendant Bankers Indemnity Insurance Company, was engaged in the business of writing liability insurance at the City of Newark, County of Essex and State of New Jersey.

2. On or about the 19th day of October, 1929, the defendant made and entered into a certain contract or policy of insurance bearing No. A P 75158 with Ralph M. Schmidt, whereby the said defendant agreed to pay any loss within the limits expressed in said policy, resulting from the liability imposed by law upon the said Ralph M. Schmidt for damage for bodily injuries accidentally suffered or alleged to have been suffered by any person or persons by reason of the operation, maintenance and use of a certain automobile described

in said policy according to the terms and provisions thereof, which are hereby referred to and made a part hereof as though the same were herein set forth at length and which will more fully appear by the production of the said policy of insurance at the trial of this cause.

3. The liability of the said defendant to answer for said personal injuries to one person arising out of one accident according to the terms of said policy, was the sum of $5,000.

4. Under and by the terms of said policy of insurance the same was made to apply, in the same manner and under the same conditions as applied to the assured, Ralph M. Schmidt, to any person or persons while riding in or legally operating the automobile covered by said policy of insurance, provided such use and operation was with the permission of the said Ralph M. Schmidt.

5. On or about the 21st day of October, 1929, while said policy of insurance was in full force and effect, one David Mayer and one Thomas Brown, while riding in and legally operating the said automobile mentioned and referred to in said policy of insurance with the permission of the said assured Ralph M. Schmidt, negligently operated and maintained said automobile, thereby causing damage to the said plaintiff on account of bodily injuries.

6. On or about the second day of April, 1931, the plaintiff recovered final judgment in the Supreme Court of New Jersey, against said David Mayer and Thomas Brown, for the sum of $1,800, together with costs of suit taxed at $73.78.

7. Plaintiff has since caused execution to be issued against said David Mayer and said Thomas Brown, directed to the Sheriff of the County of Essex for the satisfaction of said judgment and costs and said execution has been returned unsatisfied.

8. Said David Mayer and said Thomas Brown, are each of them, unable to answer for his pecuniary engagements or to pay said judgment and is insolvent within the meaning of the said policy of insurance.

9. Plaintiff has demanded of the defendant to pay to the plaintiff the said sum of $1800 damages and $73.78 costs, making a total of $1873.78 and has caused a notice to be served upon the defendant demanding such payment, but defendant has refused and neglected and still does refuse to pay the same, wherefore the plaintiff is entitled to have and receive of the said defendant the sum of $1873.78, together with interest thereon from the 2nd day of April, 1931.

Plaintiff demands $3000.00.

AARON VAN POZNAK
Attorney for Plaintiff

Answer

(Filed July 3, 1931.)

ESSEX COUNTY CIRCUIT COURT

HARRY ASNIS, *Plaintiff*, *v.* BANKERS INDEMNITY INSURANCE COMPANY, a corporation *Defendant.*	Action at Law Answer

The Answer of Bankers Indemnity Insurance Company of Newark, New Jersey, to the complaint of the plaintiff;

1. Defendant denies the allegations of the complaint.

FIRST SEPARATE DEFENSE

1. This defendant says that the said alleged policy of insurance referred to in the complaint does not and did not cover the persons named in the sixth paragraph thereof being David Mayer and Thomas Brown or either of them at the time of the happening of the said alleged accident referred to in the complaint nor at any other time. This defendant says that the plaintiff is not entitled to recover against it for the said alleged cause of action set forth in the complaint.

SECOND SEPARATE DEFENSE

1. This defendant says that it is not indebted to the plaintiff because it says that the said persons David Mayer and Thomas Brown referred to in paragraph five of the plaintiff's complaint were not riding in and legally operating the automobile of the said Ralph M. Schmidt with the permission of the said Ralph M. Schmidt. This defendant says that the said plaintiff is therefore barred from having and maintaining his aforesaid action thereof against this defendant.

THIRD SEPARATE DEFENSE

1. This defendant says that on November eighth Nineteen Hundred and Twenty-nine Harry Asnis brought a suit in the New Jersey Supreme Court for Essex County against Ralph Schmidt, David Mayer and Thomas Brown, a copy of the Summons and Complaint being hereto annexed. Ralph Schmidt duly filed his Answer thereto a copy of which is hereto annexed and a Reply was filed thereto a copy of which is hereto annexed. On March eighteenth, Nineteen Hundred and Thirty-one the plaintiff herein duly discontinued his said action against the said Ralph Schmidt and an Order of Discontinuance was entered a copy of which is annexed hereto and made part hereof. The said defense for the said Ralph Schmidt was filed by the attorneys of this defendant and this defendant was at the said time and place defending the said action for the said Ralph Schmidt. By reason of the action of the plaintiff in discontinuing the said suit against the said Ralph Schmidt this defendant was prevented from

participating in the trial of the said action of the said plaintiff against the said David Mayer and Thomas Brown. This defendant says that in the said cause it was then and there established that the said defendants David Mayer and Thomas Brown were operating the automobile which was involved in the said accident without the consent of the said Ralph M. Schmidt or anyone representing him. This defendant says that the said plaintiff is estopped and barred from having and maintaining his aforesaid action thereof against this defendant.

FOURTH SEPARATE DEFENSE

1. Defendant says it repeats paragraph one of the Third Separate Defense.

2. Plaintiff waived his claim against the said Ralph Schmidt and waived his claim, if any, against this defendant. Defendant says he is barred from maintaining this action.

OBJECTION IN POINT OF LAW

1. At or before the trial of this action defendant will move to strike out the complaint on the following grounds.

(a) It does not state a cause of action.

(b) It is so framed as to hinder, prejudice and delay a fair trial of this action.

(c) It fails to show liability on the part of defendant.

(d) It fails to show an indebtedness of defendant.

FRANK G. TURNER
Attorney of Defendant

Reply

(Filed .)

ESSEX COUNTY CIRCUIT COURT

HARRY ASNIS,
Plaintiff,
v.
BANKERS INDEMNITY INSURANCE COMPANY, a corporation
Defendant.

Action at Law
Reply

Plaintiff denies the allegations set forth in the separate defenses in the answer of the defendant.

AARON VAN POZNAK,
Attorney for Plaintiff.

Discontinuance

(Filed .)

ESSEX COUNTY CIRCUIT COURT

HARRY ASNIS, *Plaintiff*, v. BANKERS INDEMNITY INSURANCE COMPANY, a corporation *Defendant*.	Action at Law Discontinuance

It is hereby stipulated by and between the undersigned that the above matter be discontinued without costs to either party.

AARON VAN POZNAK,
Attorney for Plaintiff.

FRANK G. TURNER,
Attorney for Defendant.

Dated October 30, 1931.

Complaint

(Filed .)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

HARRY ASNIS, *Plaintiff*, v. RALPH SCHMIDT, DAVID MAYER and THOMAS BROWN, *Defendants.*	Action at Law Complaint

The plaintiff Harry Asnis, residing in the City of Newark, County of Essex and State of New Jersey, says that:

COUNT I

1. On or about the 21st day of October, 1929, the defendant, Ralph Schmidt was the owner of a certain automobile which was being driven and operated in an easterly direction on Peddie Street, a public highway in the said City of Newark.

2. Said automobile was then and there being operated and driven by a certain agent or servant of the said defendant thereunto duly authorized.

3. The plaintiff was then and there lawfully walking on said Peddie Street, on a certain cross-

walk where said Peddie Street is intersected by a certain other highway known as Belmont Avenue.

4. Said defendant then and there so carelessly and negligently managed and controlled his said automobile, by his agent and servant as aforesaid, that said automobile ran into and collided with said plaintiff, causing certain physical injuries.

5. The negligence of the said defendant, his agent and servant, consisted in failure to use reasonable care in the following particulars:

(a) To keep a lookout for persons in the vicinity of this automobile;

(b) To control the motion thereof so as to avoid striking persons lawfully upon said highway;

(c) To give warning of the approach thereof;

(d) To propel same at rate of speed safe to persons lawfully on said highways;

(e) To equip same with proper appliances and brakes and to have same in proper condition.

6. As a direct and proximate result of the said acts of negligence, or some of them, the plaintiff became sick, sore, lame and disordered and sustained injuries in and about his head, body and limbs, some or all of which injuries are permanent in character.

7. By reason of his said injuries, the plaintiff has undergone and in the future will undergo

great pain and suffering and he has been compelled to expend large sums of money for medical attendance and has lost and in the future will lose earnings he otherwise would have gained.

WHEREFORE, plaintiff demands on this count of the defendant Ralph Schmidt, the sum of $25,000.00 damages.

COUNT II

1. On the 21st day of October, 1929, the defendant David Mayer, by himself, his agent and servant, was driving and operating a certain automobile in a easterly direction on Peddie Street, a public highway in the City of Newark, County of Essex and State of New Jersey.

2. Plaintiff repeats the allegations of paragraph 3 of the First Count.

3. Plaintiff repeats the allegations of paragraph 4 of the First Count.

4. Plaintiff repeats the allegations of paragraph 5 of the First Count.

5. Plaintiff repeats the allegations of paragraph 6 of the First Count.

6. Plaintiff repeats the allegations of paragraph 7 of the First Count.

WHEREFORE, plaintiff demands on this count of the defendant, David Mayer, the sum of $25,000.00 damages.

Complaint

COUNT III

1. On or about the 21st day of October, 1929, the defendant Thomas Brown, was driving and operating a certain automobile on Peddie Street, a public highway in the City of Newark, County of Essex and State of New Jersey.

2. Plaintiff repeats the allegations of paragraph 3 of the First Count.

3. Said defendant then and there so carelessly and negligently managed and controlled said automobile that said automobile ran into and collided with said plaintiff, causing certain physical injuries.

4. Plaintiff repeats the allegations of paragraph 5 of the First Count.

5. Plaintiff repeats the allegations of paragraph 6 of the First Count.

6. Plaintiff repeats the allegations of paragraph 7 of the First Count.

WHEREFORE, plaintiff demands on this count of the defendant Thomas Brown, the sum of $25,000.00 damages.

AARON VAN POZNAK,
Attorney for Plaintiff

Answer

(Filed .)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

HARRY ASNIS,
Plaintiff,
v.
RALPH SCHMIDT, DAVID MAYER and THOMAS BROWN,
Defendants.

Action at Law

Answer

The separate answer of the defendant, Ralph Schmidt, residing in the City of Newark, County of Essex and State of New Jersey, says that:

AS TO COUNT ONE

1. He denies the allegations of all paragraph of count one.

AS TO COUNT TWO

1. Defendant, Ralph Schmidt, denies all allegations of all paragraphs of count two, which refer to him.

AS TO COUNT THREE

1. Defendant, Ralph Schmidt, denies all allegations of all paragraphs of count three, which refer to him.

Reply

SEPARATE DEFENSE TO COUNT ONE, TWO AND THREE

1. Defendant, Ralph Schmidt, denies that he is in any way liable for the said alleged accident charged in the complaint as just prior to the alleged accident he had stored his automobile in the garage of the defendant, David Mayer, and no one at said garage had permission either actual or implied to use said automobile.

2. Defendant, Ralph Schmidt, prays for dismissal of the within complaint as to him.

HUGH F. DOHERTY,
Attorney for Defendant, Ralph Schmidt.

Reply

(Filed .)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

HARRY ASNIS, *Plaintiff*, *v.* RALPH SCHMIDT, DAVID MAYER and THOMAS BROWN, *Defendants.*	Action at Law Reply

The plaintiff replying to the answers of the defendants Ralph Schmidt, David Mayer and

Thomas Brown, denies each and every allegation set forth in said answers and joins issue with same.

AARON VAN POZNAK,
Attorney for Plaintiff.

Dated: November 30, 1929

Order of Discontinuance

(Filed .)

NEW JERSEY SUPREME COURT

ESSEX COUNTY

HARRY ASNIS.
Plaintiff,
v.
RALPH SCHMIDT, DAVID MAYER and THOMAS BROWN,
Defendants.

Order of Discontinuance

The parties hereto by their respective attorneys having consented to this Order, it is on this 18th day of March, 1931, ORDERED, that this action be and the same is hereby discontinued without costs to either party hereto as against the other, as to the defendant Ralph Schmidt only.

WORRALL F. MOUNTAIN,
Judge.

Order that Cause be tried without a Jury

On Motion of
HUGH F. DOHERTY,
Atty. of Defendant Ralph Schmidt.

We hereby consent to the entry of the above order.

AARON VAN POZNAK,
Attorney of Plaintiff.

TURNER AND STALTER,
Attorney of Defendant.

Order

(Filed .)

ESSEX COUNTY CIRCUIT COURT

HARRY ASNIS, *Plaintiff*, *v.* BANKERS INDEMNITY INSURANCE COMPANY, a corporation *Defendant.*	Action at Law Order

Application having been made to me, upon due notice and it appearing that the defendant may have an equitable defense of fraud, and upon reading the consents hereunder written, it is on this 13 day of January, 1932.

ORDERED that this cause be placed on the "Commercial Calendar" for Friday, January 15th,

Order that Cause be tried without a Jury

1932, to be heard before the Honorable Newton H. Porter, Judge of our Circuit Court, and it is further

ORDERED that the said Judge shall have the power to determine any and all questions involving the alleged equitable defense of fraud, and the said Judge shall have full and complete power to decide any equitable questions as would ordinarily be decided by the Chancellor, and it is further

ORDERED that the above cause be tried without a jury.

NEWTON H. PORTER,
Judge.

We hereby consent to the entry of the above order, and we hereby waive a trial by jury in the above cause.

AARON VAN POZNAK,

FRANK G. TURNER.

Judgment

(Filed .)

ESSEX COUNTY CIRCUIT COURT

57452

HARRY ASNIS, *Plaintiff*, *v.* BANKERS INDEMNITY INSURANCE COMPANY, *Defendant.*	Action at Law Tried without a Jury Judgment Entered January 20, 1932 Damage $1,873.78 Int. $ 89.81 Costs $ 97.48 Total $2,061.07

AARON VAN POZNAK, Atty. of Plaintiff.

This action was tried before Judge Newton H. Porter without a jury at the Essex Circuit Court on January 20, 1932.

The cause having been heard, the Court rendered a judgment as follows:

The Court finds in favor of the plaintiff Harry Asnis and against the defendant Bankers Indemnity Insurance Company for the sum of One Thousand Eight Hundred Seventy-three Dollars and Seventy-eight cents ($1,873.78) damage and Eighty-nine Dollars and eighty-one cents interest.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of One Thousand Eight Hundred Seventy-three dollars and Seventy-eight cents ($1,873.78) damage and Eighty-nine Dollars and Eighty-one Cents interest and costs

which are taxed at Ninety-seven Dollars and Forty-eight Cents, making in the whole the sum of Two Thousand Sixty-one Dollars and seven Cents.

Judgment signed and Entered January 20, 1932.

WILLIAM S. GUMMERE,
C. J.

Book 115 Page 446 Circuit Court Judgments

Case

ESSEX COUNTY CIRCUIT COURT

Friday, January 15, 1932.

Before—NEWTON H. PORTER, *J.*, without a jury.

HARRY ASNIS,

v.

BANKERS INDEMNITY INSURANCE COMPANY, a corporation,

Action at Law

For the Plaintiff appear AARON VAN POSNAK and JOSEPH COULT.

For the Defendant appears FRANK G. TURNER.

It is stipulated by and between the parties that the case shall be decided by the Court without a jury, and that the Court shall have power to pass upon all questions both as to law and equity that may arise.

Mr. Coult opens for plaintiff.

Mr. Turner opens for defendant.

Mr. Coult: I offer in evidence an automobile public liability policy No. 75158 issued to Ralph Schmidt, dated October 19, 1929, for the term of one year, covering a Dodge roadster, four-cylinder, 1926.

(The same is received in evidence and marked Exhibit P-1.)

Mr. Coult: I offer in evidence a certified copy of a judgment in the New Jersey Supreme Court in an action at law, in the sum of $1,800 damages and $73.78 costs, entered on the 2nd day of April, 1931, in favor of Harry Asnis against David Mayer and Thomas Brown, certified on the 13th day of October, 1931.

(The same is received in evidence and marked Exhibit P-2.)

Mr. Coult: I offer in evidence a certified copy of an execution issuing out of the Supreme Court of New Jersey to the Sheriff of the County of Essex against David Mayer and Thomas Brown, attested on the 2nd day of April, 1931, returnable at the May Term of the Supreme Court, 1931, with the return unsatisfied, Harry L. Huelsenbeck, Sheriff.

(The same is received in evidence and marked Exhibit P-3.)

Mr. Turner: I produce a letter dated June 2, 1931, written to the Bankers Indemnity Insurance Company by Aaron Van Posnak.

Mr. Coult: I offer in evidence the letter which has been referred to by counsel for the defendant and produced by him.

(The same is received in evidence and marked Exhibit P-4.)

(Mr. Coult then read Exhibit P-4 to the Court.)

Mr. Coult: I suppose counsel will admit he did not pay the amount demanded in the letter.

Mr. Turner: We did not pay it.

DAVID MAYER, sworn in behalf of plaintiff.

Direct examination by Mr. Coult:

Q. Mr. Mayer, do you recall an accident that happened on the 21st day of October, 1929, in Newark? A. Yes, sir.

Q. You were involved in that accident, were you not? A. Yes, sir.

Q. You were then in an automobile which was being driven by one Brown? A. Yes, sir.

Q. Whose automobile was it? A. Ralph Schmidt's.

Q. What kind of an automobile was it? A. A Dodge roadster, 1926.

Q. Do you know how many cylinders it had? A. I am not quite sure whether it was a four or a six.

Q. Did you know Mr. Schmidt? A. Yes, sir.

Q. How long had you known him? A. Well, he was in our garage about five years. He worked for Saks & Company.

Q. Where did you get this car from? A. It was standing outside, across the street from my garage.

Q. Where did you say the car was when you got it? A. Outside, just opposite the garage.

Q. On the street? A. Yes, sir.

Q. On what street? A. On Mercer Street.

Q. And what was it doing there? A. Well, the garage was packed. He did not bring it in, he left it outside and brought in the key in the garage, in the office.

Q. Was this car ever stored in your garage? A. No, sir.

Q. Had it been left in this same parking place before? A. All the time, most of the time.

Q. For how long? A. For a couple of years.

Q. During that time had you ever made use of it? A. No, sir, only that was the first time. My children had used it.

Q. Had anybody else used it? A. Oh, yes, a lot of those drivers there.

Q. Had you ever had permission to use that car? A. Yes, sir.

Q. From whom? A. From Ralph Schmidt.

Q. And when did you get it? A. Well, he told me any time that I needed her I could have her, but I never used her.

Q. When did he tell you that? A. Well, he told me a few times, because he left the keys with me in the office there.

Q. He left the keys with you? A. Yes, sir.

Q. Did you let other people use the car? A. No, sir.

Q. Who did use it? A. Well, some of his people there that have been working with him together.

Q. Was this accident that you had the same accident you were sued for? A. Yes, sir.

Q. And there is a judgment against you for $1,800? A. Yes, sir.

Cross examination by Mr. Turner:

Q. You run a garage, do you? A. Yes, sir.

Q. And you were in the garage business on October 21, 1929? A. Yes, sir.

Q. And this Mr. Brown against whom a judgment was obtained, also worked for you, did he? A. Yes, sir.

Q. What work did he do in your garage? A. He is a working man.

Q. What? A. A working man.

Q. A laborer? A. A laborer.

Q. What does he do? Wash cars? A. Yes, sir.

Q. And clean up? A. Yes, sir.

Q. And fill cars with oil and gas? A. Yes, sir.

Q. And fix tires and do all sorts of work that a workman does in a garage? A. Yes, sir.

Q. Do you use Mr. Brown also as a garage chauffeur? A. Yes, sir.

Q. And you were using him as a garage chauffeur on the day of this accident? A. Yes, sir.

Q. At what time did you take out Mr. Schmidt's car, or take it to use? A. It was pretty near twelve o'clock.

Q. Noon? A. Noon, about ten minutes of twelve.

Q. At that time, when you took it out, it was standing out in Mercer Street, was it? A. Yes, sir.

Q. How close to your garage? A. Just across the street.

Q. Mr. Ralph Schmidt stored his business car in your garage, didn't he? A. He never did.

Q. What? A. He never did.

Q. He drove for Saks & Company, didn't he? A. Yes, sir.

Q. Wasn't Saks' car stored in your garage? A. Yes, sir.

Q. Mr. Ralph Schmidt brought the Saks car

into your garage every night, didn't he? A. No, sir.

Q. How often did he bring it in? A. Well, he came to work, and he brought it in. If he had room to put it in the garage, I allowed him to put it in, and if he did not have room, I let him leave it outside.

By the Court:

Q. Are you talking about the Saks car?

Mr. Coult: I cannot see the point of Mr. Turner's inquiry.

Mr. Turner: When the Saks car was taken out, we contend Mr. Schmidt's car was put in the space where the Saks car was.

Mr. Coult: That is a part of the defendant's case, and not cross examination.

Mr. Turner: Perhaps it is.

The Court: As long as you have Mr. Mayer here, I shall let you make him your witness for that.

By Mr. Turner:

Q. Do you know about what time Mr. Schmidt reported to your garage in the morning? A. Sometimes seven, sometimes a quarter past seven.

Q. What time usually did he take the Saks automobile out of your garage? A. Around eight o'clock.

Q. Eight o'clock in the morning? A. Yes, sir.

Q. On the day of your accident, October 21, 1929, did he report there about eight o'clock in the morning? A. Yes.

Q. That was on Monday, was it? A. Yes, sir.

Q. Did Mr. Schmidt pay you for the space that he used in there for the Saks car? A. For the Saks car?

Q. Yes. A. Schmidt never paid. Saks & Company sends in our checks.

Q. Then you got paid from Saks & Company? A. Sure thing.

Mr. Coult: I object to that, if the Court please. I do not see its materiality. You cannot make this man a garage owner within the meaning of that policy by showing that this man's employers had cars in his garage.

The Court: I should not think so, but I cannot tell yet what counsel is driving at.

Q. Did you store other cars there besides the Saks car? A. Positively.

Q. How many? A. About seventy.

Q. How many employees did you have in the garage besides Brown? A. Only one, I keep a day man and a night man.

Q. Do any of your sons work there? A. Yes, sir.

Q. How many of them? A. At that time, two of them.

Q. Two sons besides the day man and the night man? A. Yes, sir.

Q. What time did you bring this car back after the accident? A. Well, I didn't brought it back, because you see they took that fellow with our car to the hospital, and I didn't have no room, I went home and my man brought back the car, it must be around about half past one or a quarter to two.

Q. There was damage done to Ralph Schmidt's car? A. No damage at all.

Q. Wasn't there? A. No, sir.

Q. Wasn't the headlight damaged? A. No, it was not, because he did not come to the headlight, it is only on the fender.

Q. There was a light broken on it, wasn't there? A. This I don't remember.

Q. Well, you paid for it, didn't you? A. Sir?

Q. You paid for the damage to Ralph Schmidt's car? A. I paid for it?

Q. Didn't you? A. No, sir.

Q. You never paid for it? A. No, sir.

Q. How much did the damage amount to in dollars and cents? A. How do I know? I didn't pay for it.

Q. Well, you are a garageman. Don't you know what the damage was? A. I didn't see no damage at all.

Q. None at all? A. No.

Q. You are quite sure about that? A. Positively.

Q. Are you sure that you did not pay for it? A. Positively not.

Q. When did you tell Ralph Schmidt that you had been in an accident?

Mr. Coult: I object to that, if the Court please. This is the gentleman we have the judgment against. He is primarily responsible to us. He is the man that did the damage. He is not a party to this suit, and his cross examination should be limited, it seems to me. If counsel wants to go into all of these things, they certainly are not binding on my client.

