

NEW JERSEY COURT OF ERRORS  
AND APPEALS

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C. VERDON FIRTH,  
*Plaintiff-Appellee,* }  
vs. } On Appeal.  
FLEETWOOD MOTOR CAR CO., }  
*Defendant-Appellant.* }

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The defendant-appellant, Fleetwood Motor Car Co., appeals to the New Jersey Court of Errors and Appeals from the judgment entered in this case upon the following grounds:

1. The New Jersey Supreme Court did reverse the judgment of the Burlington County Circuit Court.
2. The New Jersey Supreme Court should have affirmed the non-suit entered against the plaintiff-appellee, C. Verdon Firth.

ROBERT PEACOCK,  
*Attorney of Defendant-Appellant.*

NEW JERSEY COURT OF ERRORS  
AND APPEALS

FEBRUARY TERM, 1924

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10 C. VERDON FIRTH,  
Plaintiff-Appellant, )  
vs. )  
FLEETWOOD MOTOR CAR CO., )  
Defendant-Respondent. )

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APPEAL BURLINGTON CIRCUIT

Argued February Term, 1924. Decided May Term, 1924.

20 FRANCIS J. SMITH, For Plaintiff-Appellant.

ROBERT PEACOCK, For Defendant-Respondent.

Argued before the Chief Justice, MINTURN and BLACK,  
J. J.

*Per Curiam:*

30 The plaintiff sued to recover on a contract for the sale and purchase of a Hudson sedan motor car, warranted to be of the 1920 model. It turned out to have been a car made in the year 1918 or earlier, and having ascertained that fact the plaintiff tendered it back to the vendor, and demanded the purchase money paid therefor. In this situation it was ultimately agreed that the defendant should substitute a seven-passenger Hudson car with a badger top, for the car in question, and the

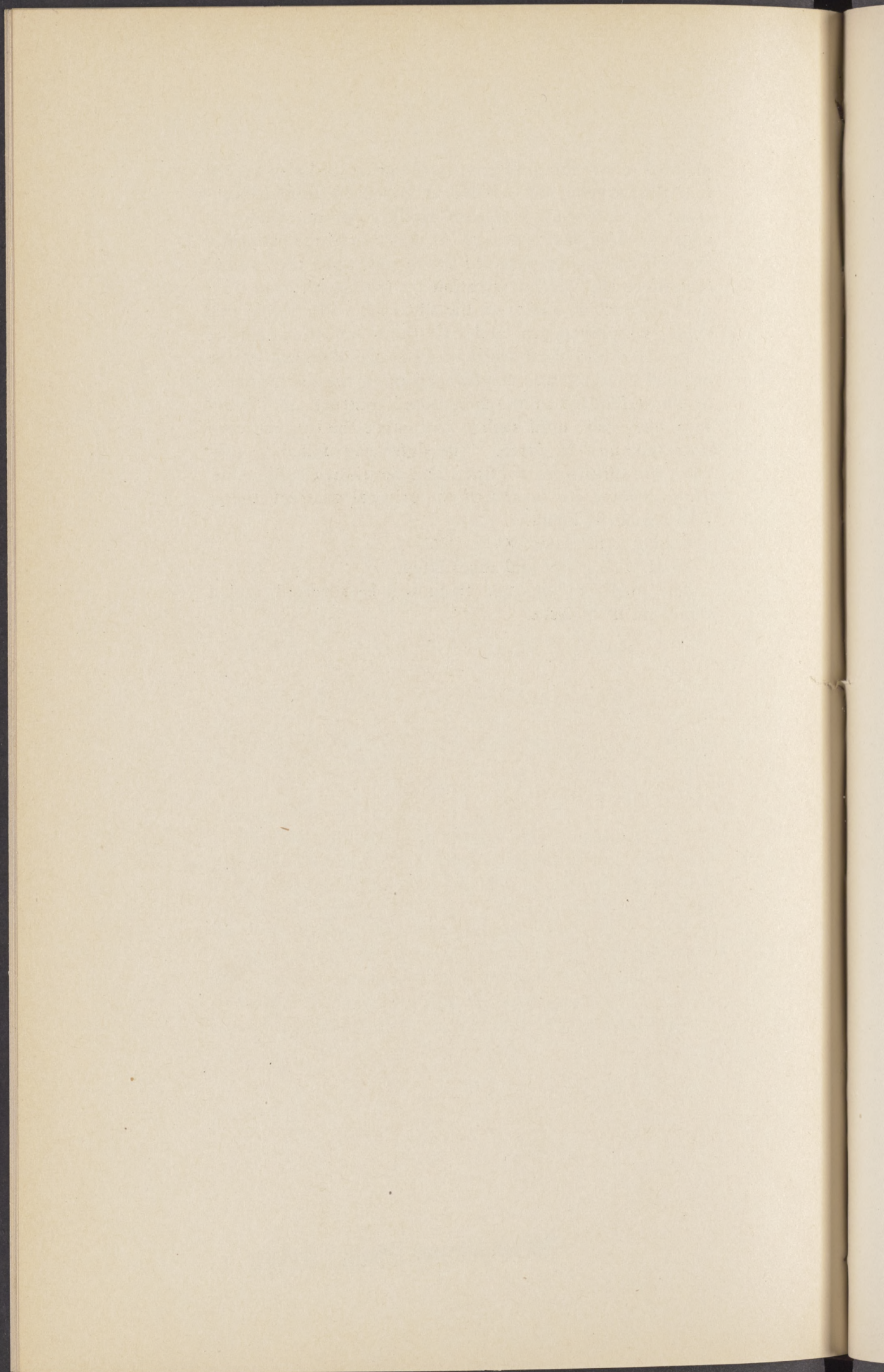
plaintiff to pay the difference in the price, and also agreed that the carrying out of this arrangement should exonerate the defendant from any liability for non-performance of his original contract. At the close of the plaintiff's case the trial judge directed a non-suit, upon the ground that there had been a novation by the substitution of a new contract in place of the old one. We think this ruling was erroneous, and that there was no novation.

It was clearly established that the abandonment of the original contract was conditioned upon the performance<sup>10</sup> by the defendant of the substituted contract, and therefore, obviously, until such performance the original contract remained in force. The defendant failed to perform the substituted contract, and the right of the plaintiff to recover for breach of the original contract, therefore remained intact.

Cooke v. McAdoo, 85 L. 692.

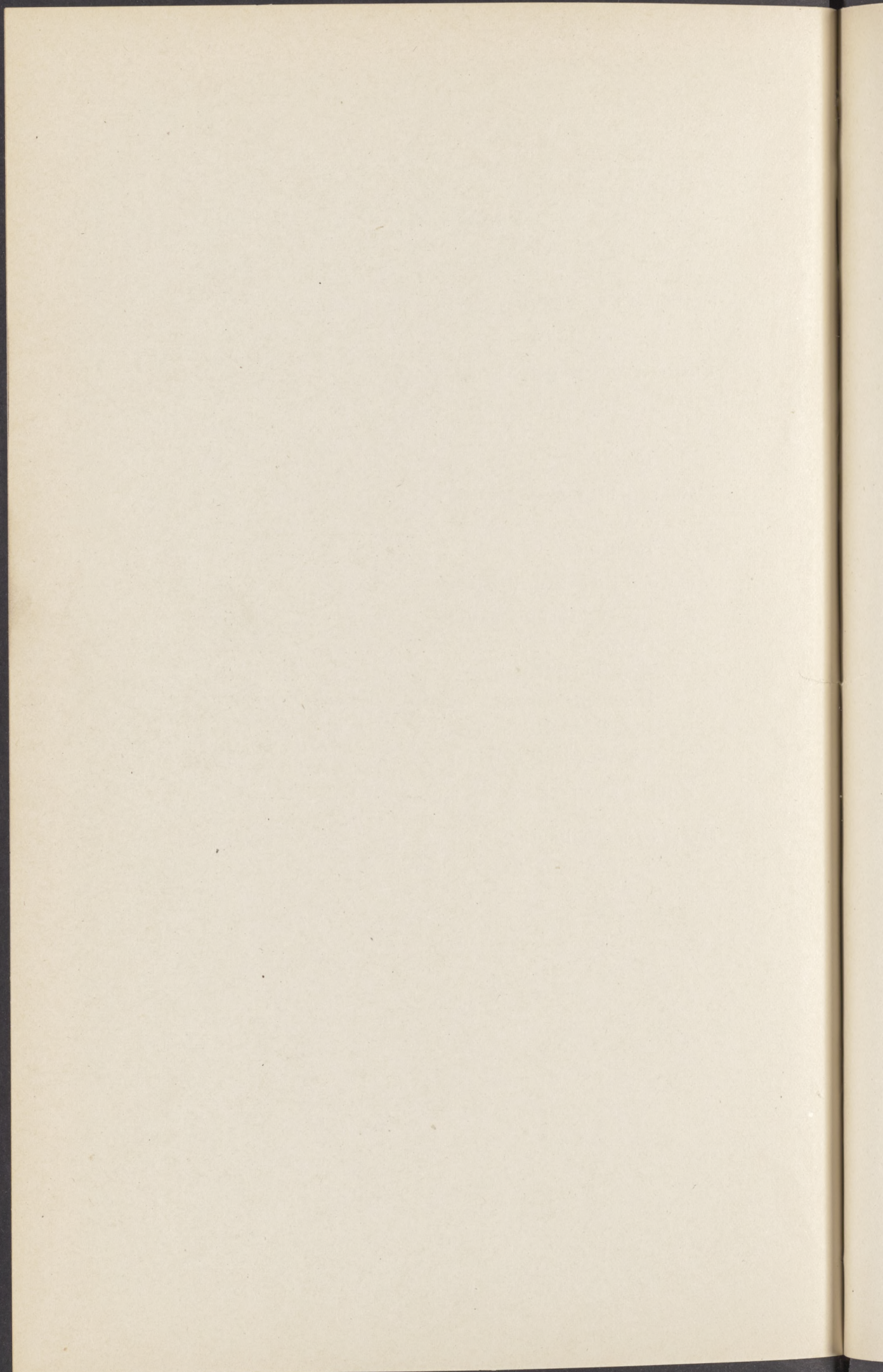
20 R. C. L. 369 and cases cited.

The judgment appealed from will be reversed, and a venire de novo issue.



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STATEMENT OF CASE.

BURLINGTON COUNTY CIRCUIT COURT.

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C. VERDON FIRTH,  
Plaintiff,  
v.  
FLEETWOOD MOTOR CAR  
COMPANY,  
Defendant.

On Appeal. 10  
Statement of Case.

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*To Robert Peacock, Attorney of Defendant:*

Take Notice, that the plaintiff appeals to the New Jersey Supreme Court, from the whole of the judgment entered in this case, upon the following grounds: 20

The trial Court directed a judgment of non-suit against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant, whereas the said Court should have denied said motion and should have submitted to the jury for decision the questions involved in the issue.

FRANCIS J. SMITH,  
*Attorney for Appellant.* 30

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Fleetwood Motor Car Company, the defendant in this cause, was summoned to answer unto C. Ver-

don Firth, the plaintiff therein in an action at law upon the following complaint:

The plaintiff C. Verdon Firth, of the City of Beverly, County of Burlington and State of New Jersey, says that: First: On or about the tenth day of November, 1922, plaintiff bargained with the defendant for the purchase of a motor car belonging to defendant, and defendant to induce the plaintiff to buy said car and to pay \$1400.00 for the same, falsely declared to the said plaintiff that the said car which was a Hudson sedan, model M, manufacturer's serial No. 75754, motor No. 60680, six cylinders, was built in 1920.

Second: Plaintiff believed said statements to be true and being induced thereby bought said motor car and paid \$1400.00 or the equivalent thereof to the plaintiff for the same.

20 Third: Said motor car was not a 1920 car as represented, but was a 1918 car as the defendant well knew.

Fourth: A 1918 car is of much less value than a 1920 car of the same make and model.

Fifth: Said plaintiff upon the discovery of the deceit at once returned the car but defendant refused to receive the same.

30 Sixth: Said plaintiff has stored the car awaiting its disposition by the defendant. Plaintiff demands fourteen hundred dollars damages.

FRANCIS J. SMITH,  
*Attorney for Plaintiff.*

The defendant answered as follows:

1. Defendant denies the matters and things set forth in plaintiff's complaint.

2. Defendant will set up the following defense at the trial.

1. That the car was not sold for the sum of fourteen hundred (\$1400.00) dollars as set forth in paragraph 1 of said complaint, but was sold as a Hudson sedan [model M, taking in change an Essex car belonging to plaintiff and five hundred dollars (\$500.00)]. 10

2. Plaintiff examined and made inquiry as to the car that he purchased and after examination accepted said car.

3. Defendant denies that there was any misrepresentation or deceit on defendant's part on the sale of said car. 20

4. Defendant will offer as a matter of defense.

1. That the car has never been offered for return by plaintiff to the defendant company.

2. Defendant will set up as a matter of defense that Hudson cars are not sold by year number.

ROBERT PEACOCK, 30  
*Attorney of Defendant.*

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The plaintiff replied to answer of defendant as follows:

The plaintiff denies every material allegation in the answer of the defendant.

