INDEX

	PAGE
Bill of Complaint	1
Answer and Counter-Claim of Lida A. Endicott	22
Answer and Counter-Claim of Harry Garfinkel	37
Answer and Counter-Claim of Milton J. Garfinkel	57
Replication to Answer and Answer to Counter-Claim of Lida A. Endicott, Executrix of Thomas D. Endicott, Deceased	76
Replication to Answer and Answer to Counter-Claim of Harry Garfinkel	81
Replication to Answer and Answer to Counter-Claim of Milton J. Garfinkel	86
Replication to Answer to Counter-Claim of Lida A. Endicott	91
Replication to Answer to Counter-Claim of Harry Garfinkel	93
Replication to Answer to Counter-Claim of Milton J. Garfinkel	95
Testimony	97

New Jersey State Library

PAGE

COMPLAINANT'S TESTIMONY:

Max A. Kreps—Direct 98
Cross 111

Lloyd E. Fuller—Direct 134
Cross 142

John C. Carroll—Direct 146
Cross 149

John A. Kershaw—Direct 152
Cross 154

George Fiedler—Direct 154

Joseph L. Soloff—Direct 157

DEFENDANTS' TESTIMONY:

Clarence L. Cole—Direct 162
Cross 170

Milton Garfinkel—Direct 177
Cross 198
Recalled—Direct 320
Recalled—Cross 323

Max A. Kreps—Cross 228

Joseph L. Soloff—Direct 232

William J. Wilson—Direct 233
Cross 235

Lydie E. Endicott—Direct 237

New Jersey State Library

PAGE

John Soloff—Direct 238
Cross. 253
Recalled—Direct. 291

F. Hobart Higgins—Direct. 262
Cross. 283

Robert Garfinkel—Direct 300
Cross. 302

Burton A. Gaskill—Direct. 313
Cross. 318

Stipulation. 330

DEPOSITION:

Harry Garfinkel—Direct 333
Cross. 357
Re-direct. 381

COMPLAINANT'S REBUTTAL TESTIMONY:

F. Hobart Higgins—Direct. 390
Recalled—Direct. 397
Recalled—Cross. 399

Joseph L. Soloff—Direct. 394

John Soloff—Direct 396

Exhibit C1, Insurance Policy, Hudson Casualty Company to Harry Garfinkel. 402

Exhibit C2, Insurance Policy, Hudson Casualty Company to Milton Garfinkel. 415

PAGE

Exhibit C5, Letter, Hudson Casualty Company, to Harry Garfinkel, Dated August 3, 1928, Enclosing Check for $39.56..... 428

Exhibit C6, Conditional Sale Contract..... 429

Exhibit C8, Letter, Robert C. Garfinkel to Hudson Casualty Company, Dated Dec. 13, 1928..... 434

Exhibit C9, Letter, Robert C. Garfinkel to Hudson Casualty Company, Dated Dec. 11, 1928..... 436

Exhibit C10, Letter, Robert C. Garfinkel to Hudson Casualty Company, Dated Dec. 21, 1928..... 437

Exhibit C11, Letter, Hudson Casualty Company to Harry Garfinkel, Dated Nov. 23, 1928..... 438

Exhibit C12, Letter, Enclosure in Letter Marked C11 439

Exhibit C13, Letter, Harry Garfinkel to Hudson Casualty Co., Dated Dec. 12, 1928.... 440

Exhibit D1, Automobile Insurance Order..... 441

Exhibit D2, Letter, Hudson Casualty Company to Harry Garfinkel, Dated July 24, 1928..... 442

Exhibit D3, Record of Case in re Endicott v. Garfinkel and Cordery..... 443

PAGE

Exhibit D4, Letter, C. L. Cole to Milton Garfinkel, Dated June 13, 1929..... 481

Exhibit D5, Insurance Policy, United States Fidelity and Guaranty Company to Milton J. Garfinkel..... 484

Exhibit D6, Letter, Taylor & Soloff to Harry Garfinkel, Dated April 10, 1928..... 499

Exhibit D7, Letter, Hudson Casualty Company to Harry Garfinkel, Dated Aug. 10, 1928.. 500

Exhibit D8, Executed Contract for Defense Between Hudson Casualty Company and Harry Garfinkel 501

Exhibit D9, Letter, Taylor & Soloff to Hudson Casualty Company, Dated Nov. 20, 1928.. 504

Stipulation..... 505

Conclusions..... 507

Final Decree 511

Notice of Appeal..... 514

Petition of Appeal..... 517

BILL OF COMPLAINT.

(Filed Dec. 24, 1929.)

IN CHANCERY OF NEW JERSEY.

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

Complainant, Hudson Casualty Insurance Company, a corporation of the State of New Jersey, incorporated under the insurance laws, with its principal place of business in the City of Jersey City, County of Hudson and State of New Jersey, respectfully shows unto your Honor:

1. Complainant is engaged in the business of insuring against loss by reason of the liability imposed by law on the assured for damages on account of bodily injuries or death and against loss by reason of damage to or destruction of property which may be occasioned by the operation of automobiles, and, in the performance of its business, it issues policies of insurance to owners of automobiles insuring against such losses. The risk which complainant assumes in any individual case is affected by the personal responsibility of the assured, the nature of his business, his care as a driver and as an owner, places where the car will be used and elements of similar nature which require a knowledge of the assured and his business; and in many cases complainant will refuse risks and in other instances the amount of premiums which complainant receives is

governed or affected by one or more of the elements above referred to.

2. On or about the 2d day of February, 1928, one Milton J. Garfinkel, of Ventnor City, New Jersey, applied to complainant for a policy insuring a Ford car and, thereupon, complainant did issue a policy of insurance to the said Milton J. Garfinkel, of Ventnor City, New Jersey, upon a Ford car, insuring the said Milton J. Garfinkel from the 2d day of February, 1928, until the 2d day of February, 1929, against loss as hereinbefore set forth, under the terms and conditions as set forth in said policy. It was represented by the said Milton J. Garfinkel at the time of obtaining said insurance that the car was to be used only for private and business purposes in the vicinity of Ventnor City, N. J.

3. Complainant issued said policy when requested, so that there should be no delay in coverage, and immediately thereafter instituted an investigation. Complainant discovered that the said Milton J. Garfinkel was slightly lame and did also discover certain other matters which made it apparent to complainant that it did not desire to assume the risk and continue the insurance, and thereupon, and on or about the 6th day of March, 1928, complainant notified the said Milton J. Garfinkel, in accordance with the terms and conditions of the said policy, that the said policy was cancelled because "not wanted by the company."

4. Upon or about the 6th day of April, 1928, an application was made to complainant through its

representative in Atlantic City, ostensibly by one Harry Garfinkel, for insurance upon a Chevrolet car, and thereupon complainant issued its policy of insurance insuring the said Harry Garfinkel with respect to said Chevrolet car against loss, as hereinabove set forth, subject to certain terms and conditions, a copy of which said policy of insurance is hereto annexed and made a part hereof and marked Exhibit 1; that at the time of the making of the said application it was represented to complainant, as appears by the schedule annexed to said policy, that said automobile would be used for the private and business purposes of the assured in the vicinity of Ventnor, New Jersey, and that the interest of the assured was that of unconditional and sole ownership, and that no company or association had cancelled or refused to issue or renew automobile insurance to the assured during the then past three years, except as therein stated. Complainant issued its said policy of insurance, as aforesaid, upon the representation that the said Harry Garfinkel was the sole and unconditional owner of said car and that it would be used as hereinbefore set forth, and believing that the said Harry Garfinkel was the true and rightful owner of said car and that the said car would be used in his business, which was represented to be that of a jewelry salesman.

5. On May 14, 1928, the automobile covered by the insurance policy hereinbefore last referred to was in collision with a car driven by one Timothy Cordery. There were in the car driven by the said Timothy Cordery the said Timothy Cordery and

Thomas D. Endicott, and as a result of said collision the said Thomas D. Endicott was killed.

6. Complainant was immediately notified of the accident and set in progress an investigation and then discovered, and complainant charges the fact to be, that the said car, while purchased from Bartrum and Kershal Co., Inc., of Atlantic City, New Jersey, in the name of the said Harry Garfinkel, was, in fact, purchased by and for the said Milton J. Garfinkel, and that said car, after its purchase, was driven by the said Milton J. Garfinkel in and about the business of the said Milton J. Garfinkel, and that it was purchased for the purpose of being used by, and it was the intent of the said Milton J. Garfinkel and Harry Garfinkel at the time of purchase and at the time of the making of the application to complainant that it should be used by the said Milton J. Garfinkel aforesaid in and about his business, and not be used or driven by the said Harry Garfinkel in and about his business, and that the said car, instead of being principally used in the vicinity of Ventnor, N. J., was in fact principally used in the vicinity of Philadelphia, Pa., and that it was the intent and purpose of the said Milton J. Garfinkel and Harry Garfinkel, at the time of the purchase of said car and of the making of the application to complainant, that it should be so used principally in the vicinity of Philadelphia and not in the vicinity of Ventnor.

7. Complainant charges that the application for the insurance was made to complainant in the name of the said Harry Garfinkel, and the purchase of

said car was made in the name of the said Harry Garfinkel so that application could be made to complainant in the name of the said Harry Garfinkel, solely because the said Milton J. Garfinkel and Harry Garfinkel knew that, if application was made to complainant for a policy of insurance in the name of the said Milton J. Garfinkel, who was, in fact, the real owner of said car, complainant would not issue its policy, and that the application to complainant in the name of the said Harry Garfinkel was made as a result of a conspiracy between the said Milton J. Garfinkel and Harry Garfinkel to deceive complainant and to induce it to grant a policy of insurance assuming risks which it would not have issued or assumed had it known the true facts; and the said Milton J. Garfinkel and Harry Garfinkel knew that had complainant known the true facts with respect to the ownership of said car and the use to which it was intended said car was to be put, it would not have issued its policy of insurance or assumed the risks.

8. Immediately upon discovering the facts aforesaid and the fraud perpetrated upon it, complainant notified the said Harry Garfinkel of the cancellation of said insurance on or about the 3d day of August, 1928, said cancellation being as of the date of issue, namely, noon of April 6, 1928, and complainant says that its delay in cancelling the policy of insurance was due to the difficulty which it had and the time which it had to spend in making the investigation hereinbefore set forth and in getting at the true facts, complainant charging that when it approached the said Harry Garfinkel for information the said

Harry Garfinkel refused to give any information and complainant acted as soon as it had the information upon which to act.

9. Complainant says that it also discovered, and it charges the fact to be, that the said Harry Garfinkel, at the time of the issuance of said policy, was not the sole and unconditional owner of said car, but that, on the contrary, he had given as part payment of the purchase price certain notes, which said notes were discounted by the General Motors Acceptance Corporation, and that he held only a conditional bill of sale of said car.

10. On or about the 28th day of September, 1928, a suit was brought in the New Jersey Supreme Court by Lida A. Endicott, executrix of Thomas D. Endicott, deceased, as plaintiff, v. Harry Garfinkel, Milton Garfinkel and Timothy Cordery, to recover damages for the death of the said Thomas D. Endicott, and in said suit a counter-claim was filed by the said Harry Garfinkel and Milton Garfinkel, asking damages against the said defendant, Timothy Cordery, and in said suit a counter-claim was filed by the said Timothy Cordery against the defendants, Harry Garfinkel and Milton Garfinkel, and said suit came on for trial at the New Jersey Supreme Court, Atlantic Circuit, on the 17th day of June, 1929, and resulted in a verdict in favor of the plaintiff, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against Harry Garfinkel and Milton Garfinkel, for $20,000, and in favor of the defendant, Timothy Cordery, against the defendants, Harry Garfinkel and Milton Garfinkel, for

$200, and thereafter a rule to show cause was taken which was argued before the Supreme Court, and which resulted, on or about the 14th day of October, 1928, in a reduction of the verdict in favor of the plaintiff to $15,000, and judgment final was entered in favor of the plaintiff for the said $15,000 and also in favor of the said Timothy Cordery for $200.

11. Complainants further show that said judgments have not been paid, and if they are not paid, as complainants are advised they may not be, and if the defendant, Harry Garfinkel, be insolvent, then, under the terms of the policy, complainant may be charged to be liable for the payment of said judgments and suits may be brought by the said Lida A. Endicott, executrix of Thomas D. Endicott, deceased, and by the said Timothy Cordery, against complainant; and the said Harry Garfinkel and Milton J. Garfinkel, if they shall pay said judgments, may bring suits against complainant to recover the amounts which they may pay.

12. At the time of the happening of the accident one Isaac M. Garfinkel, who is a brother of Harry Garfinkel and the father of Milton J. Garfinkel, was riding in said car, and as a result of the accident was injured,, and although no suit has been brought by the said Isaac M. Garfinkel, he may bring suit to recover for his damages and ultimately complainant may be sued at law to hold it responsible for the damages to the said Isaac M. Garfinkel.