New Jersey State Library

The Court: I think if you are going into that, Mr. Turner, you had better call him as your witness. I thought before that if just wanted to ask him the one question it would be all right to do it now.

Q. Has Mr. Asnis, the plaintiff in this case, ever examined you in supplementary proceedings to find out what property you have? A. This I don't know, whether he did or not.

Q. Have you ever been examined before a Commissioner concerning your property? A. No, sir.

Q. You have not? A. No, sir.

Mr. Turner: That is all.

PLAINTIFF RESTS

Mr. Turner: If the Court please, I move for a nonsuit in this case, because it now appears that this accident was caused by the proprietor and employee of a garage, and that the car was being used by the garage chauffeur at the time of the accident. Under the terms of the policy, there is a strict exclusion of an automobile garage, repair shop, automobile sales agency or service station, or the agents or employees thereof. On that ground I press my motion for a nonsuit.

(Argument.)

The Court: I shall reserve decision on that point.

Ralph M. Schmidt, direct

RALPH M. SCHMIDT sworn in behalf of defendant.

Direct examination by Mr. Turner:

Q. Mr. Schmidt, you live where? A. 182 Bay Avenue, Glen Ridge.

Q. On the 21st day of October, 1929, for whom did you work? A. I worked for Saks & Company at Fifth Avenue, New York.

Q. And what did you do? A. Chauffeur.

Q. You kept this Saks car where? A. At 34-36 Mercer Street, known as the Mercer Garage.

By the Court:

Q. In Newark? A. Yes, sir.

By Mr. Turner:

Q. Is that the garage of Mr. David Mayer? A. Owned and operated by David Mayer.

Q. On the 19th day of October, 1929, which was on a Saturday, did you then have a policy of insurance with the Bankers Indemnity Insurance Company? A. I did not have a policy on the 19th of October.

Q. What is that? A. I did not have a policy on the 19th.

Q. Did you have a policy with them on Sunday, the 20th of October, 1929? A. No.

Q. Did you have a policy of insurance with the Bankers Indemnity on Monday, the 21st of October, 1929? A. No.

Q. Did you have one with the Bankers Indemnity Insurance Company on Tuesday, the 22nd day of October, 1929? A. No.

Q. This car that was owned by you was what? A. A Dodge roadster.

Q. How long prior to October, 1929, had you had it? A. About five months.

Q. Did you or did you not store your car in David Mayer's garage? A. Which car? There were two.

Q. The Dodge roaster. A. I did, yes.

Q. Did you pay any storage to David Mayer? A. Not on the Dodge.

Q. How did you come to store the Dodge in his garage without paying him for it? A. Before that, previous to the Dodge roadster, I had a Ford coupe. I had permission to put that in there a couple of times, and then Mr. Mayer and I had a little run-in about payment, and I paid him 50 cents for putting the car in there for a week. That was just during the day. He and I got on friendly terms again, and I was putting my car in the garage for nothing.

Q. What space did you put your Dodge roadster in? A. I put my own car in the space where I took my truck out.

Q. Do you recall specifically the 19th of October, 1929? A. Yes, sir.

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

Q. On that Saturday did you use that car yourself? A. I did, I brought it down to the garage.

Q. What time did you bring it down to the garage? A. About half past seven or a quarter of eight.

Q. How long did you leave it there after you brought it down? A. Saturday is a light day. At two o'clock.

Q. Who took your car away on Saturday? A. I took it myself.

Q. Did you take it away on Saturday, or did

some of your family? A. No, I took the car myself on Saturday.

Q. On Sunday, which was the 20th of October, where then was your car? A. Home, at 29 South 13th Street.

Q. Was your car at any time in the Mercer Garage on Sunday the 20th of October? A. It may have been outside in the street, as I had charge of Saks' truck to grease. It may have been down at the garage, but not in it. I do not recall that.

Q. On Monday, the 21st of October, 1929, what time did you bring your car down to the garage, if you did? A. I brought it down about a quarter after seven.

Q. In the morning? A. Yes, sir.

Q. How long did you leave your car there? A. I loaded my truck, and I went out on the road on my route. I left the car in the garage, in Saks' truck's space, with the keys in the car, as I was instructed by Mr. David Mayer, because they were stepping on my starter to get the car around the garage when it needed to be moved.

Q. Did they sometimes have to move the car in the garage?

Mr. Coult: He knows that only by hearsay.

A. Yes.

Q. Did you take your car home that Monday afternoon, or did some of your family take it? A. No, I did not take it home. My mother called for the car that afternoon to go shopping.

Q. After Monday, the 21st of October, when did you next see the car? A. Tuesday morning, the 22nd.

Q. Where was the car then? A. In the garage at my home, 29 South 13th Street.

Q. What if anything did you notice about the car when you saw it Tuesday morning? A. I noticed the front right light bent, a lens broken, and the fender pushed in.

By the Court:

Q. Which light? A. The right front.

Q. The right front light was broken. What else was the matter with the car? A. The lens.

Q. You mean the bulb and the lens, both? A. The lens.

Q. Just the lens? A. The lens and the rim that holds the lens in.

Q. And the fender? A. Yes, sir.

Q. What was the matter with the fender? A. Bent.

Q. The right front fender? A. Yes, sir.

Q. Was there any other damage? A. No other damage.

Q. That damage had not been on the car before? A. No, sir.

Q. That was the first time you saw it? A. Yes.

By Mr. Turner:

Q. Did you give permission to Mr. David Mayer or to Mr. Brown, his employee, to use that car on Monday, the 21st day of October, 1929? A. I did not.

Q. Did any one in your family have permission to use the car? A. My mother has always permission to use my car.

Q. When you saw this car Tuesday morning in its damaged condition, did you know who had

damaged it? A. No, but I asked my mother to investigate.

Mr. Coult: I object to what he said to his mother.

Q. Before you left home, did you find out anything about who damaged the car?

Mr. Coult: I object to that.

The Court: Objection sustained.

Mr. Turner: The answer will not hurt the other side, if the Court please.

The Court: That does not make any difference.

Q. When you took that car out Tuesday morning, did you know then who had broken it? A. I did not.

Q. On Tuesday morning, the 22nd of October, you took the car where? A. I took the car to work, and from there my mother was going down to the shore with the car.

Q. When you got over to the Mercer Garage, did you see Mr. David Mayer? A. I did.

Q. Did you ask him who had broken your car? A. I called him out——

Mr. Coult: This is not binding upon us. I do not represent Mr. Mayer. I have no objection to trying this all over. We can figure out afterward what is competent and what is not competent.

Mr. Turner: However, it does contradict Mr. Mayer.

Mr. Coult: He may go ahead. I have no objection.

Q. Did you talk to Mr. Mayer? A. I did.

Q. What did he say to you? A. He said that he did not know anything about it. The car was on the left-hand side of Mercer Street, right in front of the garage, and I pulled up to the door, because the car was only going to stand there for a second, and then my mother was going home. I called Mr. Mayer and asked him what he knew about the car in that condition. He says, "Nothing." With that, I told my mother to go on, and I went in to work.

Q. Did you have another talk that same day with Mr. David Mayer? A. I did.

Q. About what time was that conversation? A. Just before I was pulling out of the garage with my load.

Q. In the morning? A. Yes, in the morning.

Q. What did Mr. David Mayer say to you then? A. Mr. David Mayer told me then that he had had a slight accident with my car, that I should not worry about it, that he would fix it up.

Q. Did he tell you what the accident was? A. He told me that a man had fallen into the car.

Q. As a matter of fact, was your car repaired? A. My car was repaired after a long argument and dispute about repairing it.

Q. Who paid for the repairs to your car? A. I do not know, I left the car down at the Mercer Garage, and they fixed it.

Q. At the Mercer Garage? A. At the Mercer Garage. The car stood outside the day it was fixed.

Q. When you say you had an argument about fixing it, with whom was that argument? A. The argument was with Mr. David Mayer.

By the Court:

Q. You mean the gentleman who was a witness here? A. The defendant.

Q. No, he is not the defendant. You mean Mr. David Mayer, who was on the witness stand a little while ago? A. Yes.

By Mr. Turner:

Q. On the 22nd day of October, 1929, the day that you had this talk with Mr. Mayer, at that time did you have any policy of insurance with the Bankers Indemnity? A. I did not have any policy that day.

By the Court:

Q. That was Tuesday? A. That was Tuesday.

The Court: I think he has already said he had none on Tuesday.

By Mr. Turner:

Q. When next did you have a conversation with Mr. David Mayer? A. Tuesday afternoon, when I come in.

Q. What was that conversation? A. That conversation was about the insurance.

By the Court:

Q. What time was that when you came in? A. Three o'clock in the afternoon.

By Mr. Turner:

Q. What did you say to him and what did he say to you about insurance?

Mr. Coult: I am still reminding the Court that this is not binding on the plaintiff.

A. In the morning, after telling me about the accident, he asked me what I thought I could do with Porter.

Q. Who was Porter? A. Porter was the insurance agent.

Q. What did you say to him? A. I said I would see what I could do about it.

By the Court:

Q. What did that mean? A. In reference to getting out an insurance policy.

Q. What was said? Just what did Mr. Mayer say? A. Mr. Mayer asked me if I thought I could get insurance out on my car.

Q. That was in the morning? A. That was in the morning after he told me of the accident. You see, it was twice in the morning we had a talk. There was once when he denied knowing anything about it, in the presence of my sister-in-law and mother, and the second time when we were alone, just before I was leaving the garage to go out on the route.

Q. Just say again what he said to you then with respect to insurance, that second time. A. He told me that it was a slight accident, and he asked me if I thought I could do anything with Porter in reference to getting out insurance to cover that accident. I questioned it myself.

Q. What did you say? A. I said I would see what I could do, I would try. He then called my driver—I was not a steady driver at the time—

he called my driver in and asked him to please see that I saw Mr. Porter at the bank about insurance, for him to remind me of it.

By Mr. Turner:

Q. That last conversation that you had on Tuesday, the 21st of October, with Mr. David Mayer was at about what time? A. The last conversation——

Q. Did you have a conversation in the afternoon? A. Yes, I had one in the afternoon when I returned from my route.

Q. About what time was that? A. That was about three o'clock.

Q. What was that conversation at three o'clock on the 22nd of October? A. That conversation was about insurance.

Q. What did he say and what did you say? A. I told him that I had spoken to Mr. Porter about it, and Mr. Porter said that he would give me an answer the next day.

By the Court:

Q. What did you tell Mr. Porter? A. I told Mr. Porter that a friend of mine had had a slight accident with the car, could I get insurance to cover it? He said he would see what he could do, that he would give me an answer the next day, which was Wednesday.

By Mr. Turner:

Q. What time of the day was it that you saw Mr. Porter on the 22nd? A. I saw Mr. Porter about 11:30 in the morning, in the forenoon.

Q. When you say Mr. Porter, you mean Mr. Porter Versfelt? A. Yes.

Q. He had a position in the bank, did he? A. He was a teller in the Montclair bank.

Q. Have you told us all the conversation you had with him? A. That is all the conversation I had with Mr. Porter at the bank, because it is his place of business, and it is no place to discuss insurance policies at a bank.

Q. Is he at a window? A. Yes.

Q. A teller's window? A. Yes, inside a cage.

Q. Was he busy that day when you went in? A. He was busy.

Q. On the following day, the 23rd of October, 1929, did you have any talk either with Mr. David Mayer or with Mr. Versfelt? A. Mr. Mayer on Wednesday morning, the 23rd, asked me to be sure that I seen Mr. Versfelt, and ask him what he is doing about the policy.

Q. And what did you say to Mr. Mayer? A. I said I would see.

Q. Did you have any other talk that day with Mr. Mayer about insurance that you recall? A. I don't recall. The next talk I had with Mr. Mayer was when I had the policy.

Q. When did you get the policy? A. Either Thursday or Friday, the 24th or 25th.

Q. And how did you get the policy? A. I got the policy from Mr. Versfelt up at the bank.

Q. Either then or when you had the policy, did you have any talk with Mr. David Mayer about who was going to pay for the premium on the policy? A. Mr. Mayer had said something about paying half of the premium to me, but I never seen any money.

Q. Did he give you any money? A. No, he never gave me any money.

Q. Do you remember whether you ever did report this accident to the insurance company? A. I made out a blue statement. I filled in my end of it, describing the car, and my address. I gave it down to Mr. Mayer. He filled in the rest of it, the diagram of how it happened, and I gave it up to Mr. Porter.

Q. About when did you give it to Mr. Porter, if you remember? A. The day after I received the policy.

Q. And you received the policy either on the 24th or the 25th? A. Yes.

Q. I show you a paper and ask you whether you signed that paper (handing document to witness)? A. Yes, that is my writing.

Q. You made that paper with the Bankers Indemnity Insurance Company, did you? A. Yes, I did.

Mr. Turner: I offer that in evidence.

Mr. Coult: I object to it. It has nothing to do with us.

The Court: Objection sustained.

Q. Had you at any time said to Mr. David Mayer that he could use this car at any time he saw fit? A. I told Mr. David Mayer that he could use the car in my presence.

Q. When did you tell him that? A. That was back on the other car.

Q. That was the other car? A. Yes.

Q. I am talking about the Dodge roadster. Did you ever give him permission to use that Dodge roadster? A. No, I never gave him permission to use the Dodge roadster unless I was there.

Q. Did you give permission to Mr. Brown to use the Dodge roadster on the 21st day of October, 1929? A. No, but Mr. Brown had asked me for a loan of the car on the 19th, which was Saturday, and when I returned to the garage in the afternoon he told me he did not use it.

Q. Mr. Brown asked you on the 19th of October, if he could use this car? A. Yes.

Q. What did you tell him when he asked you that? A. I told him he could use it, but to be careful of it.

Q. Did he tell you for what purpose he wanted to use it on the 19th of October? A. It was something about a check of his.

Mr. Coult: Of course, all of these conversations with Brown are not binding on us.

Q. Did anyone ever ask you permission for Mr. David Mayer to use your car, either on the 19th of October, or any other time? I am talking about this Dodge roadster. A. Mr. Mayer's sons had asked for the loan of the car on a few occasions, and either one of them, Abe or Phil Mayer, got it. They got the car and went where they wanted to, and came back.

By the Court:

Q. When was that? A. That was after the accident, and I think Phil Mayer had the car before the accident.

Q. With your permission? A. With my permission.

Ralph M. Schmidt, direct

By Mr. Turner:

Q. Where did you keep the keys to your car when your car was either in the David Mayer garage or across the street? A. When my car was in the garage, the keys were always in it.

Q. Did you ever leave it parked across the street before the accident? A. Occasionally, I would leave it across the street. If it was a nice summer's day, I would leave it across the street.

Q. And what did you do with the keys when you left the car across the street? A. Put them in my pocket.

Q. Was there any occasion to leave the keys with Mr. Mayer when your car was left out in the street? A. Not that I recall.

Q. When you talked to Mr. Porter about this policy, did you tell him that you wanted the policy dated any particular date? A. I told Mr. Porter that I would like to have the policy that it would cover that accident, as Mr. Mayer had instructed me to say, that it was only a slight accident, but they would make a mountain out of a mole hill.

Q. Did you tell Mr. Porter what the date of that accident was? A. I believe I did.

By the Court:

Q. What did you tell him? A. In reference to what, your Honor?

Q. The date. A. Monday, the accident happened, and Tuesday, I had spoken to Mr. Porter about it. That would be the 23rd.

Q. So you told Mr. Porter the accident happened on the 23rd? A. On the 22nd.

Q. You told him that the accident happened on the 22nd? A. Yes, your Honor.

Q. You are sure about that? A. Yes, sir.

By Mr. Turner:

Q. After the first conversation with Mr. Mayer, did you have any other conversations with him concerning your making any representations to the insurance company as to whether you had given him permission to use the car? A. He told me, Mr. Mayer told me that was what I would have to say, after I found out what the accident really was he told me all that I would have to say was that he had permission to use the car, and the insurance company would cover the accident.

Q. About when was that conversation with him? A. That was after I received a letter from Mr. Asnis' lawyer.

Cross examination by Mr. Coult:

Q. You worked for Saks & Company? A. I did.

Q. And Saks & Company stored its cars in this garage, did it? A. Right.

Q. How many of them? A. Five.

Q. There was a driver for each car, was there? A. There was a driver for each car and a helper for each car.

Q. When you would go to work you would drive your car to the garage to get the car that you were going to take out for Saks; is that right? A. No.

Q. How would the car get down there? A. After Saks' truck was out——

Q. I mean, starting in the morning. You are at home in bed in the morning. You get up and take your car and drive down to the garage? A. Right.

Q. And then you go in the garage and get out the Saks car? A. Right.

Q. If it was a nice day, clear weather, you would leave your car on the opposite side of the street, wouldn't you? A. Yes, I would.

Q. And you would just take the Saks car and drive away with it, and go about your business? A. Right.

Q. Keeping the keys in your pocket? A. Right.

Q. But if it was not a nice day, after you drove the Saks car out, you would stop the Saks car, get out of it, go back to your car, and put your car in the garage? A. Right.

Q. Is that right? A. Right.

Q. Your car, as far as you knew, was perfectly safe out on the sereet? A. Yes.

Q. So it was only a question of the weather, wasn't it? A. Yes.

Q. If it happened to be a bad day, you would put it in the garage, but if it was a nice day, you would leave it out? A. I wouldn't say all nice days I would leave it out. It depended on how I felt about it. If I had time to put it in the garage, it would go in.

Q. For that you did not pay anything, did you? A. Yes, I paid something.

Q. What did you pay? A. When Mr. Mayer and I had the little dispute about money, and what he thought I was, and this and that and the other thing, I was paying 50 cents a week.

Q. That was on the other car, the Ford? A. That happened on the Dodge too.

Q. When was that? A. When I first bought it.

Q. How long was it before this accident that you had not been paying anything for the occa-

sional times that you put the car in the garage? A. I don't recall. I know it was some time.

Q. Well, give us your best judgment. A. About two months.

Q. During the time that you were leaving your car on clear days and when you felt like it out on the street and the rest of the time in the garage for no pay, how many people beside yourself used it? A. How many people besides myself used it?

Q. Yes. A. My mother is the only one that ever had any permission.

Q. You said Mr. Mayer's boys used it. A. They asked me for it on special occasions.

Q. It was not limiting this to times when you were asked. I am asking you: How many people used it? A. Four.

Q. And who were they? A. My driver, Mr. Mayer's two sons and my mother.

Q. So that while the car was in the garage, you would occasionally give permission to the Mayer boys to drive it? A. I would.

Q. But only in your presence? A. Right.

Q. What do you mean by that, only in your presence? A. When I was there and they would ask me for it personally, I would let them have it.

Q. After they took it, it was not in your presence, was it? A. No.

Q. That is, you would let them take it wherever they wanted to go? A. What I mean by that is when I was out on the road, I did not want anybody to have that car except my mother, which was a general understanding with Mr. Mayer, that when my mother came down to that garage she could take the car.

Q. How was she going to get the car on those

days when you had the key in your pocket? A. If my mother told me she was going to use the car, the key was left in the pocket of the car.

Q. If your mother told you she was going to use the car, you told Mayer, didn't you? A. Yes.

Q. Then why did you give him general instructions that when your mother wanted it, she should have it? A. Because my mother went down there once or twice, and the car was out.

Q. Were those on occasions when you told Mr. Mayer in the morning that your mother was going to take it? A. I don't recall that.

Q. The three or four times when your mother went down there without having personally informed you—on those occasions you might have had the keys with you, as far as she knew? A. Right.

Q. But it is a fact that every time you left the car across the street, you took the keys away? A. Unless I knew my mother was coming down for the car, and the key would be in the pocket underneath some rags.

Q. Did you ever leave the keys in the office? A. No.

Q. Not on any occasion? A. No, never.

Q. Never? A. Never.

Q. You knew about this accident on Tuesday, did you? A. I knew that there was an accident with my car by the looks of it in the morning. I did not know anything of it until about 10:30 Tuesday morning.

Q. Did you have a conversation with Mr. Mayer on that day? A. Tuesday morning I had three conversations with Mr. Mayer.

By the Court:

Q. Two in the morning and one in the afternoon? A. Yes.

By Mr. Coult:

Q. When did you see Mr. Porter, as you call him? A. When I seen Mr. Porter?

Q. Yes. A. On Tuesday morning.

Q. Before or after you had the conversations with Mayer? A. After I had the conversations.

Q. How many of the conversations? A. After the second conversation with Mayer.

Q. So you had a conversation with Mayer, then another conversation with Mayer, then one with Porter, then another one with Mayer? A. Right.

Q. What is Porter's real name? A. Porter Leroy Versfelt.

Q. So that his name is Versfelt? A. Right.

Q. You have known him for some time? A. I have.

Q. He has written policies of insurance for you before, hasn't he? A. He has.

Q. When did you make application for this policy? A. I made application for that policy—I asked him about it the 22nd, and the 23rd or the 24th I signed the policy.

Q. You signed the application when? A. The 24th or the 25th.

Q. That was a written instrument, was it? A. That was written.

Q. With your signature on it? A. Right.

Q. And you turned it into the insurance company? A. I turned it back to Mr. Versfelt.

Q. And, as far as you know, it went to the insurance company?

Mr. Turner: I object to that. He could not know that.

Q. As far as you know, Versfelt got it? A. Yes.

By the Court:

Q. That was on the 23rd or the 24th? A. Yes.

By Mr. Coult:

Q. You told Versfelt that you had already had an accident? A. Yes, I told Versfelt that I had an accident.

Q. And you told him to antedate the policy, to date the policy back? A. Ahead.

Q. And you told him the accident occurred on the 22nd? A. Yes.

Q. Why did you tell him that? A. Mr. Mayer told me to see what I could do with Mr. Versfelt about getting insurance on the car, being as I had conversations with Mr. Versfelt before that about insurance on the car. That was when I still had the Ford car.

Q. Why didn't you tell him it happened on the 21st? A. Why didn't I tell him I had an accident?

Q. Why didn't you tell him you had an accident on the 21st? Why didn't you tell him the truth that far? A. I told Mr. Versfelt that not myself had an accident but the man down at the garage.

Q. Why did you put it on the 22nd? A. I don't know.

Q. That was just for no reason at all, as far as you know? A. Right.

Q. It was not true, was it? A. No.

Q. What was your idea in doing all this? What did you want to do? A. What do you mean?

Q. Did you want to cover yourself by insurance? A. Oh, no.

Q. Were you trying to help out Mr. Mayer? A. Mr. Porter——

Q. Were you trying to help out Mr. Mayer? A. Yes, I was.

Q. You did not consider yourself at all in the matter? A. No, because the car was taken without my permission in the first place.

Q. You were just doing this in a friendly sort of way for Mr. Mayer? A. Yes.

Q. You knew you could not be held responsible in any event? A. No.

Q. Because you knew that car was taken out without your permission? A. Right.

Q. So you did not have the slightest fear at all about a judgment against you in this case? A. The only thing I had a fear about was that the law might be after me for not having Mr. Mayer arrested, after knowing that Mr. Mayer was out and being in an accident. That was the only thing that I was afraid of.