FRANCIS J. SMITH,  
*Attorney for Plaintiff.*

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10 By leave and order of the Court the plaintiff was allowed to amend the said complaint as follows:

1. The defendant sold the plaintiff the car above referred to and expressly warranted it to be a 1920 Hudson sedan.

2. Said warranty was false.

3. Defendant knew it was false.

20 4. As a result of the breach of said warranty, defendant has suffered a loss of fourteen hundred dollars.

5. Upon discovery of the breach plaintiff tendered return of car which defendant refused to accept, on this count plaintiff demands damages in the sum of fourteen hundred dollars.

By leave and order of the Court the defendant was allowed to amend the said answer as follows:

30 1. Defendant denies the matter and things set forth in plaintiff's complaint. Defendant will offer the following defense at the trial.

1. That the car was not sold for the sum of fourteen hundred dollars as set forth in paragraph one of said complaint.

2. That said car was a second-hand Hudson car and was sold by defendant to plaintiff in consideration of five hundred dollars and another car.

3. Said car was sold as a Hudson sedan, model M.

4. Hudson cars are not sold as yearly models.

5. Plaintiff examined and made inquiry as to the car in question before he purchased the same and after examination and operation of said car accepted the said car. 10

6. Defendant in the bill of sale stated that the year built was 19-20 which was a mistake on the part of the clerk making up the bill of sale which should have been 18-19 but the car in question was not sold as a 19-20 but as a Hudson sedan, model M, and not as a yearly model.

7. Defendant denies that there was a misrepresentation or deceit on defendant's part on the sale of said car. 20

8. Defendant will further show that at the time plaintiff purchased said car he made inquiry of the former owner and knew the model of said car.

Defendant will further show car was never offered to be returned to defendant.

Plaintiff terminated contract with defendant and entered into a new contract. 30

Defendant will show there was no breach of contract on their part.

This action came regularly on for trial before Honorable Harold B. Wells, Judge of the Burlington County Common Pleas Court, to whom the same was duly referred by the Honorable Ralph W. E.

Donges, Judge of the Burlington County Circuit Court, with a jury, in the presence of counsel of the respective parties, on November 26, 1923.

And the plaintiff having submitted his evidence, and the Court being of opinion that it was not sufficient to entitle him to recover, ordered judgment of non-suit to be entered against him.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant  
10 Fleetwood Motor Car Company, recover of the plaintiff C. Verdon Firth, its costs, which are taxed at the sum of thirty-eight dollars and two cents (\$38.02).

Judgment entered December 10, 1923, at 1 P. M.

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TESTIMONY.

BURLINGTON COUNTY CIRCUIT COURT.

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C. VERDON FIRTH, <i>Plaintiff,</i>	}	Action at Law.	10
v.			
FLEETWOOD MOTOR CAR Co., <i>Defendant.</i>			

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Mount Holly, N. J., November 26, 1923. 20

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TESTIMONY

Before HON. HAROLD B. WELLS, Judge, and a jury.

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APPEARANCES:

For plaintiff, FRANCIS J. SMITH, ESQ.	30
For defendant, ROBERT PEACOCK, ESQ.	

C. VERDON FIRTH, sworn for plaintiff.

Direct examination.

By Mr. Smith:

Q. Mr. Firth, where do you live?

A. Beverly, New Jersey.

10 Q. What is your business there?

A. Textile manufacturer.

Q. Did you about November, 1922, purchase from the Fleetwood Motor Company a Hudson sedan?

A. Yes, sir.

Q. Did you receive at that time a bill of sale for the sedan?

A. I did.

Q. Is this the bill of sale, Mr. Firth? (Paper shown witness.)

20 A. Yes, sir; that is it.

(Paper offered in evidence and marked Exhibit P1.)

Q. How long did you have that car, Mr. Firth? How long did you have the car when you attempted to dispose of it?

A. About four or five weeks.

30 Q. Whom did you talk to about the disposition of it?

A. Mr. Puro, in Beverly.

Q. What disposition were you trying to make of it?

(Objected to as immaterial.)

(Question withdrawn.)

The Court: He has withdrawn the question. He is asking another question.

Q. Were you trying to sell the car or trade it in?

A. To trade it in.

Q. Did you succeed in trading it in?

A. No.

Q. At the time you purchased this car, Mr. Firth, 10 did you believe it was the year —

Mr. Peacock: I object. The written contract speaks for itself, not what he believes.

Q. What information did you have as to the year the car was purchased at the time you purchased it?

(Objected to.)

20

Mr. Smith: Their answer is that we had knowledge. They have raised the issue that we had knowledge that this was other than a 1920 car; therefore it is relevant to find out what information he had.

The Court: Well, as I understand now, you have offered in evidence a written agreement which covers the subject matter and seems to be a memorial of the transaction between the parties. Isn't that your contract, irrespective of what may have 30 been said before?

Mr. Smith: I think you are quite right on that. We are bound by that.

Q. Did you ever after the execution of this con-

tract have any discussion with Mr. Fleetwood as to the year that this car was built?

Mr. Peacock: That is objected to as being immaterial, subsequent to the date of the agreement. This suit is brought upon a breach of warranty made at the time the property was sold.

The Court: Upon what is the suit based?

10

Mr. Peacock: The first count on fraud, the second on warranty.

Mr. Smith: We are proceeding on the warranty that the car was built in the year 1920. That is the warranty in the contract. It has developed that the car was built in the year 1918. We are setting that out as a breach of warranty.

20

The Court: I mean is your case based on an action for fraud or deceit?

Mr. Smith: No, for a breach of warranty. I think it is immaterial whether there was fraud or not. We take the breach of warranty.

The Court: Well, you are electing, I understand, to stand not upon the question of fraud but upon the breach of warranty in the suit?

30

Mr. Smith: That is right; breach of warranty of the year built.

The Court: Breach of warranty in the contract?

Mr. Smith: Yes.

The Court: Well, now, the purpose of this is to show that you rescinded your contract or what?

Mr. Smith: I will show that, but the purpose of my question is to show that Mr. Fleetwood after the execution of the agreement, after the car was delivered, then admitted to us, to Mr. Firth, that this car was built in 1918. That is the purpose of my inquiry. If the stenographer will repeat the question I think it is all right.

10

(Question repeated.)

The Court: Now what is your objection, Mr. Peacock? I understand the purpose of the question is to show an admission on the part of a representative of the defendant company to the effect that this car was not as represented. Isn't that competent—not on the contract but to show that it has been broken?

20

Mr. Peacock: There is no testimony here showing that this car is not as set forth in the bill of sale.

The Court: That is what he seeks to show.

Mr. Peacock: He has got to show that first. Now not a Hudson car, model M, serial number 75,654, there is no testimony here showing that this was motor number 60,680. The bill of sale does not say that it was a 1920 car, but this bill says 1919-1920, which means either 1919 or 1920. There is no testimony here showing that that bill of sale is not correct. He has got to show that before he can show any admission on the part of the defendant. There is no testimony here showing any breach of

30

warranty upon the part of the defendants in this case.

The Court: I will admit the question.

(Objection noted for defendant as ground of appeal.)

A. Yes, I did.

10 Q. And where and when was that conversation, the first conversation you had?

A. In the office of Francis Smith, in Beverly, New Jersey.

Q. Who was present at that conversation?

A. Mr. Smith.

Q. Anyone else? Mr. Fleetwood there, was he?

A. Mr. Fleetwood.

Q. Anyone else besides myself and Mr. Fleetwood?

20 A. No.

Q. Now will you tell us what was said by you and what was said by Mr. Fleetwood in reference to the year in which this car was built?

(Objected to. Objection overruled. Objection noted for defendant as ground of appeal.)

30 A. Why, I told Mr. Fleetwood that this bill of sale called for the year built 1920 and the car actually was a 1918 car and that he knew that because he had received the car in 1918; that his salesman did come around and offer me a Hudson sedan car, used car, with the idea of me trading in an Essex car for it. I asked what condition the car was in; he said in fairly good condition. I asked him what year car it was; he said 1920.

By Mr. Peacock:

Q. Who said that?

A. Mr. Grady.

Mr. Peacock: I object to that. This testimony was allowed concerning the conversation with Mr. Fleetwood, and I ask that it be stricken out.

Mr. Smith: He is stating now the statements to 10  
Mr. Fleetwood.

By the Court:

Q. When was this? What date was this, after the date of the bill of sale or before?

A. After.

Q. How long after?

A. I should say about five weeks.

Q. You think it was sometime in the month of De- 20  
cember, 1922, then?

A. Yes, sir; it was. I hadn't finished this conversation.

Q. All right; go ahead.

By Mr. Smith:

Q. Maybe we can save the Court's and everybody's time. What did Mr. Fleetwood say as to whether this was a 1918 or 1920 car, the year in 30  
which it was built?

(Objected to as leading and suggestive.)

(Question withdrawn.)

Q. What did he say as to the year in which the car was built?

A. It was 1918.

Q. Mr. Firth, what did you pay for this car?

(Objected to, that the contract speaks for itself.)

(After argument.)

10 Mr. Smith: We will pass that for the present.

Q. After this conversation and at that conversation did Mr. Fleetwood make any attempt to adjust this matter with you?

(Objected to as leading.)

The Court: It is admitted. He started out to relate the entire conversation between Mr. Fleetwood and himself and I think he is able to do that  
20 without suggestive questions from Mr. Smith.

Q. Proceed with the conversation.

A. Am I at liberty to tell the whole conversation?

Q. Tell the whole conversation.

Mr. Peacock: May we have the time?

The Court: Sometime in December, about five weeks after November 10th, which is the date of the  
30 bill of sale.

A. Mr. Fleetwood said that in his absence from town this sale had been made without his authority and that there had been a very severe blunder made; that he regretted it very much and wished that some adjustment could be made so that the thing could

be fixed up amicably and without getting into the hands of people that he didn't want it to get into. I said I was quite willing to go the limit, but I had paid \$1,200 for the car and I had found out the value wasn't there on account of its year being 1918 and not 1920. He asked me what adjustment I would like to make. I said, "Well, I will take from you a seven passenger touring car with a Badger top and you allow me the \$1,200 that I paid on the car, on this car," if he took this car in, "and deliver me a Hudson touring car with a Badger top." Mr. Fleetwood thought that was a very good suggestion and agreed to it. That was about the only conversation at that time. 10

Q. How long did you wait for that car? How long did you wait to receive that car?

A. I should say five or six weeks, probably.

Q. Did you then write to the Fleetwood Motor Company?

A. Yes, sir.

Q. Is this the letter that you wrote to them? (Letter shown witness.) 20

A. Yes, sir.

Q. Will you kindly read that letter?

A. "Feb. 1, 1923.

Fleetwood Motor Car Co.,

Mt. Holly, N. J.

(Attention of Mr. Fleetwood.)

Gentlemen:

You must admit that I have waited patiently these last six weeks for an adjustment of my claim. 30

It was your suggestion at that time that I must be satisfied and that you gave me every assurance that you would act promptly in delivering me a new Hudson seven passenger car with Badger enclosure to replace the sedan which your firm sold me under misrepresentation. I accepted this arrangement in

good faith and was willing to bear the extra cost mainly to comply with your wishes that it would look better in the eyes of our neighborhood that you had made satisfactory adjustment.

During this period of unnecessary waiting my business has suffered considerably and further it is costing me money to get around, with great loss of time. Also you must consider that I am paying good money to liquidate notes contracted through  
10 your misrepresentation.

Will you please take notice, therefore, that unless you deliver a seven passenger Hudson phaeton (either with or without Badger top) within twenty-four hours from the receipt of this letter I will immediately place this whole matter in the hands of my attorney for settlement. Also kindly take notice that I emphatically decline to entertain any further correspondence or concede any personal interviews on this matter under any pretext whatever.

20 Regretting the necessity of this communication,  
Yours very truly,

C. Verdon Firth."

Q. Did you receive the car within that time?

A. No.

Q. Did you get any further word from Mr. Fleetwood?

A. Only promises.

Q. When did you return the car which you purchased from the Fleetwood Motor Company? When did you return it to them?

30 A. Immediately I found out it was a 1918 car.

Q. Who accompanied you at that time?

A. The time I returned the car?

Q. Yes.

A. Mr. Engel.

Q. What is his first name?

A. George.

Q. He is here in court, is he?

A. Yes, sir.

Q. Where did you take the car to?

A. The Fleetwood Motor Car Company, Mount Holly.

Q. Who did you see there?

A. Mr. Wills.

Q. Did you offer him the car?

A. Yes, sir.

Q. What did he say?

10

A. He said that he would not accept it, that the car was not a 1918 car, it was exactly as called for in the bill of sale.

Q. Did you afterwards write to the——

A. Yes, sir.

Mr. Smith: I call for letter of December 13th.

(Letter produced by Mr. Peacock.)

20

Q. Did you afterwards write this letter to the Fleetwood Motor Company?

A. I did.

Q. Would you kindly read that letter?

(Objected to.)

The Court: What is the date of it?

Mr. Smith: December 13th.

30

Mr. Peacock: Under the testimony as given by the plaintiff, five weeks subsequent to November 10, 1922, Mr. Fleetwood told him that the sale was made without his authority or the Fleetwood Company, and at that time this plaintiff entered into a new contract for the purchase of another car, which

was subsequent to the date of that letter. He is bound by his new contract and the offer to return must be made subsequent to that. In accordance with the testimony of the plaintiff it was prior to the date when he entered into a new contract with Mr. Fleetwood for the purchase of a five passenger Badger top car.

(After argument.)

10

The Court: I will accept it.