13. Complainant further shows that the said Harry Garfinkel is an uncle of Milton J. Garfinkel.

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

Complainant has no adequate remedy at law and therefore prays:

1. That the defendants, who are Harry Garfinkel, Milton J. Garfinkel, Isaac M. Garfinkel, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, Timothy Cordery, may answer this bill and each statement therein contained, but without oath.

2. That it may be adjudged and decreed that the policy of insurance hereinbefore referred to was obtained from complainant by fraud and that said policy of insurance had no binding force and effect from the date of its issue and that its cancellation by complainant as of the date of issue be confirmed, and that complainant is under no liability under said policy and never was under any liability under said policy to the defendants or any or either of them.

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

4. That, pending the determination of this suit, defendants and their attorneys and agents be temporarily enjoined as aforesaid.

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

MERRITT LANE,
Solicitor for and of Counsel with Complainant.

EXHIBIT T.

STOCK COMPANY

Form A. P.—Automobile Policy
Public Liab. and Prop. Damage
(Trade-mark):
Hudson Casualty Insurance Company
As Reliable as the Hudson
HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City, New Jersey

In Consideration of the premium herein provided and of the statements contained in the Schedule hereinafter set forth, which statements the Named Assured makes and warrants to be true by the acceptance of this Policy, the HUDSON CASUALTY INSURANCE COMPANY, hereinafter called the Company,

HEREBY AGREES

with the Named Assured, subject to the limits and conditions hereinafter set forth.

(Agreement I—Legal liability for bodily injuries or death)

TO PAY ANY LOSS BY REASON OF THE LIABILITY IMPOSED BY LAW upon the Assured for damages on account of bodily injuries, or death resulting at any time therefrom, including instantaneous death, accidentally suffered or alleged to have been suffered while this policy is in force, by any person or persons (except those persons referred to in Condition E.) by reason of the ownership, maintenance or use of any of the automobiles as described and enumerated in Statement 5 of the said Schedule; and including in the case of commercial automobiles, the loading, transportation and unloading of goods usual to the business of the Assured as defined in Statement 2 of said Schedule; and

(Agreement II—Legal liability for damage to property of others)

TO PAY ANY LOSS BY REASON OF THE LIABILITY IMPOSED BY LAW upon the Assured for damages (including damages allowed for loss or use of property damaged or destroyed) on account of damage to or destruction of property (except property of the Assured or property of others by or in charge of the Assured or any of the Assured's employees or carried in or upon the automobiles covered hereby) as a result of the ownership, maintenance or use of any of the automobiles enumerated and described in Statement 5 of said Schedule; including in the case of commercial automobiles, the loading, transportation and unloading of goods usual to the business of the Assured as

defined in Statement 2 of said Schedule. (This Agreement shall be effective only as provided in Statement 5 of said Schedule.)
And in addition, the Company agrees

TO DEFEND THE ASSURED AND PAY EXPENSES AND COSTS:

CONDITIONS
OMNIBUS COVERAGE

Condition A. The term "Named Assured" shall apply to the Assured named and described as such in Statement I of said Schedule, but the term "Assured" shall apply to any person or persons while riding in or legally operating any of the automobiles described in Statement 5 of said Schedule, and any other person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant, it being understood, however, that this policy shall not cover as provided in Item (2) of Condition E hereof, nor shall it be available to any Automobile Garage, Sales Agency and/or Service Station nor to any Agent or Employee thereof, and provided further that indemnity under the said policy shall insure first to the named Assured, and then, (as to the remainder, if any) to any other persons entitled thereto. In the event an automobile covered by this policy is sold, transferred or assigned, it is agreed that this policy shall not

extend to indemnify the purchaser, transferee or assignee, unless and until the consent of the Company in writing has been obtained.

NOTICE AND COSTS.

Condition B. The Assured shall give the Company or its duly authorized agent immediate written notice of any accidents causing loss covered by this policy, with the fullest information obtainable. The Assured shall give like notice of claims for damages on account of such accidents. If any suit is brought against the Assured to recover such damages, the Assured shall immediately forward to the Company every summons or other process served upon him and the Company shall defend such suit (whether groundless or not) in the name and on behalf of the Assured. The expenses incurred by the Company in defending any suit or legal proceeding, including the interest on any verdict and any costs taxed against the Assured, and any expenses necessarily incurred and paid in money by the Assured for such immediate surgical aid as may be imperative at the time of any accident, irrespective of the limit of liability expressed herein, will be paid by the Company.

CLAIMS AND SUITS

Condition C. The Company shall have the exclusive right to contest or settle any of said claims or suits, and the Assured shall not incur any expense (except for such immediate surgical aid as may be imperative at the time of the accident) or settle any

claim or suit without the written authority of the Company.

CO-OPERATION OF ASSURED

Condition D. The Assured shall not voluntarily assume any liability, nor incur any expense, other than for immediate surgical relief, nor settle any claim, except at the Assured's own cost. The Assured shall not interfere in any negotiation for settlement, nor in any legal proceeding, but whenever requested by the Company, and at the Company's expense, the Assured shall aid in securing information and evidence and the attendance of witnesses, and shall at all times co-operate with the Company (except in a pecuniary way) in all matters which the Company deems necessary in the defense of any suit or in the prosecution of any appeal.

EXCLUSIONS

Condition E. (1) This policy shall not cover in respect of any automobile: (a) while driven or manipulated by any person in violation of law as to age or, if there is no legal age limit, under the age of sixteen years; (b) while used for any other purposes than those specified in Statement 6 of said Schedule; (c) while driven or manipulated in any race or speed test; (d) while being used for towing or propelling a trailer or any other vehicle used as a trailer, unless such privilege is endorsed hereon and a proper premium charged therefor, or such trailer is also insured by the Company, (incidental assistance to a stranded automobile on the road is

permitted); (e) while used elsewhere than within the limits of the United States of America or the Dominion of Canada; or (f) while used other than during the policy period defined herein; (2) This policy shall not indemnify nor protect any firm, person or corporation other than the Named Assured if this policy is issued to cover automobiles while rented to others or used to carry passengers for a consideration; (3) the Company shall not be liable on account of bodily injuries or death suffered by Assured's domestic or household servants while operating or caring for any insured automobile or suffered by other employees of the Assured if engaged in the duties of their employment at the time of the accident; (4) nor shall the Company be liable for any liability assumed by or imposed upon the Assured under any Workmen's Compensation Plan, Law or Agreement.

PREMIUM COMPUTATION

Condition F. The premium for this policy is based upon a specific charge for each automobile dependent upon its description and the purposes for which it is to be used and the extent of the insurance required by the Assured.

CANCELLATION

Condition G. This policy may be cancelled at any time by either of the parties upon written notice to the other party stating when thereafter cancellation shall be effective and the date of cancellation shall then be the end of the policy period. If can-

celled by the Assured the Company shall receive or retain the short rate premium calculated in accordance with the short rate table printed hereon. If cancelled by the Company the Company shall be entitled to the earned premium pro rata. Notice of cancellation in writing, mailed to or delivered at the address of the Assured as herein given, shall be a sufficient notice, and the check of the Company or of its duly authorized agent, similarly mailed or delivered, a sufficient tender of any unearned premium.

SUBROGATION

Condition H. In case of payment of loss under this policy the Company shall be subrogated to all rights of the Assured against any person, firm or corporation as respects such loss, and the Assured shall do everything which may be necessary to secure to the Company such rights.

OTHER INSURANCE

Condition I. If the Named Assured carries a policy of another insurer against a loss covered by this policy, the Company shall not be liable for a larger proportion of the entire loss than the amount hereby insured bears to the total amount of the Named Assured's valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.

INSPECTION

Condition J. Any of the Company's authorized inspectors shall have the right and opportunity to inspect at all reasonable times during the policy period any of the automobiles covered by this policy.

ACTION AGAINST COMPANY

Condition K. No action for the indemnity against loss provided for in Agreements I and II of this policy shall lie against the Company unless brought within two years from the date when the loss is made certain either by judgment against the Assured after final termination of the litigation or by agreement between the parties with the written consent of the Company. No action to recover under any other agreement shall lie against the Company, unless brought within twelve months after the right of action accrues.

BANKRUPTCY OR INSOLVENCY OF ASSURED

Condition L. The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the term of this policy but in case of such insolvency or bankruptcy an action may be maintained by the claimant against the Company subject to the terms of this policy for an amount not exceeding the amount of this policy.

CONFLICTING STATUTORY PROVISIONS

Condition M. If any condition contained in this policy relating to the limitation of time for notice of accident or for any legal proceeding is at variance with any specific statutory provision in the State in which the accident occurs, such specific statutory provisions shall be substituted for such condition.

ASSIGNMENT OF INTEREST

Condition N. No assignment of interest under this policy shall be binding upon the Company unless such assignment is consented to by endorsement signed by its President and Vice President and countersigned by a duly authorized agent, but in the event of the death, insolvency or bankruptcy of the Named Assured within the policy period, the policy during the unexpired portion of such period shall cover the legal representative of the Named Assured, provided that notice in writing is given to the Company within thirty days after the date of such death, insolvency or bankruptcy.

CHANGES

Condition O. No change in the Agreements, Conditions, or Statements contained in the Schedule of this policy, either printed or written, shall be valid unless made by endorsement signed by the President and Vice-President and countersigned by a duly authorized agent, nor shall notice to, or knowledge possessed by any agent or any other person be held

to waive, alter or extend any of such Agreements, Conditions, or Statements contained in Schedule, nor to preclude the Company from asserting any defense under said Agreements, Conditions or Statements contained in the Schedule, unless set forth in a duly executed endorsement attached hereto.

ENDORSEMENTS MAY BE ATTACHED HERE

POL. No. A. P. 15803

SCHEDULE

1. Named Assured Harry Garfinkel
Address 4 South Surrey Ave., Ventnor City, N. J.
(Street and Number, City or Town, County and State)
Individual, Partnership, Corporation, Trustee or Estate Individual

2. The Named Assured's business or profession is Jewelry salesman

3. The policy period shall be from the 6th day of April 1928, at noon, to the 6th day of April 1929, at noon, standard time at the place where this policy has been countersigned as to each of said dates.

4. The Company's liability, as respects each automobile covered hereby, shall be limited:

(a) UNDER AGREEMENT I, to Twenty five thousand Dollars ($25,000) as respects any one accident resulting in bodily injuries to or

the death of one person, and, subject to that limit for each person, the Company's total liability on account of any one accident resulting in bodily injuries or death to more than one person is limited to Fifty thousand Dollars ($50,000)

(b) UNDER AGREEMENT II, to One thousand Dollars ($1,000) as respects any one accident, irrespective of whether property of one or more than one person is damaged or destroyed.

5. The automobiles covered by this policy and the premium charges for same are as follows:

Particulars	Automobile 1	Automobile 2
Trade Name of Automobile	Chevrolet	
Year of Model	1926	
Serial No.	2K47422	
Factory No. of Engine or Motor	1850670	
Kind of Power	gas.	
Number of Cylinders	4	
Style of Body	Sedan	
Model of Car (If Private Passenger Car.)		
Load Capacity (If Commercial Car.)		

Automobile 3	Automobile 4

(NOTE—In accordance with Agreement II, such Agreement shall be effective as respects any

automobile described above only if the premium therefor is specifically entered in the proper division provided below for such Agreement and for such automobile.)

Premium Charge on Account of		
Agreement I	$28.56	$
Agreement II	$11.00	$
Premium per Automobile	$39.56	$
$	$	

Total Premium THIRTY NINE AND 56/100 ..... Dollars $39.56 100

6. The automobiles are used for the following purposes only Private and Business

7. The automobiles are principally maintained and garaged in the city or town of Ventnor City, N. J. and are principally used in the city or town of Ventnor City, N. J. and in the vicinity of said city or town.

8. None of the automobiles described above are or will be rented to others or used to carry passengers for a consideration, except as herein stated: no exceptions

9. The interest of the Named Assured in the automobiles herein described is that of unconditional and sole ownership, except as follows: no exceptions

10. No Company or Association has cancelled or refused to issue or renew automobile insurance to the Named Assured during the past three years, except as herein stated: no exceptions

In Witness Whereof, The HUDSON CASUALTY INSURANCE COMPANY has caused this policy to be signed by its President and Vice President, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

M A Kreps
Vice-President.
Specimen

Frank J Higgins
President.
Specimen

Countersigned at JERSEY CITY, N.J.
....., 19.....

By .....
Agent.

AUTOMOBILE POLICY
Liability and Property Damage
Hudson Casualty Insurance
Company
As Reliable as the Hudson
HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City New Jersey
M. A. KREPS
General Manager
Policy No. A. P. 16321
Specimen
ISSUED TO
Harry Garfinkel
Premium, $39.56 Expiration 4/6/29

ANSWER AND COUNTER-CLAIM OF LIDA A. ENDICOTT.

(Filed Jan. 27, 1930.)

IN CHANCERY OF NEW JERSEY.

Between HUDSON CASUALTY INSURANCE COMPANY, a corporation, etc., *Complainant*, and HARRY GARFINKEL, *et al.*, *Defendants.*	On Bill, etc. Answer.