Q. Did you think insurance would help you in that case? A. Well, according to Mr. Mayer's talk, it looked very good to me then.

Q. You thought that if you had insurance you would not be criticized for not having had Mr. Mayer arrested? A. That is it.

Q. You thought the insurance company would help you out in that? A. And Mr. Mayer also said—after I went home and had a talk with my mother, my mother said to let Mr. Mayer pay for his own insurance and use his own cars and we

will pay for our insurance and end that—how is it? I don't know. Anyway, the thing was that the insurance company was not going to have the car, and if I had done what was right I would have had a warrant out for Mr. Mayer to have him locked up for having my car out without permission and causing damage to somebody else.

Q. So that was true, you were willing to do these things and tell these lies for Mr. Mayer? A. Right.

Q. In order that he would be protected and you would not be in any trouble by reason of not having had him arrested? A. In the first place, Mr. Mayer did not tell me that the man's leg was broken. Mr. Mayer told me that a man fell into the car, that my car had not struck anybody, that the man fell into it.

Q. Did you know that what you were doing was wrong? A. I did realize it at the time. I do now though.

Q. Did you know then that it was a fraud? A. Yes, in one way I did, and in another way I did not.

Q. And you were doing it only for Mr. Mayer's protection and not your own, except in so far as you have told us about being arrested? A. That is it.

Q. And that was the only reason you had for doing it? A. Right.

Q. Now, when did you first tell the insurance company about these things that you had done? A. When did I first tell them about it?

Q. Yes. A. Only a short time ago.

Q. How long ago? A. I don't recall, when the trial was upstairs before and put off.

Q. After the plaintiff took a voluntary nonsuit against you? Was that when you saw the light and wanted to tell the insurance company about this? A. Right.

Q. You were sued, weren't you? A. No, not that I know of.

Q. You don't know that? A. No.

Q. Don't you know the insurance company defended a suit for you? A. Right. I know that.

Q. Don't you know you got a nonsuit? A. Right.

Q. Did you know that? A. No.

Mr. Turner: I think counsel is in error. Counsel took a discontinuance.

Q. Did you know the suit against you was dropped? A. No, I do not.

Q. Did you go to the insurance company or did they come to you? A. They came to me.

Q. When? A. I believe it was after Mr. Mayer had lost his case, and they told me that they were reopening the case, and that I had to appear in the case.

Q. Then you told them about this, that the insurance had been antedated? A. I did.

Mr. Coult: Sergeant Foster, will you stand up?

(Sergeant Foster then stood up in the courtroom.)

Q. That is Sergeant Foster, is it not, standing in the courtroom? Do you recognize him? A. I do.

Q. Do you remember when he investigated this case? A. No, I don't.

Ralph M. Schmidt, cross

Q. It was a couple of days after the accident, wasn't it? A. I know I seen somebody one night, and I could not distinguish who it was. There was two gentlemen come to see me.

Q. You remember when the police talked to you, don't you? A. I can't say as I do, no. I did not see anybody in uniform.

By the Court:

Q. You said you recognized the officer, didn't you? A. I recognize the gentleman.

By Mr. Coult:

Q. Do you remember talking to him? A. I do.

Q. How soon was that after the accident? A. That was two days after the accident.

Q. Where? A. I don't recall just how long after the accident it was. Then after I seen him, after I seen the two gentlemen, the next day I received a letter from Asnis' lawyer.

Q. Did you tell the officer when he talked to you that you had told Brown and David Mayer that any time they wished to use your car they could do so? A. If I was there, yes.

Q. That is all, if you were there? A. If I was there, yes.

Q. I thought a while ago you said that Mr. Mayer never had permission to use it. A. Mr. Mayer never had permission to use my car, because he is not a licensed chauffeur.

Q. Just listen to this a moment: Did you tell this officer that David Mayer and Brown could have your car at any time they wished to? A. No, I did not.

Q. Then what did you mean a while ago when

you said "Only in my presence"? A. If I am standing there in the garage greasing trucks, I am right there, knowing when my car is being used. That is what I mean.

Q. Did you tell the officer that? A. Yes.

Q. What did you tell the officer? A. I told the officer that when I am there at the garage, knowing that my car is being used, they could use it.

Q. Who could use it? A. Any of the garage employees or Mr. David Mayer's sons.

Q. Did you tell him David Mayer could use it? A. No, Mr. David Mayer couldn't use my car.

Q. How about Brown? A. Brown asked for it, but did not use it.

Q. Did you tell the officer that Brown could use it when he wanted it? A. No.

Q. What did you tell the officer? A. Only when I am there, with my permission.

Q. You did tell the officer that Brown could use the car when you were there, with your permission? A. Right.

Q. Did you tell the officer then that you were insured by the Bankers Indemnity Insurance Company, and that a report of the accident had been made to the insurance company? A. I can't recall that.

Q. Well, will you say you did not tell him that? A. I won't say I did not, and I won't say I did.

Q. Well, was it true? Were you then insured? A. No, I was not.

Q. Had you made a report? A. No.

Q. Can you remember now whether you told the officer that you were insured and that you had made a report? A. No, I can't.

By the Court:

Q. You mean you are not sure? A. I am not sure about the conversation with the officer at all.

Q. But you are sure you were not insured then? A. I know I was not insured then.

Q. Nevertheless, you might have told him that you were; is that right? A. Right.

Redirect examination by Mr. Turner:

Q. Mr. Schmidt, you were asked when you made known the facts to the insurance company. I show you an affidavit dated the 24th day of July, 1931. Will you look at that and see if you signed and swore to that affidavit (handing document to witness)? Is that your signature? A. It is.

Mr. Turner: I offer that in evidence, for the purpose of showing the disclosure to the insurance company.

Mr. Coult: I object to it. It is a self-serving declaration. He can use it for the purpose of refreshing the witness' recollection. I do not want the affidavits in this case.

The Court: I do not think we need that.

Q. Did you make another affidavit showing additional facts concerning this matter, on the 15th of October, 1931 (handing document to witness)? A. That is my signature. That was down at your office, wasn't it?

Q. You made both of them at my office.

JENNY SCHMIDT, sworn in behalf of defendant.

Direct examination by Mr. Turner:

Q. Mrs. Schmidt, you are the mother of Ralph Schmidt, the last witness? A. Yes.

Q. And you live where? A. I live at 7 Broad Street now, but at the time of the accident I lived at 29 South 13th Street.

Q. Did you have any financial interest in this Dodge roadster? A. Yes, I had all the financial interest. I paid for the car.

Q. Did you at any time prior to the 24th of October, 1929, have any insurance on this car?

Mr. Coult: I object to that.

The Court: What difference does that make?

Q. Do you know whether your son Ralph had any policy of insurance on the car prior to October 24?

Mr. Coult: I object to that.

The Court: I do not think the answer to that question will help us very much.

Q. Do you recall Monday, the 21st of October, 1929? A. Yes, I do.

Q. Where did you go that day? A. I went to Mr. Mayer's garage in the afternoon, around three o'clock, and I took out the Dodge roadster.

Q. Where was the car? A. The car was standing in the space where the Saks truck had stood during the night, until Ralph took it out in the morning. He left the car in the same space.

Q. When you took the car out, where did you take it to? A. I took it down to the market.

Mr. Coult: I cannot see the materiality of this.

Mr. Turner: This is the day of the accident.

Q. What time did you say you got it from Mr. Mayer's garage? A. About three o'clock in the afternoon.

Q. That night where was the car left? A. In our garage at home. I drove it home.

By the Court:

Q. You did not take it back to Mayer's garage? A. No, your Honor, I did not.

Q. What time did you get it home? A. I got it home about a quarter to five.

By Mr. Turner:

Q. When you got that car home, did you look at the car and notice anything about it? A. I had noticed it when I was in Mulberry Street. I had noticed that the lens was broken and there was a slight damage to the front, the fender was bent, and several other little dents.

Q. Did you know how those things got in the car? A. No, I did not, and I questioned no one because there was no one in the garage, and I didn't know if Ralph had struck something on his way to work.

By the Court:

Q. Well, you did not notice it in the garage anyway, did you? A. No.

Q. Then you would not have asked anybody about it in the garage, because you did not see the damage there. A. No.

Q. So even though they had all been there, you would not have asked them anyway? A. No, I would not.

By Mr. Turner:

Q. The following morning, which was October 22nd, did you go anywhere with your son? A. Yes, I went down to the garage with him. Driving out of the garage, he asked me what had happened with his car, if I had had an accident, and I said, "No, I did not, but I did not know if you had one on your way to work, so I questioned no one. But the car was damaged when I took it out," I knew I had not struck any one, and I saw it when I was taking it out of the garage, out of the Mercer Garage.

Mr. Coult: Conversations between this lady and her son I do not think are binding on anybody.

The Court: No, do not waste time on that, Mr. Turner.

Mr. Turner: I do not think such conversations are binding either.

Q. The following morning you went where? A. I went down to Belford, New Jersey.

Q. Before you went down did you stop anywhere? A. Yes, we stopped at the Mercer Garage and inquired as to what had happened to the Dodge roadster.

Q. And you spoke to whom? A. Ralph spoke to Mr. David Mayer, but Mr. Mayer denied all

knowledge of it until after he had called Ralph inside and then he said——

By the Court:

Q. That was not in your presence, was it? A. Yes, he called Ralph inside.

Q. You were not inside, were you? A. I was sitting outside.

Q. You were not inside? A. No.

By Mr. Turner:

Q. You don't know what happened inside? A. No.

Q. What was said outside in your presence? A. Ralph ran out and said, "Mother——"

Q. Do not tell us that. What happened outside in your presence when Ralph first spoke to Mr. Mayer? A. Mr. Mayer denied all knowledge.

Q. What did he say? A. He simply said, "Don't ask me, I don't know anything about it."

Q. You went down to Belford, New Jersey, that day? A. Yes, my daughter-in-law and myself.

Q. Did you have any talk with Mr. Mayer some time after this morning of the 22nd of October? A. Yes, I did.

Q. About how soon after was that? A. Probably two days later, because I thought that he should have the car repaired, which he did not attend to right away. After Ralph said it was his accident, I said he should surely take care of the repairing of the Dodge, and he promised me that he would when I spoke to him. Whether he paid for it or whether his mechanic did it, I could not answer.

Q. After that, did you have a conversation with

Mr. Mayer relative to the question of insurance? A. Yes, I did.

Q. About when was that? A. I couldn't recall the date, but it was shortly after the accident. Ralph came home, and he said that Mr. Mayer——

By the Court:

Q. He did not ask you that. He asked you whether you had any conversation with Mr. Mayer? A. Yes, I did.

Q. When did you? A. Shortly after the accident.

Q. The same week? A. There were two gentlemen——

Q. Was it the same week? A. Yes, I believe so.

Q. What was the conversation between you and Mr. Mayer about insurance? A. The conversation was that Mr. Mayer should pay his accident and we would pay our own insurance.

By Mr. Turner:

Q. Did Mr. Mayer say anything about paying for your insurance?

Mr. Coult: Just a moment, that is very leading.

A. Yes, Mr. Mayer did say it. He did say he would pay my insurance.

The Court: Strike it all out.

Q. What, if anything, did you say to Mr. Mayer? A. I told him that I would take care of the insurance, either Ralph or myself, and he could take care of the accident which he had had

without my consent or Ralph's consent to use that car, that I thought he was in a better position to furnish an automobile for his mechanic than I was able to.

Q. After that did you go and have a talk with Mr. Versfelt? A. Yes, I did, I went to the Montclair bank and I repeated the same story.

Mr. Coult: Conversations between this witness and somebody else certainly cannot be binding upon us.

The Court: No, do not go into that, Mr. Turner.

(Argument.)

Mr. Coult: Your Honor, I have one or two witnesses whom I should like to put on this afternoon. I wonder if Mr. Turner would mind if I called them out of order.

Mr. Turner: Certainly not.

EMIL FOSTER, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Coult:

Q. Where do you live, sir? A. I live in Newark, New Jersey, 245 Alexander Street.

Q. You are a police officer? A. Yes, sir.

Q. What is your position? A. Sergeant.

Q. Where are you attached? A. Eighth Precinct at present.

Q. Did you investigate the accident that was the basis of the suit of Asnis against Mayer? A. I did.

Q. Whom did you interview in connection with

New Jersey State Library

it? A. I interviewed Mr. Asnis, I interviewed Mr. Mayer, Mr. Mayer's son, Mr. Brown and Mr. Schmidt.

Q. Do you remember what day you saw Mr. Schmidt? A. About two days after the accident had occurred.

Q. Where? A. At Mr. Mayer's garage.

Q. Then and there, did Mr. Schmidt tell you that he had told Brown and David Mayer that any time they wanted to use that car they might do so? A. He did.

Q. Did he also tell you that he was insured by the Bankers Indemnity Insurance Company, Clinton Street, Newark, and that an accident report had been sent to them? A. Yes, sir.

Cross examination by Mr. Turner:

Q. On what date did you see him? A. About the second day after the accident had occurred.

Q. You say about the second day? A. About the second.

Q. Can you fix the date when you did see him? A. No, sir.

Q. You cannot fix it? A. No, sir.

PORTER LEROY VERSFELT, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Coult:

Q. Where do you live, Mr. Versfelt? A. Caldwell.

Q. Where in Caldwell? A. 11 Mill Street, Caldwell.

Q. What is your business? A. Banking.

Q. Where are you a banker? A. In the Bank of Montclair.

Q. What position have you with that bank? A. Teller.

Q. How long have you been with them? A. Fifteen years.

Q. Do you write insurance? A. Yes.

Q. Do you know Ralph Schmidt? A. Yes.

Q. I show you a policy of insurance marked Exhibit P-1 and ask you if you wrote that policy of insurance (handing document to witness). A. Yes, I did.

Q. Do you remember when that was applied for? A. May I see the date? October 19, 1929.

Q. Where? A. At the time he stopped into the bank to make a deposit he asked me to put insurance on him.

Q. Can you remember what day of the week that was? A. As I recall, it was on a Saturday.

Q. On a Saturday? A. Yes.

Q. Did you ever arrange with him to take an application of insurance at any time and antedate your policy? A. No, I wouldn't under any such circumstances at all.

Q. Did you ever do that for him? A. No one at all.

Q. Had you written insurance for him before? A. Yes.

Q. What kind of insurance? A. As a sickness.

Q. Had there been any negotiations about this policy before the application was made? A. Yes.

Q. For how long? A. Possibly a month or two months.

Q. Of what nature? A. Before he took out the accident insurance, which was a month before

the automobile insurance went into effect, he spoke to me that he wanted an automobile policy but he couldn't afford to pay for it.

Q. Have you your records that you made in connection with this policy? A. Yes.

Q. Where are they? A. (Witness produces documents.)

Q. What have you got there? A. A copy of an insurance policy.

Q. What kind of a copy is that? A. It is the agent's copy.

Q. Is that the one you kept for yourself? A. Yes.

Q. Does that show the date of the application? A. It shows the date the insurance went into effect.

Q. What is that? A. October 19, 1929.

Q. Have you got a record as to the application and the payments for the policy? A. Yes.

Q. Have you got your original record there? A. Yes.

Q. What does that show, generally? A. It gives the party's name, and what it covers, and the amount, and the date, and the amount of premium.

By the Court:

Q. What is the date of the application? A. October 19, 1929.

By Mr. Coult:

Q. What are the dates of payments? A. He paid $10 November 10, 1929. He paid $10 November 12, 1929. He paid $5 January 5, 1930. He paid $6 July 17, 1930. He paid $5 October 1, 1930.

Q. Did that complete the full payment on the policy? A. Yes, $36.

Q. Have you his record there for the other insurance that you wrote for him? A. Yes.

By the Court:

Q. Did he, at the time he applied for this, say that he had had a slight accident? A. Not at the time.

Q. I mean before the policy was issued, at the time he applied for it. A. No.

Q. Did he ask you under those circumstances whether you could fix him up for a policy, and you said, "I will let you know in a day or two?" A. No.

Q. And did he come back in a day or two, at which time you did issue the policy to him? A. He spoke to me about two months before.

Q. I am not asking you about that. I am asking you whether when he did apply for this he asked you whether you could fix him up with a policy that would cover a slight accident that had already occurred. A. No.

Q. And did you reply to him, when he made that request, that you would let him know in a day or two, or perhaps the next day? And did that happen? A. No.

Q. And did he then come back, and you said, "Yes, I will fix you up and issue you a policy and date it back for the 19th?" A. No, it is not so.

By Mr. Coult:

Q. Was a notice of accident given to you? A. It was given to me, as I recall, about a week after, or possibly three days after the policy was de-

livered to him, which was a week after it went into effect.

Q. Did you have any knowledge of an accident before that? A. I had no knowledge of an accident.

Cross examination by Mr. Turner:

Q. Mr. Versfelt, do you know Vera Price Versfelt? A. Yes.

Q. She is your wife, isn't she? A. Yes.

Q. She is a notary public? A. Yes.

Q. Did you swear to this affidavit before your wife as a notary public on the 25th day of November, 1931 (handing document to witness)? A. Yes.

Mr. Turner: I will ask at this time that the affidavit be marked for identification.

(The same is marked Exhibit D-1 for Identification.)

Q. The contents of this affidavit were true when you swore to them?

Mr. Coult: Let him look at it. He has a right to look at it. He is a witness and not a party to the suit.

(The affidavit was then shown to the witness.)

Q. Is that affidavit true? A. I notice you mention in the affidavit that the date the policy is in effect is the 24th.

Q. I am just asking you one question: Are the contents of this affidavit true? A. At the time I signed the affidavit, I read it over quickly. I just

got home from business at, say, 6:30 and I had a party from your office waiting for me, and I read it over in a hurry, and I signed the affidavit, and my wife took the affidavit.

Q. The facts in this affidavit you had previously given to me, had you not? A. As to the dates, I wasn't sure of the dates. My records showed the policy went into effect on October 19th.

Q. Do you say now that any part of this affidavit that you swore to is not true? A. As to the effective date of the insurance.

Q. If any part of this affidavit is not true, will you tell us what is not true? A. The insurance policy reads——

Q. I do not care what your records show. Take the affidavit and tell us anything in that affidavit that you now say is not true. A. Ralph Schmidt decides to have insurance.

Q. Underline anything that you say is not true.

Mr. Coult: I do not think the witness ought to be asked to do that.

By the Court:

Q. What is in that affidavit that is not true? A. That when Ralph Schmidt spoke to the deponent on October 24, 1929, he suggested to the deponent that the policy should be dated the 19th.

Q. Isn't that true? A. There was no agreement made, or no request to have the policy issued other than the date that he gave me the order.

Q. Then that part is not true. Is that what you mean? A. It is not true.

Q. Is there any other part that is not true?

By Mr. Turner:

Q. Which page is that on? Page 2? A. Page 2.

Q. How many lines down? A. The eighth line down.

Q. Is there any other part of that affidavit that you say is not true? A. No binder was issued on October 19, 1929.

Q. Wasn't that true? A. My records show——

Q. I am not asking you about your records. Is that true, when you swore there that no binder was issued on October 19, 1929? A. An application was made out.

Q. There was no binder issued on October 19, 1929? A. An application was made out. I don't know whether he considers that a binder.

Q. You mean an application was dated October 19, 1929? A. An application was made out on October 19th.

Q. Why do you say it was made out on the 19th of October? A. That is the date he came in to see me.

Q. What makes you say that? How do you fix that? Do you fix it from the date on your application? A. Yes.

Q. And that is the only way you have to fix it, isn't it? A. The date on the application.

Q. Then when you tell us, for illustration, that parts of that affidavit are not true, you are basing your knowledge on the fact that the application you have is dated October 19, 1929? Isn't that what you are basing your knowledge on, and your statement on? A. I am basing it on the day he came in and asked me to put insurance on his car.

Q. How do you fix that date? Do you fix that

date from the date on the application? A. The application was made out the same day he asked me to put insurance on the car. He asked me to put insurance on the car on a Saturday, October 19th.

Q. I want to know how you fix that date. Is it from the date that is on the application? Have you any independent recollection of this, outside of your application? A. Yes, I recall him coming in and asking me to put insurance on the car.

Q. Do you recall what date he came in? A. I can recall the date from the date of the application.

Q. Then you fix the date that he came in from the date that is on the application? A. Saturday, October 19th.

Q. That is the date on the application, isn't it? A. And that is the day he called.

Q. Do you fix that in your mind by taking it from the application? A. I take it from the application which I sent in, into the company.

Q. Then when you say that that part of that affidavit is not true, when you say in the affidavit that you did not issue a binder on October 19, 1929, you say it is not true because your application bears the date the 19th? A. I issued an application requesting insurance to be written on that date.

Q. Is that what your affidavit says? I want to know what in that affidavit is not true. A. It says no binder was issued on October 19th.

Q. That is true, isn't it? A. Is an application considered a binder? I don't know.

Q. Don't you know that? I think I will let the Court tell you whether an application is a binder.

Mr. Coult: I do not think it is.
The Court: I know it is not.

Q. You did not issue any binder on October 19, 1929? A. If I took insurance on a certain date and made the application out and forwarded it to the company, the insurance went into effect on that day.

Q. So your purpose when you dated this the 19th of October was to have a policy issued and dated October 19, 1929, wasn't it? A. In all cases——

Q. That is what you intended to do in this particular case? A. In all cases.

Q. In this case you intended that the policy should be dated the 19th of October, didn't you? A. Yes.

Q. Now, tell us anything else that you think is not true in that affidavit. A. Deponent says that the application for insurance, said policy of insurance, October 19th, was issued at the request of the said Ralph Schmidt, mailed in to the Bankers Indemnity Insurance Company.

Q. Isn't that true? A. Yes, issued at his request.

Q. Now, tell us anything you find that is not true.

By the Court:

Q. What else is in that affidavit, other than what you have already told us, that is not true? A. Nothing else that I know of.

Q. Why did you sign it if it contained matters that were not true, and swear to it? A. I called at Mr.—the attorney's office. He called me up in

regard to the accident. I called and gave him the statement which he requested. At the time, I did not know as he states here that it was the 24th. He states in here that the insurance went into effect on the 24th instead of the 19th.

Q. Didn't you tell him that when you called at his office? A. When I called at the office, I don't recall if I had any records with me or not. Did I?

Q. Don't ask him. A. I had no records with me, as I recall.

Q. Did you read the affidavit when you signed it? A. Yes, I read it.

Q. And didn't you detect at that time the errors that were in it? A. No, I didn't.

By Mr. Turner:

Q. You signed it in front of your wife? A. Yes.

By the Court:

Q. Where do you keep your records, Mr. Versfelt? A. At my home.

Q. And where do you issue the policies? A. The company issues the policies.

Q. Yes, but you sign them? A. The company forwards the policies to me, and I sign them after the date of issue, which is sometimes three or four days after I send the applications in.

Q. Do you issue binders yourself? A. I issue applications.

Q. You get applications. Applications are received. Suppose I came in the bank some Saturday morning and asked you to insure my automobile. You would hand me an application, and I would go over to the desk and fill it out, would I not? A. No.

Q. Wouldn't I do it that way? A. An application is made out by the agent.

Q. Aren't you the agent? A. Yes.

Q. Then you would fill it out? A. I would fill it out at my home.

Q. Then I couldn't get covered that day, could I? A. I don't do any business in the bank.

Q. I say: I couldn't get covered that day? A. As soon as I got home.

Q. No, I mean that day. I would come in, in a rush, and I would say, "I am going off on a trip, and I want to be covered." What would you say? A. You will get coverage as soon as I reach my home.