(Objection noted for defendant as ground of appeal.)

By Mr. Peacock:

Q. What is the date of that letter?

A. December 13, 1922.

20

Mr. Peacock: I object to this testimony being received.

(Objection overruled.)

(Objection noted for defendant as ground of appeal.)

The Court: Proceed to read your letter.

30

A.

“Dec. 13, 1923.

Fleetwood Motor Car Co.,  
31 Main Street.,  
Mount Holly, N. J.

Gentlemen:

Confirming the writer's conversation with your Mr. R. D. Wills when in your office this morning,

will you please take notice that the Hudson car in question was tendered to you at your address this morning with a request for a refund of \$1,200 this amount being the price paid for the car.

This course was taken immediately after it became known to the writer that the date of the manufacture of said car had been misrepresented when sale was made. Inasmuch as you refused to accept this tender the car is now being held at your risk.

This matter will be placed in the hands of my attorney at noon tomorrow (Thursday, December 14th, 1922.) 10

Yours very truly,  
C. Verdon Firth."

Mr. Smith: I would like to offer both of those letters.

Mr. Peacock: I object to that letter on the further ground that it is not binding upon the defendant in this case. Under the written contract signed and agreed to by this man he agrees to abide by all printed conditions on the reverse side of this agreement. On the same date, November 10, 1922, on the agreement of the plaintiff in this case all the terms of this agreement were assigned to Hare & Chase, of Philadelphia, who became a party to the agreement instead of the Fleetwood Motor Company, because all the claims that he may have had and all the terms of the contract were assigned to Hare & Chase on the assignment of the agreement in this matter. 20 30

(After argument.)

The Court: I will permit it and see what develops.

Mr. Smith: I offer in evidence these two letters.

(Letters marked Exhibits P2 and P3.)

Mr. Peacock: Under that last objection your Honor overruled my objection at the time concerning the conversation of Mr. Fleetwood five weeks subsequent to November 10th. Under the last objection concerning this assignment I would like to  
10 move to strike from the record any conversation the plaintiff had with Mr. Fleetwood concerning the number or year of make of this car as not binding on the defendant.

The Court: The question was not objected to and I shall not strike it from the testimony.

Mr. Peacock: It was objected to at that time.

20 The Court: On that ground there were no objections made. The objection was made on an entirely different ground.

(Objection noted for defendant as ground of appeal.)

The Court: I don't understand that you contend, Mr. Peacock, that either Mr. Wills or Mr. Peacock are not officers?  
30

Mr. Peacock: Oh, they are both officers, yes.

The Court: Of the Fleetwood Motor Company?

Mr. Peacock: Yes.

Mr. Smith: No question of their authority to make admissions?

Mr. Peacock: That is a question of fact to be proven. I admit that they are both officers of the Fleetwood Motor Company.

Mr. Smith: And they are the persons who signed the contract for the car; that is admitted without objection. 10

By Mr. Smith:

Q. Mr. Firth, at the time you purchased this car, what information did you have, if any, other than the statements of Mr. Grady and your contract as to the year in which the car was built?

Mr. Peacock: That is objected to. There is no testimony that he had anything except he was 20 bound by the bill of sale as to what the car is.

Mr. Smith: I am perfectly willing to stand on that ground.

The Court: That is your case, as I understand it.

Mr. Smith: I am perfectly willing to stand on that ground, but I do not want to have to recall witnesses. If that is the Court's ruling, that is 30 satisfactory.

Mr. Peacock: A further objection, that there is no testimony here to show that Mr. Grady had any authority to bind the Fleetwood Motor Car Company; because under the plaintiff's own testimony

he said that Mr. Fleetwood said to him, "This was made without our authority. Whoever did it had no authority to make any contract or representations." I object that he is precluded from going back of the testimony of Mr. Grady or anybody else.

The Court: Well, his case is rested, as I understand it, upon the sole agreement which has been  
10 offered in evidence and conversations that led up to it are not now admitted. They are not pressed.

Cross-examination.

By Mr. Peacock:

Q. Your contract to purchase this car is set forth in the bill of sale, is it not, Mr. Firth?

20 (Objected to.)

Mr. Peacock: This is cross-examination.

Mr. Smith: It is not for him to decide where his contract was. I think it is a question for the Court. The Court has just ruled a minute ago that this was the contract.

The Court: But you have undertaken to show,  
30 as I understand the case, that subsequent to his undertaking to rescind this agreement he entered into a new agreement, which was not carried out, and he is cross-examining him as to the agreement that he now rests on.

Mr. Smith: I did not understand that.

A. This paper here, you mean?

Q. Yes. Yes or no; that is all I ask you.

A. This paper does not represent——

Q. I ask you to answer that yes or no.

A. No.

Q. All right. It does not?

A. No.

Q. You tried to trade the same car that you purchased from the Fleetwood Motor Car Company to Mr. Puro, didn't you? 10

A. Yes, sir.

Q. And you had a contract to purchase a Durant car, didn't you?

A. No, no contract.

Q. You did talk to him about purchasing a Durant car?

A. Yes, sir.

Q. And your agreement was made between the two as to what he should allow you on your car, was it not? 20

A. Yes.

Q. What was he to allow on your car?

Mr. Smith: I object. This is new testimony. I would like the right to cross-examine on this.

The Court: I will permit it.

Q. How long was that after November 10, 1922, that you attempted to trade your car to Puro for a 30 Durant car?

A. Whatever the date of that letter is that I——

(Letters shown witness.)

A. It is hard to remember dates when they are

so far back. About December 10th or 11th, or around that, within two or three days.

Q. About December 10th, then, you made a contract for a Durant car; is that correct?

A. A verbal contract, yes.

Q. Yes a verbal contract. Was this car a Hudson sedan that you had purchased from Mr. Fleetwood?

A. Yes, sir.

Q. Was it a Model M car?

10 A. Yes.

Q. Was the motor number 60,680?

A. Yes.

Q. Was it six cylinders?

A. Yes.

Q. Do you of your own knowledge know when the car was built, of your own knowledge?

A. Of my own knowledge, no.

Q. All you know is what someone has told you; is that correct?

20 A. And the other papers I have seen.

Q. I say all you know is what someone has told you?

A. Yes.

Q. This bill of sale calls for a Hudson sedan, Model M, 75,654, motor number 60,680, six cylinder, was built 1919-1920, price of motor \$990, does it not?

A. Yes.

30 Q. At the bottom it says. "Buyer agrees to abide by all printed conditions on the reverse side of this agreement and acknowledges the transfer of this agreement to Hare & Chase, incorporated, Philadelphia, Pa., as set forth in assignment below." Signed by C. Verdon Firth, witnessed by William P. Grady. Did you sign that?

A. Yes.

Q. After that assignment was made you made your payments to Hare & Chase, did you not?

A. Yes.

Q. For how long a time?

A. Whatever the contract called for; eight months, I believe.

Q. After November 10th, then, you continued to pay to Hare & Chase monthly installments for eight months, did you not?

A. Yes.

10

Q. Until you had paid \$554.80?

A. That is correct.

Q. When you had made these payments to Hare & Chase for eight months they then gave you a bill of sale for the car, did they not?

A. Yes.

Q. And Mr. Smith has the bill of sale on his folder, hasn't he?

A. Yes.

20

Mr. Peacock: Will you give it to me, Mr. Smith?

Mr. Smith: You didn't call for it.

Mr. Peacock: Your client says you have it. I call for it.

Mr. Smith: I have a release. I have no bill of sale.

30

(Produces paper.)

Q. I show you a paper writing signed by Hare & Chase to C. Verdon Firth, 1920 Hudson sedan, No. 60,680, dated at Philadelphia, Pa., July 24, 1923, signed and acknowledged by those people, signed and acknowledged by Hare & Chase.

A. 1920 Hudson sedan.

Q. You received that from Hare & Chase on July 24, 1923, didn't you? Is that correct?

A. That is right.

Q. Then after November 10, 1922, when you made your contract with the Fleetwood Motor Company, knowing this to be a 1918 car, you continued making your payments for eight months, did you not?

A. Yes, I did that to fulfill my obligation.

10 Q. And you made those payments to Hare & Chase, did you not, under the assignment of that contract?

A. Yes.

Mr. Peacock: I would like to offer this letter and the form from Hare & Chase.

(Papers marked Exhibits A and B for identification.)

20

Q. Then from November 10, 1922, to July, 1923, for eight months, you made payments on a car which you claim was misrepresented to you; is that correct?

A. I made payments on notes.

Q. To Hare & Chase, for this car?

A. I made payments on notes.

Q. Did you ever make any claim on Hare & Chase for the return of your money?

30 A. No.

Q. You had a conversation with Mr. Fleetwood at Mr. Smith's office, did you not?

A. Yes.

Q. That was five weeks subsequent to November 10th; is that correct, under your direct examination?

A. Just about the time.

Q. About what date was that in November, being five weeks subsequent to November 10th?

A. In December.

Q. What date would it be in December, yes.

A. Towards the end, according to that.

Q. About the latter part of December; is that correct?

A. I would rather see some of the papers. I can't remember dates a year ago.

Q. There isn't any paper here showing when you had a conversation with Mr. Fleetwood, is there? 10

A. Mr. Smith should have some.

Q. Tell me what date would be five weeks from November 10th.

A. I don't specify any date until I get it down more accurately.

Q. Well, it would be after December 15th, wouldn't it, when you had your conversation with Mr. Fleetwood at Mr. Smith's place of business? Wouldn't it? 20

A. Yes, I think it would.

Q. And at that time you agreed to buy a Hudson seven passenger Badger top car, didn't you?

A. Yes.

Q. You entered into a new agreement with Mr. Fleetwood for the purchase of another car, didn't you?

Q. It is a question for the Court whether it is an agreement or not; negotiations but not agreement.

The Court: It is cross-examination. 30

A. Arrangement.

Q. Then you made an arrangement for the purchase of a new car?

A. Yes.

Q. Mr. Fleetwood told you it would take some time to get a Badger top, didn't he?

A. No, sir.

Q. He told you that under this new agreement to purchase a new Hudson seven passenger it would take some time to get a car, did he not?

A. Some little time to get a car, yes.

Q. And he told you how much money you would have to pay?

10 A. About.

Q. Did you ever go to him and offer to pay the money for a new car?

A. No.

Q. Did you ever go after the new car?

A. If the car had come——

Q. I didn't ask you that. Did you ever go after the new car?

A. Not personally but by phone, yes, several times.

20 Q. Now, after having your conversation with Mr. Fleetwood as you say, after December 15th, you sent a letter to him which is dated December 13th, didn't you?

Q. This letter was written before the conversation with Mr. Fleetwood.

Q. Oh, it was written before?

A. Yes.

30 Q. Then, "Confirming the writer's conversation with your Mr. R. D. Wills when in your office this morning, will you please take notice that the Hudson car in question was tendered to you at your address this morning." Now after you tendered the car to Mr. Wills and after you had written the letter of December 13th, you entered into a new arrangement for the purchase of another car, didn't you?

A. Yes.

Q. Did Mr. Fleetwood ever refuse to deliver to you any new seven passenger Badger top car?

A. Not refuse; he doesn't fulfill it.

Q. What?

A. He didn't fulfill it.

Q. He didn't fulfill it?

A. No.

Q. Because on February 1st, 1923, you cancelled that contract, didn't you?

10

A. I told him if it was not there in twenty-four hours I should put the matter in the hands of my attorney.

Q. You cancelled the contract, didn't you, by your letter?

Mr. Smith: It is a matter of interpretation for the Court, not for the witness.

A. That is not a cancellation.

20

Q. "Will you please take notice, therefore, that unless you deliver a seven passenger Hudson phaeton (either with or without Badger top) within twenty four hours from the receipt of this letter I will immediately place this whole matter in the hands of my attorney for settlement." Did you say that?

A. Yes.

Q. And did you do that?

A. I did, because the car was not delivered.

30

Q. And in the same letter of February 1st, in the last paragraph you say, "Also kindly take notice that I emphatically decline to entertain any further correspondence or concede any personal interviews on this matter under any pretext whatever." Signed, "C. Verdon Firth."

A. That is right.

Q. Then you didn't attempt to see Mr. Fleetwood or talk to him or make any arrangement?

A. No, I didn't.

Q. For the purchase of a new car, did you?

A. No, sir.

Q. And had he brought it there you would not have received it, would you?

A. If it had been brought there at the time specified, yes.

Q. If he had brought it there by February 2nd?

A. Yes.

Q. And after that date you rescinded the contract to purchase this car, didn't you?

A. I purchased a new car, yes; I had to do it.

Q. During the time that you had this car you drove the car, did you?

A. Yes.

Q. In the winter months?

A. Yes.

Q. Did you drive it every day up until the time you attempted to trade it in with Mr. Puro?

A. Yes.

Q. The radiator was frozen, wasn't it?

A. Yes.

Q. During the time that you were driving it?

A. No, during the time it was in the garage.

Q. While it was in your possession?

A. Yes.

30 Q. And you took it to Puro to have the radiator repaired, did you not?

A. Yes.

Q. And it was repaired?

A. Yes.

Q. What else happened to the car while it was in your possession?

A. Nothing that I am aware of, that I can recall now.

Q. It was not hurt in any other way?

A. No.

Q. It was not?

A. I can't recall it right now.

Q. Well, you know, don't you?

A. I should know, yes.

Q. Didn't you damage the water pump?

A. No.

Q. You didn't? When the car was frozen the water pump was not damaged?

10

A. It was not noticed by me and that is the first intimation I ever had of it.

Q. Didn't you have a new shaft put into the motor, in the water pump?

A. If I did someone put it in without my knowledge.

Q. Didn't Puro put it in for you?

A. Not that I am aware of.

Q. At the time you let the car freeze up you say that they didn't put in a new water pump, a new shaft in the water pump?