Lida A. Endicott, executrix of Thomas D. Endicott, deceased, one of the defendants in the above-entitled cause severally answering the bill of complaint filed therein, says that:

1. Defendant admits that complainant is engaged in the business of insuring against loss by reason of liability imposed by law on the assured for damages arising out of and by reason of the circumstances stated, and in the performance of its business, issues its policies of insurance to the persons

with the effect alleged in paragraph 1 of said bill, but though defendant is without knowledge or information sufficient to form any belief touching the factors or elements which determine in individual cases the acceptance or rejection of risk, or the issuing or withholding of its policies of insurance save the exaction and payment of a premium therefore, and if the facts touching the same be deemed to be in anywise material or relevant the defendant requires legal proof thereof.

2, 3. This defendant is without knowledge or any information sufficient to enable her to form any belief respecting the matters set forth and alleged in paragraphs 2 and 3, and if said matters or any of them be deemed by complainant to be in anywise competent, material or relevant, the defendant requires legal proof thereof.

4. The matters set forth and facts alleged in paragraph 4, as therein set forth and alleged are denied. This defendant, on information and belief, admits that on or about April 6, 1928, application was made ostensibly, and in fact by one Harry Garfinkel, to complainant for insurance upon a Chevrolet car, and that complainant issued its policy of insurance insuring the said Harry Garfinkel with respect to said Chevrolet car, and that a copy of said policy, which is substantially correct, save that it does not purport to be countersigned by Taylor & Soloff, by John Soloff, complainant's agents, and copy attached to the bill of complaint indicates policy was countersigned at Jersey City, N. J., when, in fact,

the original policy was countersigned at Atlantic City, N. J., on April 6, 1927, and save for the fact that in said copy the word "Ventnor City" is correctly spelled, while in the original it is incorrectly spelled "Vetnor City," is annexed to said bill marked Exhibit 1. This defendant denies that at the time of making application to complainant to issue its policy of insurance, any statement or representation, false in fact was made to complainant, and expressly denies that it was represented or stated to complainant that the interest of said Harry Garfinkel, the applicant and assured, was that of unconditional and sole ownership. On the contrary the said Harry Garfinkel, the said applicant and assured, at the time of application by him for said policy was not asked as to his interest in the automobile, and he made no statement of any kind respecting his interest in said automobile, and that if any term or condition of said policy contains any representation or statement that the said Harry Garfinkel was at the time of the issuing of said policy, or at the time of the application therefor, the sole and unconditional owner of said car, the said representation or statement was not made by him, or by his authority, or with his knowledge or consent, and the presence in said policy of any such representation or statement, term or condition, was not brought to his attention and was not known to him.

5. The statements made and allegations contained in paragraph 5 are admitted.

6. Defendant admits that complainant was imme-

diately notified of the accident as alleged in paragraph 6, and denies each and every other fact and matter alleged in said paragraph 6.

7. Defendant denies each and every fact, matter, conclusion, and every allegation and inference of fraud or deceitful representation set forth and made in paragraph 7 of said bill, and avers that the said policy was issued upon and after full and truthful disclosure of all the facts required by complainant to be made known to it as a condition upon which its policy would be issued, and every other fact of which said Harry Garfinkel had knowledge, or which was in anywise essential to the risk to be assumed by complainant and only after receiving all such information and with full knowledge respecting such risk.

8. Each and every allegation of fact contained in paragraph 8 is denied, excepting that complainant did, on or about August 3, 1928, by letter addressed to said Harry Garfinkel, sent by mail and received by him, declaring said policy null and void as of April 6, 1928, the date thereof, after complainant had previously denied liability under said policy, to which said Harry Garfinkel, the assured, responded that he would hold complainant to be liable upon said policy according to the terms thereof.

Further answering said paragraph 8, this defendant avers that the said notification to the said assured, declaring null and void said policy, was not received or given until after the collision mentioned in the said bill had occurred, and the liability of the

complainant upon its said policy had become and was thereby fixed. Except as and to the extent that the allegations of said paragraph 8 are herein admitted or otherwise answered, the same are denied.

9. Paragraph 9 is admitted save so far as the allegations thereof tend to support an inference that the facts alleged were ascertained by any effort or independent investigation on the part of complainant, or its agents, respecting which facts this defendant avers that the same were disclosed and made known to the complainant by said Harry Garfinkel when the facts were requested.

10. Each and every allegation contained in paragraph 10 of said bill is admitted.

11. Paragraph 11 is admitted. This defendant admits that under the terms of the policy complainant may be charged under the circumstances therein stated to be liable for the payment of said judgment as alleged in paragraph 11. As to the other matters therein alleged, this defendant is without any knowledge and has no information upon which to found any belief.

12, 13. Paragraphs 12 and 13 are admitted on information and belief.

14. Paragraph 14 is denied, and this defendant expressly avers that said policy of insurance was issued and obtained without any fraudulent statement or concealment of any material fact whatso-

ever, and if any such fraud existed this defendant was innocent thereof and ignorant of the same.

COUNTER-CLAIM.

By way of counter-claim against the complainant and against the defendant, Harry Garfinkel, defendant respectfully shows and says that:

1. On or about April 6, 1928, the said defendant, Harry Garfinkel purchased from Bartram-Kershaw Co., Inc., a certain used Chevrolet sedan automobile bearing the motor number 1850670 and the manufacturer's serial number 2 K 47422, 1926 model for the price or sum of $299, of which $119 was paid in cash at the time of said purchase and the said automobile was delivered to the said purchaser, leaving a deferred balance of $180 payable in six (6) equal installments of $30 each on the same day of each successive month commencing one month from the date thereof, which deferred balance the said Harry Garfinkel assumed and agreed to pay. At the time of said purchase the seller of said automobile delivered possession thereof to the said Harry Garfinkel, the purchaser, and therewith delivered to him a document called "conditional sale contract," setting forth the terms and conditions of said sale and purchase.

2. On or about April 6, 1928, and immediately after the purchase of said automobile and taking possession thereof, the said Harry Garfinkel, for

the purpose of obtaining insurance and indemnity against loss by reason of the liability imposed by law for damages on account of bodily injuries or death, and against loss by reason of damages to or destruction of property which might be occasioned by the operation of said automobile, applied to the complainant, through Taylor & Soloff, their duly authorized agents and representative in Atlantic City, for insurance upon said automobile and thereupon complainant issued the policy of insurance No. A. P. 15803, bearing date April 6, 1928, insuring the said Harry Garfinkel with respect to said automobile against loss as hereinabove set forth for the period of one year from and after the date thereof, for which the said insured paid, and the complainant, the said insurer, received a premium amounting to $39.56, and delivered said policy to the said assured.

3. On May 14, 1928, after the issuing of said policy of insurance and while the same remained in full force and effect the said automobile covered thereby as aforesaid, collided with a car driven and operated by one Timothy Cordery in which car driven and operated by said Timothy Cordery was also Thomas D. Endicott, this defendant's testator, and as a result of said collision the said Thomas D. Endicott was killed. Immediate notice of said accident was given to the complainant pursuant to the requirement of Condition B contained in said policy.

4. On or about September 28, 1928, this defendant, Lida A. Endicott, executrix of Thomas D. En-

dicott, deceased, commenced an action at law in the Supreme Court of New Jersey against Harry Garfinkel the assured and others to recover damages for the death of the said Thomas D. Endicott; that notice of said action brought against him was given, and the summons and complaint therein served upon the assured was immediately forwarded by him to the complainant pursuant to the requirement of said Condition B of the policy, and the complainant defended said action in the name and on behalf of the insured, and that said action was duly brought on for trial in the New Jersey Supreme Court, at the Atlantic Circuit on June 17, 1929, and resulted in a verdict for the plaintiff therein, this defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against said Harry Garfinkel and another for $20,000, which verdict having been thereafter reviewed by the said Supreme Court upon a rule to show cause was, by said Court, reduced to $15,000 and upon acceptance of said reduction by this defendant in the said verdict, final judgment thereon in favor of this defendant against said assured, Harry Garfinkel and another was entered for the sum of $15,000 and $118.57 costs. Said judgment has not been paid or in anywise satisfied.

5. Upon information and belief this defendant alleges the fact to be that the said Harry Garfinkel having purchased said automobile as aforesaid and intending to operate the same personally or by his servants or agents, applied to the complainant through Taylor and Soloff, its duly authorized agents at Atlantic City, New Jersey, on or about

April 6, 1928, to issue its policy insuring and indemnifying him, the said Harry Garfinkel, against loss by reason of the legal liability imposed upon him for damages on account of bodily injuries or death, which might be occasioned by the operation of said automobile; that at the time of said application the said assured, in response to inquiries by said agents of complainant, stated to said agents, the trade name of said automobile, year of its model, the serial number, the factory number of engine or motor, the kind of power, the number of cylinders, and style of body, and Harry Garfinkel truthfully replied to every such inquiry made, and it was thereupon expressly and explicitly agreed by and between said Harry Garfinkel and the complainant, through its said agents, Taylor and Soloff, that complainant, in consideration of a premium or sum of $39.56 would issue its policy insuring and indemnifying said Harry Garfinkel against loss or legal liability for damages on account of bodily injuries or death occasioned as aforesaid, by reason of the operation of said Chevrolet automobile, and thereupon said assured paid said premium or sum as the consideration for said risk assumed by the complainant and the complainant accepted the same and issued to said assured a policy of insurance, of which Exhibit 1 annexed to the bill of complaint is substantially a copy, except as noted in paragraph 4 of defendant's answer, which policy was sent by mail to the said assured by said agents on or about April 10, 1928, without any notice, mention, or reference to the statements in paragraphs 6, 7, 8, 9 and 10 of the schedule annexed to said policy, or any

allusion to the fact that said policy was in anywise variant from that bargained for and purchased, although said schedule was prepared by complainant with full knowledge and after full disclosure by the applicant for said policy of the facts and conditions as required by said agents.

6. Upon receiving said policy from said agents, the said assured believed and assumed, and relying upon the belief that the same was prepared in accordance with and contained the provisions for his indemnity, agreed upon as aforesaid, put the same away among other papers for safe keeping without examining or reading the same and so failed to discover that said policy was not the policy bargained for and agreed upon until subsequent to May 14, 1928, on which date the collision which resulted in the death of the defendant's testator, Thomas D. Endicott, occurred and the liability of the complainant, upon the policy, became fixed, nor until after July 24, 1928, on or about which date complainant notified the assured by letter that it denied liability under its said policy for misstatement in the warranties contained in said policy and thereupon the said assured examined said policy and discovered in the schedule therein referred to the following provision contrary to the terms of said agreement, viz:

> 6. The automobiles are used for the following purposes only—Private and Business.
>
> 7. The automobiles are principally maintained and garaged in the city or town of Vetnor City, N. J. and are principally used in the city or

town of Vetnor City, N. J. and in the vicinity of said city or town.

8. None of the automobiles described above are or will be rented to others or used to carry passengers for a consideration, except as herein stated: No exceptions.

9. The interest of the Named Assured in the automobiles herein described is that of unconditional and sole ownership, except as follows: No exceptions.

10. No company or Association has cancelled or refused to issue or renew automobile insurance to the Named Assured during the past three years, except as herein stated: No exceptions.

7. Although the said assured, when he applied to the said agents of the complainant who were authorized as aforesaid, to agree and act for the complainant in the matter of the issuing of said policy, and informed said agents fully and completely of all the facts the said agent deemed material to the subject-matter of said policy, and the said parties agreed upon the provisions to be contained therein, and the said policy was duly issued and delivered to the assured and the premium therefor fully paid, yet the said policy so issued fails to express the agreement so made and on which the minds of the parties met, because of the insertion in said schedule of the policy the statements numbered 6 to 10 referred to in paragraph 6 herein, which statements had not or were not agreed upon and the insertion of which was a mistake in preparing said policy, or

by fraud or other inequity on the part of the complainant or its agents, said statements were inserted into said schedule of the said policy contrary to said agreement between the parties, thereby entitling the assured to the equitable remedy of reformation of said policy.

8. This defendant is informed and believes and alleges the fact to be that the said Harry Garfinkel is insolvent and without any property subject to execution out of which the said judgment recovered by this defendant, or any part thereof, can be realized; that this defendant caused execution upon her said judgment to be issued against the said defendants, Harry Garfinkel and Milton Garfinkel, which execution has been returned by the sheriff of the County of Atlantic, wholly unsatisfied, the said sheriff being unable to find any property of said defendants in his county of which to make the said moneys therein mentioned; that the provisions of paragraphs 6 to 10 contained in the schedule annexed to said policy will be set up in bar of and will preclude any recovery by reason of said judgment on an action she has commenced, and is now pending, at law against the complainant based upon the provisions of said policy, therefore, this defendant charges that she is entitled to the benefit of the provisions of Condition L contained in said policy and is entitled to relief in this Court in the premises by way of a reformation of said policy for her protection by force of the provisions of Chapter 153, Laws of 1924 (P. L. p. 352) in order that the said policy may conform to the agreement

of the parties thereto, and is also entitled to enjoin the complainant from setting up in the action at law commenced by this defendant against it to enforce its liability aforesaid the alleged invalidity of said policy by reason of the alleged misrepresentation or misstatement of the assured.