Q. And then I would say, "It is too late. I may be dead by then. Good-bye." What would you do then? A. I couldn't issue any policy.

Q. You would say, "I am sorry, I cannot do it." Is that it? A. Yes.

Mr. Turner: I think, in order to save time, I will offer this affidavit in evidence.

Mr. Coult: Of course, it is incompetent. I wish to save time, however, and I shall not object to it.

(D-1 for identification is received in evidence and marked Exhibit D-1.)

By Mr. Turner:

Q. You say that on Saturday you went home and made out the application for Ralph Schmidt? A. Yes.

Q. What time did you get home that day? A. As I recall, 2:30.

Q. On Saturday you would get home at 2:30? A. Yes.

Q. On other days you would get home when? A. Around six.

Q. Six o'clock. You live in Caldwell, do you? A. Yes.

Q. If you made this out on a Saturday, do you know when it would be mailed? A. It would be mailed possibly on Monday.

Q. Mailed on Monday from Caldwell? A. No, I usually mail it from Montclair.

Q. Have you any recollection of going to Montclair on this date that you have down on your application? A. I go to Montclair every day, every business day.

Q. If you did not make this out until you got home from your work, would you go again to Montclair, or would you take it in Monday morning to Montclair? A. It was no doubt mailed Monday morning.

Q. It was probably mailed Monday morning from Montclair. Where would you mail it on Monday morning from Montclair? A. In one of the mail boxes.

Q. Near the bank? A. Yes.

Q. Do you know what time the first collection is on Monday morning? A. No, I don't.

Q. You don't know what time the first collection is? A. No.

Q. What time in the morning would you put it in the box? A. Around eight o'clock.

Q. When after that, if you know, or what record if any have you as to when you received this policy from the insurance company? A. That I couldn't say, because my records don't show the date I received the policy back.

Q. What was the first date that you got any premium from Mr. Ralph Schmidt? Would that

help you in fixing the date? A. November 10, 1929.

Q. That is the first time he paid anything on it? A. Yes.

Q. There is no way for you to tell when this policy was delivered to Ralph Schmidt? A. I couldn't say what date the policy was delivered to him. I don't keep a record of the date.

By the Court:

Q. How long had you known Mr. Schmidt at this time? A. About three and a half years.

Q. By reason of his coming into the bank? A. Yes.

Q. Did you know him outside of that? A. Well, I often met him on the street, a good deal, yes. I met him through his transactions with the company he used to work for.

Redirect examination by Mr. Coult:

Q. In the usual course of your business, what do you do with these applications for insurance? A. If the party wishes insurance, I make the application out and send it in to the company.

Q. If this application was written on Saturday, when would it go out? A. As I recall, on Monday.

Q. What is that? A. On Monday.

Q. Out of Caldwell or Montclair? A. Out of Montclair on Monday.

Q. Do you remember when you posted it? A. I think it must have been on Monday, around eight o'clock.

Q. To what address did you mail it? A. Bankers Indemnity—I don't recall where the company was located in 1929. They moved the office.

Q. Well, in what city? A. In Newark.

Q. Were you dealing with the Newark office? A. Yes.

Q. Were you an agent of the company? A. Yes.

Q. And in due course the policy came back to you, didn't it? A. Yes.

Q. Do you remember what day you got the policy? A. I don't recall. It must have been three or four days after, or possibly a week after. Three or four days after, maybe.

By the Court:

Q. Did you deliver it to Mr. Schmidt or mail it to him? Do you remember that? A. The policy, as I recall, was mailed to him.

Q. To what address did you mail it? Do you remember that? A. 29 South 13th Street, Newark.

Q. To his home? A. Yes.

By Mr. Coult:

Q. In this affidavit, you say that the policy went into effect on October 24th. Where did you get that information? A. October 24th?

Q. Yes, in this affidavit you say it went into effect on October 24th. Where did you get that information? A. I don't know where that information came from.

Q. Did it come from you? A. Not that I recall, because my records show October 19th.

Q. Did you have anything else before you, anything from the company or from anybody else, to show that this insurance went into effect on the 24th? A. No.

Q. Did anybody tell you it went into effect on the 24th? A. I think we referred to a calendar. I wasn't sure of the date.

Q. Where did you look at the calendar? A. At the attorney's office.

Q. At the attorney's office? A. Yes.

Q. You said something about this application being made on a Saturday. What impresses that on you, if anything? A. Because of the date of the order in my records.

Q. Is it the date of the order, or the fact that it was a Saturday? Can you remember whether it was a Saturday or not? A. Yes, it was a Saturday.

Q. How long do you work on Saturday? A. About 1:30.

Q. Was this day a whole day or a half day, the day this policy was issued? A. A half day.

Q. Did anybody from our office or from the plaintiff talk to you about this case before yesterday? A. Yes.

Q. Who? A. This attorney (indicating Mr. Turner).

Q. He and I are not together in this case. A. No.

Q. Were subpoenaed yesterday, weren't you? A. Yes, sir.

Mr. Coult: Mr. Moore, will you stand up?

(Mr. Moore then stood up in the court room.)

Q. Is this the gentleman that subpoenaed you? A. Yes.

Q. Where did he subpoena you? A. In front of the bank.

Q. At that time, did you have your records with regard to this insurance company? A. Yes, I did.

Q. What? A. No, I had no records with me.

Q. You were told to bring your records down with you? A. Yes.

Mr. Coult: I have a calendar here, your Honor, which shows that the 19th was a Saturday.

Recross examination by Mr. Turner:

Q. Do you fix Saturday the 19th because that is the date shown on your records? A. Yes, that is the date the insurance was ordered.

The Court: We shall take a recess now until Monday morning.

(Adjourned until Monday, January 18, 1932, at ten o'clock a. m.)

SECOND DAY

Monday, January 18, 1932.

Continued pursuant to adjournment.

Present, counsel as before stated.

FLORENCE SCHMIDT, sworn in behalf of defendant.

Direct examination by Mr. Turner:

Q. Mrs. Schmidt, you are a sister-in-law of Ralph Schmidt? A. Yes.

Q. And your husband's first name is what? A. Harold.

Q. You lived with whom in 1929? A. My mother-in-law.

Q. Did Mr. Ralph Schmidt live with his mother? A. Yes.

Q. In the same house with you? A. Yes.

Q. Did you live as one family, or were you separated? A. One family.

Q. Do you remember the morning of the 22nd of October, 1929? A. I do.

Q. On that morning, you and your mother-in-law were going where? A. To Belford, New Jersey.

Q. Do you remember what day of the week that was? A. Yes, Tuesday.

Q. Did you see the car that morning? Were you going in the car? A. Yes, sir.

Q. Did you see the front of the car that morning before you got into it? A. Yes, sir.

Q. Did you notice what its condition was? A. Yes, sir.

Q. What did you notice about it? A. The right lens was broken and the right fender was dented in.

Q. Who got into the car when you left your house? A. Ralph's mother and I.

By the Court:

Q. Is Mrs. Schmidt your mother-in-law? A. Yes, sir.

Q. You are a sister-in-law of Ralph Schmidt? A. Yes, sir.

Q. You married his brother? A. Yes, sir.

By Mr. Turner:

Q. About what time in the morning, if you re-

call, did you leave your house? A. Well, I should say about a quarter of seven.

Q. Did you go to the Mercer Garage that morning? A. Yes, sir.

Q. Did you see Mr. David Mayer that morning? A. Yes, sir.

Q. Where was Mr. David Mayer when you saw him? A. In his garage.

Q. Did he come out or not? A. Yes, sir.

Q. Did you hear any conversation that morning between Ralph Schmidt and Mr. David Mayer concerning Ralph's car? A. Yes, I did.

Q. What did you hear? A. I heard Ralph ask Mr. Mayer who did damage to his car, and Mr. Mayer said he knew nothing of it.

Q. And then after that you did not hear any more of the conversation between the two? A. No.

Q. They went inside, did they? A. Yes, sir.

Q. Did you see that car on Monday morning? A. Yes, I did.

Q. Where did you see it that Monday morning before? A. I was standing at the doorway, and I saw Ralph pull out of the driveway going to work Monday morning.

Q. Was that car damaged on Monday morning when Ralph went out? A. No, sir.

CROSS EXAMINATION WAIVED

RAYMOND McGEE, sworn in behalf of defendant.

Direct examination by Mr. Turner:

Q. Where do you live, Mr. McGee? A. 235 Fairmont Avenue, Newark.

Q. You are connected with what company? A. Bankers Indemnity Insurance Company.

Q. Mr. McGee, you are in what department of the company? A. The New Jersey Department.

Q. Underwriting? A. Underwriter.

Q. I show you policy AP75158 issued to Ralph M. Schmidt. Have you here the original agent's application for that policy? (Handing document to witness.) A. I have.

Q. Will you produce it, please? A. (Witness produces document.)

Q. Will you tell us whether that application shows the date of its receipt by the company? A. Yes, sir, it does.

Q. What is the date? A. October 23rd, in the mail.

Q. 1929? A. 1929.

Q. Is there anything on that application to indicate that Ralph M. Schmidt's car had been involved in an accident on any date prior to the receipt of that application? A. No, sir, if it had we would not have issued the policy.

Mr. Coult: I object to that.

The Court: Objection sustained. He does not need to say that.

Q. Is this application signed by anybody? A. No, it is not.

Q. Did Mr. Versfelt sign it? A. No.

Q. Is there anything to indicate from whom it was received? A. Well, the way we get these, it might be in the form of a letter, or else there would be a summary application written in pen and ink. But it was received from him, and the name is written on that application.

Q. His name appears on the application? A. Yes.

Mr. Turner: I offer the application in evidence.

(The same is received in evidence and marked Exhibit D-2.)

Q. This application states the period of the policy as October 19, 1929, to October 19, 1930. A. Yes, sir.

Q. Can you tell us, although this policy application was not received until October 23, why the policy was issued as of October 19? A. Well, in a great many cases we will accept an application from a broker whom we have no cause to question that would send in an application where an accident happened. In this particular instance, we never had any cause to question Mr. Versfelt's methods. That is the reason it was dated.

Q. Did Mr. Versfelt have any power to bind the company, to issue binders?

Mr. Coult: I object to that.

Q. Do you know whether he had any power to issue binders?

The Court: How can this witness know that?

Mr. Turner: Because they are issued a commission, and the commission distinctly shows what the powers are.

The Court: But there was no binder in this case. There was nothing but the policy. The policy was not issued by the agent, but by the company. Therefore, I

think it is irrelevant and immaterial, as to what power he may have had, inasmuch as he did not exercise it and did not attempt to exercise it, under the testimony.

By the Court:

Q. You have no personal recollection of this, Mr. McGee, have you? A. No, I have not.

Q. You only say it was received on the 23rd because it is so indicated on the policy? A. As a matter of practice.

Q. You do not know why it was dated on October 19th? A. No.

Q. It is just a surmise? A. Yes. But our practice is with an agent or a broker, we sometimes feel that they get a policy in over a week-end and have not got an opportunity to send it, and we cannot of course penalize them for that.

Q. But they would have to tell you about it, wouldn't they? You would have to have some knowledge, other than the application itself, wouldn't you? A. No, we would not.

Q. How would you know, then, to date it back under those circumstances? A. The application is dated that way.

Q. Is that application dated the 19th? A. The 19th?

Q. Is it dated the 19th? A. Yes.

Cross examination by Mr. Coult:

Q. Will you first point out to me what indicates the date of receipt at your office? A. Here (indicating).

Q. Where? A. That is the date it is received (indicating).

Q. Those are the words, "Mail, 10/23?" A. Yes.

Q. I think you have already said you have no personal recollection of this coming in. A. No, I have not.

Q. You deal with a great many of them? A. Yes, sir.

Q. About how many a day? A. Fifty or sixty.

Q. And there is nothing here to show what time of day this was received? A. No, sir.

Q. And you do not know what time of day it was received? A. No, sir.

Q. There is nothing unusual in the receipt of an application four days after the date of the application, is there? A. Well, there is and there is not. By that I mean: Usually you get them the next morning. You will get an application dated today, and that will come in tomorrow morning. But this happened to be over a week-end.

Q. Was there anything unusual in having it come in that late over a week-end? A. No.

Q. In other words, if it was written on the 19th you would expect to receive it perhaps on the 23rd under those circumstances, would you? A. Yes.

Q. You said something about never having suspected this agent of any impropriety. I think you said that that was the reason that you did not take it up with the agent; is that so? A. Yes, sir.

Q. Did you mean to imply, or did you feel when you made that answer, that there might have been something curious about getting an application on the 23rd that was dated the 19th? A. I did not.

Q. So that you were not concerned about whether or not this agent was reputable or otherwise, were you? A. Not about this agent. We are concerned about them all in that respect. We have some that we would not do that for. We have had past experience with them.

Q. What would be your practice in that case? A. Date it the date it was received in the office.

Q. So that if there had been any question about the integrity of this agent, you would have dated your policy the date that it was received in the office? A. Yes.

Q. Is that your usual custom? A. Yes, sir.

Q. So that you differentiate between the degrees of respectability of your agents? A. Yes, sir.

Q. And when you have one that is not respectable you date the policy on the date that the application is received, and if it is a respectable agent you date it the date that the application is dated? A. Yes.

Q. How many respectable agents do you have and how many that are not respectable? A. You can't define that. There are some that you have some dealings with, some of the things that they ask you to do, you would not take a chance on receiving anything from them and date it on their say-so.

Q. I just want to know what percentage of the agents of your company that you have knowledge of are of such a character that you would not date the policy on the date of the application. A. In the first place, he is not an agent.

Q. I am asking you: How many of these agents do you treat in one way, and how many in the other? A. That is pretty hard to tell.

Q. Why is it hard? A. Because there are two thousand brokers in the State of New Jersey, We are supposed to know the agent or the broker, whoever it is. Those that we have no record of, that have never given us any business or very little business, we question everything that they send in.

Q. What I am asking you is this: You had control of this department? A. Yes.

Q. How many agents did you have under you? A. We have about seven hundred and some odd agents.

Q. And some of those seven hundred odd agents were so respectable that you would take their word for the date of the application, and some of them were not? A. All of our agents we take them from, but from brokers, we look them up carefully.

Q. Well, this man was your agent, wasn't he? A. No, he was not, he was a broker.

Q. Did he have power to sign the policy? A. No, he did not.

Q. You had dealt with this man before, this broker? A. Yes.

Q. For how long? A. Well, I came with the Bankers Indemnity in January, 1929. Before that, I don't know how long they were dealing with him.

Q. But ever since you had been there, they were dealing with him? A. Yes.

Q. Did he write much busniess? A. No, he did not.

Q. Can you give us any idea of how many applications he sent in during the term you were there? A. I would say in round figures that his

business with us amounted to between $1,500 and $2,000 a year.

Q. Where did you acquire your knowledge as to his respectability and responsibility? A. It was not a question of respectability or responsibility, it was a question that the man had never asked us for anything unusual.

Q. So that you accepted this application and dated the policy on the date of the application because this broker during the few months that you had been with this company, who wrote only about $2,000 worth of business a year had never made any request to you for anything unusual; is that so? A. Yes, sir.

Q. And that is the only reason why in this particular case you assumed that this application was bona fide? A. We assumed the agent's responsibility in the first place. In that particular case, as in all cases, we find their connections, we know what their connections are. We assumed the man's connection with the bank would keep him from doing anything that would be out of the ordinary.

Q. When did you learn that he was with the bank? A. I knew that from the agency file when I first came with the company.

Q. Do you look all these agents up? A. That was the department I was in.

Q. How many of these agents were there? A. 792 agents.

Q. And that included brokers? A. Yes, sir.

Q. How many? A. 792, I believe. I won't say that is absolutely right.

Q. I suppose now from memory you could tell us the connections of all these 792 brokers? A. No, I could not.

Q. And yet you tell us that the reason why you had confidence in him was because you remembered that he had been connected with a bank in Montclair? A. Yes, sir.

Q. When you say he wrote about $2,000 worth of business a year, do you mean $2,000 in premiums or coverages? A. In premiums.

The Court: I think he said $1,500.
Mr. Coult: $1,500 or $2,000.

Q. That is a very small amount of business, isn't it? A. If you are examining the business as it comes through, and you get monthly reports on it, you know just where your business is coming from. All of those 792 agents do not produce every week.

Q. This is all in answer to a question that is this: $1,500 to $2,000 worth of business is not much for an agent to write, is it? A. No, it is not.

Q. Most of your agents write a great deal more than that, don't they? A. Yes, sir.

Q. And you have that in mind when you tell us that you can remember this man and his connections? A. Yes, sir.

Q. And that your memory is based upon your looking him up in a rating book during your term of service before this policy was written? A. Yes, sir.

By the Court:

Q. Why do you say that Porter Versfelt is not an agent but a broker, and has no authority to sign policies when he did sign this particular policy, in fact (handing Exhibit P-1 to witness)? A.

The only answer I can give to that, your Honor, is that the policy got out without being signed, and he took it upon himself to sign it.

Q. And another answer is that you did not know when you made that statement that he had in fact signed it? A. I did not, your Honor. He does not carry the authority to sign it.

Q. But he does sign them? A. This got out, and he took the chance, I suppose.

Q. What do you mean when you say he took the chance? A. Signed it himself, because we sign those policies in our office.

Q. How did he get hold of it? A. Well, the policy went out from the policy writing department without a signature on it.

Q. Is that the way you do business? A. It just happened to be an error.

Q. It is signed in two places. In fact, it is signed in three places by him. Do you mean to say you sent it out without its being signed in any place? A. Yes, sir.

Mr. Turner: I would like to call Mr. Van Posnak for one question. I do not care whether he is sworn or not. I am willing to ask him without being sworn.

The Court: Let him answer without being sworn.

Mr. Turner: Mr. VanPosnak, you have produced here the original policy of insurance on which this action is based. Will you tell us from whom you received that policy?

Mr. Van Posnak: I got that policy from Abraham Mayer.

Abraham Mayer, direct

Mr. Turner: Abraham Mayer, the son of Mr. David Mayer?

Mr. VanPosnak: Yes, sir.

Defendant rests.

ABRAHAM MAYER, sworn in behalf of plaintiff in rebuttal.

Direct examination by Mr. Coult:

Q. Where do you live, Mr. Mayer? A. 20 Mercer Street, Newark, New Jersey.

Q. And what is your business? A. An attorney-at-law of New Jersey.

Q. You are the son of the Mr. Mayer who nas been sworn in this case? A. I am.

Q. Where are you practicing? A. I practice in Newark.

Q. In whose office? A. Nathan Berger's office.

Q. How long have you been admitted? A. About a year.

Q. Before that what did you do? A. I was connected with the Mercer Garage.

Q. In what capacity did you work in the garage? A. I was the bookkeeper there and manager.

By the Court:

Q. And a law clerk? A. (No answer.)

By Mr. Coult:

Q. Do you recall the happening of this accident? A. I do.

Q. Were you in your father's office on the day the accident happened? A. I was.

Q. What was the first you knew about it? A. Well, the first I knew about it is when my father called me up that he had had an accident.

Q. Did you see Mr. Schmidt that day? A. I did.

Q. Where and when did you see him? A. I saw him when he came in off of his route. He brought his truck into the garage.

Q. Did you have a conversation with him? A. I did.

The Court: What day was that?

Mr. Coult: The day of the accident.

Q. What was that conversation? A. I told Schmidt that my father had had an accident, and I told him I anticipated trouble as a result of it.

Q. Where was the car then? A. Well, the car was at the garage.

Q. Did you notice the condition of the car? A. I did.

Q. What was the condition of it? A. Well, the car was in a general decrepit condition. I mean it was an old second-hand car.

Q. I do not mean that. I mean: Was there any damage on it? A. I don't remember any damage on it.

Q. You said there might be trouble out of this accident? A. I did, yes.

Q. What did Schmidt say? A. Schmidt told me that he was insured and that his insurance company would take care of any trouble we had as a result of the accident.

Q. Were you in the office the next day? A. I was.

Q. Do you recall any conversation between your

father and Mr. Schmidt on that day? A. I recall no conversations, no. I mean no extraordinary conversations that would impress themselves on my memory.

Q. Previous to this accident, where had Schmidt kept his car? A. Schmidt kept his car in and outside of the garage.

Q. What did he do with his keys? A. He used to leave his keys in the office of the garage.

Q. Did he do that frequently or infrequently? Was it a general custom or otherwise? A. It was a general custom.

Q. With whom did he leave them? A. He just left them on the desk of the office.

Q. Did you previous to this accident hear Schmidt say anything with regard to the use of that car? A. I personally had general permission to use the car, and all members of my family.

Q. That is your conclusion. What did he tell you? A. He told me at any time I wanted to use the car I could do so. He had told my brother to use the car whenever he wanted to.

By the Court:

Q. In your presence? A. Yes.

By Mr. Coult:

Q. Did he give any permission to your father? A. Well, no, I don't remember he had given any permission to my father directly.

Q. Do you recall the police investigating this accident? A. I do.

Q. Do you remember who made the investigation for the police? A. Yes, sir, Sergeant Foster made the investigation.

Q. When did he come to see you? A. It was about two or three days after the accident.

Q. And where? A. At the office of our garage.

Q. Whom did he see there besides yourself? A. He saw my father and Schmidt.

Q. Were they both present at the same time? A. Yes.

By the Court:

Q. How soon after the accident was that? A. About two or three days after the accident.

By Mr. Coult:

Q. Did or did not Mr. Schmidt at that time tell Officer Foster that your father was driving the car with his permission? A. He said my father was using the car with his permission.

Q. Did he or did he not then say that he was insured in the Bankers Indemnity? A. I don't recall that statement.

Q. Did Schmidt pay any rent in your garage? A. No, he did not.

Q. Had he ever paid any? A. He had never paid any rent at all.

By the Court:

Q. Did he ever pay 50 cents a week? A. Nothing at all, your Honor. I was the bookkeeper, and he never paid me anything for keeping his car in the garage.

Cross examination by Mr. Turner:

Q. Did he have a Ford car before that? A. Yes, he did.

Q. Did he pay anything for the Ford car? A. He did not.

Q. You haven't got your books here, have you? A. Well, I remember I never had a page in the ledger for him, I never had a page in the book for him.

Q. You never opened an account for him? A. No, if he had paid anything I would have had to open an account for him.

Q. You did not open any account? A. I did not.

Q. He did keep his car in the garage, though, didn't he? A. Well, if he did, he kept it in as a favor. He left it on the street, and we drove it in for him.

Q. But he did keep his car in the garage, in the space where the Saks car was pulled out? A. Not necessarily.

Q. Not necessarily, but he did do it some of the time? A. No, I would not say that he put it in that particular space. He would put it anywheres in the garage where we wanted him to. We just did it as an accommodation to him, if we had room.

Q. Then if you did not have room for the car, you moved it out on the street? A. We left it on the street, exactly.

Q. Sometimes he left it in the garage himself, when he pulled the truck out? A. Sometimes, yes.

Q. And then you moved it around as your circumstances required? A. That is right.

Q. By the way, Mr. VanPosnak said he got the policy of insurance from you. Where did you get it from? A. I asked Schmidt at the time of the accident whether he was insured, and he told me he was. I asked him for the policy, so I can get in touch with the company to report the accident.