20

A. I told them to fix it and they fixed it and I paid for the fixing. That is all I know of it.

Q. It was in worse shape after being frozen up?

A. No, sir; it was not worse.

Mr. Smith: I think it is important to fix when this freezing up took place. After the rescission he was merely a bailee, and I think it is important whether that was before or after the attempted return; because if it occurred afterwards he is merely a gratuitous bailee, after that happened.

30

Q. The car froze up before you returned it to Mr. Wills, didn't it?

A. That I couldn't say, Mr. Peacock.

Q. But it was not in the same condition or as good condition as when you took it from the Fleetwood Motor Company?

A. It was repaired by a brand new casting.

Q. It was repaired by a brand new casting?

A. Yes.

Q. And it was not in the same condition as when you took it from the Fleetwood Motor Company?

10 A. I would say it was in better condition, because that casting would have broken anyhow, no matter who had the car.

Q. At the time you got this car you drove it, didn't you?

A. Yes.

Q. Went out in it with Mr. Grady?

A. Yes.

Q. How many different times?

A. I don't know how many times.

20

Mr. Smith: There is no question here as to the fact that the car ran. There is only one breach of warranty set up; that is the question whether it was a 1918 or a 1920 car; that is the action. Now I do feel that it is irrelevant to inquire —

30

The Court: Well, if you are claiming a right to rescind it is part of the plaintiff's case to show that the car was tendered to the defendant in as reasonably good condition as that in which he received it; at least to offer to put the defendant in statu quo. Along that line I think this evidence is permissible.

(After argument.)

The Court: I think his cross-examination is going

to the question of rescission, whether you have offered to rescind and pay him.

Mr. Smith: I want to object, too, to applying the doctrine of caveat emptor to the car, because it is not in the case.

The Court: Proceed.

A. I will say two or three times.

10

Q. You knew who owned the car prior to your owning it, didn't you?

A. I know his name, yes.

Q. Mr. Charles Marter? Do you know Mr. Warren Vansciver or Walter Vansciver?

A. Yes.

Q. Did you or did you not have Mr. Walter Vansciver see or call Mr. Marter before you purchased the car to find out the condition of this car?

A. That is right.

20

Mr. Smith: That is objected to as to the condition of the car. There is no question as to condition.

Mr. Peacock: The question of caveat emptor does apply in this case. This man knew what he was buying, 1920 or 1921.

Q. Didn't Mr. Walter Vansciver, pursuant to your 30 instructions, see or phone Mr. Marter as to the year this car was built?

A. No, sir.

Q. Didn't Mr. Walter Vansciver tell you when Mr. Marter owned the car?

A. No.

Q. Didn't he tell you that Mr. Marter had purchased the car in 1918?

A. No.

Q. He didn't?

A. No.

Q. What did you tell Mr. Vansciyer to find out from Mr. Marter about this car?

A. The condition of the car.

Q. And what did you find out about the condition  
10 of the car?

A. He said the condition was fairly good, excepting the rubber; that is, it needed new tires.

Q. Now, after you found that from Mr. Marter you came back to the Fleetwood Motor Company, didn't you?

A. Yes.

Q. You examined the car again?

A. Yes.

Q. And after an inspection by you and after find-  
20 ing out from Mr. Marter the condition of the car, riding in the car, you agreed to take it, did you not?

A. Yes, as a 1920 car.

Q. At that time you owned an Essex car, did you not?

A. Yes.

Q. You traded your Essex and so much cash for the Hudson car, did you not?

A. That is right.

Q. How much cash did you pay?

30 A. \$554.80.

Q. Then you traded your Essex and \$554.80 for a Hudson car, didn't you?

A. I had \$700 allowed on the Essex.

Q. I asked you that; you traded your Essex car and \$554.80 for the Hudson car?

A. Yes.

Q. That is correct, isn't it?

A. That is correct.

Q. And that was your agreement at that time with Mr. Grady for the purchase of the Hudson car, wasn't it?

A. No.

Q. Didn't you make an agreement for the Essex and \$554 for a Hudson car?

A. No.

Q. Well, that was what you gave, wasn't it?

A. I made an arrangement —

Q. Answer my question. That is what you gave, wasn't it? 10

A. Yes, that is what I gave.

Q. And the contract price of the motor vehicle as set forth in this contract is \$990, isn't it?

A. Yes.

Q. And the settlement charge or for the insurance company lending you the money was \$89.80; that is correct, isn't it?

A. Yes.

Q. That was for fire and theft insurance and so forth that you put on the car at the time you financed it through Hare & Chase? 20

A. That is right.

Q. Then the price for the motor vehicle as set forth in this contract is \$990, isn't it?

A. Yes.

Q. And you paid \$554.80?

A. Yes.

Q. That is right, isn't it?

A. Yes. 30

Q. That bill of sale does not show that that car is 1920, does it?

A. Yes.

Q. It does?

A. I would say so.

Q. Look at it.

A. Nineteen, hyphen, twenty.

Q. That doesn't say 1920, does it?

A. It says nineteen, hyphen, twenty.

Q. You know automobiles are built —

A. It doesn't say 1918.

Q. You know automobiles are built in 1920 and sold as 1919 or 1920 models, don't you?

A. Yes.

Q. And they are built as 1918 and 1919 and sold  
10 as 1918 and 1919 models?

Mr. Smith: If your Honor please, I want to object to inquiring into a trade custom in the face of a written contract.

(After argument.)

The Court: If he can show that this witness understood. Now, as I understand this contract it  
20 says 1919-1920.

Mr. Smith: It says "Year built" over the top of it.

The Court: What is your construction of it?

Mr. Smith: I don't think it is material if it is a 1919 car, if the warrant is one year off.

The Court: What as to the measure of damages?  
30 Doesn't it affect that?

(Further argument.)

(Question repeated.)

Q. You knew that, didn't you?

A. It was objected to.

Mr. Smith: What was your ruling on it?

The Court: It is admitted.

(Question repeated.)

A. Probably. I am not in the automobile business.

The Court: He is asking you if you know. If 10 you don't know —

A. No, I don't know. I presume so.

Q. Have you owned cars before this?

A. Yes.

Q. Do you know that that is the customary form of bill of sale?

A. No.

Q. Do you know some cars are made in 1919 and also sold as 1919-1920 cars, given out in the end of 20 the year? You don't know that?

Mr. Smith: He says he doesn't know that. He doesn't have to ask it a dozen different angles.

The Court: He has gone as far as he can go. He says he is not in the automobile business and doesn't know, so there is no use questioning him further.

Q. Then you depended upon this wording, 1919, 30 dash, 1920, as to what this car was; is that correct?

A. No, I didn't depend on that.

Q. Under this bill of sale it could be 1919 or 1920, couldn't it?

A. I guess so.

Q. You knew Hudson cars were sold by models, didn't you?

A. No, sir.

Q. You never knew that?

A. No.

Q. Did Mr. Fleetwood ever guarantee this car to be a 1920 car prior to the day that you purchased it?

Mr. Smith: That is just what you said we couldn't go back of.

10

The Court: Yes, the plaintiff rests his case on the agreement and you have objected to their going into testimony as to conversations leading up to the contract before it was signed. Now you are seeking to cross-examine him on the very points that you objected to his testifying to in direct examination.

20 Mr. Peacock: As binding on these defendants I have a right to show that. He has testified that any information that he obtained as to what year this car was was without the authority of Mr. Fleetwood. Now I have a right to go into the point and find what is binding on these two men, whether they ever contracted or agreed or guaranteed that it was a 1920 car.

Mr. Smith: My objection is the contract states the year built, 1919—1920.

30

The Court: The Court will permit you to either contradict or cross-examine on any points concerning a new agreement which the plaintiff and defendant may have made and which, as the case now stands, the plaintiff says he undertook to make with the defendant company for the settlement of their differences and the satisfaction of the present con-

tract, but which he says the defendant neglected or failed to carry out, that the defendant deliver a new Badger top Hudson, which he agreed to do in satisfaction of whatever obligation there may have been under that contract, in the adjustment of their difficulties. The testimony is that that agreement was a verbal agreement and that it was meant to take the place of the written agreement if it had been carried out by the defendant.

(Objection noted for defendant as ground of appeal.) 10

Q. Mr. Firth, did you or did you not, when you purchased this car, depend upon the agreement of the 1919—1920, or was not your agreement for the purchase of a Hudson car which you had seen and inspected, in consideration of the Essex and \$554.80?

Mr. Smith: The same objection: the contract speaks for itself what the agreement of the parties was. 20

(Objection sustained.)

(Objection noted for defendant as ground of appeal.)

Q. You never made any complaint about this car to the Fleetwood Company until you made an attempt to trade it to Puro, did you? 30

A. Yes, I did.

Q. You never made any complaint about the year it was built, did you?

A. No.

Q. You never made any complaint about the year

it was built until after you made an attempt to trade it to someone else, did you?

A. That is right.

Q. Then after that you had the conversation with Mr. Fleetwood, didn't you?

A. Yes.

Q. And that was subsequent to the time that is set forth in that letter?

A. Excuse me. I had a conversation with Mr. 10 Wills. Mr. Fleetwood was out of town.

Q. Then you had a conversation with Mr. Wills first when you brought the car to their garage; is that what you mean?

A. Yes, sir.

Q. Then you wrote the letter following that conversation with Mr. Wills?

A. That is right.

Q. And then later on you met Mr. Fleetwood in Mr. Smith's office, didn't you?

20 A. Yes.

Q. How long after you had a conversation with Mr. Wills, when you offered to return the car, did you have the conversation with Mr. Fleetwood at Mr. Smith's office?

A. I don't just remember dates.

Q. A week?

A. I am not going to commit myself to dates at all. I think it is all in the papers.

Q. Well, it was afterwards, wasn't it?

30 A. It was when I put the matter into Mr. Smith's hands. Mr. Smith wrote Mr. Fleetwood and in reply Mr. Fleetwood asked that he and I could get together, which we done.

Q. Then you saw Mr. Wills, according to this letter, on December 12th; "yesterday," you say?

A. Yes.

Q. That is correct?

A. Yes.

Q. Then you sent this letter on December 13th?

A. That is correct.

Q. "This morning"?

A. I wrote this on December 13th.

Q. "Confirming the writer's conversation with your Mr. R. D. Wills when in your office this morning." Then you wrote this the same day you saw Mr. Wills, December 13th?

A. Yes.

10

Q. And you said, "I will place it in the hands of my attorney, December 14th"?

A. That is right.

Q. That is when you did place it?

A. That is when I did place it.

Q. Then after you had placed it in the hands of your attorney which was subsequent to this letter, and the offer of the car to Mr. Wills, you had a conversation with Mr. Fleetwood, didn't you?

A. Afterwards.

20

Q. How many days afterwards, do you know?

A. I don't know, Mr. Peacock.

Q. Well, was it a week?

A. I don't remember. But whenever Mr. Smith arranged for Mr. Fleetwood to meet at his office, that is when it was.

Q. And at that time Mr. Fleetwood told you that whoever made the contract with you, it was made without his authority, didn't he?

A. I wouldn't just put it that way. No, he didn't.

30

Q. You didn't so state that, that when you were testifying on the direct examination to Mr. Smith, didn't you say that the conversation was five weeks after November 10th, and Mr. Fleetwood said the sale was not made with his authority? Did you so testify to Mr. Smith on your direct examination?

Mr. Smith: I want to object to that. This is a contract in writing. There is no such defense of lack of authority set up.

(After argument.)

The Court: Well, wasn't the direct examination concerning a new arrangement?

10 Mr. Peacock: That is what I am attempting to show.

The Court: Then why bother about any statement Mr. Fleetwood made that he didn't know? He doesn't dispute the fact who made it or was authorized to do it.

20 Q. Then in the presence of Mr. Smith, your attorney, you made a new agreement with Mr. Fleetwood to purchase a seven passenger Badger top Hudson car; that is correct, isn't it?

A. Arrangement instead of agreement, please.

Q. Well, arrangement then.

A. Arrangement, yes.

Q. And that was in the presence of your attorney?

A. Yes.

Q. Which you were willing to accept at that time?

A. Yes.

30 Q. Then Mr. Fleetwood was to take the car which you had, a Hudson car, as part of the purchase price for the new car, was he not?

A. That is right, yes.

Q. And what was he to allow you on that car, to purchase a new seven passenger Badger top car?

A. The amount that I paid for it, \$1,200.

Q. Is that what Mr. Fleetwood said?

A. Yes.

Q. And what was to be the purchase price of the new seven passenger Badger top car?

A. I don't remember. A few hundred dollars more, three or four hundred dollars more, I believe.

Q. Well, three or four hundred?

A. Well, whatever it was, three or four or five hundred dollars more. I was willing to pay that price in order to get settled up.

Q. And you agreed to pay it, didn't you?

10

A. I said I would take the car, yes, whatever it was.

Q. Then Mr. Fleetwood left Mr. Smith's office that day with a definite agreement with you to take your Hudson car in trade and so much consideration in addition for a seven passenger Badger top car; that is correct, isn't it?