This defendant, therefore, prays:

1. That the said policy of insurance be reformed by striking out and expunging therefrom paragraph 6 of the schedule annexed thereto.

2. That the complainant and its attorneys and agents, or assigns, be enjoined from pleading or setting up as a defense in the action commenced by this defendant against it on said policy any misrepresentation or statement of the assured that the automobile was used only for private or business purposes.

3. That the said policy of insurance be reformed by striking out and expunging therefrom paragraph 7 of the schedule annexed thereto.

4. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by this defendant against it on said policy any misrepresentation or statement by the assured that the automobile was principally maintained and garaged in the city or town of Ventnor City, and principally

used in the City or Town of Ventnor City, and in the vicinity of said city or town.

5. That the said policy of insurance be reformed by striking out and expunging therefrom paragraph 8 of the schedule annexed thereto.

6. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by this defendant against it on said policy any misrepresentation or statement by the assured that the automobile was and would not be rented to others or used to carry passengers for a consideration.

7. That the policy of insurance be reformed by striking out and expunging therefrom paragraph 9 of the schedule annexed thereto.

8. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by this defendant against it on said policy any misrepresentation or statement by the assured that the automobile was the sole and unconditional property of the assured.

9. That the policy of insurance be reformed by striking out and expunging therefrom paragraph 10 of the schedule annexed thereto.

10. That the complainant and its attorneys and agents or assigns be enjoined from pleading or set-

ting up as a defense in the action commenced by this defendant against it on said policy any misrepresentation or statement by the assured that no company or association had cancelled or refused to renew automobile insurance to the named assured during the three years preceding April 6, 1928.

11. That this defendant may have such further or other relief as may be equitable and appropriate.

BURTON A. GASKILL,
Solicitor of Defendant, Lida A. Endicott, Executrix of Thomas D. Endicott, Deceased.

ANSWER AND COUNTER-CLAIM OF HARRY GARFINKEL.

(Filed May 24, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

HUDSON CASUALTY INSURANCE COMPANY, a corporation, etc., *Complainant,*

and

HARRY GARFINKEL, *et als., Defendants.*

On Bill, etc. Answer.

Harry Garfinkel, one of the defendants in the above-entitled cause, answering the bill of complaint filed therein, says that:

1. Defendant admits that complainant is engaged in the business of insuring against loss by reason of liability imposed by law on the assured for damages arising out of and by reason of the circumstances stated, and in the performance of its business issues its policies of insurance to the persons with the effect alleged in paragraph 1 of said bill,

but though defendant is without knowledge or information sufficient to form any belief touching the factors or elements which determine in individual cases the acceptance or rejection of risk, or the issuing or withholding of its policies of insurance save the exaction and payment of a premium therefor, and if the facts touching the same be deemed to be in anywise material or relevant the defendant requires legal proof thereof.

2. Defendant denies that he had knowledge of the facts set out in paragraph 2 until after the happening of the accident, which resulted in the death of Thomas D. Endicott as set out in paragraph 5 of the bill of complaint.

3. Defendant denies that he had knowledge of the facts set out in paragraph 3, except that he knew Milton J. Garfinkel was slightly lame, and if the facts touching the other matters alleged in this paragraph be deemed to be in anywise material or relevant, the defendant requires legal proof thereof.

4. The matters set forth and facts alleged in paragraph 4 as set forth therein and alleged, are denied. This defendant admits that on or about April 6, 1928, application was made for him by Milton J. Garfinkel to Taylor & Soloff, who placed insurance in various automobile casualty companies and who were also agents for the complainant, for insurance upon the Chevrolet automobile, and that complainant issued its policy of insurance insuring this defendant with respect to said Chevrolet car, and that

a copy of said policy, which is substantially correct, save that it does not purport to be countersigned by Taylor & Soloff by John Soloff, complainant's agents, and the copy attached to the bill of complaint indicates that the policy was countersigned at Jersey City, New Jersey, when, in fact, the original policy, which is in the possession of this defendant, was countersigned at Atlantic City, New Jersey, on April 6, 1928, and save for the fact in said copy the word Ventnor City is correctly spelled while in the original it is incorrectly spelled "Ventor City." This defendant denies that at the time of making application to Taylor & Soloff, who placed insurance as hereinbefore set out, and who were agents for complainant, to issue its policy of insurance, any statement or representation false in fact was made to complainant's agents, and expressly denies that it was represented or stated to complainant that the inerest of Harry Garfinkel, the applicant or assured, was that of unconditional and sole ownership, but alleges the facts to be that the application was made by telephone, and that complainant's agents requested of the agent of this defendant to read him the numbers of the said automobile from the license card, which the agent of this defendant told the agent of the complainant that he did not then have in his possession, the license card, but would give him the numbers of the said automobile from the conditional sale contract that had been issued that day for the said automobile. Other than just hereinbefore stated no inquiry was made at the time of the application for the said policy as to the interest of the said Harry

Garfinkel in the said automobile, and this defendant nor any one in his behalf, made no statement of any kind respecting the interest of the said Harry Garfinkel in the said automobile other than hereinbefore stated in this paragraph, and that if any term or condition of said policy contains any representation or statement that the said Harry Garfinkel was at the time of the issuing of said policy, or at the time of the application therefor, the sole and unconditional owner of said automobile, the said representation or statement was not made by this defendant, or by his authority or with his knowledge or consent, nor was it made by Milton J. Garfinkel or with his knowledge or consent, and the presence in said policy of said representation or statement, term or condition, was not brought to this defendant's attention, and was not known to him, nor were such representations, statements, terms or conditions brought to the knowledge of Milton J. Garfinkel, nor were they known to him. Defendant denies that the questions, answers, or statements appearing in the schedule in Exhibit 1 and numbered 6 to 10 inclusive, were asked of him, nor answered by him, nor made by him, nor were they asked of Milton J. Garfinkel or answered by Milton Garfinkel, nor made by Milton J. Garfinkel, but charges the fact to be that said questions were answered or statements made by complainant or its agent, without any inquiry of this defendant or Milton Garfinkel, and without the knowledge or consent of this defendant or Milton J. Garfinkel, and contrary to the information of the complainant.

5. Defendant admits that on May 14, 1928, the automobile covered by the insurance policy hereinbefore last referred to, was in collision with a car driven by one Timothy Cordery. There were in the car driven by the said Timothy Cordery, the said Timothy Cordery and Thomas D. Endicott, and as a result of the said collision, the said Thomas D. Endicott was killed, and this defendant says that at the time of the said collision the said automobile, owned by this defendant and insured under the policy referred to as Exhibit I, was being operated by Milton J. Garfinkel as the servant, agent or employee of this defendant, and on the business of this defendant.

6. Defendant admits that complainant was immediately notified of the accident, and set in progress an investigation of the said accident, but defendant denies that the said automobile was purchased from the Bartram Kershaw Co., Inc., of Atlantic City, New Jersey, for Milton J. Garfinkel, but alleges the facts to be that the said automobile was purchased in the name of this defendant, with the money of this defendant, and was purchased with the intention that the said automobile was to be used by this defendant in and about his business. This defendant denies that it was the intent of this defendant and Milton J. Garfinkel that the said automobile should be used by Milton Garfinkel in and about his business, but alleges the facts to be that at the time of the said purchase of the automobile by this defendant that Milton J. Garfinkel was in the employ of this defendant.

Defendant denies that the automobile was principally used in the vicinity of Philadelphia, Pennsylvania, but alleges the facts to be that the automobile was principally used in the City of Ventnor City and in the vicinity thereof.

7. Defendant denies each and every fact, matter, conclusion, and every allegation and inference of fraud or deceitful representation set forth and made in paragraph 7 of said bill, and avers that the said policy was issued upon and after truthful disclosure of all the facts required by complainant's agent, to be made known to him as a condition upon which its policy would be issued, and every other fact of which this defendant had knowledge or which was in anywise essential to the risk to be assumed by complainant, and only after receiving all such information and with full knowledge respecting such risk, was said policy issued. And defendant says that he was the owner of the automobile, insured by the complainant, under a conditional sale contract entered into and between this defendant and the Bartram Kershaw Co., Inc. Defendant denies that he had any information on the subject of whether or not complainant would have issued the policy to Milton J. Garfinkel and he denies that Milton J. Garfinkel was in fact the real owner of the said automobile. Defendant further denies that he entered into a conspiracy with Milton Garfinkel with the intention of deceiving complainant or anyone else to induce it or them to grant a policy of insurance on the said automobile. And defendant alleges the true facts to be, as he has been informed and

truly believes, that at the time that he made application to Taylor & Soloff for insurance on said Chevrolet automobile, that Milton J. Garfinkel had an automobile insurance policy on the Ford coupe owned by the said Milton J. Garfinkel, and that said policy was not cancelled, but in full force and effect on April 6, 1928. This defendant further denies that he had knowledge that the complainant would not issue its policy to Milton Garfinkel, because he had never been advised by anyone that the complainant had cancelled the policy they had heretofore issued to Milton Garfinkel's automobile.

8. Each and every allegation of fact contained in paragraph 8 is denied, except that complainant did on or about August 3, 1928, by letter addressed to this defendant, sent by mail, and received by him, declare the policy null and void under date of April 6, 1928, the date of the issuance of said policy, after complainant had previously denied liability under said policy to which denial defendant, the assured, responded that he would hold the complainant to be liable under said policy according to the terms thereof. The complainant sent this defendant a check for the sum of $39.56, which check was returned to the complainant with the information that this defendant expected the complainant to perform its contract according to the terms thereof.

Further answering paragraph 8, this defendant avers that said notification to him declaring null and void said policy was not received or given until after the collision mentioned in said bill, had occurred and the liability of the complainant had be-

come and was thereby fixed, upon its said policy. Defendant denies that any fraud was perpetrated by this defendant, or by Milton Garfinkel, and denies that he refused to give any information, but alleges the fact to be that the complainant, by its conduct in making repeated appointments and then not keeping the said appointments, made this defendant suspicious of the motives of the said company, and he insisted on any statements to be made by him to be in the presence of his attorney solely because of the unbusinesslike conduct and methods of the complainant, who, this defendant was informed that the complainant in many cases endeavored to avoid its responsibility after the liability had been fixed upon the assured.

9. Paragraph 9 is admitted, save so far as the allegations tend to support an inference that the facts alleged were ascertained by any effort or independent investigation on the part of the complainant, or its agents, respecting which facts this defendant avers that the same were disclosed and made known by this defendant when the facts were requested. Defendant further says that the facts concerning the ownership of said automobile were a public record in the office of the county clerk at Mays Landing, New Jersey.

10. Each and every allegation contained in paragraph 10 is admitted, except the inference that the judgment in favor of Timothy Cordery against this defendant and Milton Garfinkel was reviewed by the

Supreme Court on a rule to show cause, but alleges the fact to be that the complainant, who undertook the defense of this defendant and Milton Garfinkel on Timothy Cordery's counter-claim against said defendants failed to prosecute a rule to show cause, or an appeal from a verdict of $200, which had been rendered against this defendant and Milton Garfinkel, and a judgment entered thereon. Defendant further answering paragraph 10, says that the trial of the issue mentioned herein was had in the New Jersey Supreme Court, Atlantic County Circuit on June 17, 1929.

11. Paragraph 11 is admitted. This defendant admits that under the terms of the policy, complainant may be charged under the circumstances therein stated to be liable for the payment of said judgment as alleged in paragraph 11. Further answering paragraph 11, this defendant admits that he is insolvent and unable to pay the judgment against him, or any part thereof.

12. Defendant admits the happening of the accident to one Isaac M. Garfinkel, who was riding in said Chevrolet automobile, and as a result of the accident was injured, but alleges that the said Isaac M. Garfinkel has not brought suit against this defendant within two years of the happening of this accident, and is hereby barred by the Statute of Limitations.

13. Paragraph 13 is admitted.

14. Paragraph 14 is denied. This defendant expressly avers that the said policy of insurance was issued and obtained without any fraudulent statement or concealment of any material fact whatsoever, and if any such fraud existed, this defendant was innocent of the same.

10

COUNTER-CLAIM.

By way of counter-claim against the complainant, defendant respectfully shows and says that:

1. On or about April 6, 1928, defendant, Harry Garfinkel, purchased from Bartram Kershaw Co., Inc., a certain used Chevrolet sedan automobile
20 bearing the motor number 1850670 and the manufacturer's serial number 2 K 47422, 1926 model for the price or sum of $299, of which $119 was paid in cash at the time of said purchase and the said automobile was delivered to the said purchaser, leaving a deferred balance of $180 payable in six (6) equal installments of $30 each on the same day of each successive month commencing one month from the date thereof, which deferred balance the said Harry Garfinkel assumed and agreed to pay. At the time of
30 said purchase the seller of said automobile delivered possession thereof to this defendant, the purchaser, and therewith delivered to him a document called "conditional sale contract."