He told me he had not received the policy from the company.

Mr. Turner: I move that that be stricken out.

The Court: Strike it out.

Q. From whom did you get that policy of insurance? A. From Ralph Schmidt.

Q. He turned it over to you? A. Yes.

Q. On what date, if you recall, did Ralph Schmidt turn over that policy to you? A. Well, it was about a week after the accident, I should say. That is my recollection.

Q. From a week after this accident until the present time, have you held that policy until you turned it over to Mr. VanPosnak? A. I did.

Q. And when you turned it over to Mr. VanPosnak, when was that? A. About four months ago.

Q. So Ralph Schmidt himself has never had possession of this policy from one week after the accident, has he? A. That is right.

Q. Now, did your garage pay any part of the premium on this policy, or did your father or you pay any part of the premium on the policy? A. We did not.

By the Court:

Q. At the time of the accident, did you examine the car? A. I did not. I did not examine it particularly. I saw it every day in front of the garage.

Q. Your father, as I understand it, came in and told you about the accident—either he or the man

that was with him. Which one told you about it? A. My father. My father called me up first.

Q. He told you about it? A. Yes.

Q. And that was before Mr. Schmidt got back that day? A. That is right.

Q. And when Mr. Schmidt came back you told him about the accident? A. I did.

Q. Was your father there? A. He was in the garage. I saw Schmidt first. I gave him his gas when he came in. I talked to him, and my father talked to him.

Q. Did your father talk to him in your presence? A. He did.

Q. And did your father say anything about the accident? A. Yes, the three of us discussed it together.

Q. At that time did you pay any special attention to his car? A. I paid no special attention to it.

Q. Then why do you say it was not damaged? I think you did say that; didn't you? A. I did. I mean if there was a fender smashed on it and the headlight was broken I would have noticed it. I mean I saw the car. I drove it subsequent to the accident, the day after the accident.

Q. Sunday? A. Well——

Q. Wasn't the 19th on Saturday? A. Well, it might have been Monday then. It was the day after the accident. It might have been two days after the accident.

Q. The policy was dated on the 19th, and the accident was on Monday. Did you repair the car in your garage? A. We did not.

Q. Did any of your men do it? A. We did not.

Q. Did you have a repair department there? A.

I don't think we had a repair department at that time, no.

Q. Well, is there any doubt about it? A. There is. I mean sometimes we had a mechanic there, and sometimes not. We did not have a special department for that.

Q. It would not take very much of a mechanic to straighten a fender or get a new lens or straighten the lamp, would it? A. It certainly would not be much of a job if we wanted to do it for him.

Q. But, as far as you know it was not done? A. As far as I know it was not done.

Q. And you never had any conversation about the repairs to the car with Mr. Schmidt? A. No, I did not.

By Mr. Turner:

Q. I understood you to say, in answer to Judge Porter's question, that you had this talk with Ralph Schmidt and told him about your father being in the accident, a day or two after the accident. A. No, on the same day as the accident.

Q. About what time on that day? A. I really don't recall. It was in the afternoon when Schmidt pulled in.

Q. What time would you think that would be? A. I am only guessing if I say so. I don't know.

Q. You have no recollection at all of the time of day? A. No. It was in the afternoon. It might have been four o'clock. It might have been earlier, or later.

DAVID MAYER, recalled in behalf of plaintiff in rebuttal.

Direct examination by Mr. Coult:

Q. Mr. Mayer, at the time that this accident happened was any damage done to this car? A. No, sir.

The Court: I think he has already so testified.

Mr. Coult: I want to go into the nature of the accident.

Q. What kind of an accident was it? A. It was an accident that we pulled up——

Q. Don't go into the details of it. What was it? A. The man just fell on the fender there. He just fell on the fender. Then when we stopped about a foot away or two foot away—because it was turning into a corner—there was no damage at all.

Q. The point of collision was between your front fender and a pedestrian on a crosswalk? A. Yes, he was on the crosswalk.

By the Court:

Q. Did you examine the car afterwards? A. Yes, sir, naturally. I was in the car there.

Q. Did you get out of the car when the accident happened? A. Sure, I went out right away. We picked up the man and took him down to the hospital.

Q. Did you look to see whether any damage had been done? A. Yes, your Honor.

Q. Did you see any broken glass there? A. No sir.

Q. Or a bent fender? A. No, sir, there couldn't.

Q. Did you see it? A. I did.

Q. You saw nothing of the kind? A. No, sir.

By Mr. Coult:

Q. Did Mr. Schmidt on the day following the accident, on Tuesday, have conversations with you in which you asked him to get insurance on his car? A. Never did.

Q. Did you tell him to go to see Porter or Versfelt—— A. I never knew——

Q. Wait a minute, I did not finish my question. Did you ask him to go to see Porter or Versfelt, to see what he could do about insurance? A. No, sir, because he told me that he is insured. He says, "Don't be scared."

Q. Never mind why it was. Did you have any such conversation? A. No, sir.

Q. Did you know Mr. Porter Leroy Versfelt? A. No, sir.

Q. Had you ever heard of him before? A. No, sir.

Q. When was the first you ever heard of him? A. Well, I never heard about him. My boy heard about him.

Q. When did you first hear the name of that insurance agent? A. The second or third day.

Q. And was that when the question of the receipt of this policy came up? A. Yes, sir.

Cross examination by Mr. Turner:

Q. Mr. Mayer, this policy was kept where after you got it? Where did you keep it? A. I couldn't tell you. I don't handle those papers.

Q. Did you know that your son had this policy

of insurance in his possession from a week after the accident until today? A. No, sir, I did not.

Q. You did not know it? A. No, sir.

Q. Your son never told you that he had this policy, did he? A. No, sir.

Q. And if it was kept there, you don't know where it was kept? A. No, sir.

Q. The first time you ever saw the policy was after it came into court? A. Yes, sir.

Mr. Coult: We rest, your Honor.

Mr. Turner: I should like to recall Mr. Ralph Schmidt.

Mr. Coult: I do not see how we can get into surrebuttal.

Mr. Turner: Judge Coult brought Mr. Abe Mayer on here to tell about a conversation. To rebut that, I am calling Mr. Schmidt.

RALPH SCHMIDT, recalled by defendant in surrebuttal.

Direct examination by Mr. Turner:

Q. Mr. Schmidt, Abe Mayer testifies that on the day of the accident, which was Monday, the 21st of October, "I told Schmidt my father had an accident and I anticipated trouble as a result of it." Did Mr. Abe Mayer have that conversation with you? A. I did not see Abe Mayer that day, or Mr. Mayer. I seen Phil Mayer that day, and Phil said my mother——

Mr. Coult: I object to that.

The Court (to the witness): He did not ask you that.

Q. Abe was the one who testified. Did you have that conversation with Abe Mayer on the day of this accident? A. I did not.

Q. He was the man who was studying law. Abe is the one who was a law student. Did you have any conversation with Abe Mayer, the law student, on Monday, the 21st, the day of this accident? A. I did not.

Cross examination by Mr. Coult:

Q. How did you get your car home that day? A. I did not have the car. I had to take the trolley car. My mother had come down and gotten the car, and I had to come home by trolley.

Q. So you did not get the car that day at all? A. No, sir, the next time I seen the car was on Tuesday morning.

The Court: He has already so testified.

Mr. Turner: If the Court please, I move for judgment for the defendant on the following grounds:

First, on the same grounds as the motion for a non-suit.

Second, on the ground that there was no liability on the part of the defendant to the plaintiff.

Third, the policy of insurance in this case was obtained by fraud.

Fourth, there was no meeting of the minds in the issuance of this policy, and there was no legal contract existing be-

tween the assured Ralph Schmidt and the defendant.

Fifth, the plaintiff in this case is barred by the fraud by which the policy was obtained.

(Argument.)

The Court: I shall reserve decision. I wish to look at the affidavit, Exhibit D-1, and I wish to examine the insurance policy.

Memorandum

ESSEX COUNTY CIRCUIT COURT

HARRY ASNIS,
Plaintiff,
v.
BANKERS INDEMNITY INSURANCE COMPANY,
Defendant.

APPEARANCES:

JOSEPH COULT, Esq., and AARON VAN POZNAK, Esq., for the Plaintiff.
FRANK G. TURNER, Esq., for the Defendant.

PORTER, *J.*:

Under a stipulation of the attorneys, this case was tried by the Court without a jury. It was further stipulated that the Court was empowered

to decide any questions of equity which might arise.

The facts, briefly, appear to be as follows:

Ralph Schmidt on October 21, 1929, was the registered owner of an automobile which was being driven by Thomas Brown who was accompanied by his employer, David Mayer. While the automobile was being so driven, Harry Asnis, the plaintiff, was struck by it and injured. Suit was brought in the Supreme Court by Asnis against Schmidt, Brown and Mayer. After being discontinued as to Schmidt, the case was tried and a verdict rendered against Brown and Mayer in the sum of $1800.00 on April 2, 1931, the costs thereof amounting to $73.78.

It further appears that the defendant Bankers Indemnity Insurance Company issued an "automobile public liability policy" under date of October 19, 1929, to said Ralph Schmidt indemnifying him against loss for damages on account of bodily injuries accidentally suffered by anyone by reason of the use, etc., of said automobile. Schmidt applied for the policy to Porter Versfelt, an insurance broker, who made out and filed with the defendant company an application for insurance on the company's form of application, dated October 19, 1929. The application was filled in by typewriter and not signed.

It also appears that execution on the judgment against Brown and Mayer has been returned unsatisfied. The plaintiff brings this suit to recover the amount of the judgment from the defendant company under the terms of the insurance policy.

At the close of the plaintiff's case the defendant moved for a nonsuit, claiming no liability under 6th clause of the policy, subdivision "a". Decision was reserved. From a careful reading of

that section, I conclude that there is no merit in the defendant's contention, and I therefore deny the motion. An exception will be allowed to this ruling.

The defendant company claims that the policy was issued through the fraud of the broker Versfelt, the insured Schmidt, and Mayer. It is contended that Mayer suggested to Schmidt after the accident that he go to his broker, Versfelt, and procure a policy antedating the accident; that in accordance with such a plan Schmidt called on Versfelt on October 23rd and explained that he had had an accident with his car, and applied for a policy dated October 19th; that Versfelt said he would give Schmidt an answer the next day; that the policy was delivered by Versfelt to Schmidt—dated, as requested, October 19th—on Thursday or Friday, October 25th or 26th. The defendant asks for judgment and that the policy be set aside and cancelled because of the fraud.

Whether or not there was such fraud is the only issue raised by the testimony. The three principal witnesses on this question are the three accused persons, Versfelt, Schmidt and Mayer. The testimony of each differed sharply from that of the others.

Versfelt made an affidavit for the defendant, under date of November 25, 1931, entitled "In Chancery of New Jersey," presumably to be filed in a suit to set aside the policy, in which affidavit he set forth facts quite at variance with his testimony here.

Schmidt, according to Police Officer Foster, who investigated the accident, gave the police information, shortly after the accident, which was essen-

tially different from that given here. He was also contradicted in many respects by other witnesses.

Mayer, too, was contradicted not only by Schmidt as to the policy but by several other witnesses on other points.

Even as to matters not very important to this issue there was a wide difference in the testimony of several of the witnesses; for example, as to whether or not the automobile was damaged in the accident, whether Mrs. Schmidt or Ralph Schmidt drove the car away from the Mayer garage on the day of the accident, what the arrangement was under which Schmidt left his car in the Mayer garage, etc.

The testimony of Mr. McGee, an employee of the defendant, was not very helpful, being undoubtedly based largely on surmise and conjecture, rather than on any specific knowledge of the instant transaction. He knew of Versfelt's standing with the company, he said, and yet he referred to Versfelt both as a broker and as an agent. He said that Versfelt was not authorized to act for the company and could not sign policies. When he was shown the policy in this case, signed by Versfelt as agent for the company, he was clearly surprised and gave an unsatisfactory explanation.

Aside from the question of whether or not Versfelt was the agent of the defendant and bound it by the issuance of the policy over his signature as of October 19, 1929, I have concluded that the defendant has not established by the fair preponderance of the testimony the truth of its affirmative defense of fraud. The plaintiff having made out a prima facie case, the judgment will be in his

favor, and in the sum of $1873.78, together with interest and costs.

NEWTON H. PORTER,
Judge.

January 20, 1932.

Exhibit P-1

Automobile Public Liability Policy
(Bodily Injuries and Property Damage)

BANKERS INDEMNITY INSURANCE COMPANY

Home Office
Newark, New Jersey

(Hereinafter called the Company)

In Consideration of the Premium Hereinafter Provided and of the Declarations Forming a Part Hereof Does Hereby Agree with the Assured

subject to the EXCLUSIONS herein and the CONDITIONS printed on the second page of this policy;

(1) TO PAY ANY LOSS (within the limits as expressed in the Declarations) resulting from the liability imposed by law upon the Assured for damages on account of bodily injuries, and/or death resulting therefrom, accidentally suffered, or alleged to have been suffered, by any person or persons, by reason of the ownership, maintenance and/or use of any of the automobiles described in said Declarations (including carrying

of goods thereon and the loading and unloading thereof);

(2) To Pay Any Loss (within the limit as expressed in the Declarations) resulting from the liability imposed by law upon the assured on account of damage to or destruction of property of every description, including loss of use thereof, (except property of the Assured or in charge of the Assured or any of his employees, or carried in or upon any of the automobiles covered hereby) caused, or alleged to have been caused, by an accident due to the ownership, maintenance and/or use of any of the automobiles described in said Declarations (including carrying of goods thereon and the loading and unloading thereof).

In Addition to the Above the Company Agrees:

(3) To Make Such Investigation at its own cost of all accidents reported to the Company to which this Policy applies, and to undertake such negotiations for settlement, or to make such settlements of any claims for damages made against the Assured, as the Company may deem expedient; and in the event of suit being brought against the Assured on account of such an accident, to defend such suit, even if groundless, in the name and on behalf of the Assured, unless or until the Company shall elect to effect settlement thereof;

(4) To Pay All Expense of the Company's investigation and adjustment of such claims, all costs taxed against the Assured in any legal proceedings defended by the Company, all premiums

on attachment and/or appeal bonds required in any such proceedings, and the interest accruing after entry of judgment up to the date of payment by the Company of its share of judgment;

(5) To Pay For Such Immediate Surgical Relief as shall be imperative at the time of an accident to which this Policy applies.

Additional Assured

(6) This Policy shall apply in the same manner and under the same conditions as it applies to the Named Assured, to (a) any person or persons while riding in or legally operating any of the said automobiles and to any person, firm or corporation (except an automobile garage, repair shop, automobile sales agency or service station or the agents or employees thereof) legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or, if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant, (b) the immediate next of kin or the legal representative of the Named Assured, in the event of the Named Assured's death, for a period of twenty days after such death, such period not to extend beyond the termination date as set forth in Declaration No. 5 of this Policy.

Exclusions

The Company shall not be liable under this Policy for

1. Any accident, or alleged accident, of any

kind unless the same occurs within the Policy Period or from the use of any automobile for purposes other than those specified in the Declarations.

2. Claims on account of accidents occurring while any of the automobiles are being operated in any race or speed contest or by any person in violation of law as to age or in any event under the age of sixteen (16) years.

3. Claims arising from accidents sustained by any employee of the Assured (except domestic servants, not chauffeurs) while in the course of his employment in the trade, business, profession or occupation of the Assured.

4. Any obligations, requirements, impositions or penalties of any Workmen's Compensation plan or law.

5. Liability of others assumed by the Assured under any contract or agreement, oral or written.

6. Claims arising from the use of any automobile elsewhere than within the limits of the United States of America or the Dominion of Canada.

In Witness Whereof, the Bankers Indemnity Insurance Company has caused these presents to be signed by its President and Secretary, but the same shall not be binding unless countersigned by an authorized agent of the Company.

Charles Niebling,
President

E. H. Babbage,
Secretary

Countersigned by PORTER VERSFELT,
Agent

THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS.

A.—Basis of Premium

The premium is based upon the number and character of the automobiles and the uses to which same are to be put as described in the Declarations herein.

B.—Cancelation

This policy may be canceled at any time by either of the parties upon written notice to the other party stating when thereafter cancelation shall be effective; the date of cancelation shall then be the end of the Policy Period, and if canceled by the Company the earned premium shall be computed and adjusted upon a pro rata basis. If, however, such cancelation is at the request of the Assured, the earned premium shall be calculated at short rates in accordance with the table printed hereon. Notice of cancelation mailed to the address of the Assured stated in the Declarations herein shall be a sufficient notice, and the check of the Company similarly mailed a sufficient tender of any unearned premium.

C.—Inspection

The Company shall be permitted at all reasonable times to inspect any automobile covered by this Policy.

Exhibits

D.—Reporting Accidents, Losses and Claims—Report and Defense of Suits—Co-operation of Assured

The Assured, upon the occurrence of an accident, shall give immediate written notice thereof to the Company with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If suit is brought against the Assured to enforce a claim for damages covered by this Policy, the Assured shall immediately forward to the Company every summons or other process as soon as the same shall have been served on the Assured. Nothing elsewhere contained in this Policy shall relieve the Assured of his obligations to the Company with respect to notice as herein imposed upon him. The Assured shall at all times render to the Company all co-operation and assistance in his power. If any Condition in this Policy relating to the limitation of time for notice of accident or the manner in which notice shall be given, or for any legal proceeding, is at variance with any specific statutory provision of the State in which the accident occurs, such specific statutory provision shall be substituted for such condition.

The Assured, whenever requested by the Company, shall aid in effecting settlements, securing information and evidence, the attendance of witnesses and in prosecuting appeals, but the Assured shall not voluntarily assume any liability or interfere in any negotiation for settlement, or in any legal proceeding, or incur any expense, or settle any claim, except at the Assured's own cost,

without the written consent of the Company previously given.

E.—Subrogation of Rights

In case of payment of loss and/or expense under this Policy, the Company shall be subrogated, to the amount of such payment, to the Assured's rights of recovery against others for such loss and/or expense, and the Assured shall execute all papers required and shall co-operate with the Company to secure such rights.

F.—Assured's Right of Recovery

No action shall lie against the Company to recover upon any claim or for any loss until the amount of such claim or loss shall have been fixed and rendered certain, either by judgment against the assured after trial of the issue or by agreement between the parties with the written consent of the Company nor unless brought within two years thereafter.

G.—Insolvency or Bankruptcy of Assured

The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the life of the Policy, and in case execution against the Assured is returned unsatisfied in an action brought by the injured, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person or his or her personal representative against this Company under the terms of this Policy, for the amount of the judgment in

the said action not exceeding the amount of this Policy.

H.—Change of Interest or Ownership

No assignment of interest under this Policy shall be valid unless the written consent of the Company is endorsed hereon, signed by its President, a Vice-President, Secretary or Treasurer. In the event an automobile covered by this Policy is sold, transferred or assigned, the Policy shall not extend to such purchaser, transferee or assignee except by the written consent of the Company endorsed hereon.

I.—Concurrent Insurance

If the Named Assured carries any other insurance covering concurrently a claim covered by this Policy, he shall not recover from the Company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of valid and collectible insurance, but, if any person, firm or corporation other than the Named Assured has valid and collectible insurance against any claim or loss, then in no event shall such person, firm or corporation have any right of recovery hereunder on account of such claim or loss.

J.—Alterations in Policy

No condition or provision of this Policy shall be waived or altered except by written endorsement attached hereto and signed by the President, a Vice-President, Secretary or Treasurer of the Company; nor shall notice to any agent, nor shall knowledge possessed by any agent or by any oth-

er person, be held to effect a waiver or change in any part of this contract. Upon the acceptance of this Policy the Assured agrees that its terms embody all agreements then existing between the Assured and the Company or any of its agents relating to the insurance described herein.

K.—Authorized Agents

No person shall be deemed an agent of the Company unless such person is authorized in writing as such agent by the President, a Vice-President, Secretary or Treasurer of the Company.

L.—Declarations

The Declarations herein numbered 1 to 11 inclusive, are hereby made a part of this contract, and, exclusive of items 4 and 5, are acknowledged and declared by the Assured to be true upon the acceptance of this Policy.

KINDS OF INSURANCE	LIMITS	RATE	PREMIUMS
Liability for Personal Injuries	One Person, $5,000 One Accident, $10,000	26.10	26.10
Liability for Property Damaged	Any One Accident, $1,000	9.90	9.90
		Total	$36.00

Items of DECLARATIONS set forth and hereby made a part of policy number A. P. 75158

1. Name of Assured: Ralph M. Schmidt.

2. Address of Assured: 29 South 13th St., Newark, Essex County, N. J.

3. The Assured is—Individual. Business—Helper on car of Saks-Company delivery.

4. The Company's liability under insuring agreement (1) for loss on account of an accident resulting in bodily injuries to and/or death of one person whether there be one or more Assured, is limited to Five Thousand Dollars ($5,000.00); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident or series of accidents arising from one and the same cause resulting in bodily injuries to and/or death of more than one person is limited to Ten Thousand Dollars ($10,000.00).

The Company's liability under insuring agreement (2), exclusive of damage resulting from loss of use, whether there be one or more Assured, is limited to the 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 in no event shall the Company's liability under any or all of the provisions of said insuring agreement (2) exceed the sum of One Thousand Dollars ($1,000.00) for any one accident or series of accidents arising from one and the same cause.

5. The term of this policy begins at noon on the 19th day of October, 1929, and ends at noon on the 19th day of October, 1930, Standard Time.

6. The Automobiles are and will be principally used, maintained and garaged in the city or town of Newark, N. J.

7. The following Schedule contains a full description of the Automobiles to be covered by this policy, and a full statement of the uses to which each is to be put:

NOTE:—The term "pleasure and business use" is defined as private and business calls. The term "commercial use" is defined as usual to the business of the Named Assured as described above, and in the event the Named Assured is an individual or a co-partnership, occasional pleasure use by the named Assured's family.

Descriptive Trade Name and Type of Body (If Truck, State Load Capacity)	Serial and Motor Number	Model No. or Letter and Year No. of Cylinders	Motive Power	Purposes for which Automobiles are and will be used
Dodge Roadster	Ser-A-501066 Mot-A-5335	1926 4 Cylinder	Gas	Pleasure & Business

8. None of the insured Automobiles are, or will be, rented to others nor used to carry passengers for a consideration, actual or implied nor equipped with a trailer, except as follows: No exceptions.

9. None of the Insured Automobiles are, or will be, used for transportation of dynamite, nitroglycerine or explosive powder, except, as follows: No exceptions.

10. No similar insurance has been declined or canceled by any company during the past year, except as follows: No exceptions.

11. The Automobiles covered by this Policy are owned exclusively by the Named Assured, except as follows: No exceptions.

PORTER VERSFELT
Agent

AUTOMOBILE MERIT RATING ENDORSEMENT

The public liability and/or property damage premiums charged under the policy to which this endorsement is attached have been reduced 10% in consideration of the following information:

1. The name assured has owned, maintained and used or permitted to be used, a private passenger automobile for a period of not less than twenty-four months immediately prior to the effective date of the policy.

2. No private passenger automobile owned by the named assured has been involved in an accident resulting in bodily injury or damage to the property of another, in consequence of which loss for either personal injury or property damage has been paid by the assured, or by an insurance carrier in his behalf, or a reserve established for pending claims, during a period of twenty-one months beginning twenty-four months prior to the effective date of this policy and ending three months prior thereto.