A. That was my understanding, yes.

Q. Then he made arrangements and attempted to get you a car, didn't he?

20

A. I doubt it.

Q. Didn't he tell you that?

A. He told me that, yes, but I doubt it.

Q. How many times did he see you after that?

A. At least four.

Q. And he told you he was attempting to get this new car, didn't he?

A. Each time, yes.

Q. And he didn't tell you he was having some trouble in getting the new car?

A. Yes, he did.

30

Q. And he didn't tell you he was having some trouble getting the Badger top?

A. No.

Q. Then you wrote him a letter and said, "I want it within twenty-four hours, with or without Badger top," didn't you?

A. Yes, after waiting six or eight weeks.

Q. Then after writing him saying you wanted it with or without Badger top, you say Mr. Fleetwood never mentioned it to you that he couldn't get a Badger top?

A. No, he didn't.

Q. Then why did you say you wanted it with or without Badger top?

A. Because I wanted a car to do my work with. I  
10 was without a car all the time.

Q. You had this other car?

A. Which car?

Q. This car you are suing for. You could run that car?

A. Yes, I could run that car, but I preferred not to.

Q. You preferred not to because you wanted to get \$1,200 out of Mr. Fleetwood, didn't you?

A. That was not my intention.

20 Q. Well, the car will run today the same as when you bought it?

A. Yes.

Q. And you have it yet?

A. It is in the garage, yes.

Q. Now, after making the new arrangement with Mr. Fleetwood at Mr. Smith's office you never offered to return this 1918 car, did you?

A. It was not necessary.

30 Q. I didn't ask you that. You never did offer to return it, did you?

A. No.

Q. And you never did return it?

A. No.

Q. And you still have possession of it?

A. Yes.

Q. Have you driven it since that time?

A. Not since December 31, 1922.

Q. Then you did drive it up till December 31, 1922?

A. Occasionally, yes.

Q. Then you made an effort to return it on December 13th, and continued to drive it up till December 31st, did you?

A. At Mr. Fleetwood's suggestion.

Q. You continued to drive it, didn't you?

A. Yes, at Mr. Fleetwood's suggestion.

Q. Did you ever come to Mr. Fleetwood's garage 10  
to get your new car?

A. No. I phoned.

Q. Well, you don't know whether he got it for you or not, do you?

A. No, I don't know. I presume if he had had it at the time I wanted it he would have delivered it to me.

Q. You refused to let him talk to you after February 1st, didn't you?

A. Yes, but that was personal, that was direct. 20  
Afterwards we talked through Mr. Smith.

Q. After that you wanted him to talk through your lawyer?

A. Yes.

Q. You wanted him to tell Mr. Smith when he had that new car there, and if Mr. Fleetwood had that new car for you on February 2nd, you would not have taken it, would you?

A. What date?

Q. After you had given twenty-four hours' notice. 30

A. Yes, I would have taken it.

Q. You would have taken it after having cancelled the contract in that letter?

A. Yes.

Q. Then why did you say you would cancel the contract in twenty-four hours?

A. If the car had been there I would have taken it.

Q. How did you know it was not there?

A. But it was not there.

Q. How did you know? Did you go after it?

A. I didn't see it in front of the house.

Q. Then on February 1st, after giving him twenty-four hours notice to deliver that car, you say you would have taken it anyhow?

10 A. I say if he had brought the car to my house I would have taken it.

Q. In the same letter you told him you didn't want him to talk to you any more or have any further dealings with you; that is correct, isn't it?

A. Yes.

Q. Then you don't know whether Mr. Fleetwood had the car on that date or not, do you?

A. If he had the car he certainly would have told me about it.

20 Q. Do you know whether he had it or not?

A. I don't know, no.

Q. You didn't make your offer to pay for it, did you?

A. Why should I before I got the car?

Q. I didn't ask you that?

A. No, I didn't.

Q. Did you go tender the other car and cash for your new car?

A. No.

30 Q. Then you didn't attempt to get the new car or perform any part of your transaction, did you?

A. Yes, I did.

Q. Did you offer to turn your car and cash over to Fleetwood for a new car?

A. Which new car?

Q. There is only one car in the case. I mean the car he gave you.

A. You are mixed up.

Q. Did you take this Hudson car you have in your possession and the additional money that you were to pay for the new seven passenger car to Mr. Fleetwood?

A. No.

Q. Then you made no effort to produce the car and the money for the new car, did you?

A. Yes.

Q. You did, when?

A. I made an effort to produce the car for Fleetwood. 10

Q. When?

A. On the occasion of the automobile show, and then later on I called at the office.

Q. Automobile show in Philadelphia?

A. Yes.

Q. Where did you take it, to Philadelphia?

A. What?

Q. The car.

A. I went to the show. 20

Q. The auto show was January 15th, wasn't it?

A. Yes, that was the time I was waiting for Mr. Fleetwood's car to come there.

Q. But Mr. Fleetwood went to the show to get a car for you?

A. Yes, and he couldn't get it.

Q. He didn't get it, did he?

A. I could have gotten one down there for him.

Q. Did you tell him that?

A. I told Mr. Fleetwood at that time, yes. 30

Q. Why didn't you get it?

A. That is what I am here for.

Q. That is what you are here for?

A. Yes.

Q. To get \$1,200 out of Mr. Fleetwood?

A. Yes.

Re-direct examination.

By Mr. Smith:

Q. You used that car after that conference in my office. Why did you use it?

(Objected to.)

10 The Court: Well, you have brought out that he has been using it.

(Objection withdrawn.)

Q. Why did you use it?

A. I had to have a car to get around in and Mr. Fleetwood said, "You better go ahead and use that car" until he could get a new car there for me.

Q. And it was at his suggestion that you used the  
20 car?

A. Yes.

Q. Do you remember whether I at that time made the suggestion to him in the adjustment of the question on trial that you use the car?

A. Yes.

Q. What did he say then?

A. He said, "All right. Go ahead and use it. You have my authority to do it."

Q. Have you ever bought and sold cars as a business?

30 A. No, sir.

Q. Do you have any special knowledge of automobiles other than that of a —

A. Just an owner and driver, that is all.

GEORGE E. ENGELS, SWORN for plaintiff.

Direct examination.

By Mr. Smith:

Q. Mr. Engels, where do you live?

A. Beverly.

Q. What is your business?

A. Manager of the Cooperative Growers' Association. 10

Q. Do you know Mr. Firth?

A. Yes, sir.

Q. Did you accompany Mr. Firth to the office of the Fleetwood Motor Company about the 12th day of December, 1922?

A. Yes, sir.

Q. When he returned a Hudson sedan motor car?

(Objected to.) 20

The Court: The ground of objection being what?

Mr. Peacock: A new contract being entered into and there is no return since that new contract. This testimony is all prior to the new contract, December 12th, as per the letter of —

The Court: Well, the case is not in yet. Let's see what happens before the case is finished. 30

Mr. Peacock: Mr. Smith acknowledged that with this witness, as of December 12th.

The Court: That is part of one link. That is not confined just to the testimony of the plaintiff.

A. Yes, sir.

Q. Who did you see there?

A. This gentleman; Mr. Wills I believe is his name.

Q. Did Mr. Wills and Mr. Firth have a conversation in your presence?

A. Yes, sir.

Q. What was it referring to?

A. The car in question and the misrepresentation.

10 Q. What was said by Mr. Wills and Mr. Firth at that time that you remember?

A. The part that I remember, that Mr. Firth tendered the car —

Mr. Peacock: I ask that that be stricken out as a matter of conclusion. What did he do and what did he say?

20 The Court: Yes, you can tell what he said and what was done.

A. Mr. Firth tendered the car to Mr. —

Mr. Peacock: I move that that be stricken out.

Q. They object to the word tender. It is technical and they object to your using it. What did he say?

30 The Court: What did he say? How do you know he tendered it?

A. He said, "I have brought the car over for the motor car company to accept." I don't just exactly remember the exact words, but in substance that Mr. Firth offered the car.

Mr. Peacock: I ask that that be stricken out. That is a matter of opinion.

A. He did offer it.

Q. What did Mr. Wills say, if anything?

A. Mr. Wills stated that the car was not misrepresented and that the contract was fulfilled, or words to that effect.

Q. Did they accept the car?

A. No, sir. 10

Q. What did you do then?

A. Well, we came out.

Q. And where did you go then?

A. Came home.

Q. Back to Beverly?

A. Back to Beverly.

Q. And brought the car back with you?

A. Yes, sir.

Cross-examination. 20

By Mr. Peacock:

Q. That was at the Fleetwood garage?

A. Yes, sir.

Q. Did you drive the car in the Fleetwood Garage?

A. Not in the garage.

Q. You were out front with the car?

A. Yes, sir.

Q. On the other side of the street, wasn't it? 30

A. I don't recall just exactly where it was.

Q. And Mr. Firth went in and says, "I have brought the car over for the company to accept"?

A. Words to that effect.

Q. He didn't take the car and leave it there, did he?

A. No.

Q. Didn't he have lots of opportunity to drive it in the garage and leave it there?

A. That I couldn't say.

Q. He drove away and took it home again?

A. Yes.

Q. And you were right in front of the garage at the time you went into Mr. Fleetwood's office, were you not?

10 A. We went into the office, yes.

Q. You were in his office, were you not?

A. Yes.

Q. And the car was in front of the office, was it not?

A. I wouldn't say directly in front. It might have been either side of the street. It was in Mount Holly, on that street.

Q. But you didn't take the car in and leave it there, did you?

20 A. Where?

Q. In Fleetwood's garage.

A. No, sir.

Q. And you didn't leave it out in the street in front of Fleetwood's garage?

A. Yes, we did.

Q. Only while you were in there?

A. Yes.

Q. And after Mr. Wills told you the car was not misrepresented and the contract had been fulfilled  
30 you took the car home again?

A. Yes.

Q. You had no intentions of leaving it there then, did you?

A. I had nothing to do with it.

Q. Mr. Firth had no intentions, because he drove back again?

A. I presume—I can't say as to what he had in mind.

Q. You anyhow got in the car and took it home?

A. Yes.

Q. You know he drove it after that?

A. Yes.

Q. For quite some time?

A. I couldn't testify as to that.

Q. You are his brother-in-law, are you not?

A. No, sir.

10

Q. No relation to him?

A. No relation.

Re-direct examination.

By Mr. Smith:

Q. Why didn't Mr. Firth leave the car there, do you know?

20

Mr. Peacock: I object. He can't testify to what was in his mind. He has said that.

Q. Do you know why he didn't leave the car there?

A. No, sir.

Q. Was there anything in the conversation between them that might have been the reason why the car was not left?

(Objected to as a matter of conclusion and opinion.) 30

The Court: I will permit it if he knows.

A. Yes.

Q. What was there in the conversation that might have been a reason why the car was not left?

(Objected to.)

The Court: What was said by either party?

A. Mr. Wills stated that the car did not belong to us, he said; I presume meaning the Fleetwood Motor Car Company; and not belonging to him he wouldn't take it back.

10 Re-cross examination.

By Mr. Peacock:

Q. He said the car didn't belong to the Fleetwood Company; is that right?

A. Yes.

Q. Did he tell you who it did belong to?

A. No.

20 Q. And then when he told Mr. Firth it didn't belong to them Mr. Firth took it home again?

A. Yes.

---

ELWOOD ZIEGENFUSS, sworn for plaintiff.

Direct examination.

By Mr. Smith:

30 Q. Mr. Ziegenfuss, where do you live?

A. Beverly.

Q. What is your business?

A. Manager of Fineberg's Auto Tire and Accessory Store, Burlington.

Q. Do you buy and sell automobiles there?

A. Not there, no.

Q. How long have you been in the automobile business, buying and selling cars?

A. I have never been in it for myself.

Q. No, but for others?

A. I should say around about two years and a half.

Q. Did you during that time sell new cars?

A. Yes.

Q. And bought old cars?

A. Traded them in.

Q. What if anything is the custom of the trade —

10

(Objected to.)

The Court: I don't know what the question is.

Mr. Peacock: The custom of the trade. He objected to my showing it.

Q. What if anything is the custom of the trade in ascertaining the values and the years of the manufacture of used cars? Where, if any place do you get that information? 20

A. From the year of the car.

Q. How do you place the year of the car? If I brought in a car to you—this car—how would you ascertain from your records or from other records the year that car was built?

A. By serial numbers.

Q. What of the serial numbers would give you the information? How would you ascertain from the serial number the year the car was built? 30

A. Why, from a book that we have.

Q. What book is that?

A. Called the Red Book.

Q. Is that a book that is customarily used by dealers in used cars?

A. Yes.

Q. And by those who take cars in trade?

A. Yes.

Q. For the purpose of ascertaining the year of manufacture?

A. Yes.

Q. Of used cars?

A. Yes, sir.

Q. Have you that book with you?

10 A. I have a 1923.

Q. Will that show the year of manufacture of a certain serial number?

A. Yes, sir.

Q. Will you refer to that book and tell us from that book what year Hudson sedan M 75,654 is?

A. That is not listed in the 1923 book.

Q. It is not listed?

A. No, sir.

20 Q. Will you let me look at that book? (Examines book.) Under the line "Serial Numbers" the witness's attention is called to M 5,000 to M 97,499.