2. On or about April 6, 1928, and immediately after the purchase of said automobile and taking

possession thereof, this defendant, by Milton J. Garfinkel his agent, for the purpose of obtaining insurance and indemnity against loss by reason of the liability imposed by law for damages on account of bodily injuries or death, and against loss by reason of damages to or destruction of property which might be occasioned by the operation of said automobile, applied to Taylor & Soloff, who procured insurance from several automobile casualty companies and who were complainant's authorized agents and representatives in Atlantic City, for insurance upon said automobile and thereupon complainant issued the policy of insurance No. A. P. 15803, bearing date April 6, 1928, insuring this defendant, and anyone operating said automobile with his consent, with respect to said automobile against loss as hereinabove set forth for the period of one year from and after the date thereof, for which the said insured paid, and the complainant, the said insurer, received a premium amounting to $39.56, and delivered said policy to the said assured with the advice that said policy covered the said Chevrolet sedan.

3. On May 14, 1928, after the issuing of said policy of insurance and while the same remained in full force and effect the said automobile covered thereby as aforesaid and operated by Milton J. Garfinkel, as the agent, servant, and employee of this defendant and on his business, collided with a car driven and operated by one Timothy Cordery, in which car driven and operated by said Timothy Cordery was also Thomas D. Endicott, the defen-

dant, Lida A. Endicott's testator, and as a result of said collision the said Thomas D. Endicott was killed. Immediate notice of said accident was given to the complainant pursuant to the requirement of Condition B contained in said policy.

4. On or about September 28, 1928, defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, commenced an action at law in the Supreme Court of New Jersey against this defendant, the assured and Milton J. Garfinkel to recover damages for the death of the said Thomas D. Endicott; that notice of said action brought against him was given, and the summons and complaint therein served upon this defendant and Milton J. Garfinkel was immediately forwarded to the complainant pursuant to the requirement of said Condition B of the policy, and the complainant defended said action in the name and on behalf of the insured in the Supreme Court, at the Atlantic Circuit on June 17, 1929, and resulted in a verdict for the plaintiff therein, for defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against this defendant and Milton J. Garfinkel for $20,000, which verdict having been thereafter reviewed by the said Supreme Court upon a rule to show cause, was, by said Court, reduced to $15,000 and upon acceptance of said reduction by defendant, Lida A. Endicott, final judgment thereon in favor of defendant, Lida A. Endicott, against said assured, Harry Garfinkel, and Milton J. Garfinkel was entered for the sum of $15,000 and $118.57 costs. Said judgment has not been paid or in anywise satisfied.

That there was tried at the same time and place, and defended by said complainant, a counter-claim by Timothy Cordery against this defendant and Milton J. Garfinkel, on which counter-claim a verdict of $200 was rendered in favor of the counter-claimant against defendants, Harry Garfinkel and Milton Garfinkel, on which said judgment no rule to show cause was issued, nor has an appeal been taken, and which said judgment remains unpaid to this date.

5. This defendant alleges the fact to be that he, having purchased said automobile as aforesaid and intending to operate the same personally or by his servants or agents, applied to the complainant through Taylor and Soloff, its duly authorized agents at Atlantic City, New Jersey, on or about April 6, 1928, to issue its policy insuring and indemnifying him, the said Harry Garfinkel and others operating said automobile, against loss by reason of the legal liability imposed upon him or them for damages on account of said automobile; that at the time of said application this defendant's agent, in response to inquiries by said agents of complainant, stated to said agents, the trade name of said automobile, year of its model, the serial number, the factory number of engine or motor, the kind of power, the number of cylinders, and style of body, and the agent of this defendant truthfully replied to every such inquiry made, and it was thereupon expressly and explicitly agreed by and between this defendant, through his said agent, and the complainant, in consideration of a premium or sum of $39.56 then and there insured said automobile and would send its

policy insuring and indemnifying said Harry Garfinkel against loss or legal liability for damages on account of bodily injuries or death occasioned as aforesaid, by reason of the operation of said Chevrolet automobile, and thereupon said assured paid said premium or sum as the consideration for said risk assumed by the complainant and the complainant accepted the same and issued to said assured a policy of insurance, of which Exhibit I annexed to the bill of complaint is substantially a copy, except as noted in paragraph 4 of defendant's answer, which policy was sent by mail to the said assured by said agents on or about April 10, 1928, without any notice, mention, or reference to the statements in paragraphs 6, 7, 8, 9 and 10, of the schedule annexed to said policy, or any allusion to the fact that said policy was in anywise variant from that bargained for and purchased, although said schedule was prepared by complainant with full knowledge and after full disclosure by the applicant for said policy of the facts and conditions as required by said agents.

6. Upon receiving said policy from said agents with a letter stating that said policy covered the Chevrolet sedan, the said assured believed and assumed, and relying upon the belief that the same was prepared in accordance with and contained the provisions for his indemnity, agreed upon as aforesaid, put the same away among other papers for safe-keeping without examining or reading the same and so failed to discover that said policy was not the policy bargained for and agreed upon until sub-

sequent to May 14, 1928, on which date the collision which resulted in the death of the defendant's, Lida A. Endicott's, testator, Thomas D. Endicott, occurred and the liability of the complaint, upon the policy, became fixed, nor until after July 24, 1928, on or about which date complainant notified the assured by letter that it denied liability under its said policy for misstatement in the warranties contained in said policy and thereupon the said assured examined said policy and discovered in the schedule therein referred to the following provision contrary to the terms of said agreement, viz:

6. The automobiles are used for the following purposes only—Private and Business.

7. The automobiles are principally maintained and garaged in the city or town of Ventor City, N. J. and are principally used in the city or town of Ventor City, N. J. and in the vicinity of said city or town.

8. None of the automobiles described above are or will be rented to others or used to carry passengers for a consideration, except as herein stated: No exceptions.

9. The interest of the Named Assured in the automobiles herein described is that of unconditional and sole ownership, except as follows: No exceptions.

10. No company or association has cancelled or refused to issue or renew automobile insurance to the Named Assured during the past three years, except as herein stated: No exceptions.

7. Although this defendant, when he applied, by Milton J. Garfinkel his agent, to the said agents of the complainant who were authorized as aforesaid, to agree and act for the complainant, in the matter of the issuing of said policy, and informed said agents fully and completely of all the facts the said agent deemed material to the subject-matter of said policy, and also having informed complainant's agent that the automobile was purchased under a conditional sales contract, and the said parties having agreed upon the provisions to be contained therein, and said agents having advised defendant that the said automobile was insured, and the said policy was duly issued and delivered to the assured and the premium therefor fully paid, yet the said policy so issued fails to express the agreement so made and on which the minds of the parties met, because of the insertion in said schedule of the policy the statements numbered 6 to 10 referred to in paragraph 6 herein, which statements had not or were not agreed upon and the insertion of which was a mistake in preparing said policy, or by fraud or other inequity on the part of the complainant or its agents, said statements were inserted into said schedule of the said policy contrary to said agreement between the parties and without the knowledge or consent of this defendant, thereby entitling the assured to the equitable remedy of reformation of said policy.

8. This defendant alleges the fact to be that he is insolvent and that Milton Garfinkel is insolvent, and that both of them are unable to satisfy the execu-

tion or judgment recovered against the said defendant or any part thereof, and that an execution issued against this defendant and Milton Garfinkel has been returned by the sheriff of Atlantic County wholly unsatisfied. That under the Condition A of the said policy this defendant is entitled to have applied on account of the judgment so obtained against him the sum of $15,000 by virtue of the terms of the said policy by reason of his insolvency as provided for in Condition L in said policy; that a suit had been begun in the New Jersey Supreme Court by Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against the complainant to recover against the complainant the said sum that it contracted to pay under the said policy; that the provisions of paragraphs 6 to 10, inclusive, contained in the schedule annexed to said policy has been set up in bar of and will preclude any recovery by said Lida A. Endicott, executrix, etc., against the complainant; and this defendant charges that he is entitled to the benefit of the provisions of the policy and is entitled to relief in this court in the premises by way of a reformation of said policy for his protection by force of the provisions therein contained in order that the said policy may conform to the agreements of the parties thereto, and is also entitled to enjoin the complainant from setting up in the action at law commenced by Lida A. Endicott, executrix, etc., against it to enforce its liability aforesaid, the alleged invalidity of the said policy by reason of the alleged misrepresentation or misstatements of the assured, Harry Garfinkel, or his agent.

9. Defendant alleges that complainant had defended the suit brought against him by Lida A. Endicott, executrix, etc., and Timothy Cordery and he was led to believe by complainant's agents that complainant would pay any judgment rendered against him if he, the said defendant, cooperated with the complainant in the defense of the said suit, and did not know that the complainant had refused to pay the judgment it had contracted to pay under its policy until the time of filing the bill in this cause.

This defendant, therefore, prays:

1. That the said policy of insurance be reformed by striking out and expunging therefrom paragraph 6 of the schedule annexed thereto.

2. That the complainant and its attorneys and agents, or assigns, be enjoined from pleading or setting up as a defense in the action commenced by Lida A. Endicott, executrix, etc., against it on said policy any misrepresentations or statement of the assured that the automobile was used only for private or business purposes.

3. That the said policy of insurance be reformed by striking out and expunging therefrom paragraph 7 of the schedule annexed thereto.

4. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by Lida A. Endicott, executrix, etc., against it on said

policy any misrepresentation or statement by the assured that the automobile was principally maintained and garaged in the City or Town of Ventnor City, and principally used in the City or Town of Ventnor City, and in the vicinity of said city or town.

5. That the said policy of insurance be reformed by striking out and expunging therefrom paragraph 8 of the schedule annexed thereto.

6. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by defendant, Lida A. Endicott, executrix, etc., against it on said policy any misrepresentation or statement by the assured that the automobile was and would not be rented to others or used to carry passengers for a consideration.

7. That the policy of insurance be reformed by striking out and expunging therefrom paragraph 9 of the schedule annexed thereto, or by striking out the words "no exception," and adding thereto "purchased under a conditional sale contract."

8. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by defendant, Lida A. Endicott, executrix, etc., against it on said policy any misrepresentation or statement by the assured that the automobile was the sole and unconditional property of the assured.

9. That the policy of insurance be reformed by striking out and expunging therefrom paragraph 10 of the schedule annexed thereto.

10. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by defendant, Lida A. Endicott, executrix, etc., against it on said policy any misrepresentation or statement by the assured that no company or association had cancelled or refused to renew automobile insurance to the named assured during the three years preceding April 5, 1928.

11. That this defendant may have such further or other relief as may be equitable and appropriate.

MAURICE J. HALPERN,
Solicitor of Defendant,
Harry Garfinkel.

[ENDORSED]

We consent to the filing of within answer.

Thompson & Hanstein,
Sol. for Comp.

ANSWER AND COUNTER-CLAIM OF MILTON J. GARFINKEL.

(Filed May 24, 1930.)

IN CHANCERY OF NEW JERSEY.

Between
HUDSON CASUALTY INSURANCE COMPANY, a corporation, etc.,
Complainant,
and
HARRY GARFINKEL, *et als.*,
Defendants.

On Bill, Etc.
Answer.

Milton J. Garfinkel, one of the defendants in the above entitled cause, answering the bill of complaint filed therein, says that:

1. Defendant admits that complainant is engaged in the business of insuring against loss by reason of liability imposed by law on the assured for damages arising out of and by reason of the circumstances stated, and in the performance of its business issues its policies of insurance to the persons with the effect alleged in paragraph 1 of said bill, but though

defendant is without knowledge or information sufficient to form any belief touching the factors or elements which determine in individual cases the acceptance or rejection or risk, or the issuing or withholding of its policies of insurance save the exaction and payment of a premium therefor, and if the facts touching the same be deemed to be in anywise material or relevant the defendant requires legal proof thereof.

2. Defendant admits paragraph 2.

3. Defendant denies the matters set forth in paragraph 3, except that he admits that he is slightly lame. Defendant denies that complainant notified him that the policy that was issued as set forth in paragraph 2 was "not wanted by the company," but alleges the facts to be that the representative of the complainant called him by telephone in the early part of February, 1928, and advised this defendant that the agency was transferring his insurance into another company, and they did not advise him at that time, nor has he been advised since by the agents of the complainant, or anyone else, that the policy was canceled by the company, except as he has been advised by the bill of complaint filed in this matter. And the defendant further says that at the time he was advised by the agent of the complainant that the agency was transferring his insurance into another company that the said agency delivered to this defendant a policy covering his Ford automobile in a casualty insurance company, one of the largest and strongest casualty

companies doing business in the United States, and that this said policy continued in full force and effect until the same was canceled by this defendant on or about the 10th day of April, 1928.