3. If the named assured has owned, maintained and used or permitted to be used two or more private passenger automobiles concurrently during part or all of the period stated in Item 1, and one or more automobiles was involved in such an accident within the period described, then

The number of such automobiles involved in such accident was——

The number of such automobiles not involved in such accident was——

4. The assured's operating license has not been suspended or revoked nor has he been convicted of driving while intoxicated, evading responsibility after an accident, or reckless driving during a period of twenty-one months beginning twenty-four months prior to the effective date of this policy and ending three months prior thereto.

5. The assured keeps brakes and steering gear in good working condition and will have them inspected at least semi-annualy and give written evidence of such inspection if called upon to do so.

Anything in the policy to the contrary notwithstanding is hereby understood and agreed that in the event the above information in whole or in part is not the true information for the period described, the policy to which this endorsement is attached shall not be void on account thereof, and that the named assured shall pay in the form of a penalty an amount equal to two times the amount of premium credit allowed hereby.

Nothing herein contained shall be held to alter, vary or waive any of the agreements, conditions, or statements of this policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

This endorsement becomes effective on the 19th day of October, 1929 noon, Standard Time.

Attached to and forming part of Policy No. AP-75158 dated October 19th, 1929 issued by the Bankers Indemnity Insurance Company to Ralph M. Schmidt.

E. H. Babbage
Secretary

Countersigned: PORTER VERSFELT
Agent

SHORT RATE CANCELATION TABLE

For the Term of One Year

To find the earned premium hereunder, multiply the whole premium for the full original policy period calculated as provided in condition B, by the percentage opposite the number of days or months Policy has been in force. Periods not specifically named in this table must be charged at a rate proportionate to the rate charged for the next preceding and succeeding periods.

	Per Cent. of Annual Premium		Per Cent. of Annual Premium
1 day	2%	55 days	29%
2 days	4%	60 day or 2 Months	30%
3 days	5%	65 days	33%
4 days	6%	70 days	36%
5 days	7%	75 days	37%
6 days	8%	80 days	38%
7 days	9%	85 days	39%
8 days	9%	90 days or 3 months	40%
9 days	10%	105 days	45%
10 days	10%	120 days or 4 months	50%
11 days	11%	135 days	55%
12 days	12%	150 days or 5 months	60%
13 days	13%	165 days	65%
14 days	13%	180 days or 6 months	70%
15 days	14%	195 days	73%
16 days	14%	210 days or 7 months	75%
17 days	15%	225 days	78%
18 days	16%	240 days or 8 months	80%
19 days	16%	255 days	83%
20 days	17%	270 days or 9 months	85%
25 days	19%	285 days	88%
30 days or 1 Month	20%	300 days or 10 months	90%
35 days	23%	315 days	93%
40 days	26%	330 days or 11 months	95%
45 days	27%	345 days	98%
50 days	28%	360 days or 12 months	100%

Exhibit P-2

NEW JERSEY SUPREME COURT

HARRY ASNIS, *Plaintiff,* v. DAVID MAYER and THOMAS BROWN, *Defendants.*	Action at Law on Postea Aaron Van Poznak, Attorney

Judgment entered this second day of April, A. D. nineteen hundred and thirty-one in favor of plaintiff and against the defendants for the sum of one thousand eight hundred dollars damages and seventy-three dollars and seventy-eight cents costs.

$1800.00	
73.78	
$1873.78	

WM. S. GUMMERE,
C. J.

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the Judgment entered in above-stated cause, which said Judgment is recorded in this office in Vol. 37 of Judgments, page 142.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this thirteenth day of October, A. D. nineteen hundred and thirty-one.

(Seal)

FRED L. BLOODGOOD,
Clerk.

Exhibit P-3

New Jersey, ss.

The State of New Jersey to our Sheriff of our County of Essex Greeting:

(L. S.)

We command you That of the goods and chattels, rights and credits of David Mayer, and Thomas Brown, Defendants in your County, you cause to be made the sum of One thousand eight hundred seventy-three dollars and seventy-eight cents which to Harry Asnis, Plaintiff lately in our Supreme Court, at Trenton, before the Justices of our same Court, for his damages which he has sustained and which were adjudged to him in an action at law, and also for his costs and charges by him about his suit in this behalf expended, whereof the said defendants are convicted, as appears of record; and if sufficient goods and chattels, rights and credits of the said defendants cannot be found in your County, whereof the damages aforesaid may be made, Then we further command you that you cause the whole, or the residue, as the case may require, of the said damages to be made of the lands, tenements, hereditaments and real estate whereof the said defendants were seized on the second day of April nineteen hundred and thirty-one or at any time afterwards, in whose hands soever the same may be; and that you have that money before our Justices aforesaid, at Trenton aforesaid, on the first Tuesday in May next, to render unto the said plaintiff for his damages aforesaid, and have you then and there this writ.

WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice, at Trenton aforesaid, the second day of April A. D. nineteen hundred and thirty-one.

AARON VAN POZNAK,
Attorney.

FRED L. BLOODGOOD,
Clerk.

(ENDORSED ON BACK.)

NEW JERSEY SUPREME COURT

ESSEX COUNTY.

HARRY ASNIS, *vs.* DAVID MAYER, *et al.*	Action at Law *Fi. Fa. de bonis et terris* Filed Oct. 15, 1931 Fred L. Bloodgood Clerk.

Ret'ble May Term, A. D. 1931
Aaron Van Poznak Att'y
Levy Damages $1800.00
Costs 73.78

$1873.78

Interest thereon from April 2, 1931. ..... $.....
Besides Sheriff's exe'n fees.
Delivered to me.....,19.....
at.....o'clock.....M.
Paid Levy 6.28 4/6/31
2.00 4/16/31 Sheriff.

Received

Harry L. Huelsenbeck
Sheriff
Apr. 4 11.00 A. M. 31
Essex County, N. J.

I hereby appoint and depute Charles Bruemmer to serve the within writ. Witness my hand and seal this 7 day of Apr. 1931.

Harry L. Huelsenbeck
Sheriff.

by Louis E. Batchelor
Under Sheriff

Sheriff fees ..... $.....

(Seal)

Unsatisfied

Harry L. Huelsenbeck
Sheriff.

Recorded in the office of the Clerk of the Supreme Court, in A66 of Process, page 513.

Fred L. Bloodgood,
Clerk.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true copy of execution and return in the above stated cause as the same remains on file in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this sixth day of November A. D. nineteen hundred and thirty-one.

(Seal)

FRED L. BLOODGOOD,
Clerk.

Exhibit P-4

AARON VAN POZNAK

COUNSELLOR AT LAW

Newark & Essex Building
744 Broad Street
Newark, N. J.

June 2nd, 1931.

Bankers Indemnity Insurance Co.,
American Insurance Building,
Washington Street,
Newark, N. J.

Re: Harry Asnis *vs.* David Mayer and Thos. Brown. Attention of Claim Department.

Gentlemen:

I represent the above named plaintiff who obtained a judgment against the aforementioned defendants in the Supreme Court, Essex County. The automobile which caused the injuries to my client was owned by Ralph Schmidt who was in-

sured in your company under policy # A. P. 75158.

I am hereby demanding the sum of $1800.00 damages and $83.78, costs, making a total of $1883.78. After you have reviewed your file, will you kindly advise me whether or not you intend to pay the last mentioned amount. If I do not hear from you within five days from receipt of this letter, I shall be compelled to resort to legal action to enforce the payment of my client's claim.

Very truly yours,

AARON VAN POZNAK.

AVP:LLL:

Exhibit D-1

IN CHANCERY OF NEW JERSEY

Between BANKERS INDEMNITY INSURANCE COMPANY, *Complainant,* and HARRY ASNIS, RALPH M. SCHMIDT, *et als.*, *Defendants.*	On Bill, &c. AFFIDAVIT

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

PORTER LAROY VERSFELT, being duly sworn according to law, on his oath, deposes and says that

he resides at No. 11 Miller St., Caldwell, New Jersey; that he is a duly licensed insurance broker and that he procured for Mr. Ralph M. Schmidt of 29 So. Thirteenth St., Newark, N. J., a certain policy of insurance, "A. P. 75158 from the Bankers Indemnity Insurance Company of Newark, N. J. on the twenty-fourth day of October, Nineteen Hundred and Twenty-nine.

On October 24th, 1929, the said Ralph M. Schmidt inquired of this deponent as to whether this deponent could procure for him a policy of insurance covering his 1926 Dodge Roadster, serial No. A501066, motor No. A-5335. The said Ralph M. Schmidt did not disclose to this deponent that his automobile had been in an accident on October 21st, 1929, and this deponent had no knowledge of such an accident. If deponent had known of such an accident he would not have procured the said policy of insurance for the said Ralph M. Schmidt.

When the said Ralph M. Schmidt spoke to the deponent about the policy of insurance that he desired to have issued on October 24th, 1929, the said Ralph M. Schmidt stated to deponent that he the said Ralph Schmidt had previously spoken to deponent in reference to procuring an insurance policy for the said Dodge Roadster. It was true that the said Ralph M. Schmidt on previous occasions had talked to deponent about procuring insurance but he had never given an order for the insurance before October 24th, 1929, for the reason, as he stated, that he did not have the money to pay for the insurance. When the said Ralph M. Schmidt spoke to deponent on October 24th, 1929, he suggested to deponent that the policy of insurance should be dated October 19th,

1929, because, as the said Ralph Schmidt stated, he had spoken to deponent about insurance on that date. Deponent had no recollection of his having mentioned insurance on October 19th, 1929, although he had spoken about it on previous occasions. No binder was issued on October 19th, 1929, and no memorandum was sent to the insurance company nor did this deponent make any memorandum of the said conversation with the said Ralph M. Schmidt. This deponent relied upon the statement of the said Ralph M. Schmidt and at his request, this deponent applied to the Bankers Indemnity Insurance Company on behalf of the said Ralph M. Schmidt for a policy of insurance dated October 19th, 1929, without disclosing to the said Bankers Indemnity Insurance Company that the automobile of the said Ralph M. Schmidt had been involved in an accident on October 21st, 1929. If this deponent had disclosed to the Bankers Indemnity Insurance Company that the said automobile of the said Ralph M. Schmidt had been involved in an accident on October 21st, 1929, deponent is certain that no policy of insurance would have been issued to the said Ralph M. Schmidt through this deponent as such broker. In procuring said policy of insurance deponent was acting as the agent and broker of the said Ralph M. Schmidt and if deponent had known of the said accident of October 21st, 1929, deponent would not have applied for the said policy of insurance to the Bankers Indemnity Insurance Company of Newark, N. J. This deponent dated the application for the said policy of insurance October 19th, 1929, at the request of the said Ralph M. Schmidt and mailed it in to the Bankers Indemnity Insurance Company. This

deponent when he inserted the said false date in the said application did not know that it was for the purpose of perpetrating a fraud on the Bankers Indemnity Insurance Company and did not know that it was for the purpose of having the said policy cover an accident that had already occurred with the said automobile of the said Ralph M. Schmidt. This deponent says that no application was made for the said policy of insurance by the said Ralph M. Schmidt until October 24th, 1929, and the true and correct date in the said policy should be October 24th, 1929, instead of October 19th, 1929, and that the insertion of the said date of October 19th 1929, was in fact a fraud upon the Bankers Indemnity Insurance Company and this deponent would not have been a party to the said plan or scheme if he had known of the said accident on October 21st, 1929.

PORTER LAROY VERSFELT

Subscribed and sworn to before me
this 25 day of November, 1931.

VERA PRICE VERSFELT
(Seal) Notary Public of N. J.
My Commission Expires Mar. 17, 1936.

Exhibit D-2

It is hereby understood and agreed that Item #7, of the Declarations of the undermentioned policy is or are corrected to read as follows:

Item No.—#7:—Motor Number—M-A573335
Item No.
Item No.

Nothing herein contained shall be held to alter, vary or waive any of the agreements, conditions, or statements of this policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

This endorsement becomes effective on the 27th day of November, 1929 noon, standard time.

Attached to and forming part of Policy No. AP-75158 dated October 19th, 1929 issued by the Bankers Indemnity Insurance Company, to Ralph M. Schmidt.

E. H. Babbage,
Secretary.

KB 12/2

Automobile Merit Rating Endorsement

The public liability and/or property damage premiums charged under the policy to which this endorsement is attached have been reduced 10% in consideration of the following information:

1. The name assured has owned, maintained and used or permitted to be used, a private passenger automobile for a period of not less than twenty-four months immediately prior to the effective date of the policy.

2. No private passenger automobile owned by the named assured has been involved in an accident resulting in bodily injury or damage to the property of another, in consequence of which loss for either personal injury or property damage has been paid by the assured, or by an insurance

carrier in his behalf, or a reserve established for pending claims, during a period of twenty-one months beginning twenty-four months prior to the effective date of this policy and ending three months prior thereto.

3. If the named assured has owned, maintained and used or permitted to be used two or more private passenger automobiles concurrently during part or all of the period stated in Item 1, and one or more automobiles was involved in such an accident within the period described, then

The number of such automobiles involved in such accident was——

The number of such automobiles not involved in such accident was——

4. The assured's operating license has not been suspended or revoked nor has he been convicted of driving while intoxicated, evading responsibility after an accident, or reckless driving during a period of twenty-one months beginning twenty-four months prior to the effective date of this policy and ending three months prior thereto.

5. The assured keeps brakes and steering gear in good working condition and will have them inspected at least semi-annually and give written evidence of such inspection if called upon to do so.

Anything in the policy to the contrary notwithstanding is hereby understood and agreed that in the event the above information in whole or in part is not the true information for the period described, the policy to which this endorsement is attached shall not be void on account thereof, and that the named assured shall pay in the form

of a penalty an amount equal to two times the amount of premium credit allowed hereby.

Nothing herein contained shall be held to alter, vary or waive any of the agreements, conditions, or statements of this policy, except as herein stated, nor shall this endorsement bind the Company until countersigned by a duly authorized representative of the Company.

This endorsement becomes effective on the 19th day of October, 1929 noon, Standard Time.

Attached to and forming part of Policy No. AP-75158 dated October 19th, 1929 issued by the Bankers Indemnity Insurance Company to Ralph M. Schmidt.

E. H. Babbage
Secretary

BANKERS INDEMNITY INSURANCE COMPANY

Newark, New Jersey

Automobile
Mail 10/23

Home Office No.—5767
Registered Oct 28 1929
Approved—J.
Policy Checked—CY
In Lieu of—New IB 10/23
Agent—Porter LaRoy Versfelt, 11 Miller Ave., Caldwell, N. J.
Code No.—0-9934
Renewal of .....
Endorsements—Merit Rating End. Att.

KINDS OF INSURANCE	LIMITS	RATE	PREMIUMS
Liability for Personal Injuries	One Person, $5,000 One Accident, $10,000	26.10	26.10
Liability for Property Damaged	Any One Accident, $1,000	9.90	9.90
		Total	$36.00

Financial Certificate Filed

Items of DECLARATIONS set forth and hereby made a part of policy number A. P. 75158

1. Name of Assured: Ralph M. Schmidt.

2. Address of Assured: 29 South 13th St., Newark, Essex County, N. J.

3. The Assured is—Individual. Business—Helper on car of Saks-Company delivery.

4. The Company's liability under insuring agreement (1) for loss on account of an accident resulting in bodily injuries to and/or death of one person whether there be one or more Assured, is limited to Five Thousand Dollars ($5,000.00); and, subject to the same limit for each person, the Company's total liability for loss on account of any one accident or series of accidents arising from one and the same cause resulting in bodily injuries to and/or death of more than one person is limited to Ten Thousand Dollars ($10,000.00).

The Company's liability under insuring agreement (2), exclusive of damage resulting from loss of use, whether there be one or more Assured, is limited to the intrinsic value of the property dam-

aged or destroyed at the time of its damage or destruction or the cost of its suitable repair or replacement, and in no event shall the Company's liability under any or all of the provisions of said insuring agreement (2) exceed the sum of One Thousand Dollars ($1,000.00) for any one accident or series of accidents arising from one and the same cause.

5. The term of this policy begins at noon on the 19th day of October, 1929, and ends at noon on the 19th day of October, 1930, Standard Time.

6. The Automobiles are and will be principally used, maintained and garaged in the city or town of Newark, N. J.

7. The following Schedule contains a full description of the Automobiles to be covered by this policy, and a full statement of the uses to which each is to be put:

NOTE:—The term "pleasure and business use" is defined as private and business calls. The term "commercial use" is defined as usual to the business of the Named Assured as described above, and in the event the Named Assured is an individual or a co-partnership, occasional pleasure use by the named Assured's family.

Descriptive Trade Name and Type of Body (If Truck, State Load Capacity)	Serial and Motor Number	Model No. or Letter and Year No. of Cylinders	Motive Power	Purposes for which Automobiles are and will be used
Dodge Roadster	Ser-A-501066 Mot-A-5335	1926 4 Cylinder	Gas	Pleasure & Business

Kind of Pol.—010 110
State—29. City—28. Class 1101 1101. Exposure—10. Premium—26.10 9.90.

8. None of the insured Automobiles are, or will be, rented to others nor used to carry passengers for a consideration, actual or implied nor equipped with a trailer, except as follows: No exceptions.

9. None of the Insured Automobiles are, or will be, used for transportation of dynamite, nitroglycerine or explosive powder, except, as follows: No exceptions.

10. No similar insurance has been declined or canceled by any company during the past year, except as follows: No exceptions.

11. The Automobiles covered by this Policy are owned exclusively by the Named Assured, except as follows: No exceptions.

.....

Manager.
Agent.

Renewed
AP129502

47 OCT.T.1932

New Jersey Court of Errors and Appeals

HARRY ASNIS, *Plaintiff-Appellee,* *v.* BANKERS INDEMNITY INSURANCE COMPANY, a corporation, *Defendant-Appellant,*	At Law.

BRIEF OF APPELLANT.

Facts.

This is an action brought to recover the amount of a judgment obtained by Harry Asnis against David Mayer and Thomas Brown for eighteen hundred and seventy-three dollars and seventy-eight cents ($1,873.78) judgment and costs.

The policy on which suit is brought is a standard form of automobile public liability policy which had been obtained by Ralph M. Schmidt after the accident in which Harry Asnis had been injured and for which he brought suit. The policy expressly excluded (Case p. 107) an automobile garage, repair shop, automobile sales agency or service station or the agents or employees thereof. David Mayer operated a service station and garage and Thomas Brown was an employee thereof.

No judgment was obtained by Harry Asnis against Ralph Schmidt, the person named in the insurance policy. Ralph Schmidt was named as a

defendant in that action but a discontinuance was entered as to him (Case p. 18). This case was tried without a jury and in addition to the usual powers of the Trial Court without a jury an order was entered (Case p. 20):

> "ORDERED that the said Judge shall have the power to determine any and all questions involving the alleged equitable defense of fraud, and the said Judge shall have full and complete power to decide any equitable questions as would ordinarily be decided by the Chancellor, and it is further
>
> "ORDERED that the above cause be tried without a jury."

In the case of *Defiance Fruit Co.* v. *Fox,* 76 N. J. L. 482, this Court held:

> "In this state a writ of error is not confined to the review of proceedings in the course of the common law, but extends to decisions rendered in the exercise of the equitable powers of a court of law or in the course of its statutory or summary jurisdiction, provided they result in a final disposition of the matter and have not rested in the discretion of the court."

The accident in which Harry Asnis was injured by being struck by the automobile driven by David Mayer and his servant Thomas Brown occurred on October 21st, 1929.

Ralph M. Schmidt testifies (Case p. 31) that he did not have a policy of insurance on October 19th, 1929, the date when the policy is supposed to have been issued, and did not have one on October 20th, 1929, nor October 21st, 1929, nor October 22nd, 1929. He says that on October 21st, 1929 (being the date of the accident), he left his car in David Mayer's garage with the keys in the car as he was instructed by Mr. David Mayer to

do because they were moving his car around by stepping on the starter (Case p. 33). On the twenty-second of October, nineteen hundred and twenty-nine, Mr. David Mayer, the owner of the Mercer Garage, informed him that his car had been in a slight accident. That afternoon Mr. Mayer asked him if he thought he could get insurance on the car and he said he would see what he could do (Case p. 38). On the twenty-second of October, Ralph Schmidt saw Mr. Porter Versfelt, an insurance agent, and told him that a friend of his had a slight accident with a car and he wanted to know whether he could get insurance to cover it and Mr. Versfelt said that he would see what he could do and that he would give him an answer the next day, which was Wednesday (Case p. 39). On either Thursday, October 24th, or Friday, October 25th, he obtained the policy from Mr. Versfelt at the bank (Case p. 40). This policy of insurance from about a week after the accident until the time of trial had been in the possession of Mr. Abraham Mayer, who is the son of David Mayer (Case p. 94). The day after Ralph Schmidt received the policy he gave to Mr. Porter Versfelt a report of the accident (Case p. 41). Ralph M. Schmidt further testifies (Case p. 50):

"Q. Were you trying to help out Mr. Mayer? A. Yes, I was.

"Q. You did not consider yourself at all in the matter? A. No, because the car was taken without my permission in the first place.

"Q. You were just doing this in a friendly sort of way for Mr. Mayer? A. Yes.

"Q. You knew you could not be held responsible in any event? A. No.

"Q. Because you knew that car was taken out without your permission? A. Right.

"Q. So you did not have the slightest fear at all about a judgment against you in this case? A. The only thing I had a fear about

was that the law might be after me for not having Mr. Mayer arrested, after knowing that Mr. Mayer was out and being in an accident. That was the only thing that I was afraid of.

"Q. Did you think insurance would help you in that case? A. Well, according to Mr. Mayer's talk, it looked very good to me then.

"Q. You thought that if you had insurance you would not be criticized for not having had Mr. Mayer arrested? A. That is it."

Porter Versfelt, the agent from whom Ralph M. Schmidt procured the policy, made an affidavit, Exhibit D-1, which he swore to in the presence of his wife, who is a notary public (Case pp. 124-125-126-127) that on October 24th, 1929, Ralph Schmidt inquired as to whether he could procure a policy of insurance and he says that Ralph Schmidt did not disclose that his automobile had been in an accident on October 21st, 1929, and that if he had known of such accident he would not have procured the said policy of insurance for the said Ralph M. Schmidt. Porter Versfelt says that he did not disclose to the Bankers Indemnity Insurance Company that the automobile had been in an accident on October 21st, 1929, and that he dated the application for the policy October 19th, 1929, at the request of the said Ralph M. Schmidt and mailed it to the defendant company because he did not know it was for the purpose of perpetrating a fraud upon the Bankers Indemnity Insurance Company. The application for the policy was actually received on October 23rd, 1929, through the mail (Case p. 80), and it is customary in the case of responsible brokers to date the policy as of the date of the application, which in this case was October 19th, 1929. Mr. Porter Versfelt testifies (Case pp. 68-69) and he admits that he fixes the time when Ralph Schmidt came in to

him based upon the date that is on the application being October 19th, 1929—

> "Q. Why do you say it was made out on the 19th of October? A. That is the date he came in to see me.
>
> "Q. What makes you say that? How do you fix that? Do you fix it from the date on your application? A. Yes.
>
> "Q. And that is the only way you have to fix it, isn't it? A. The date on the application."

and he testifies (Case p. 73), it was probably mailed on Monday morning from Montclair. The application then would have been mailed to the Insurance Company on October 21st, 1929, although Mr. McGee testifies that it was received by the defendant company on October 23rd, 1929 (Case p. 80), which would be two days after the alleged accident, which accident occurred on October 21st, 1929, the date on which Versfelt says he mailed the application for the policy.