Mr. Peacock: That is not according to the contract either, that note on the marginal edge of that book. I object. The witness has testified that that number is not in that book, the number as set forth in this contract.

30 The Court: Yes, that is what I understood him to say.

Mr. Smith: I suppose the Court will take judicial notice of the fact that that number, the number of this car, 79,000, is between M 5,000 and M 99,000. The serial number there says M 5,000 to M 99,000, showing that those cars were built in that particular year. An examination of the book will con-

vince your Honor of that. I think the Court will take judicial notice of that.

Mr. Peacock: I object on the further ground that there is no testimony showing that this book shows the correct numbers of the Hudson cars.

Mr. Smith: He has testified who it was made by.

Mr. Peacock: He has not testified to any such 10 thing.

The Court: I will sustain the objection, Mr. Peacock. On that objection I think it is incompetent.

Q. By whom is that book made?

A. National Used Car Market Report and Red Book, 1923 Edition.

Q. Is that the market report that is used by dealers in used cars?

20

(Objected to.)

(Argument.)

The Court: As the testimony now stands there is nothing to show that the defendant had anything to do with the issuing of this book, or even the Hudson Company, by what authority or wherefore. There is no question before the court. I don't see how you can offer that evidence.

30

Mr. Smith: I will withdraw the witness at this time. I will prove it another way. Now I call for the production of a letter written by the Hudson Motor Car Company, of Detroit, Michigan, to Joseph Fleetwood, or the Fleetwood Motor Car Com-

pany, around December 15th, in response to your inquiry as to the date when this car was manufactured.

Mr. Peacock: I have no such letter. I have presented Mr. Smith with two letters that he called for, the only ones we have in our files.

10 Mr. Smith: I ask now for the production, which is also by subpoena, of any papers and records of the Fleetwood Motor Car Company showing the purchase of this car and the resale by them to Mr. Marter. Have you those records?

Mr. Peacock: We have any such records except a copy of this sale contract to him.

20 Mr. Smith: The original agreement and original correspondence is called for by subpoena and by notice, the original agreement between the Hudson Motor Car Company and the Fleetwood Motor Car Company itself.

Mr. Peacock: We haven't any such papers or records except this contract.

---

JOSEPH FLEETWOOD, sworn for plaintiff.

30 Direct examination.

By Mr. Smith:

Q. Mr. Fleetwood, you are an officer of the Fleetwood Motor Company?

A. Yes, sir.

Q. And you know there was a Hudson sedan M 75,654, motor number 60,680, six cylinders, used car, sold to Mr. Firth; you know that?

A. Yes, sir.

Q. You had sold that car when it was new, hadn't you, Mr. Fleetwood?

A. The car was sold, yes, when it was new.

Q. When was it first sold by you and to whom?

A. It was sold to Charles Marter.

Q. When?

A. I don't know whether I can give you the exact date. 10

Q. In what year?

A. In August, 1918.

Q. And then it was purchased by your company from Marter and afterwards sold to Mr. Firth; is that right?

A. Yes, sir.

Cross-examination.

20

By Mr. Peacock:

Q. Is that the same car that was set out in the bill of sale, Mr. Fleetwood, between the Fleetwood Motor Company and Mr. Firth?

A. Yes, sir.

Q. And what is the description of that car on that conditional bill of sale?

Mr. Smith: I object to that as not cross-examination. I merely asked him if he bought and sold the car. I limited my examination to that. 30

The Court: Is it the purpose of cross-examination to show that it is not the same car?

Mr. Peacock: It is the purpose of the examination to show that it is the same car.

(Question repeated.)

A. Hudson sedan, Model M, manufacturer's or serial number, 75,654, motor number 60,680, six cylinders, was built 1919—1920.

Q. Does that mean that is a 1918 car, Mr. Fleet-  
10 wood?

Mr. Smith: I object. That is his interpretation of the contract.

The Court: Yes, I think that is correct.

Q. Does that bill of sale tell what year this car was built?

20 Mr. Smith: I object to that as his interpretation of the contract. The contract speaks for itself; it is in writing.

(Objection sustained.)

(Objection noted for defendant as ground of appeal.)

Q. What does that bill of sale show as to the year  
30 built of the car?

Mr. Smith: I object. The contract speaks for itself. He may read.

Mr. Peacock: I didn't ask him to do anything else except read.

(Objection sustained.)

Q. Does that bill of sale say that that is a 1920 car, Mr. Fleetwood?

Mr. Smith: I object. That is an interpretation of the contract again.

The Court: Yes, this witness has not been asked anything concerning this bill of sale by Mr. Smith. He was only asked as to what year he sold the car to Mr. Marter. He said August, 1918. Now, when he is your witness you may be able to put that. 10

Q. Does that bill of sale, Mr. Fleetwood, say that it is a 1920 car?

(Objected to as not cross-examination; he has already answered it.)

(Objection sustained.) 20

(Objection noted for defendant as ground of appeal.)

Q. I would like to ask one more question. Mr. Fleetwood, the car that you have testified that you sold Mr. Marter in 1918, what model car was that?

A. Model M.

Q. Are Hudson cars sold by number ——— 30

Mr. Smith: I object to that as not cross-examination. It is an attempt to change a written contract by trade custom.

(Objection sustained.)

(Objection noted for defendant as ground of appeal.)

Q. Do you know whether or not the same car was sold to Charles Marter is the same that is set forth in the bill of sale of the Fleetwood Motor Car Company to Firth?

A. It is.

10

MORRIS PURO, sworn for plaintiff.

Direct examination.

By Mr. Smith:

Q. What is your business?

A. Automobile business and buying and selling  
20 automobiles.

Q. At Beverly?

A. Beverly, New Jersey.

Q. You know Mr. Firth here?

A. I do.

Q. You were subpoenaed here today, were you?

A. By Mr. Fleetwood.

Q. Now, you made some repairs on this Hudson car for Mr. Firth, didn't you?

A. I did.

30 Q. What did you do on it?

A. Why, I think—I am sure rather—that we towed the car in the shop one morning on Mr. Firth's say-so and we found that he had a cracked water pump jacket on it and I replaced that for Mr. Firth.

Q. You replaced all that was to be done there that might be caused by any freezing?

A. Yes.

Q. And when the car left your garage it was in good condition as far as any damage any freezing might have done to it?

A. As far as I know; as far as we could see.

Q. You examined it and you could find nothing?

A. Yes, as far as the leaking. The only way we could tell is by leaking water and that is the only place we could find.

Q. And after you made your repairs there was absence of leaks?

A. Positively. 10

Q. Mr. Puro, you are the gentleman that Mr. Firth tried to trade this car in with, aren't you?

A. Yes, sir.

Q. Now, why did you refuse to take this car?

(Objected to.)

Q. Did you refuse to take this car?

(Objected to.) 20

(Objection sustained.)

Q. Did you examine the car?

A. Only examined it as to the condition as general. I didn't go into any details.

Q. Did you ascertain what year the car was made?

(Objected to.)

Q. Well, did you find out ——— 30

Mr. Peacock: You have got to show his source of knowledge first.

Q. Did you ascertain it?

A. Ascertain what?

Q. What year the car was manufactured.

A. I did ——

Q. Did you or didn't you?

A. Yes.

Q. Where did you make your inquiries?

(Objected to as hearsay.)

Mr. Smith: At least he can tell where he made  
10 his inquiries. He might have made them of Mr.  
Fleetwood.

The Court: Yes, he may do that.

Q. Where did you make your inquiries?

A. Why, first I looked in the book, next I went  
to—at the same time I bought the water pump part  
I inquired at the Gommery-Schwartz Motor Car  
Company.

20 Q. And who are they in Philadelphia?

A. They are the distributors for Eastern Penn-  
sylvania, Delaware and New Jersey for Hudson  
motor cars.

Q. And they told you ——

(Objected to.)

Mr. Smith: They are the agents of the Hudson  
Motor Car Company and Mr. Fleetwood is their  
30 agent.

Mr. Peacock: They are. The book has been ruled  
out of evidence and the other basis of his inquiry  
is what someone told him.

By Mr. Peacock:

Q. Have you the bill of repairs?

A. No, I haven't. I couldn't find the bill but I found a copy of the ledger report.

Q. When did you make those repairs?

A. According to this sheet here it was made on December 13th, the bill was made out. I believe the repairs were made about that time, and the bill was paid on the 16th of December.

Q. Do you know that was the same day that he offered to tender it to the Fleetwood Company?

A. No, I don't. I don't know anything of it. 10

Q. December 13th?

A. Yes, that is what this calls for.

By Mr. Smith:

Q. You say you think the work was done on that date, or did you afterwards make the charge on that date?

A. That I can't tell you. We tried to find our records, and it was before the 1st of January, and we destroyed all the rest except this. 20

Q. That might have been done on the 12th?

A. It might have been the 12th or 10th or the 11th, around that date.

Q. It was paid for by Mr. Firth?

A. Positively.

By Mr. Peacock:

Q. Your records show that to be December 13, 1922?

A. As far as this sheet is concerned it shows here that we entered the charge on December 13th and that was the day the bill was made out. It was paid on the 16th of December. 30

Q. Then by your records it was done the same day?

A. Positively, as far as I recall.

PLAINTIFF RESTS.

## MOTION FOR NON-SUIT.

Mr. Peacock: I am going to make a motion for non-suit, on the ground that there is no testimony here showing any misrepresentation on the sale of this car, that the car is not as set forth in the contract.

- 10 On the further ground that in order to bring a suit for damage under the sales act on a rescission there must be a return. There is no testimony here of any return being made by the plaintiff to the defendant prior to bringing this action. The testimony shows that on December 12th, there was an offer, as he states in his letter, to return, when at the same time he got in the car and drove it back here, and he did not leave it at the Fleetwood Motor Car Company. Subsequent to that date the plaintiff's own testimony is that the contract upon which
- 20 he is now suing was abandoned and that a new contract was entered into between the plaintiff and the defendant company for the purchase of a seven passenger touring car with Badger top; that at that time the contract upon which suit is being brought was abandoned by the plaintiff, he having entered into a new contract. Subsequent to the date of that new contract, which is shown to be December 15th or 17th, from that time down until February he waited until the new car could be delivered upon
- 30 which he had based his new contract. He himself testified that he did not know whether Mr. Fleetwood had obtained the car for him or not because he made no inquiry up to that date. He gave him twenty-four hours' notice under the new contract that he rescinded the contract to purchase a new car. Now, under the new contract and from De-

ember 12th to date there is no testimony before this court that the plaintiff has ever offered to return the car or has returned it, which he must do in order to rescind, to bring this case before this court. Under the testimony I submit to your Honor that the plaintiff has failed to make out his case and I ask for a non-suit.

10

—————  
(Recess to 1.40 P. M.)

(Trial of the cause resumed at 1.40 P. M.)

Mr. Smith: I ask leave to present further testimony.

The Court: You ask to have the case opened in order that you might prove ———

20

Mr. Smith: Yes.

The Court: What have you to say to that?

Mr. Peacock: I object.

The Court: I think it is discretionary with the court. I will permit that.

30

JOSEPH FLEETWOOD, recalled for plaintiff.

Direct examination.

By Mr. Smith:

Q. Mr. Fleetwood, you have been sworn, haven't you?

10 A. Yes, sir.

Q. Do you remember coming to my office, Mr. Fleetwood, and attempting to settle this matter?

A. Yes, sir.

Mr. Peacock: I object to the form of the question.

Q. Do you remember?

A. Yes, sir.

20 Q. And what conversation occurred between you and Mr. Firth with reference to the adjusting of this case?

A. I couldn't tell you the whole conversation.

Q. Tell us what you remember then.

A. It was in reference to the car. He agreed to—said the other car was not satisfactory to him and he wanted to make arrangements with me for a new seven passenger open car with a Badger top.

30 Q. What arrangement did you make with him, if any?

A. Not any at that time.

Q. When was the next time you saw him?

A. I saw him three or four different times after that.

Q. What arrangement did you make with him those times?

A. There was none made until the latter part of January. I was there several times.

Q. What was the arrangement you made then?

A. Then I arranged to deliver him a new seven passenger car with a Badger top.

Q. When were you to deliver it?

A. As soon as it could be gotten from the factory.

Q. What were you to allow him for his old car?

A. I think the price that was stipulated under the 10 old agreement.

Q. Did you ever deliver that car to him?

A. No, sir.

Q. Were you ever ready to deliver the car to him?

A. Yes.

Q. When?

A. Shortly after I got notice from him that he didn't want further dealings with me.

Q. Did you take it up with him then and offer to deliver the car?

20

A. No, sir; I had it for him if he wanted it, but he instructed me he didn't want to have anything further to do with me in any way, shape or form, as you will see by a letter there.

Q. What were the terms of the second agreement you had between you and Mr. Firth?

A. There were no terms only verbal.

Q. Never reduced it to writing?

A. No, sir.

Q. Were you going to sell this car to him on a verbal contract or to reduce it to writing later?

30

A. Well, I couldn't say about that. I suppose that the car might have been delivered then without a contract.

Q. Well, were you going to sell it to him on conditional sale or what? What were the terms that

you had made with him? What terms had you come to?