4. The matters set forth and facts alleged in paragraph 4 as set forth therein and alleged are denied. This defendant admits that on or about April 6, 1928, application was made by him, as an agent for Harry Garfinkel, to Taylor & Soloff, who placed insurance in various companies and who were also agents for the complainant, for insurance upon the Chevrolet automobile and that complainant issued its policy of insurance insuring the said Harry Garfinkel with respect to said Chevrolet car, and that a copy of said policy which is substantially correct, save that it does not purport to be countersigned by Taylor & Soloff by John Soloff, complainant's agents, the copy attached to the bill of complaint indicated that policy was countersigned at Jersey City, New Jersey, when, in fact, the original policy which is in the possession of this defendant was countersigned at Atlantic City, New Jersey, on April 6, 1928, and save for the fact in said copy the word "Ventnor City" is correctly spelled while in the original it is incorrectly spelled "Ventor City," is annexed to said bill and marked Exhibit 1. This defendant denies at the time of making application to Taylor & Soloff, agents for complainant, to issue its policy of insurance, any statement or representation false, in fact, was made to complainant's agents and expressly denies that it was represented or stated to complainant that the interest of Harry

Garfinkel, the applicant and assured, was that of unconditional and sole ownership, but alleges that facts to be that the application for said insurance was made by telephone and that complainant's agents requested of this defendant to read him the numbers of the said automobile from the license card, which this defendant told said agent of the complainant that he did not then have in his possession the license card but would give him the numbers of the said automobile from the conditional sale contract that had been issued for the said automobile. Other than just hereinbefore stated, no inquiry was made at the time of the application for said policy as to the interest of the said Harry Garfinkel in the said automobile, and this defendant made no statement of any kind respecting the interest of the said Harry Garfinkel in the said automobile other than hereinbefore stated in this paragraph, and that if any term or condition of said policy contains any representation or statement that the said Harry Garfinkel was at the time of the issuing of said policy, or at the time of the application therefor, the sole and unconditional owner of said automobile the said representation or statement was not made by this defendant or by his authority or with his knowledge or consent, nor was it made by Harry Garfinkel, or with his knowledge or consent, and the presence in said policy of any such representation or statement, term or condition was not brought to this defendant's attention and was not known to him, nor were such representations, statements, terms, or conditions brought to the knowledge of Harry Garfinkel nor were they known

to him. Defendant denies that the questions, answers, or statements appearing in the schedule in Exhibit 1, and numbered 6 to 10, inclusive, were asked of him or answered by him, or made by him, but charges the fact to be that said questions were answered or statements made by complainant or its agents, without any inquiry of this defendant or Harry Garfinkel, and without the knowledge or consent of this defendant, or Harry Garfinkel, and contrary to the information of the complainant.

5. The statements made and the allegations contained in paragraph 5 are admitted.

6. Defendants admit that complainant was immediately notified of the accident and set in progress an investigation of the said accident, but defendant denies that the said automobile was purchased from the Bartram Kershaw Company, Inc., of Atlantic City for him, but alleges the fact to be that the automobile was purchased in the name of Harry Garfinkel with the money of the said Harry Garfinkel, and was intended for the use of the said Harry Garfinkel in and about his business. The defendant denies that it was the intent of this defendant and Harry Garfinkel that the said automobile should be used by this defendant in and about his business, but alleges the facts to be that at the time of the said purchase of the automobile by Harry Garfinkel this defendant was in the employ of the said Harry Garfinkel. Defendant denies that the automobile was principally used in the vicinity of Philadelphia, Pennsylvania, but alleges the facts to be that the

automobile was principally used in the City of Ventnor City and in the vicinity thereof.

7. Defendant denies each and every fact, matter, conclusion, and every allegation and inference of fraud or deceitful representation set forth and made in paragraph 7 of said bill and avers that the said policy was issued upon and after truthful disclosure of all the facts required by complainant's agent to be made known to it as a condition upon which its policy would be issued, and every other fact of which this defendant had knowledge or which was in anywise to be essential to the risk to be assumed by complainant and only after receiving all such information and with full knowledge respecting such risk was said policy issued. And defendant denies that he was the owner of the automobile insured by the complainant, but alleges the fact to be that the automobile was the sole property of Harry Garfinkel. This defendant denies that he had knowledge that the complainant would not issue its policy to him because he had never been advised by any one that the complainant had on its own volition canceled the policy they had theretofore issued on defendant's Ford automobile. Defendant denies that he entered into a conspiracy with Harry Garfinkel, or any other person, to deceive complainant in issuing the insurance policy covering the said Chevrolet automobile.

8. Each and every allegation of fact contained in paragraph 8 is denied, except that complainant did on or about August 3, 1928, by letter addressed to

said Harry Garfinkel, sent by mail and received by him, declare said policy null and void as of April 6, 1928, the date thereof, after complainant had previously denied liability under said policy, to which said Harry Garfinkel, the assured, responded that he would hold complainant to be liable upon said policy according to the terms thereof.

Further answering paragraph 8, this defendant avers that said notification to the assured declaring null and void said policy was not received or given until after the collision mentioned in said bill had occurred and the liability of the complainant, upon its said policy, had become and was thereby fixed. Defendant denies that any fraud was perpetrated upon the complainant by the said Harry Garfinkel or this defendant, and denies that said Harry Garfinkel refused to give any information, but alleges the fact to be that the complainant, by its conduct in making repeated appointments and then not keeping the said appointments, made the said Harry Garfinkel suspicious of the motives of the said company and he insisted on any statements to be made in the presence of his attorney solely because of the unbusinesslike conduct and methods of the complainant, who the said Harry Garfinkel was informed, as was likewise this defendant, that the complainant in many cases endeavored to avoid its responsibility after liability had been fixed upon its assured.

9. Paragraph 9 is admitted save so far as the allegations tend to support an inference that the facts alleged were ascertained by any effort or indepen-

dent investigation on the part of the complainant or its agents respecting which facts this defendant avers that the same were disclosed and made known by Harry Garfinkel when the facts were requested.

10. Each and every allegation contained in paragraph 10 is admitted, except the inference that the judgment in favor of Timothy Cordery against Harry Garfinkel and this defendant was reviewed by the Supreme Court on a rule to show cause, but alleges the fact to be that the complainant, who undertook the defense of Harry Garfinkel and Milton Garfinkel of Timothy Cordery's counter-claim against said defendants failed to prosecute a rule to show cause or an appeal from a verdict of $200.00, which had been rendered against Harry Garfinkel and this defendant, and a judgment entered thereon. Defendant further answering paragraph 10 says that the trial of the issue mentioned therein was had in the New Jersey Supreme Court, Atlantic County Circuit on June 17, 1929.

11. Paragraph 11 is admitted. This defendant admits that under the terms of the policy, complainant may be charged under the circumstances therein stated to be liable for the payment of said judgment as alleged in paragraph 11. Further answering paragraph 11, this defendant admits that he is insolvent and unable to pay the judgment against him, or any part thereof.

12. Defendant admits the happening of the accident of one Isaac M. Garfinkel who was riding in

said Chevrolet automobile, and as a result of the accident was injured, but alleges that the said Isaac M. Garfinkel has not brought suit against this defendant or Harry Garfinkel within two years of the happening of this accident, and is thereby barred by the statute of limitations.

13. Paragraph 13 is admitted.

14. Paragraph 14 is denied. This defendant expressly avers that the said policy of insurance was issued and obtained without any fraudulent statement or concealment of any material facts whatever, and if any such fraud existed this defendant was innocent of the same.

COUNTER-CLAIM.

By way of counter-claim against the complainant and against the defendant, Harry Garfinkel, defendant respectfully shows and says that:

1. On or about April 6, 1928, defendant, Harry Garfinkel purchased from Bartram Kershaw Co., Inc., a certain used Chevrolet sedan automobile bearing the motor number 1850670 and the manufacturer's serial number 2 K 47422, 1926 model for the price or sum of $299, of which $119 was paid in cash at the time of said purchase and the said automobile was delivered to the said purchaser, leaving a deferred balance of $180 payable in six (6) equal installments of $30 each on the same day

of each successive month commencing one month from the date thereof, which deferred balance the said Harry Garfinkel assumed and agreed to pay. At the time of said purchase the seller of said automobile delivered possession thereof to the said Harry Garfinkel, the purchaser, and therewith delivered to him a document called "conditional sale contract," setting forth the terms and conditions of said sale and purchase.

2. On or about April 6, 1928, and immediately after the purchase of said automobile and taking possession thereof, this defendant, as agent of the said Harry Garfinkel, for the purpose of obtaining insurance and indemnity against loss by reason of the liability imposed by law for damages on account of bodily injuries or death, and against loss by reason of damages to or destruction of property which might be occasioned by the operation of said automobile, applied to Taylor & Soloff, complainant's authorized agents and representatives in Atlantic City, for insurance upon said automobile and thereupon complainant issued the policy of insurance No. A. P. 15803, bearing date April 6, 1928, insuring the said Harry Garfinkel, and anyone operating said automobile with his consent, with respect to said automobile against loss as hereinabove set forth for the period of one year from and after the date thereof, for which the said insured paid, and the complainant, the said insurer, received a premium amounting to $39.56, and delivered said policy to the said assured with the advice that said policy covered the said Chevrolet sedan.

3. On May 14, 1928, after the issuing of said policy of insurance and while the same remained in full force and effect the said automobile covered thereby as aforesaid, collided with a car driven and operated by one Timothy Cordery in which car driven and operated by said Timothy Cordery was also Thomas D. Endicott, the defendant, Lida A. Endicott's testator, and as a result of said collision the said Thomas D. Endicott was killed. Immediate notice of said accident was given to the complainant pursuant to the requirement of Condition B contained in said policy.

4. On or about September 28, 1928, defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, commenced an action at law in the Supreme Court of New Jersey against Harry Garfinkel, the assured and this defendant, to recover damages for the death of the said Thomas D. Endicott; that notice of said action brought against him was given, and the summons and complaint therein served upon the assured and this defendant was immediately forwarded by him to the complainant pursuant to the requirement of said Condition B of the policy, and the complainant defended said action in the name and on behalf of the insured, in the Supreme Court, at the Atlantic Circuit on June 17, 1929, and resulted in a verdict for the plaintiff therein, for defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against said Harry Garfinkel and this defendant for $20,000, which verdict having been thereafter reviewed by the said Supreme Court upon a rule to show cause was, by

said Court, reduced to $15,000 and upon acceptance of said reduction by defendant, Lida A. Endicott, final judgment thereon in favor of defendant, Lida A. Endicott, against said assured, Harry Garfinkel, and this defendant was entered for the sum of $15,000 and $118.57 costs. Said judgment has not been paid or in anywise satisfied.

That there was tried at the same time and place a counter-claim by Timothy Cordery against Harry Garfinkel and this defendant, on which counter-claim a verdict of $200 was rendered in favor of the counter-claimant against defendants, Harry Garfinkel and Milton Garfinkel, on which said judgment on rule to show cause was issued, nor has an appeal been taken, and which said judgment remains unpaid to this date.

5. This defendant alleges the fact to be that the said Harry Garfinkel having purchased said automobile as aforesaid and intending to operate the same personally or by his servants or agents, applied to the complainant through Taylor and Soloff, its duly authorized agents at Atlantic City, New Jersey, on or about April 6, 1928, to issue its policy insuring and indemnifying him, the said Harry Garfinkel and others operating said automobile, against loss by reason of the legal liability imposed upon him or them for damages on account of said automobile; that at the time of said application this defendant, the agent of the said assured, in response to inquiries by said agents of complainant, stated to said agents, the trade name of said automobile, year of its model, the serial number, the factory

number of engine or motor, the kind of power, the number of cylinders, and style of body, and this defendant, for Harry Garfinkel, truthfully replied to every such inquiry made, and it was thereupon expressly and explicitly agreed by and between said Harry Garfinkel, through his said agent, and the complainant, in consideration of a premium or sum of $39.56 then and there insured said automobile and would send its policy insuring and indemnifying said Harry Garfinkel against loss or legal liability for damages on account of bodily injuries or death occasioned as aforesaid, by reason of the operation of said Chevrolet automobile, and thereupon said assured paid said premium or sum as the consideration for said risk assumed by the complainant and the complainant accepted the same and issued to said assured a policy of insurance, of which Exhibit I annexed to the bill of complaint is substantially a copy, except as noted in paragraph 4 of defendant's answer, which policy was sent by mail to the said assured by said agents on or about April 10, 1928, without any notice, mention, or reference to the statements in paragraphs 6, 7, 8, 9 and 10 of the schedule annexed to said policy, or any allusion to the fact that said policy was in anywise variant from that bargained for and purchased, although said schedule was prepared by complainant with full knowledge and after full disclosure by the applicant for said policy of the facts and conditions as required by said agents.

6. Upon receiving said policy from said agents with a letter stating that said policy covered the

Chevrolet sedan, the said assured believed and assumed, and relying upon the belief that the same was prepared in accordance with and contained the provisions for his indemnity, agreed upon as aforesaid, put the same away among other papers for safekeeping without examining or reading the same and so failed to discover that said policy was not the policy bargained for and agreed upon until subsequent to May 14, 1928, on which date the collision which resulted in the death of the defendant's, Lida A. Endicott's, testator, Thomas D. Endicott, occurred and the liability of the complainant, upon the policy, became fixed, nor until after July 24, 1928, on or about which date complainant notified the assured by letter that it denied liability under its said policy for misstatement in the warranties contained in said policy and thereupon the said assured examined said policy and discovered in the schedule therein referred to the following provisions contrary to the terms of said agreement, viz:

6. The automobiles are used for the following purposes only—Private and Business.

7. The automobiles are principally maintained and garaged in the city or town of Ventor City, N. J., and are principally used in the city or town of Ventor City, N. J., and in the vicinity of said city or town.