POINT ONE.

The Trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff.

The purpose of the order that was entered into in this case was to avoid filing a bill in Chancery for the purpose of litigating the fraud by which this policy of insurance was obtained. The defense of equitable fraud is to be considered by the learned Trial Judge the same as legal fraud so that all of the issues might be determined in one suit.

In the case of *Continental Insurance Company* v. *Ferro,* 157 Atl. Rep. 558, 109 N. J. E. 374, a mortgagee clause was obtained by the defendant two years after executing a release. He went to the

office of the complainant and induced a bookkeeper therein to affix a mortgagee clause making the loss payable to a building and loan association.

The Court holds that this clause was obtained by fraud and the Insurance Company was entitled to a cancellation of the policy.

It is respectfully urged in the present case that the obtaining of the policy by Ralph Schmidt after the happening of the accident and without disclosing the accident to the broker, was a legal fraud which bars any recovery under the policy by the plaintiff in the present case.

In the case of *Kramer* v. *Western Assurance Company* (N. J. Supreme Court, 1931), 157 Atl. 171, it is held:

> "When policy is in standard form, it will not be construed more strongly against party preparing it."
>
> "Where indemnity company being sued to collect on judgment against insured after insured's failure to pay judgment, was not party to original suit, such suit cannot be *res judicata* as to indemnity company.
>
> "As respects indemnity policy, where employee, driving master's car, deviated from route on business of his own, without master's knowledge, master cannot be said to have acquiesced in use of car, or to have impliedly permitted him to use same while he was on own business.
>
> "Where employee, driving car, deviated from route on business of his own, without permission of employer, employer's insurer was not liable for injuries sustained while employee was on own business."
>
> *Denny* v. *Royal Indemnity Co. of New York*, 159 N. E. 107.

"A policy insuring automobilist against loss from operation of his automobile as a

pleasure car, subject to call from the garage only, did not protect the owner, where a person talking with the owner at his garage about hiring an automobile asked for the driver, who was absent, and a little later the driver went to the shop of such person and arranged to take him for a ride, and when at his house was engaged by still another person, whose party he was driving at the time of the accident.

"In suit against insurer of automobilist against liability, to enforce payment of a judgment for personal injuries against the automobilist, plaintiff must show that the accident was covered by the policy."

Mathews v. *Bloomfield,* 141 N. E. 494.

"Policy insuring against 'loss and expense by reason of claims made upon the assured' by reason of injury due to ownership maintenance and use of a delivery automobile is unambiguous, and limits the liability of insurer to accidents which happen while automobile is being used in the firm business of insured partners, and there can be no recovery against insurer for loss due to operation of automobile by another firm composed of insured partners and another."

Hartigan v. *Casualty Co. of America,* 124 N. E. 789.

"Automobile dealer's unreported loan of an automobile to his mechanic on vacation at a summer camp for pleasure purposes exclusively exposed it to hazards not reasonably incident to 'dealer's open policy' on automobiles for sale, making the storage location a vital element, and was therefore a violation of the provision as to failure to report the change of storage location of the car."

Hunter v. *Royal Ins. Co.,* 203 N. Y. S. 833; 209 App. Div. (N. Y.) 15.

Where chauffeur was using an automobile for his own purpose, without the owner's permission, when the injury occurred, neither owner nor his insurer was liable to the injured party for chauffeur's negligence.

> *Schoenfeld* v. *New Jersey Fidelity & Plate Glass Ins. Co.*, 197 N. Y. S. 606, 203 App. Div. 796.

It is respectfully urged that the plaintiff in this case has no right of action against this defendant. There is no contract between the plaintiff and the defendant. The right of the plaintiff to maintain this action is challenged.

> "A fire policy, stipulating that insured warrants that the automobile covered by the policy shall not be used for carrying passengers, and that in the event of a violation of the warranty the policy shall be void, is breached where, with insured's knowledge and consent, his son, for compensation which he received and retained, made trips with the automobile for the accommodation of passengers, and there can be no recovery on the policy, and whether the risk has been increased in consequence of the breach is immaterial."
>
> *Elder* v. *Federal Ins. Co.*, 100 N. E. R. 655.

> "Where theft policy, under the caption 'Warranties,' provided that use of automobile insured would be private and for pleasure, use of it in business of insured's employers held neither private nor for pleasure within policy, but for business purposes in service of employers. Where theft policy was issued on insured's statement that his uses of automobile were private and for pleasure, it was immaterial whether stipulation was made with intent to deceive or whether risk of loss was increased by employing automobile in business of insured's employers, policy thereby

becoming void, G. L. c. 175, par. 186, providing that no oral warranty should defeat policy being inapplicable."

Record v. *Royal Ins. Co.*, 149 N. E. R. 546.

In the absence of a statute providing otherwise, an insured owner is not liable, and therefore the insurer is not liable, for injury to third persons while the car is being used without the insured's permission. In a New York case it was held that where the plaintiff was insured against loss "by reason of the ownership, maintenance or use of" the automobile, he would require to show, in order to recover, that the chauffeur who drove the automobile at the time of the accident was his servant and engaged in his business, especially in view of the insured's answer in the injured person's action denying that such chauffeur was the insured's servant and engaged in his business. All that appeared at the trial on this question was that the truck, which was used by the insured for delivery purposes, had been put into storage with a garage company, with liberty to rent it, and the garage company had sent it out, in charge of a chauffeur hired by it, to deliver for another company. This was held insufficient to bring the claim within the terms of the policy. *Mayor, Lane & Co.* v. *Commercial Casualty Ins. Co.*, 169 App. Div. 772, 155 N. Y. Supp. 75. Neither the insured owner of an automobile nor the insurer is liable to an injured person where the car at the time of the accident was being driven by the owner's chauffeur for his own purposes and without the owner's permission. *Schoenfeld* v. *New Jersey Fidelity & Plate Glass Ins. Co.* (1922), 203 App. Div. 796, 197 N. Y. Supp. 606. An insurance company was not liable for the amount of a judgment against the manager of the insured corporation for injuries caused while the automobile was being used by

the manager for his own purposes. *Rock Springs Distilling Co.* v. *Employers' Indemnity Co. of Philadelphia* (1914), 160 Ky. 317, 169 S. W. 730. A policy covering liability for injuries to others due to the ownership, maintenance or "use by himself" of the car does not cover liability for injuries occurring while another than the owner was driving although the owner was an occupant of the car at the time. *Lucas* v. *Mueller* (1924), 183 Wis. 529, 198 N. W. 286.

POINT TWO.

The Trial Court erroneously refused to order a judgment of nonsuit in favor of the defendant and against the plaintiff because it appeared that the accident was caused by the proprietor and employee of a garage and that the car was being used by the garage chauffeur at the time of the accident. Under the terms of the policy there is a strict exclusion of an automobile garage repair shop, automobile sales agency or service station, or the agents or employees thereof (Case p. 107, lines 20-23).

In the case of *Tondi* v. *Fidelity & Casualty Co. of New York*, 145 Atlantic Reporter 183 (Court of Appeals of Maryland), where an automobile insurance policy stipulated against liability while the automobile was being operated by the owner of automobile repair shop or automobile sales agency, the replication set up that the automobile was being operated by the driver in his individual capacity with permission of the owner as distinguished from his capacity as the operator of an automobile repair shop or automobile sales agency. The Court says (p. 184):

> "But it was not an answer to the second plea to say that at the time of the accident the

> automobile was being operated by Schwartz in his individual capacity for, and with the permission of, Bell. The replication does not deny that the automobile was intrusted by the owner to Schwartz, the owner of an automobile repair shop, for the purposes of sale, or that Schwartz at the time of the accident was endeavoring to sell the automobile, and for that purpose was engaged in demonstrating it to a prospective customer. The proviso in the policy would have but little meaning if the owner of an automobile repair shop could step outside, disassociate himself temporarily from his business, proceed to sell a car which for days had been left at his place of business to be sold, and then successfully claim that he was not excluded by the proviso. The demurrer to the replication to the second plea was properly sustained."

The facts in the above case were set forth in the case of *Bell* v. *Tondi,* 138 Atlantic 227, and it appears that the owner of the car took it each morning to the garage sales agency and took it away each night.

POINT THREE.

The Trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the same grounds as a motion for nonsuit.

At the close of the defendant's case the fact was clearly established and was undisputed that the automobile of Mr. Ralph M. Schmidt at the time of the accident was being used by an employee of an automobile garage, repair shop, sales agency and service station, and this is absolutely excluded under this form of policy.

Garages, service stations and sales agencies have a separate and distinct form of policy of insurance with a different rate from that in the present case.

It is respectfully urged that the Trial Court should have directed a verdict in favor of the defendant and against the plaintiff on this ground.

POINT FOUR.

The Trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the ground that there was no liability on the part of the defendant to the plaintiff.

In the present case the defendants David Mayer and Thomas Brown would not be entitled to sue the defendant. There was no privity of contract between them and the defendant. They had taken the automobile of Ralph Schmidt without his permission at the time. But regardless of this question of permission the law is quite clear that no action could be taken by them against the Bankers Indemnity Insurance Company on the policy. This question has been passed upon by the Supreme Court of Canada and the following is a copy of the opinion of that Court:

SUPREME COURT OF CANADA.

THE PREFERRED ACCIDENT INSURANCE COMPANY OF NEW YORK,
(Defendant) Appellant,

and

ALICE MARIE VANDEPITTE,
(Plaintiff) Respondent,

and

R. E. BERRY,
Defendant.

(Concurred in by RINFRET, LEMONT & CANNON, JJ.), NEWCOMBE, J.

The respondent was injured while riding in a car, driven by her husband, which collided with a car belonging to the defendant R. E. Berry, and driven by his daughter, Jean Berry. The respondent in an action against Jean Berry, recovered judgment on 13th June, 1928, for $4,600.00 damages and costs, taxed at $780.25; and, in third party proceedings, the respondent's husband was held liable to contribute to Jean Berry $2,300.00 and costs, upon the finding that he and she, the drivers of the two cars, were guilty of negligence in the same degree.

The defendant, R. E. Berry, was insured, by a combination automobile policy of the appellant company, against legal liability for bodily injuries or death of one person, for $5,000.00; and it was provided by the clauses described as "Insurance Agreements", printed upon the back of the policy,

that the Insurers agreed, among other clauses, to section E, entitled "Legal liability for bodily injuries or death", and thereby undertook (quoting the words and figures):

(1) To indemnify the Insured against loss from the liability imposed by law upon the Insured for damages on account of bodily injuries (including death, at any time resulting therefrom) accidentally suffered or alleged to have been suffered by any person or persons (excluding employees of the Insured engaged in the operation, maintenance and repair of the automobile, and employees of the Insured who at the time of accident are engaged in the trade, business, profession or occupation of the Insured) as a result of the ownership, maintenance or use of the automobile; provided that on account of bodily injuries to or the death of one person the Insurer's liability under this section shall not exceed the sum of Five Thousand Dollars ($5,000.00), and subject to the same limit for each person the Insurer's liability on account of bodily injuries to or the death of more than one person as the result of one accident shall not exceed the sum of Ten Thousand Dollars ($10,000.00).

(2) To serve the Insured in the investigation of every accident covered by this policy and in the adjustment, or negotiations therefor, of any claim resulting therefrom.

(3) To defend in the name and on behalf of the Insured any civil actions which may at any time be brought against the Insured on account of such injuries, including actions alleging such injuries and demanding damages therefor, although such actions are wholly groundless, false or fraudulent, unless the Insurer shall elect to settle such actions.

(4) To pay all costs taxed against the Insured in any legal proceeding defended by the Insurer; and all interest accruing after entry of judgment upon such part of same as is not in excess of the Insured's limit of liability, as hereinbefore expressed.

(5) To reimburse the Insured for the expense incurred in providing such immediate surgical relief as is imperative at the time such injuries are sustained.

The foregoing indemnity provided by Sections D and/or E shall be available in the same manner and under the same conditions as it is available to the Insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the Insured, or of an adult member of the Insured's household other than a chauffeur or domestic servant; provided that the indemnity payable shall hereunder be applied, first, to the protection of the named Insured, and the remainder, if any, to the protection of the other persons entitled to indemnity under the terms of this section as the named Insured shall in writing direct.

It is provided by the Insurance Act of British Columbia, 1925, cap. 20, sec. 24, that

Where a person incurs liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the Insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the Insurer would have if the judgment had been satisfied.

The defendant, R. E. Berry, had given notice of the accident to the Insurers, pursuant to the policy, and his daughter, Jean, in the action to which I have referred, was represented and defended by solicitors named and instructed by the appellant company.

The present action was commenced on 20th May, 1929 against the appellant company as sole defendant; but, by order of 7th October, 1929, R. E. Berry was added as a defendant, subject to a proviso "that the joinder should not in itself entitle the plaintiff to any relief which she could not have claimed if the action had commenced at the time of such joinder."

The action was tried before GREGORY, J., of the Supreme Court of British Columbia, who held that the plaintiff (respondent) was entitled to recover from the defendant company (appellant) the sum of $5,000.00 and her costs. The company appealed, and the respondent cross-appealed claiming that the amount of her recovery was insufficient and should be increased by the sum of $648.70. The Court of Appeal, composed of MARTIN, GALLIHER and MCPHILLIPS, JJ., dismissed the appeal and allowed the cross-appeal, directing that the judgment should be increased by the sum claimed.

Upon the appeal to this Court the appellant company contends that Jean Berry was not entitled to sue upon the policy, and that a case of liability under the policy has not been established. There are other submissions on behalf of the appellant, to which, in my view, it will be unnecessary to refer.

The main question depends upon the interpretation of section 24 of the Insurance Act in its application to the provisions of Section E of the insuring Agreements, by which it is provided, as already shown, that the indemnity shall be "avail-

able in the same manner and under the same conditions as it is available to the insured to any person or persons while riding in and legally operating the automobile for private or pleasure purposes, with the permission of the insured."

Section 24 is obviously a provision in aid of execution, and in the nature of a garnishee proceeding. The action thereby authorized lies only if the judgment debtor, in this case Jean Berry, is insured, or, as I interpret it, has a right to recover indemnity from an insurer. Now the policy is between R. E. Berry, the Insured and the appellant company, the Insurer, and Jean Berry, the Insured's daughter, is not a party to it. Moreover, there is no consideration moving from her to the assured for the covenant upon which the respondent relies to establish that Miss Berry is insured, within the meaning of section 24 of the statute. In *Colyear* v. *Mulgrave,* 1836, 2 Kean 81, 44 R. R. 191, to which the Court of Appeal referred with approval *In re D'Angibau, Andrews* v. *Andrews,* 1180, 15 Ch. D. 242, it was held that where two persons for valuable consideration as between themselves covenant to do some act for the benefit of a third person, that person cannot enforce the covenant against the two, though either of the two might do so against the other.

In *Tweddle* v. *Atkinson,* 1861, 1 B. & S. 393, in the Queen's Bench, the judgment of WIGHTMAN, J., in which CROMPTON and BLACKBURN, JJ., agreed, is as follows:

> "Some of the old decisions appear to support the proposition that a stranger to the consideration of contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest

> of those cases is that cited in *Bourne* v. *Mason* 1 ventr. 6, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit."

In *Grav* v. *Pearson,* 1870 L. R., 5 Common Pleas, 568, 574, WILLIES, J., said, at the beginning of his judgment:

> "I am of the opinion that this action cannot be maintained and for the simple reason, a reason not applicable merely to the procedure of this country, but one affecting all sound procedure,—that the proper person to bring an action is the person whose right has been violated."

In *Candy* v. *Candy,* 1885, 30 Ch. D. 57, at page 69, BOWEN, L. J., said:

> "It was said at one time in the history of our common law, that there was an exceptional class of cases, in which where a contract was made for the benefit of a person who was not a contracting party, that is to say, a stranger, it could be enforced by that person at law, it would be a mere pedantry now to go through the history of that idea; it is sufficient to say that in the case of Tweddle *v.* Atkinson, 1 B. & S. 393, to which we were referred, the true common law doctrine has been laid down. But whatever may have been the common law doctrine, if the true intent and true effect of this deed was to give to the children a beneficial right under it, that is to say, to give them a right to have these covenants performed, and to call up the trustees to protect their rights and interests under it, then the children would be outside the com-

> mon law doctrine, and would, in a Court of Equity, be allowed to enforce their rights under the deed. But the whole application of that doctrine, of course depends upon its being made out that upon the true construction of this deed it was a deed which gave the children such a beneficial right. Numerous other cases might be cited to the same effect, and Lord HALDANI'S speech in *Dunlop Pneumatic Tire Coy.* v. *Selfridge and Coy.*, 15 A. C., at p. 853, should not be overlooked."

I construe the policy to have effect only as between the parties to it, namely, R. E. Berry and the company; and while it may be that the former, according to the covenant, may recover from the insurer, presumably for the benefit of a person driving his car with his permission, I find nothing to convince me that the assured can be compelled to exercise such a right of recovery or to undertake the duties and responsibility of a trustee, unless by his consent or by reason of his having become the custodian of indemnity belonging to his daughter. The intention of the clause is perhaps, not perfectly clear, but it should be so construed, if possible as to make it operative for some purpose. Certainly, it does not confer upon the licensee of the car a right of action upon the policy to recover against the insurer, or to compel the insured to exercise his remedies for the recovery; and it seems unreasonable to suppose that the insured would be compelled to become a trustee for a stranger for no other cause than that he or a member of his household had permitted the stranger to drive his car or to ride in it at a time when that stranger negligently caused an accident in which a third party suffered bodily injuries.

But it is said that this case is different because of what I am about to state.

The plaintiff, in her action against Miss Berry, in answer to the company's denial that Miss Berry was insured, pleaded that the company, by its conduct in defending the plaintiff's action against her was stopped from denying liability under the insurance policy issued by the company to Miss Berry's father. The evidence is that Mr. Berry, as the insured, under that policy, gave, in his own name, notice of the accident to the insurer, and that, on the back of this, a notice, his daughter filled up and signed the form requiring a statement of particulars from her as the "person driving car at time of accident." Mr. Berry is asked "Who defended the action?" and says "The insurance company." In his Examination for Discovery he said that he knew the action against his daughter was defended by the insurance company, and that neither he nor his daughter paid for legal services in connection with that lawsuit. Referring to the company, he says, that "They got all the information from my daughter; they did not ask me for anything." The adjusters, he says, took the whole matter over, Miss Berry, upon Discovery after Judgment, says that she knew the company's solicitors were her solicitors. The learned Judges in British Columbia seem to have thought that in view of these facts, the company became liable, as insurer, to indemnify Miss Berry; but, with due respect, I do not agree, what the evidence suggests, and what I think may be assumed, is that the company was acting in pursuance of its practice under section E of the insuring Agreements, and not with the intention or effect of incurring or as representing itself as willing to incur, any obligation for payment of indemnity to the insured's daughter not enforceable by her under the policy. The essentials of estoppel are lacking; and the company's defence of the

plaintiff's action against Miss Berry does not, in my opinion cut any figure in determining liability in this case, wherein the respondent is asserting a direct statutory obligation of the company, as the insurer of Miss Berry, to pay the respondent's judgment up to the face value of the policy.

I would allow the appeal and dismiss the action with costs throughout.

Preferred Accident Co. v. *Vandepitts.*

DUFF, J.:

I agree with the conclusion of my brother Newcombe and in substance with his reasons.

The action out of which the appeal arises was instituted under sec. 24 of the B. C. Insurance Act of 1925, ch. 20, which reads as follows:

> "24. Where a person incurs liability for injury or damage to the person or property of another and is insured against such liability and fails to satisfy a judgment awarding damages against him in respect of such liability, and an execution against him in respect thereof is returned and unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied."

Appellant's factum.

The respondent was injured in a motor accident, the car in which she was a passenger having come into collision with a car owned by the defendant, R. E. Berry, and driven by his daughter, Jean Berry. The judgment was against Jean Berry for $4,600, damages and costs taxed at 780-25. In the action Jean Berry was the sole defendant, and she was defended by solicitors appointed by the appel-

lants, professing to act in pursuance of the policy, her father, R. E. Berry, having given notice of the accident pursuant to the policy.

The B. C. Courts held that by virtue of this policy, Miss Jean Berry was "insured" within the meaning of S. 24 in respect of any liability attaching to her by reason of automobile accidents while driving a car belonging to her father, and consequently that the respondent was entitled to recover from the appellants the amount of her judgment up to the sum named in the policy.

I agree that the insurance contemplated by sec. 24 is one which confers a right of indemnity, that is within the protection of the law, that is to say, one which the person incurring the liability has the legal means, direct or indirect, of enforcing. I think this is so for two reasons. First, unless it is so restricted in its operation, it is difficult to assign any certain limits to the scope of the section. Second, the section does provide for method by which the liability of the insurance company to the person responsible for the injuries may be made available for the benefit of the person injured. In many cases, no doubt, the same result might be achieved through a receiver by way of equitable execution—perhaps in all cases; but the Legislature has seen fit to give to the person injured a direct action against the insurance company in his own name, and there have been very good reasons for doing so. So long as the enactment is limited to enforcing against the insurance company a right which could have been enforced through the courts by the person responsible for the injury, the insurance company, so far as one can see, can have nothing to complain of, especially in cases in which the same object could have been effectuated by a more circuitous method. It would, however, be an obvious injustice to estab-

lish by legislation a right of recourse, against the insurance company, is in any way responsible. Here the father, R. E. Berry, was responsible for his daughter's act under sec. 12 of cap. 44 of the B. C. Statutes of 1926, sec. 27 but the respondent elected to proceed against the daughter. No judgment having been recovered against the father, the conditions never arose, under which, alone by the terms of the policy, the insurance company would be called upon to indemnify him in respect of his liability to the respondent. It would, I repeat, be a monstrous injustice to impose upon the insurance company, by statute, a liability to the daughter or to persons injured by the act of the daughter, which the daughter could not enforce directly or indirectly, in the absence of some such enactment, and a construction leading to that result ought not to be accepted unless the language employed is so clear as to leave no reasonable way of escape.

The respondents base their claim upon two alternative contentions: The first is that Miss Berry was entitled to require the insurance company to indemnify her in respect of the judgment recovered against her, either directly, or indirectly, by calling upon her father to take proceedings under the policy. The second ground is that in consequence of the steps taken by the insurance company in defense of the action, they are estopped from denying Miss Berry's right to indemnify under the policy, as against both Miss Berry and the plaintiff.

It will be convenient to consider these contentions in the order in which I have stated them. I agree with my brother Newcombe, that there is no ground for holding that the policy was effected by Mr. R. E. Berry as trustee for Miss Berry.

The clause relied upon, by which the indemnity under section E becomes available for the benefit

of the classes of persons mentioned in it, does not, I think, disclose an intention to declare that the named insured is contracting as trustee. That clause is in these words:

> "The foregoing indemnity provided by Section D and/or same conditions as it is available to the insured to any person or persons while riding in or legally operating the automobile for private or pleasure purposes, with the permission of the Insured, or of an adult member of the Insured's household other than a chauffeur or domestic servant; provided that the indemnity payable hereunder shall be applied, first to the protection of the named insured, and the remainder, if any, to the protection of the other persons entitled to indemnity under the terms of this section as the named Insured shall in writing direct."