A. Well, I took it for granted it would be a conditional sale. The other one was and I assumed that would be.

Q. Was the contract ever consummated between you and him and final terms ever agreed upon?

A. Yes, verbally.

Q. How was he to make payment for the car?

10 A. I don't think there was an arrangement in regard to the payment, how he was to make it.

Q. Merely the amount you agreed upon?

A. Yes, sir.

Q. The contract was never completed so far as the method of making the payment, was it?

A. I think not.

Cross-examination.

20 By Mr. Peacock:

Q. And when did you complete the second agreement, Mr. Fleetwood?

Mr. Smith: If your Honor please, he says it has not been completed.

Q. When did you make final arrangements?

A. Final arrangement was made just before the receipt of that letter.

30 Q. And at the time that you received that letter did you have sufficient time to get him the car and deliver it to him?

A. I did not or he would have had it.

Q. Had you made efforts to get a car for him?

A. Yes, sir; I arranged for it.

Q. And what agreement did you make with him at that time, that you were to allow him \$1,200 for that car and how much cash?

A. He was to pay me the difference between the price as agreed to and a new one.

Q. The market price at that time?

A. No, the price of—give the contract price on the car that he bought and the price of a new car.

Q. I say he was to pay the contract price of a new car?

10

A. Sure.

Q. And what was the price of a Badger top?

A. I couldn't tell you at this time.

Q. And that agreement was made between you and Mr. Firth?

A. Yes, sir.

Q. And accepted by both parties?

A. Yes, sir.

Re-direct examination.

20

By Mr. Smith:

Q. You were to deliver a car but you made no arrangement as to the terms, did you?

A. Yes, I think the terms were all agreed upon, except I don't know that he had the charges, for his financing charges, and so forth, from the time of delivery. But the terms, the price and everything was agreed upon and he wanted the car as soon as he could get it and I told him I would get it for him as soon as I could get it.

30

Q. Do you remember what the terms were?

A. No, I don't remember, except that he was to pay the difference for the car.

Q. You don't remember what the terms were,

what payments he was to make, monthly payments or anything like that?

A. No, I didn't figure it out. That would be done at the time of the delivery of the car.

Q. You never tendered a delivery of the car?

A. No, I was advised that he didn't want any further communications with me.

Re-cross examination.

10

By Mr. Peacock:

Q. You were ready to deliver it when you did receive it, Mr. Fleetwood?

A. When I received that communication I was not ready to deliver it. That was only shortly after we had made the final arrangement and I hadn't time to get the car and deliver it. I received that letter on Saturday and the twenty-four hours would be up on Monday and there was no way I could get a car in that length of time.

Q. Your terms of agreement with him were to allow him \$1,200 on that car, on the market price of a new car at that time; that was your contract, was it not?

Mr. Smith: He is putting the contract in his mouth.

30 Q. You so testified, that you were to allow \$1,200 on the car that he had and he was to pay the difference between that and the market price of a Hudson car at that time?

A. Yes.

Q. As to how he was to pay you don't know?

A. No, we didn't arrange.

- Q. Had he agreed to pay it?  
A. I don't know whether he wanted to pay it in one month or eight or ten.  
Q. You say that after you received that letter you did obtain a car for him?  
A. Yes.  
Q. He never delivered the old car to you?  
A. At no time, no, sir.  
Q. Never offered to return it?  
A. No, sir.  
Q. Or to pay the difference in price between that and a new car? 10  
A. No, sir.  
Q. And has not to this day?  
A. No, sir.

PLAINTIFF RESTS.

---

Mr. Peacock: I renew my motion for non-suit. 20

(Mr. Smith replies.)

The Court: The motion is made. I feel in this case that there has been proof on the plaintiff's own case of a novation here. And by that it does not mean that the plaintiff has not a remedy against the defendant. But this action is based upon a certain written contract and agreement dated November 10, 1922, and the plaintiff undertakes to recover because of the breach of the warranty on the theory that he has rescinded the contract. And the suit is not based upon damages for the breach of the warranty but upon the return of the moneys which the plaintiff claims that he has paid or the purchase price of this car. 30

Now, the testimony is here that they did make another agreement. There is considerable dispute as to when it was made. One of the witnesses of the plaintiff says it was made sometime in the month of December and the defendant's witness who is called by the plaintiff and made a part of the plaintiff's case said it was made sometime in the month of January. But the undisputed fact seems to be that there was a new agreement made; and the correspondence that has been offered in evidence here on the part of the plaintiff calls upon the defendant to deliver to him a new Hudson seven passenger car with a Badger enclosure and notifies the defendant that unless that is done within twenty-four hours the matter will be placed in the hands of an attorney. It seems to be an admission and acknowledgment that there was a new arrangement made. Of course, the plaintiff's own testimony shows that to be the case. It may be, I haven't any doubt that the plaintiff has an ample remedy if there has been a breach of this contract for damages such as he has sustained because of the breach of this second contract, which, in the Court's judgment, under the testimony as it now stands, takes the place of the first contract. But the pleadings as now framed and the testimony as now presented are not such as warrant sending the case to the jury in the present condition of the record. Whether they should be amended is a question, or whether a new suit should be brought under the court's ruling.

I will grant the motion and allow an exception.

(Objection noted for plaintiff as ground of appeal.)



At the conclusion of the plaintiff's motion for a non-suit was made on the following grounds:

1. There was no misrepresentation on the sale of the car.
2. Under the sales act on rescission there must be a return of the article in question or offer to return, and there was no return or offer to return.
3. Plaintiff abandoned his original contract and entered into a new contract.
- 10 4. Plaintiff's case showed a novation, which released defendant from liability for the original contract.

On the question of novation the plaintiff's own testimony is that the contract upon which suit was brought in this case was abandoned and a new contract entered between plaintiff and defendant company for the purchase of a seven-passenger touring car with Badger top, as shown by the letter of plaintiff to defendant which constituted a novation.

State of case, P. 15-16.

20 Plaintiff testifies as follows:

Q. At that time you agreed to buy a Hudson seven-passenger car?

A. Yes.

State of case, P. 27, L. 20-24.

Q. Then you made an arrangement for the purchase of a new car?

A. Yes.

State of case, P. 27, L. 33-35.

30 And further:

Q. And if he had brought it there you would have taken it?

A. If it was brought there at the time specified; yes.

Q. If he had brought it there on February 2nd?

A. Yes.

Q. And after that you rescinded the contract to purchase this car, didn't you?

A. I purchased a new car; yes, I had to do it.

State of case, P. 30, L. 6-16.

Q. Then in the presence of Mr. Smith, your attorney, you made a new agreement with Mr. Fleetwood to purchase a seven-passenger Badger-top Hudson car; that is correct, isn't it?

A. Arrangements instead of agreement, please.

10

Q. Well, arrangement, then.

A. Arrangement, yes.

Q. And that was in the presence of your attorney?

A. Yes.

Q. Which you were willing to accept at that time?

A. Yes.

Q. Then Mr. Fleetwood was to take the car which you had, a Hudson car, as part of the purchase price for the new car, was he not?

A. That is right, yes.

20

Q. And what was he to allow you on that car, to purchase a new seven-passenger Badger-top car?

A. The amount that I paid for it, \$1,200.

Q. Is that what Mr. Fleetwood said?

A. Yes.

Q. And what was to be the purchase price of the new seven-passenger Badger top car?

A. I don't remember. A few hundred dollars more, three or four hundred dollars more, I believe.

Q. Well, three or four hundred?

30

A. Well, whatever it was, three or four or five hundred dollars more, I was willing to pay that price in order to get settled up.

Q. And you agreed to pay it, didn't you?

A. I said I would take the car, yes, whatever it was.

Q. Then Mr. Fleetwood left Mr. Smith's office that day with a definite agreement with you to take your Hudson car in trade and so much consideration in addition for a seven-passenger Badger-top car; that is correct, isn't it?

A. That was my understanding, yes.

State of case, P. 42, L. 18-36; P. 43, L. 1-18.

10 And on examination of Mr. Joseph B. Fleetwood, who was called as a witness by the plaintiff he testified as follows:

A. There was none made until the latter part of January. I was there several times.

Q. What was the arrangement you made then?

A. Then I arranged to deliver him a new seven-passenger car with a Badger top.

Q. When were you to deliver it?

A. As soon as it could be gotten from the factory.

20 Q. What were you to allow him for his old car?

A. I think the price that was stipulated under the old agreement.

Q. Did you ever deliver that car to him?

A. No, sir.

Q. Were you ready to deliver the car to him?

A. Yes, sir.

Q. When?

A. Shortly after I got notice from him that he didn't want further dealings with me.

30 Q. Did you take it up then and deliver the car?

A. No, sir; I had it for him if he wanted it, but he instructed me he didn't want to have anything further to do with me in any way, shape or form, as you will see by a letter there.

Q. What were the terms of the second agreement you had between you and Mr. Firth?

A. There were no terms only verbal.

State of case, P. 69, L. 1-27.

And further testimony Mr. Fleetwood shows:

Q. And that agreement was made between you and Mr. Firth?

A. Yes, sir.

Q. And accepted by both parties?

A. Yes, sir.

10

State of case, P. 71, L. 14-18; L. 24-30.

And Mr. Fleetwood, further testifying, says:

Q. You were to deliver the car but you made no arrangement as to the terms, did you?

A. Yes, I think the terms were all agreed upon, except I don't know that he had the charges, for his financing charges, and so forth, from the time of delivery. But the terms, the price and everything was agreed upon and he wanted the car as soon as he could get it, and I told him I would get it for him as soon as I could get it.

20

State of case, P. 71, L. 22-30.

The above testimony clearly shows that the plaintiff did abandon the contract upon which he has brought suit, to wit, a breach of warranty. That there was clearly a new contract entered into between the parties hereto and the old one abandoned.

“Novation consists of a bilateral agreement for the substitution of one obligation for another, and may take place either by the substitution of a new for the old, or by the substitution of a new agreement

30

between the parties or by a change of parties and agreement at the same time."

Parson Mfg. Co. v. Hamilton Ice Mfg. Co.  
73 Atl. P. 254.

10 "Where the parties to an existing agreement found themselves unable to agree upon the amount due thereunder it was competent for them to adjust their differences by another contract, whereby the one obligated herself to pay to the other a fixed sum of money in settlement of their accounts. Held that the later contract, under the doctrine of novation, was substituted for the earlier contract, and the rights of the parties were controlled by its terms; the earlier contract being thereby extinguished."

Morecraft v. Allen—75 Atl. P. 920.

20 "Novation in general where the facts were in dispute is ordinarily a question for the jury where there is no doubt as to the terms of the agreements it is a question of law for the Court.

Morecraft v. Allen—75 Atl. 922; 29 Cyc. 1140

30 There cannot be any doubt as to terms of the new agreement in this case having been entered into between the parties to this suit because the plaintiff and also Joseph B. Fleetwood, who was called as a witness by the plaintiff, has shown by the testimony above that there was an entire new contract entered into between the parties so that it was not uncertain but plainly proven by the plaintiff as to price, terms, &c.

State of case, P. 71.

Therefore it was a question for the Court to decide that a novation had been effected.

“A Novation having been effected it was absolutely and unconditional and amounted to a direct extinguishment of the original debt with all the rights, and liens appertaining thereto.”

29 Cyc. 1137, 1138.

Under that decision cited *Schlicher v. Vogel*, 49 Atl., 448 and was affirmed in 54 Atl. 1125.

So that in this case there being a substitution of a new agreement the old debt was entirely extinguished and the Court was within its jurisdiction in granting a non-suit in this case as the Court said, “By the plaintiff’s own case they had proved a novation. That this action was based on a certain written contract and agreement dated November 10, 1922, and the plaintiff undertakes to recover because of the breach of warranty on the theory that he has rescinded the contract. 10

The suit is not based upon damages for the breach of warranty but upon return of the moneys which the plaintiff claims he has paid, or the purchase price of the car. But the undisputed fact seems to be that there was a new agreement made and the correspondence that has been offered in evidence on the part of the plaintiff calls on the defendant to deliver him a new Hudson seven-passenger car with a Badger enclosure, and if not done in 24 hours the matter will be placed in the hands of an attorney. 20

State of case, P. 18-19.

It seems to be an admission and acknowledgment that there was a new arrangement made. 30

State of case, P. 73-74.

And in the Court's conclusion he practically stated that the pleadings as now framed, there could be no recovery, but whether there should be an amendment or a new suit, was a question, but plaintiff's attorney did not take advantage of that proposition to ask for an amendment in this case.

On the original suit as brought, the case plainly shows there was a novation and a new contract entered, and after the new agreement between the parties there  
10 was no return of the car upon the original contract.

On the question of a return of the article on which suit is based.

In rescinding the contract of sale the purchaser must return or offer to return everything of value which he received under the contract, upon condition that the seller do likewise, unless the other is unable or positively refuses to do.

Berry on automobiles, P. 1270.

In this case the plaintiff was able and could have re-  
20 turned the automobile, but he failed to make a return after a new contract was entered into.

As the Sales Act says: 'Where there is a breach of warranty by the seller, the buyer may at his election if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.'

Compiled Stat., Section 69, P. 4663.

The plaintiff under his new contract with Mr. Fleetwood never offered to return the 1918 car.

30 Q. Now after making the new arrangement with Mr. Fleetwood at Mr. Smith's office you never offered to return the 1918 car, did you?

A. It was not necessary.

Q. I didn't ask you that. You never did offer to return it, did you?

A. No.

Q. And you never did return it?

A. No.

Q. And you still have possession of it?

A. Yes.

Q. Have you driven it since that time?

A. Not since December 31, 1922.

State of case, P. 44, L. 24-37.