8. None of the automobiles described above are or will be rented to others or used to carry passengers for a consideration, except as herein stated: No exceptions.

9. The interest of the Named Assured in the automobiles herein described is that of uncon-

ditional and sole ownership, except as follows: No exceptions.

10. No company or Association has cancelled or refused to issue or renew automobile insurance to the Named Assured during the past three years, except as herein stated: No exceptions.

7. Although this defendant, when he applied for Harry Garfinkel, to the said agents of the complainant who were authorized as aforesaid, to agree and act for the complainant in the matter of the issuing of said policy, and informed said agents fully and completely of all the facts the said agent deemed material to the subject-matter of said policy, and also having informed complainant's agent that the automobile was purchased under a conditional sales contract, and the said parties having agreed upon the provisions to be contained therein, and said agents having advised defendant that the said automobile was insured, and the said policy was duly issued and delivered to the assured and the premium therefor fully paid, yet the said policy so issued fails to express the agreement so made and on which the minds of the parties met, because of the insertion in said schedule of the policy the statements numbered 6 to 10 referred to in paragraph 6 herein, which statements had not or were not agreed upon and the insertion of which was a mistake in preparing said policy, or by fraud or other inequity on the part of the complainant or its agents, said statements were inserted into said schedule of the said policy contrary to said agreement between the

parties, thereby entitling the assured and others indemnified under said policy to the equitable remedy of reformation of said policy.

8. This defendant alleges the fact to be that he is insolvent and that Harry Garfinkel is insolvent, and that both of them are unable to satisfy the execution or judgment recovered against the said defendant or any part thereof, and that an execution issued against this defendant and Harry Garfinkel has been returned by the sheriff of Atlantic County wholly unsatisfied. That under Condition A of the said policy this defendant is entitled to have applied on account of the judgment so obtained against him the sum of $15,000 by virtue of the terms of the said policy by reason of his insolvency as provided for in Condition L in said policy; that a suit had been begun in the New Jersey Supreme Court by Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against the complainant to recover against the complainant the said sum that it contracted to pay under the said policy; that the provisions of paragraphs 6 to 10, inclusive, contained in the schedule annexed to said policy has been set up in bar of and will preclude any recovery by said Lida A. Endicott, executrix, etc., against the complainant; and this defendant charges that he is entitled to the benefit of the provisions of the policy and is entitled to relief in this court in the premises by way of a reformation of said policy for his protection by force of the provisions therein contained in order that the said policy may conform to the agreements of the parties thereto, and is also entitled to enjoin

the complainant from setting up in the action at law commenced by Lida A. Endicott, executrix, etc., against it to enforce its liability aforesaid, the alleged invalidity of the said policy by reason of the alleged misrepresentation or misstatements of the assured, Harry Garfinkel, or his agent.

9. Defendant alleges that complainant had defended the suit brought against him by Lida A. Endicott, executrix, etc., and he was led to believe by complainant's agents that complainant would pay any judgment rendered against him if he, the said defendant, cooperated with the complainant in the defense of the said suit, and did not know that the complainant had refused to pay the judgment it had contracted to pay under its policy until the time of filing the bill in this cause.

This defendant, therefore, prays:

1. That the said policy of insurance be reformed by striking out and expunging therefrom paragraph 6 of the schedule annexed thereto.

2. That the complainant and its attorneys and agents, or assigns, be enjoined from pleading or setting up as a defense in the action commenced by Lida A. Endicott, executrix, etc., against it on said policy any misrepresentations or statements of the assured that the automobile was used only for private or business purposes.

3. That the said policy of insurance be reformed

by striking out and expunging therefrom paragraph 7 of the schedule annexed thereto.

4. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by Lida A. Endicott, executrix, etc., against it on said policy any misrepresentation or statement by the assured that the automobile was principally maintained and garaged in the city or town of Ventnor City, and principally used in the city or town of Ventnor City, and in the vicinity of said city or town.

5. That the said policy of insurance be reformed by striking out and expunging therefrom paragraph 8 of the schedule annexed thereto.

6. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by defendant, Lida A. Endicott, executrix, etc., against it on said policy any misrepresentation or statement by the assured that the automobile was and would not be rented to others or used to carry passengers for a consideration.

7. That the policy of insurance be reformed by striking out and expunging therefrom paragraph 9 of the schedule annexed thereto, or by striking out the words "no exceptions," and adding thereto "purchased under a conditional sale contract."

8. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by defendant, Lida A. Endicott, executrix, etc., against it on said policy any misrepresentation or statement by the assured that the automobile was the sole and unconditional property of the assured.

9. That the policy of insurance be reformed by striking out and expunging therefrom paragraph 10 of the schedule annexed thereto.

10. That the complainant and its attorneys and agents or assigns be enjoined from pleading or setting up as a defense in the action commenced by defendant, Lida A. Endicott, executrix etc., against it on said policy any misrepresentation or statement by the assured that no company or association had canceled or refused to renew automobile insurance to the named assured during the three years preceding April 5, 1928.

11. That this defendant may have such further or other relief as may be equitable and appropriate.

MAURICE J. HALPERN,
Solicitor of Defendant, Milton Garfinkel.

[ENDORSED]

We consent to the filing of within answer.

Thompson & Hanstein,
Sols. for Comp.

REPLICATION TO ANSWER AND ANSWER TO COUNTER-CLAIM OF LIDA A. ENDICOTT, EXECUTRIX OF THOMAS D. ENDICOTT, DECEASED.

(Filed March 19, 1930.)

IN CHANCERY OF NEW JERSEY.

Between HUDSON CASUALTY INSURANCE COMPANY, a corporation of the State of New Jersey, *Complainant*, and HARRY GARFINKEL, *et als.*, *Defendants.*	On Bill, &c. Replication to Answer and Answer to Counter-Claim of Lida A. Endicott, Executrix of Thomas D. Endicott, Deceased.

The complainant joins issue upon the answer of the defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased.

Answering the counter-claim it says:

1. Answering paragraph 1 complainant denies that Harry Garfinkel purchased the said automobile as is therein set forth. It says that said automobile was, in fact, purchased by Milton J. Garfinkel. It admits that either the said Milton J. Garfinkel or Harry Garfinkel received a conditional sales contract for said car, but it says that, in fact, said car was that of Milton J. Garfinkel, and that neither the said Milton J. Garfinkel nor Harry Garfinkel was ever the sole and unconditional owner thereof.

2. It admits that a policy of insurance was issued as stated in paragraph 2 but it says that said policy of insurance was issued under the circumstances set forth in the bill of complaint.

3. It admits the statements contained in paragraph 3.

4. It admits the statements contained in paragraph 4 but it says that although it defended the said action in the name and on behalf of the insured, it did so without admitting its liability and under the circumstances set forth in the bill of complaint.

5. It denies that the application for insurance was made by the said Harry Garfinkel but asserts that such application was made to it in the name of the said Harry Garfinkel, although the said Milton J. Garfinkel actually owned said car because the said Harry Garfinkel and Milton J. Garfinkel knew that

if application was made to complainant for a policy of insurance in the name of the said Milton J. Garfinkel, who was, in fact, the real owner of said car, complainant would not issue its policy of insurance, all as charged in the bill of complaint, and it says that at the time said application was made express statements were made to its agents in answer to questions covering the subject-matter of Provisions 6 to 10, both inclusive, of the schedule attached to the policy of insurance referred to in paragraph 6 of the counter-claim, and it denies that the policy of insurance and the schedule was in any wise variant from that bargained for and purchased, and it denies that it had any knowledge that the answers contained in said provisions six to ten, both inclusive, did not represent the true facts except only that it says, as it is alleged in its bill of complaint, the policy of insurance, while ostensibly insuring the car owned by the said Harry Garfinkel, did, in fact, insure a car which was owned by the said Milton J. Garfinkel.

6. It denies the statements contained in paragraph 6 of the counter-claim except that it admits that after the 24th day of July, 1928, it denied liability under its said policy because (among other things) of mis-statements in the warranties contained in said policy, and it admits that the provisions six to ten, both inclusive, were included in the schedule annexed to and a part of the said policy which said schedule has been in the possession of the said

Harry Garfinkel or Milton J. Garfinkel, since its issuance.

7. It denies the statements contained in paragraph 7.

8. It has no knowledge or information sufficient to form a belief as to whether the said Harry Garfinkel is insolvent and without any property subject to execution out of which the judgment referred to in the counter-claim or any part thereof can be realized; it admits that the defendant caused execution on the judgment to be issued against the said Harry Garfinkel and Milton J. Garfinkel, and that such execution has been returned by the sheriff of the County of Atlantic wholly unsatisfied; it admits that in any action at law the provisions six to ten contained in the schedule annexed to the policy will be set up in bar of recovery, and may preclude any recovery by reason of said judgment on an action which has been commenced. It denies the remaining statements contained in paragraph 8.

9. Further answering the counter-claim complainant says that the counter-claim does not set forth sufficient grounds for reformation in equity and that the counter-claimant has a full and complete remedy at law, and that this Court has no jurisdiction, and it makes these objections as if upon a motion to strike and reserves the right to strike at or before the hearing.

80 *Replication to Answer and Answer to Counter-Claim of Lida A. Endicott, Executrix of Thomas D. Endicott, Deceased*

10. Further answering the counter-claim complainant says that after the issuance of said policy, the said Harry Garfinkel and Milton J. Garfinkel retained the same without objection for a long period of time and that they are bound in law with knowledge of the contents of the said policy of insurance and its schedules, and that if the policy of insurance and schedule with respect to said provisions six to ten, both inclusive, do not express the agreement of the parties, then no contract was made upon which the counter-claimant is entitled to recover.

11. Complainant further says that the counter-claimant has not a sufficient interest in said policy of insurance to seek reformation and is not entitled to seek reformation and this objection is made as if upon a motion to strike and complainant reserves the right to move to strike at or before the hearing.

12. Complainant, further answering, says that the said counter-claimant is barred by laches from seeking the relief sought by counter-claimant.

MERRITT LANE,
Solicitor for Complainant.

[ENDORSED]

Due and legal service hereby acknowledged this 12 day of March, 1930.
Burton A. Gaskill,
Sol. for Lida A. Endicott.

REPLICATION TO ANSWER AND ANSWER TO COUNTER-CLAIM OF HARRY GARFINKEL.

(Filed July 8, 1930.)

IN CHANCERY OF NEW JERSEY.

Between
HUDSON CASUALTY INSURANCE CO., *Complainant*,
and
HARRY GARFINKEL, *et al.*, *Defendants*.

On Bill, &c.
Replication to Answer and Answer to Counter-Claim of Harry Garfinkel.

Complainant, Hudson Casualty Insurance Company, joins issue upon the answer of the defendant, Harry Garfinkel, and answering the counter-claim filed by him, says that:

1. Answering paragraph 1 complainant denies that Harry Garfinkel purchased the said automobile as is therein set forth. It says that said automobile was, in fact, purchased by Milton J. Garfinkel. It admits that either the said Milton J. Garfinkel or Harry Garfinkel received a conditional sales con-

tract for said car, but it says that, in fact, said car was that of Milton J. Garfinkel, and that neither the said Milton J. Garfinkel nor Harry Garfinkel was ever the sole and unconditional owner thereof.

2. It admits that a policy of insurance was issued as stated in paragraph 2 but it says that said policy of insurance was issued under the circumstances set forth in the bill of complaint.

3. Complainant admits paragraph 3, except the statement as to the giving of the notice of the accident, and for the particulars as to that reference is made to the bill of complaint filed herein.

4. It admits the statements contained in paragraph 4 but it says that although it defended the said action in the name and on behalf of the insured, it did so without admitting its liability and under the circumstances set forth in the bill of complaint.

5. It denies that the application for insurance was made by the said Harry Garfinkel but asserts that such application was made to it in the name of the said Harry Garfinkel, although the said Milton J. Garfinkel actually owned said car because the said Harry Garfinkel and Milton J. Garfinkel knew that if application was made to complainant for a policy of insurance in the name of the said Milton J. Garfinkel, who was, in fact, the real owner of said car, complainant would not issue its policy of insurance, all as charged in the bill of complaint, and it says that at the time said application was made express

statements were made to its agents in answer to questions covering the subject-matter of provisions 6 to 10, both inclusive, of the schedule attached to the policy of insurance referred to in paragraph 6 of the counter-claim, and it denies that the policy of insurance and the schedule was in any wise variant from that bargained for and purchased and it denies that it had any knowledge that the answers contained in said provisions 6 to 10, both inclusive, did not represent the true facts except only that it says, as it is in its bill of complaint, the policy of insurance, while ostensibly insuring the car owned by the said Harry Garfinkel, did, in fact, insure a car which was owned by the said Milton J. Garfinkel.