It may be that a trust would arise in consequence of a written direction by the insured under this clause, but until there is such a direction, in all events, it seems clear that the named insured is entirely master of the situation, and under no enforceable obligation to require the Company to indemnify any one of the classes of persons described. Indeed, until a direction in writing is given, he is not entitled to require the insurance company to provide indemnity in respect of any liability other than his own.

Then as to agency. The fair inference from the clause as a whole is that he is not contracting as agent; and since he is not professing to contract as agent, ratification (assuming there be adequate evidence of ratification) would be of no avail.

A word upon *Williams* v. *Baltic*. There the action was brought by the named insurer; and ratification by the beneficiary before the accident occurred brought the case within the scope of Lord

CAMPBELL'S judgment in *Waters'* case. The question of the right of the beneficiary to recover on the policy in her own name is not discussed in the judgment, and apparently, that question was not considered material by ROCHE, J. The judgment lends no support to the respondent.

There remains the question whether, by defending the action, the appellants have precluded themselves from denying that Miss Berry was "insured" under policy within the meaning of sec. 24. The appellants professed to undertake the defense of the action on her behalf under the policy, and upon the invitation of the father. That was a recognition that the claim against Miss Berry was a claim covered by the policy; but it was not necessarily a recognition of Miss Berry's right to require indemnity either directly, or indirectly by compelling her father to proceed. The course of the company is quite naturally attributable to a desire to fulfil their obligations to R. E. Berry himself; and there is no evidence to justify the conclusion that the solicitors who acted for Miss Berry had not her full consent to do so. It is impossible to affirm, judicially, upon the evidence before us, that the solicitors derived their authority solely from the execution of a contract with the father, and with the daughter's consent, the company may have exposed themselves to a charge of maintenance, is another question.

The appeal should be allowed and the action dismissed with costs throughout.

POINT FIVE.

The Trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the ground that the policy of insurance in this case was obtained by fraud.

In the present case it is hardly necessary to even cite authorities of any nature to establish that a fraud was perpetrated from the defendant. The named assured under the policy admits the fraud and says that his broker procured for him an antedated policy to cover an accident that had already occurred. This fraud was a deliberate, wilful fraud, planned and engineered by David Mayer and carried out by Ralph Schmidt. It needs no argument to demonstrate that an insurance company is without power to insure against accidents that have already occurred and it did not intend to so insure.

POINT SIX.

The Trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the ground that there was no meeting of the minds in the issuance of this policy and there was no legal contract existing between the assured Ralph Schmidt and the defendant.

The purpose of procuring the policy of insurance in this case was not to protect Ralph M. Schmidt and was not to cover Ralph M. Schmidt but was to protect David Mayer from a claim that was

likely to be made against David Mayer. The cause of action against David Mayer was complete at the time the application for the policy was made. David Mayer was in the garage and service station business and if he had applied for this policy it would have been refused him because it does not cover the use of automobiles by garage and service station proprietors, their agents and servants. There was no cause of action against Ralph M. Schmidt and Harry Asnis had no claim against him under our decisions. In order to hold that this policy of insurance was a valid contract the Court would have to say that the defendant intended to insure David Mayer and this would lead to an absurdity because the defendant did not even know of the existence of David Mayer, in so far as the record shows. Nothing was done to bring David Mayer, or his liability, to the attention of the defendant.

POINT SEVEN.

The Trial Court erroneously refused to give judgment in favor of the defendant and against the plaintiff on the ground that the plaintiff in this case is barred by the fraud by which the policy was obtained.

The only person to benefit by the fraud perpetrated on the defendant, is David Mayer. David Mayer wanted to avoid paying the judgment which Harry Asnis obtained against him. Harry Asnis, by the present suit, is endeavoring to aid David Mayer in his effort to avoid paying the judgment. David Mayer denies that he anticipated or expected that a fraud would be perpetrated on the defendant for the purpose of protecting him. It

makes no difference whether David Mayer had knowledge of the fraud that was to be perpetrated or whether he intended that such fraud should be perpetrated, the fact remains that he is the one to benefit by the fraud. No real effort has been made by Harry Asnis to collect the amount of the judgment from David Mayer. David Mayer has no right either by common law or by statute to procure protection from the defendant as to the judgment obtained by Harry Asnis against David Mayer. There is no doubt that David Mayer could not recover against the defendant even if he had paid the judgment of Harry Asnis. Likewise, there is no doubt that Harry Asnis has no greater right against the defendant than David Mayer would have.

It is respectfully urged that the judgment should be reversed and that judgment should be entered in favor of the defendant and against the plaintiff.

Frank G. Turner

FRANK G. TURNER,

Attorney and of Counsel with Defendant.

47 OCT.T.1932

New Jersey Court of Errors and Appeals

HARRY ASNIS, *Plaintiff-Appellee,* *vs.* BANKERS INDEMNITY INSURANCE COMPANY, *Defendant-Appellant.*	**Action at Law on Appeal from Essex County Circuit Court.**

BRIEF OF APPELLEE.

This cause is before the court on appeal from the judgment entered by the Essex County Circuit Court in favor of Harry Asnis, plaintiff-appellee (hereinafter called plaintiff) and against the Bankers Indemnity Insurance Company, defendant-appellant (hereinafter called defendant) in the amount of $1873.78 plus interest from April 2, 1931 and costs, making a total sum of $2061.07.

Statement of Facts.

On October 21, 1929 one Ralph Schmidt was the owner of a certain Dodge automobile. On that day while being driven with Schmidt's permission by Thomas Brown, who was accompanied by his employer, David Mayer, it struck and injured the plaintiff, Harry Asnis. Asnis sued Brown, Mayer and Schmidt in the Supreme Court for damages on account of the injuries suffered

in the accident. Before trial a discontinuance as to Schmidt was entered. The case proceeded against Brown and Mayer and resulted in a jury verdict of $1800. in favor of Asnis. Judgment of $1800. plus costs of $73.78 was accordingly entered on April 2, 1931.

Ralph Schmidt held a policy of automobile liability insurance issued by defendant Bankers Indemnity Company covering the car which was involved in the accident. This policy insured him and anyone operating the automobile described therein with his permission and anyone legally responsible for such operation against loss from the liability imposed by law on account of bodily injuries suffered by any person because of the operation of the said automobile. Asnis demanded payment of his judgment from the defendant. Payment was refused on the ground that the policy did not cover the accident in question. Suit was then instituted on the policy.

It was then agreed between plaintiff and defendant that the entire matter be tried before the Honorable Newton H. Porter, Judge of the Essex County Circuit Court without a jury. The parties further agreed that if the facts created any question of equitable fraud Judge Porter could consider it in making his determination.

At the trial evidence was introduced from which a jury could find the following facts:

On October 19, 1929 Ralph Schmidt was the owner of a certain Dodge automobile of the roadster type. On that day he applied to Porter Leroy Versfelt, an agent of the Bankers Indemnity Company for an automobile liability insurance policy covering this automobile (C63 ll. 17-19). Versfelt filled out the required application blank and sent it to the Company. Such a policy was issued by the Newark office of defendant bearing

date October 19, 1929. It was countersigned by Versfelt as agent.

This policy provided among other things as follows:

> "Additional Assured.
> 6. This policy shall apply in the same manner and under the same conditions as it applies to the named assured, to (a) any person or persons while riding in or legally operating any of the said automobiles and to any person, firm or corporation (except an automobile garage, repair shop, automobile sales agency or service station or the agents or employees thereof) legally responsible for the operation thereof, provided such use or operation is with the permission of the named assured * * *"

On October 21, 1929, David Mayer, while using the insured automobile with the permission of the assured, for his own purposes and while he was being driven by his employee, Thomas Brown, was involved in an accident which resulted in bodily injury to the plaintiff, Harry Asnis (C24 l. 5, 62 ll. 10-20, 92 ll. 19-22).

As the result of this accident Asnis sued Schmidt, Mayer and Brown. The action was later discontinued as to Schmidt. Trial against Mayer and Brown resulted in a judgment of $1800. and costs of $73.78 in favor of Asnis.

The policy of insurance referred to also contained this stipulation:

> "G—Insolvency or Bankruptcy of Assured.
> The insolvency or bankruptcy of the assured shall not release the company from the payment of damages for injuries sustained or loss occasioned during the life of the policy, and in case execution against the assured is returned unsatisfied in an action brought by the injured or his or her personal representative in case death results from the

> accident, then an action may be maintained by the injured person or his or her personal representative against the company under the terms of the policy, for the amount of the judgment in the said action not exceeding the amount of this policy."

Execution against Mayer and Brown was issued and returned unsatisfied. (C23, 120).

The judgment against Mayer and Brown was within the policy coverage and was therefore an obligation which the defendant, Bankers Indemnity Company was required to pay.

Almost all of this testimony was disputed by defendant. However Judge Porter sitting as court and jury found the above to be the facts and consequently ordered judgment in favor of plaintiff Asnis and against defendant Bankers Indemnity Company in the sum of $1873.78 plus interest and costs of suit.

In presenting his case to this court, plaintiff will argue the points made by defendant in the sequence in which they appear in its brief.

POINT ONE.

The insured automobile was being used by Mayer and Brown at the time of the accident with the permission of Ralph Schmidt, the assured named in the policy.

Defendant argues that Mayer and Brown did not have Schmidt's permission to use the insured automobile at the time of the accident. At the trial whether or not such permission existed was a disputed question of fact. Schmidt testifying for defendant denied it. (C34 ll. 31-33) David Mayer said he had general authority from

Schmidt to use the automobile any time he wished. (C25 ll. 15-30) and that Schmidt left the keys with him. (C25 ll. 29-30)

Emil Foster, a police sergeant of the City of Newark, who investigated the accident, asserted that Schmidt told him about two days thereafter that he, (Schmidt) had given Mayer and Brown permission to use the car any time they wished. (C92 ll. 10-15) Mayer's son, Abraham, who was present at the time corroborated Foster. (C92 ll. 17-22)

Judge Porter decided this disputed question of fact adversely to defendant. It is fundamental law that the decision of a court or a jury on a controverted issue of fact is final and conclusive of the subject on appeal.

The situation is somewhat analogous to that discussed by the court in *Maryland Casualty Co.* vs. *Ronan,* 37 Fed. 2d 449 from the standpoint of the nature of the permission granted. There it was said:

> "The Turnbull Company purchased and kept the coupe 'for a salesman's car'; Stannard was its only salesman and had used it almost exclusively. Besides using it in and about the business of his employer, it was his practice to use it in and about his own private affairs, at times with the knowledge and permission of the officers of the Turnbull Company and at other times without their knowledge or permission. When any of these officers were at or about the office of the company, and he wanted to use the car for pleasure to make personal calls, visits, etc., he would ask their permission which was always given. Sometimes, several times, quite often, often on Sunday, it would happen that none of the officers would be at the office when he would want to use the car for his personal accommodation. Then it was his practice to use it without their knowledge or permission

always telling them of it later, and as they never reprimanded him, or even objected, their silence was their approval. And so his taking the car and driving to the cemetery for his personal accommodation, on the occasion of the accident to the plaintiff, Ronan, without having obtained specific permission from his employer, was, nevertheless, using the car with the permission of the Turnbull Company, implied by their usage and common practice. Thus he was 'legally operating' and 'legally responsible for the operation' at the time of the accident, and the defendant's policy 'extended' and is 'available' to him in accordance with provision 11 supra.''

POINTS TWO AND THREE.

The accident in question was within the policy coverage and was not excluded by the exception relating to an automobile garage, repair shop, automobile sales agency or service station or the agents or employees thereof.

It appeared at the trial that David Mayer operated a garage at the time of the accident, also that Thomas Brown worked for him as a general handy man, his duties consisting of washing cars, cleaning up the garage, fixing tires, etc., and garage chauffeur. (C26)

Ralph Schmidt's employer, Saks & Company, stored its truck in Mayer's garage. Schmidt was employed by this company as chauffeur. (C31) Every morning Schmidt drove his own automobile, the insured Dodge, from his home to Mayer's garage. On arrival there he would either park his own car across the street from the garage for the day or if the garage were not crowded he would park it inside. (C27) Mayer permitted him to do this as an accommodation and without

charge. (C92 ll. 26-30, 93 ll. 22-30) Schmidt customarily left the keys to the car in Mayer's office. (C25 ll. 25, 30, 91 ll. 10-20) He would then take the Saks & Company truck and go to his work. At the close of the day he would return, put his employer's truck away and drive him in his own automobile.

Nowhere in the record is there any evidence that Schimidt ever had any work done or repairs made on his car at this garage prior to the accident. There is no evidence that it was ever left there for any such purpose prior to the accident.

On the day of the accident Schmidt drove his car to the garage, parked it across the street, left his keys at the garage office, took his employer's truck and went on to work. (C24 ll. 25-40, 25 ll. 1-10)

Around noon Mayer went across the street, took Schmidt's car for his use and had his employee Brown drive it while he rode as a passenger. During this trip, the purpose of which does not appear in the record, the accident which caused the plaintiff's injuries occurred.

Defendant contends that the accident was not covered by the omnibus or "additional assured" clause of the policy. This argument is based upon the parenthetical exception which follows the word "corporation" in this clause. The language is:

> "This policy shall apply in the same manner and under the same conditions as it applies to the named assured, to (a) any person or persons while riding in or legally operating any of the said atomobiles and to any person, firm or corporation (except an automobile garage, repair shop, automobile sales agency or service station or the agents or employees thereof) provided etc. . . ."

Study of the language quoted indicates clearly that the exception relates to corporations alone.

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Ordinary rules of grammatical construction require this view. It will be observed that there is no punctuation mark of any character after the word "corporation"; no comma, for instance to indicate the possible existence of an intent to include persons or firms, as well, in the exception. Obviously a person could not be "an automobile garage, repair shop, automobile sales agency or service station." If it had been the intention of the defendant insurance carrier to include "persons" in the exception how easy it would have been to insert a comma after corporation and say "except a person, firm or corporation operating an automobile garage, repair shop, etc." Such language would remove all doubt as to its meaning.

To adopt the contention of the defendant would be to work a forfeiture of the policy and the coverage in this instance and to prevent an innocent third party from recovering his judgment. It is well settled that the law abhors forfeitures and refuses to allow them unless there is no other reasonable course. It is also beyond question that whenever a clause in an insurance policy is susceptible of two constructions, one favorable to the assured and the other to the company, that construction favorable to the assured must be adopted. When any doubt arises or any ambiguity appears in the language of an insurance contract, that doubt or ambiguity must be resolved against the company.

Connell v. *Commonwealth Cas. Co.*, 96 L. 510; 115 A. 342;
Harris v. *Amer. Cas. Co.*, 83 L. 641; 85 A. 194;
Maryland Cas. Co. v. *Hanlon*, 100 A. 352, 87 Eq. 167;
5 Couch-Cyc. of Ins. Law 4175; 32 C. J. 1152, Sec. 265.

The defendant wrote this contract and it had to be accepted on the language written. According to plaintiff's view the language of this exception is clear and unmistakable and only modifies the coverage extended to corporations. If however there is any doubt as to its meaning, that doubt should be resolved against the defendant.

Judge Porter in passing upon the contention of defendant said:

> "At the close of the plaintiff's case the defendant moved for a non-suit, claiming no liability under 6th clause of the policy, subdivision 'a'. Decision was reserved. From a careful reading of that section, I conclude that there is no merit in the defendant's contention, and I therefore deny the motion."

Whether in making this determination Judge Porter adopted plaintiff's theory of the proper meaning of this exception or whether he decided that it had no application because the record contains no proof that the car was being used at the time of the accident by an automobile garage within the contemplation of the policy, is not apparent from the opinion. If the judgment can be supported on either theory, plaintiff urges that it is the duty of the appellate court to do so.

> *Sadler* v. *Young,* 75 A. 890; 78 L. 594;
> *Solomon* v. *Public Service Ry. Co.,* 92 A. 942, 87 L. 284.

Where a defendant asserts that plaintiff is debarred from recovery under its contract because of an exclusion or exception, the burden of establishing facts sufficient to make the exclusion or exception operative rests on him. In this case there is no testimony establishing that Schmidt's car was left at the garage for any use in connection with the business carried on there or for any

service which an automobile might receive there. There is no testimony that at the time of the accident it was being used by an automobile garage. On the contrary it appears that Schmidt merely parked the car across the street from the garage on the day of the accident for his own convenience and that Mayer and Brown used it with his permission. The record is silent as to the purpose for which they used it. The defendant having failed to prove this fact, how could the trial court find that the automobile was being used by an automobile garage?

It is accordingly submitted that under either view of the question the judgment should not be disturbed.

POINT FOUR.

Under the provisions of the policy contract plaintiff's direct action against the company is maintainable.

Under this point defendant argues that there is no privity of contract between it and plaintiff and consequently he has no direct cause of action against it. In support of the argument one case is cited: *Preferred Accident Insurance Co. of New York* v. *Vandipette* decided by the Supreme Court of Canada. The citation of the case is not given but the opinion of the court is set forth in full.

It was there held that a judgment creditor of a person entitled to protection under the additional assured clause of a policy has no direct right of action against the carrier. Such a judgment creditor according to the opinion stands in the shoes of the additional assured and since such assured could not maintain the action in his own

right if he paid the judgment, the judgment creditor cannot successfully do so.

The decision seems to be based upon the apparently settled Canadian law that a third party for whose benefit a contract is made, in this instance the additional assured, cannot enforce the obligation so created at his own instance.

It is to be doubted whether there are any decisions in this country which take so conservative a view of this character of insurance contract. Such a ruling renders inoperative for all practical purposes the two most liberal provisions which have appeared in automobile liability insurance policies since the inception of contracts of that nature, i. e. The "addition assured" clause and the insolvency or bankruptcy clause.

The Canadian rule is not the law generally and while the question has not been decided specifically the plaintiff does not believe the New Jersey courts will sanction it.

In New Jersey the more liberal third party beneficiary doctrine is the established law. The right of the beneficiary to sue upon the contract made for his benefit is recognized.

> *Joslin* v. *N. J. Car Spring Co.*, 36 L. 141. (P. L. 1898, p. 481; P. L. 1903, P541 Sec. 28).

So that at the outset of the consideration of the problem the premise of the Canadian decision is non-existent.

The clause in this policy which confers on the judgment creditor the right to sue the company directly in the event of insolvency or bankruptcy of the assured after the return of a writ of execution unsatisfied because of such insolvency or bankruptcy, is required in New Jersey by statute (P. L. 1924, Chap. 153 as amended P. L. 1931, Chap. 194).

There are cases in this state where suit has been maintained successfully against the insurance carrier on such an insurance policy by judgment creditors of persons who come within the additional insured clause. The right to maintain the action does not seem to be at all doubtful. *Horn* v. *Commonwealth Casualty,* 105 L. 616.

It will be noticed that neither the statute nor the policy here says "insolvency or bankruptcy of the *named* assured". They both say: "The insolvency or bankruptcy of the assured (or "the person insured" P. L. 1931, Chap. 194) should not release the company from the payment of damages for injuries sustained etc. * * *"

This statute is remedied legislation and consequently requires liberal construction in order that its purposes may be effectuated. The word "assured" in the statute and in the policy therefore can only mean any person who fits into the category of an assured. Certainly when a person operating the automobile with the permission of the named assured is called by the policy an "additional assured", the unqualified word "assured" in the insolvency clause must include that person. To hold otherwise would be to destroy the usefulness of this section of the Insurance Law.

The right of a judgment creditor of an additional assured to sue the Company has been expressly recognized in other jurisdictions.

In *Maryland Casualty Co.* v. *Ronan,* 37 Fed. 2d 449, where the language of the policy was almost in identity with that here employed it was held that where assured's employee, who was responsible for injuries sustained by plaintiff in an automobile accident and who was entitled to protection, under the additional insured clause of his employer's policy, was insolvent, the plaintiff was entitled to recover from the insurance company. The court referred to the Vermont Insurance Act

which contains substantially the same provision as that of New Jersey relating to insolvency or bankruptcy.

In *Ocean Accident & Guaranty Co.* v. *Schmidt,* 46 Fed. 2nd 269 it was decided that the return unsatisfied of an execution against an "additional assured" gave the injured person a right of action against the insurance carrier on the liability policy.

Also:

Slavens v. *Standard Acc. Ins. Co.,* 27 Fed. 2d 860;
Metropolitan Cas. Co. v. *Blue,* 219 Ala. 37, 121 So. 25.

POINTS FIVE, SIX AND SEVEN.

The questions of fraud and the existence of the policy on the date of the accident were disputed factual matters. The judgment of the trial court adverse to defendant is conclusive on this appeal.

In these three points defendant raises the question of fraud in the procurement of the policy upon which the suit is brought and also the question which is dependent thereon, as to whether or not the policy was in force on the date of the accident.

In considering these matters the trial court said:

> "The defendant company claims that the policy was issued through the fraud of the broker Versfelt, the insured Schmidt and Mayer. It is contended that Mayer suggested to Schmidt after the accident that he go to his broker, Versfelt and procure a policy antedating the accident; that in accordance with

such a plan Schmidt called on Versfelt on October 23rd and explained that he had had an accident with his car, and applied for a policy dated October 19th; that Versfelt said he would give Schmidt an answer the next day; that the policy was delivered by Versfelt to Schmidt—dated, as requested October 19th —on Thursday or Friday, October 25th or 26th. The defendant asks for judgment and that the policy be set aside and cancelled because of the fraud.

"Whether or not there was such fraud is the only issue raised by the testimony. The three principal witnesses on this question are the three accused persons, Versfelt, Schmidt and Mayer. The testimony of each differed sharply from that of the others.

"Versfelt made an affidavit for the defendant, under date of November 25, 1931, entitled 'In Chancery of New Jersey', presumably to be filed in a suit to set aside the policy in which affidavit he set forth facts quite at variance with his testimony here.

"Schmidt, according to Police Officer Foster, who investigated the accident, gave the police information, shortly after the accident, which was essentially different from that given here. He was also contradicted in many respects by other witnesses.

"Mayer, too, was contradicted not only by Schmidt as to the policy but by several other witnesses on other points.

"Even as to matters not very important to this issue there was a wide difference in the testimony of several of the witnesses; for example, as to whether or not the automobile was damaged in the accident, whether Mrs. Schmidt or Ralph Schmidt drove the car away from the Mayer garage on the day of the accident, what the arrangement was under which Schmidt left his car in the Mayer garage, etc.

"The testimony of Mr. McGee, an employee of the defendant, was not very helpful, being undoubtedly based largely on surmise and conjecture rather than on any specific knowl-

edge of the instant transaction. He knew of Versfelt's standing with the company, he said, and yet he referred to Versfelt both as a broker and as an agent. He said that Versfelt was not authorized to act for the company and could not sign policies. When he was shown the policy in this case, signed by Versfelt as agent for the company, he was clearly surprised and gave an unsatisfactory explanation.

"Aside from the question of whether or not Versfelt was the agent of the defendant and bound it by the issuance of the policy over his signature as of October 19, 1929, I have concluded that the defendant has not established by the fair preponderance of the testimony the truth of its affirmative defense of fraud. The plaintiff having made out a prima facie case, the judgment will be in his favor, in the sum of $1873.78, together with interest and costs."

Plaintiff believes that this determination on the disputed facts is final under the law and that it is not necessary to reargue the matter.

It is therefore respectfully submitted that the judgment in favor of the plaintiff should be affirmed.

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