Q. You say that after you received that letter you did obtain a car for him? 10

A. Yes.

Q. He never delivered the old car to you?

A. At no time; no, sir.

Q. Never offered to return it?

A. No, sir.

Q. Or to pay the difference in price between that and a new car?

A. No, sir. 20

Q. And has not to this day?

A. No, sir.

State of case, P. 73, L. 3-14.

Plaintiff in his brief says that the performance of a new contract is accepted as satisfaction of the old contract but it does not discharge the original contract until the promise which was accepted as the satisfaction, has been performed.

In reply to that we have shown that by plaintiff in letter that he prevented Joseph B. Fleetwood from performing the contract, stating that if the car was not delivered within twenty-four hours he would place the same in the hands of his attorney. 30

By the testimony of Mr. Fleetwood that he could have delivered the car to him and was ready to deliver the car to Mr. Firth but Mr. Firth told him he did not want anything further to do with him.

State of case, P. 69, L. 14-25.

Counsel for plaintiff has argued in his brief that it was merely a proposition of settlement, but he is precluded from that argument because his own client, the plaintiff in this case, says that there was an entire new agreement entered into between the parties which was not  
10 a question of settlement but a substitution of a new agreement for the old which entirely extinguished the old contract and a new one substituted in place of the old and not an uncertain but plain and clear and purely a question of the Court to decide and not a jury question.

Plaintiff in his brief states that under the Sales Act the contract is over Five hundred dollars and was unenforceable. He stated that he was going to turn in his old car and the amount that he had agreed to pay on a new contract was less than four hundred dollars as follows:

20 Q. And what was to be the purchase price of the new seven-passenger Badger-top car?

A. I don't remember, a few hundred dollars more, three or four hundred dollars more, I believe.

State of the Case, P. 43, L. 1-5.

I don't think this contention of the Plaintiff applies in this case as defendants were defending this suit on a breach of warranty. That contention might apply where a plaintiff is seeking to recover on a contract but cannot apply in this case. Plaintiff testified as above that the  
30 amount he was to pay on his new contract did not exceed the sum of Five hundred dollars.

But we are confronted with what can be construed as a written contract in this case under the letter of plaintiff

to defendant in which he confirms the verbal agreement concerning the purchase of a new Hudson seven-passenger car with Badger enclosure to replace the former sedan which communication was signed by plaintiff and can be construed as a written contract in this case, which overcomes the objection of plaintiff that there was no written contract for the new car, as plaintiff in his letter says he accepted the arrangement in good faith and requested the car to be delivered within 24 hours, which is a written contract for a new car on the part of plaintiff. 10

State of case, P. 15-16.

Plaintiff bases his contention upon reversal of this case that novation is a question for the jury and bases his contention on *Lorentowicz v. Bowers*, 132, Atl. 630.

In that case it was shown that the note in settlement of the three notes held was never tendered and that the contract was not completed so as to substitute a new contract, but in the case at issue plaintiff and defendant both show a new contract and plaintiff by his own act prevented the delivery of the car under the second contract by his letter of February 1, 1923. 20

State of case, P. 15 L. 30.

And this plaintiff attempted to dispose of the car in question as shown in

State of case, P. 30.

And by his own testimony shows that he rescinded the contract and purchased a new car.

State of case, P. 30 L. 14.

And that he damaged the car in question by freezing the radiator. 30

State of case, P. 30 L. 25.

And the car was not in the same condition as when he received it from Fleetwood, as there was a new casting placed on the car.

State of case, P. 30 L. 6.

So that in this case there was no doubt as to the terms of the agreement which constituted a novation, and so it was a question of law for the Court and not for the jury.

Morecraft vs. Allen—75 Atl. P. 922.

And as the Court says in Cook vs. McAdoo, 90 Atl. P. 393, the principal distinguishing feature between them is that the novation implies the extinguishment of an existing debt or obligation by the parties thereto and  
10 its transition into a new extinguishment between the same or different parties and the Court said "that there being a contract in existence some new contract is substituted for it either between the same or different parties, the consideration mutually being the discharge of the contract."

Cook vs. McAdoo—90 Atl. 303.

Also stated in Morecraft vs. Allen—75 Atl. 920.

#### CONCLUSION

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1. I respectfully submit in this case that there was no misrepresentation on the sale of the car.

2. That under the sales act there was no return of the car under the second agreement so entered into by the parties and no effort by the plaintiff to offer to return the car.

30 3. That the plaintiff clearly admitted the second agreement which shows a novation under our law and released defendant from liability under the original contract. That there was a new contract entered into between the parties and plaintiff refused to accept the new car by his testimony as set forth in this case.

4. That the second contract was completed between the parties as to the terms and conditions and was substituted in place of the first contract.

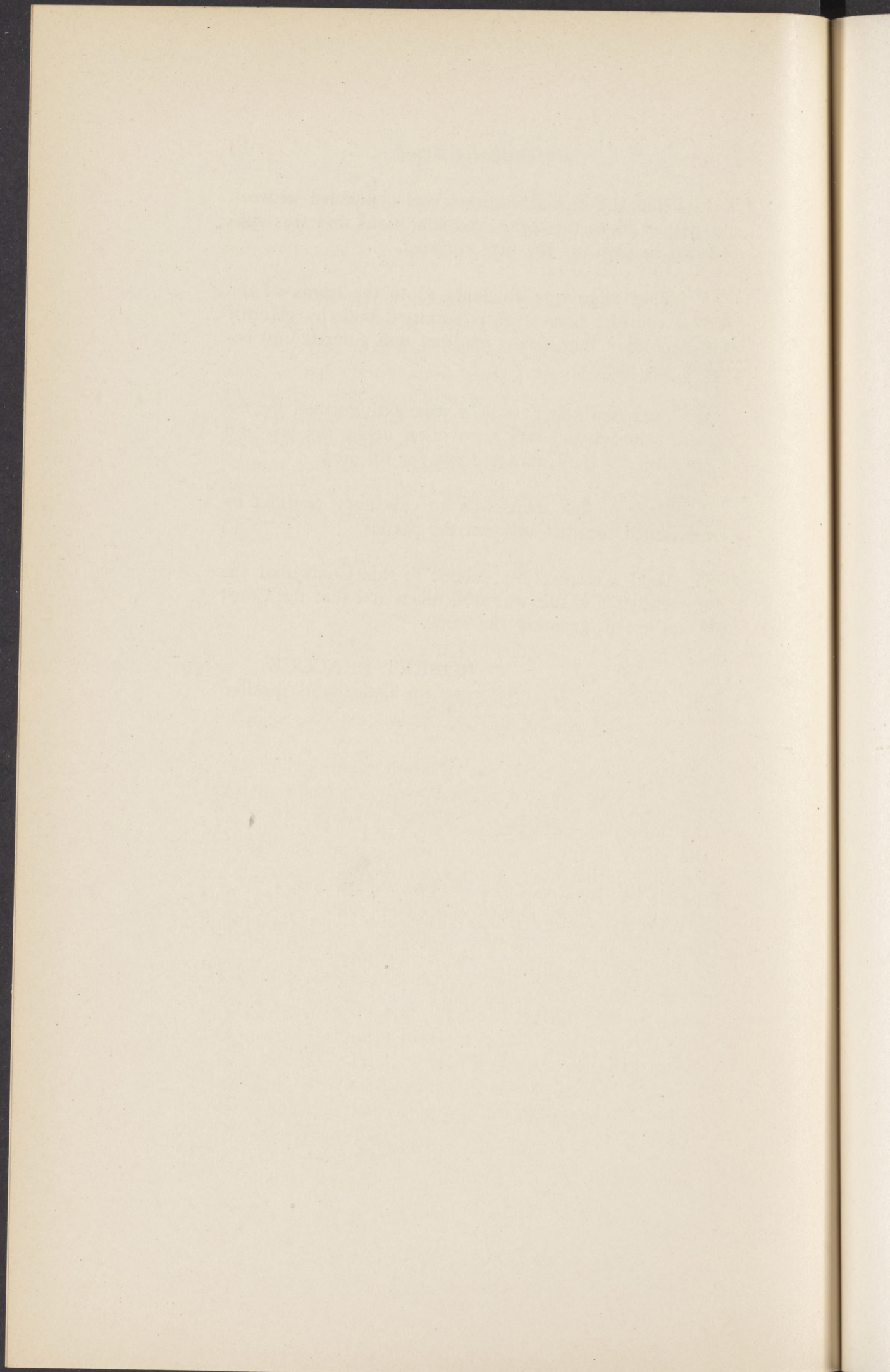
5. That there was no doubt as to the terms of the second contract because it is admitted both by plaintiff and defendant that a new contract was entered into between the parties.

6. And that the first debt was extinguished by the second contract and was a novation under the law and a question for the Court and not for the jury. 10

7. And so that there was no executory contract by an executed contract between the parties.

8. And I respectfully submit to this Court that the judgment of non-suit was well taken and that the Court did not err in granting the same.

ROBERT PEACOCK, 20  
Attorney for Defendant-Appellee.



NEW JERSEY COURT OF ERRORS AND  
APPEALS

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C. VERDON FIRTH,  
*Plaintiff-Appellee,*

v.

FLEETWOOD MOTOR CAR CO.,  
*Defendant-Appellant.*

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ON APPEAL, ETC.,

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BRIEF.

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This is an action brought by the plaintiff against the defendant alleging a breach of a warranty as to the year of the manufacturing of a motor car. It was a Burlington County Circuit Court issue, tried before the Honorable Harold B. Wells, Judge, and a jury, at Mount Holly, New Jersey, on November 26th, 1923. Judgment of non-suit was entered.

The error complained of is, that the Court erred in granting of a non-suit based on the fact that the proof in the plaintiff's case showed a novation and that this released the defendant from liability under the original contract, which was the base of the action. The Supreme Court reversed the judgment of the trial court. The appellee in this court con-

tends that there was no novation for the following reasons:

That there was no proof which justified the finding of a discharge of the ordinary debt, nor was there any express agreement or acts of the parties clearly showing the intention to work a novation.

Novation is defined to be "a substitution of a new obligation between the same parties with intent to extinguish the old obligation."

29 *Cyc.*, 1134.

In the case before us, it was merely a proposition of settlement submitted by the defendant. See Evidence, pages 14, 15, 16, 19 and 42; particularly the first paragraph of letter on page 15.

It was an attempt to compromise and an agreement to compromise is not a novation.

*Green v. Wallace Iron Works*, 49 N. J. E. 48 (see page 54).

In the same it was held: "That the old debt was not extinguished by the agreement; if the money was not paid as agreed, the whole debt could be enforced."

In this case there was an effort to compromise by the delivery of another car but there was no delivery, therefore, the original claim was not satisfied but still existed.

A novation agreement cannot be effected except "by the substitution of a new contract for an old one" and "the new contract must be a valid one on which the creditor can have his remedy."

20th R. C. L., page 368, P. 11.

If it was not a compromise then it was an agreement of sale and not being in writing was void.

On pages 69-70, answering the question:

“Were you going to sell this car to him on a verbal contract or to reduce it to writing later?”

A. Well, I couldn't say about that. I suppose that the car might have been delivered then without a contract.

Q. Well, were you going to sell it to him on conditional sale or what? What were the terms that you made with him?

A. Well, I took it for granted it would be a conditional sale. The other one was and I assumed that would be.”

Q. Was the contract ever consummated between you and him and final terms ever agreed upon?

A. Yes, verbally.”

Mr. Fleetwood, page 69 line 30 to page 70 line 8 of the state of the case testified that the new car was to be paid for by allowing the appellant \$1200.00 for the old car and he was to pay the difference in cash. This clearly shows that the price of the new car was over \$500.00 for this one item of credit alone is \$1200.00; such a contract is void under the fourth section of “An act concerning the sale of goods and makes uniform the law relating thereto,” being page 311 P. L. 1907, which is as follows:

“4. Acceptance and receipt of goods; earnest; part payment; note or memorandum; signature. (1) A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the

contract or sale be signed by the party to be charged or his agent in that behalf."

C. S. 4648.

It being void there can be no novation.

Novation is a question for the jury, and the Court erred in taking it from the jury.

Whether or not a debt has been a novation is ordinarily a question of fact and dependent entirely upon intention of the parties to the particular transaction claimed to be a novation.

29 *Cyc.* 1140.

The question whether there was a novation here or not is so equivocal and uncertain, as to justify its submission. In this case, the Court presumed a novation and a novation is never presumed.

The testimony of the parties shows that the new arrangement was conditional upon its being done within a reasonable length of time.

In the State of the Case, page 69, Mr. Fleetwood says he was to deliver a car "as soon as it could be gotten from the factory." Mr. Firth says, on page 28 of the state of the case that Mr. Fleetwood said that it would take "Some little time to get a car."

If the contract is conditional, then novation takes effect from the performance of condition.

29 *Cyc.* 1134.

Here it was conditional.

This is not a novation but is an accord and satisfaction.

The performance of a new contract is accepted as

satisfaction of the old contract but it does not discharge the original contract until the promise, which was accepted as the satisfaction, has been performed.

The doctrine is clearly set forth in  
20 R. C. L., pp. 361 and 369.

FRANCIS J. SMITH,  
*Attorney for Plaintiff-Appellee.*

#505 Federal St.,  
Camden, N. J.

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