6. It denies the statements contained in paragraph 6 of the counter-claim, except that it admits that after the 24th day of July, 1928, it denied liability under its said policy because (among other things), of mis-statements in the warranties contained in said policy, and it admits that the provisions 6 to 10, both inclusive, were included in the schedule annexed to and a part of the said policy which said schedule has been in the possession of the said Harry Garfinkel, or Milton J. Garfinkel, since its issuance.

7. It denies the statements contained in paragraph 7.

8. It has no knowledge or information sufficient to form a belief as to whether the said Harry Garfinkel is insolvent and without any property subject

to execution out of which the judgment referred to in the counter-claim or any part thereof can be realized; it admits that the defendant caused execution on the judgment to be issued against the said Harry Garfinkel and Milton J. Garfinkel, and that such execution has been returned by the sheriff of the County of Atlantic wholly unsatisfied; it admits that in any action at law the provisions 6 to 10 contained in the schedule annexed to the policy will be set up in bar of recovery, and may preclude any recovery by reason of said judgment on an action which has been commenced. It denies the remaining statements contained in paragraph 8.

9. It denies paragraph 9, except that complainant admits that it defended the suit against the defendant as set out in the bill of complaint filed herein.

Complainant, further answering, says that:

10. The counter-claim does not set forth sufficient grounds for reformation in equity, and that the counter-claimant has a full and complete remedy at law, and that this Court has no jurisdiction, and it makes these objections as if upon a motion to strike and reserves the right to strike at or before the hearing.

11. Complainant says that after the issuance of said policy the said Harry Garfinkel and Milton J. Garfinkel retained the same without objection for a long period of time and that they are bound in law, with knowledge of the contents of the said

policy of insurance and its schedules, and that if the policy of insurance and schedule with respect to said provisions 6 to 10, both inclusive, do not express the agreement of the parties, then no contract was made upon which the counter-claimant is entitled to recover.

12. Complainant further says that the counter-claimant has not a sufficient interest in said policy of insurance to seek reformation and is not entitled to seek reformation and this objection is made as if upon a motion to strike and complainant reserves the right to move to strike at or before the hearing.

13. Complainant says that the said counter-claimant is barred by laches from seeking the relief sought by counter-claimant.

THOMPSON & HANSTEIN,
Solrs. for Complainant.

[ENDORSED]

We hereby consent to the filing of the within replication and answer out of time.

Maurice J. Halpern,
Solr. of Deft., Garfinkel.
Burton A. Gaskill,
Solr. of Deft., Endicott.

REPLICATION TO ANSWER AND ANSWER TO COUNTER-CLAIM OF MILTON J. GARFINKEL.

(Filed July 8, 1930.)

IN CHANCERY OF NEW JERSEY.

Between HUDSON CASUALTY INSURANCE CO., *Complainant,* and HARRY GARFINKEL, *et al.*, *Defendants.*	Replication to Answer and Answer to Counter-claim of Milton J. Garfinkel.

Complainant, Hudson Casualty Insurance Company, joins issue upon the answer of the defendant, Milton J. Garfinkel, and answering the counter-claim filed by him, says that:

1. Answering paragraph 1 complainant denies that Harry Garfinkel purchased the said automobile as is therein set forth. It says that said automobile was, in fact, purchased by Milton J. Garfinkel. It admits that either the said Milton J. Garfinkel or Harry Garfinkel received a conditional sales con-

tract for said car, but it says that, in fact, said car was that of Milton J. Garfinkel, and that neither the said Milton J. Garfinkel nor Harry Garfinkel was ever the sole and unconditional owner thereof.

2. It admits that a policy of insurance was issued as stated in paragraph 2 but it says that said policy of insurance was issued under the circumstances set forth in the bill of complaint.

3. Complainant admits paragraph 3, except the statement as to the giving of the notice of the accident, and for the particulars as to that reference is made to the bill of complaint filed herein.

4. It admits the statements contained in paragraph 4, but it says that although it defended the said action in the name and on behalf of the insured, it did so without admitting its liability and under the circumstances set forth in the bill of complaint.

5. It denies that the application for insurance was made by the said Harry Garfinkel but asserts that such application was made to it in the name of the said Harry Garfinkel, although the said Milton J. Garfinkel actually owned said car because the said Harry Garfinkel and Milton J. Garfinkel knew that if application was made to complainant for a policy of insurance in the name of the said Milton J. Garfinkel, who was, in fact, the real owner of said car, complainant would not issue its policy of insurance, all as charged in the bill of complaint, and it says that at the time said application was made express

statements were made to its agents in ansfer to questions covering the subject-matter of provisions 6 to 10, both inclusive, of the schedule attached to the policy of insurance referred to in paragraph 6 of the counter-claim, and it denies that the policy of insurance and the schedule was in any wise variant from that bargained for and purchased, and it denies that it had any knowledge that the answers contained in said provisions 6 to 10, both inclusive, did not represent the true facts except only that it says, as it is in its bill of complaint, the policy of insurance, while ostensibly insuring the car owned by the said Harry Garfinkel, did, in fact, insure a car which was owned by the said Milton J. Garfinkel.

6. It denies the statements contained in paragraph 6 of the counter-claim, except that it admits that after the 24th day of July, 1928, it denied liability under its said policy because (among other things), of mis-statements in the warranties contained in said policy, and it admits that the provisions 6 to 10, both inclusive, were included in the schedule annexed to and a part of the said policy which said schedule has been in the possession of the said Harry Garfinkel or Milton J. Garfinkel, since its issuance.

7. It denies the statements contained in paragraph 7.

8. It has no knowledge or information sufficient to form a belief as to whether the said Harry Gar-

finkel is insolvent and without any property subject to execution out of which the judgment referred to in the counter-claim or any part thereof can be realized; it admits that the defendant caused execution on the judgment to be issued against the said Harry Garfinkel and Milton J. Garfinkel, and that such execution has been returned by the sheriff of the County of Atlantic wholly unsatisfied; it admits that in any action at law the provisions 6 to 10, contained in the schedule annexed to the policy, will be set up in bar of recovery, and may preclude any recovery by reason of said judgment on an action which has been commenced. It denies the remaining statements contained in paragraph 8.

9. It denies paragraph 9, except that complainant admits that it defended the suit against the defendant as set out in the bill of complaint filed herein.

Complainant, further answering, says that:

10. The counter-claim does not set forth sufficient grounds for reformation in equity, and that the counter-claimant has a full and complete remedy at law, and that this Court has no jurisdiction, and it makes these objections as if upon a motion to strike and reserves the right to strike at or before the hearing.

11. Further answering the counter-claim it says that after the issuance of said policy, the said Harry Garfinkel and Milton J. Garfinkel retained the same without objection for a long period of time and that

they are bound in law with knowledge of the contents of the said policy of insurance and its schedules, and that if the policy of insurance and schedule with respect to said provisions 6 to 10, both inclusive, do not express the agreement of the parties, then no contract was made upon which the counter-claimant is entitled to recover.

12. Complainant further says that the counter-claimant has not a sufficient interest in said policy of insurance to seek reformation and is not entitled to seek reformation and this objection is made as if upon a motion to strike and complainant reserves the right to move to strike at or before the hearing.

13. Complainant says that the said counter-claimant is barred by laches from seeking the relief sought by counter-claimant.

THOMPSON & HANSTEIN,
Solrs. for Complainant.

[ENDORSED]

We hereby consent to the filing of the within replication and answer out of time.

Maurice J. Halpern,
Solrs. of Defts.,
Garfinkel.
Burton A. Gaskill,
Solr. of Deft., Endicott.

REPLICATION TO ANSWER TO COUNTER-CLAIM OF LIDA A. ENDICOTT.

(Filed April 8, 1930.)

IN CHANCERY OF NEW JERSEY.

Between
HUDSON CASUALTY INSURANCE COMPANY, a corporation of the State of New Jersey, *Complainant*,
and
HARRY GARFINKEL, *et al.*, *Defendants*.

On Bill, Etc.
Replication to Answer to Counter-Claim.

The defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, joins issue on the answer of the complainant to the counter-claim filed by her in the above-entitled cause.

BURTON A. GASKILL,
Solicitor of Defendant, Lida A. Endicott, Executrix of Thomas D. Endicott, Dec'd.

[ENDORSED]

Service of within Replication to Answer to Counter-claim is acknowledged as if in time and consent is hereby given to file same as if in time.

Thompson & Hanstein,
Sol'r. for Complainant.

REPLICATION TO ANSWER TO COUNTER-CLAIM OF HARRY GARFINKEL.

(Filed July 31, 1930.)

IN CHANCERY OF NEW JERSEY.

Between
HUDSON CASUALTY INSURANCE COMPANY, a corporation of the State of New Jersey, *Complainant*,
and
HARRY GARFINKEL, *et al.*, *Defendants.*

On Bill, Etc.
Replication to Answer to Counter-Claim.

The defendant, Harry Garfinkel, joins issue on answer of the complainant to the counter-claim filed by him in the above-entitled cause.

MAURICE J. HALPERN,
Solicitor of Defendant, Harry Garfinkel.

[ENDORSED]

We consent to the filing of the within Replication to Answer to Counter-claim as of time.

Thompson & Hanstein,
Solicitors of Complainant.

REPLICATION TO ANSWER TO COUNTER-CLAIM OF MILTON J. GARFINKEL.

(Filed July 31, 1930.)

IN CHANCERY OF NEW JERSEY.

Between

HUDSON CASUALTY INSURANCE COMPANY, a corporation of the State of New Jersey, *Complainant*,

and

HARRY GARFINKEL, *et al.*, *Defendants.*

On Bill, Etc. Replication to Answer to Counter-Claim.

The defendant, Milton Garfinkel, joins issue on the answer of the complainant to the counter-claim filed by him in the above-entitled cause.

MAURICE J. HALPERN,
Solicitor of Defendant, Milton Garfinkel.

[ENDORSED]

We consent to the filing of the within Replication to Answer to Counter-claim as of time.

Thompson & Hanstein,
Solicitors of Complainant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

BETWEEN

HUDSON CASUALTY INSURANCE COMPANY, a corporation of the State of New Jersey, *Complainant*,

and

HARRY GARFINKEL, *et al.*, *Defendants.*

On Bill, &c.
Final Hearing.

Atlantic City, N. J., November 13, 1930.

TESTIMONY.

Before HON. R. H. INGERSOLL, Vice Chancellor.

APPEARANCES:

For the complainant, MESSRS. THOMPSON & HANSTEIN. A. T. VANDERBILT, ESQ.

For the defendants, Garfinkel, MORRIS J. HALPERN, ESQ.; Lydia A. Endicott, Executrix, BURTON A. GASKILL, ESQ.

Mr. Hanstein: I would like to offer in evidence the alleged policy of the Hudson Casualty Insurance Company to Harry Garfinkel, being policy Number AP15803 dated April 6, 1928.

(Policy admitted and marked Exhibit C1.)

MAX A. KREPS, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Kreps, where do you live, sir?
A. Jersey City.
Q. What is your business?
A. Insurance.
Q. How long have you been in that business?
A. Sixteen years.
Q. Do you have any official position with the Hudson Casualty Company?
A. Yes.
Q. What was that position?
A. Vice-President and General Manager.
Q. You were that around the time of the insurance of the policy of insurance to Milton Garfinkel?
A. Yes.
Q. And also at the time of the issuance of the policy in question?
A. Yes.
Q. What particular phase of the work of the insurance company do you have charge of?

A. I supervise all departments of the company.

Q. Do you have anything to do with underwriting?

A. Yes.

Q. Was that under your supervision?

A. Yes.

Q. Did you handle the direction of the questions as to what policies were to be issued and what policies were not to be issued?

A. Yes.

Q. And that was under your direction?

A. Yes, sir.

Q. In the issuance of liability insurance policies is the ownership of the automobile a material factor considered by your company?

A. Very material.

Q. In what way is that material?

A. Well, we have found where people operated cars which they did not own outright as a rule they were poorer moral risks than people who owned their cars outright. We also have found on many occasions other people had interests in the car and in the operation of the car who probably because of their own standing couldn't get insurance themselves and if those facts were known, facts which they do endeavor to find out when they know that a man is not the unconditional owner of a car in this case they will not insure anybody who operates that car. A lot of cases we have where people have had insurance policies cancelled on them by companies and then in an endeavor to secure insurance, thereby avoiding the necessity of stating that they have had previous insurance cancelled and so on,

they have the cars insured in the name of somebody else.

Q. From that standpoint ownership is material?

A. Very material, yes, sir.

Q. What effect does the place in which the automobile is to be kept or the place in which it is to be operated have in your determination as to whether or not your company enters upon any particular risk?

A. In the first place our company, every company is only licensed to do the business in a certain place, and second, there are certain territories which experience has shown are poorer territories for automobile insurance and companies will not write insurance in such territories, third the territory in which the car is operated makes the rate for that particular car.

Q. Was your company authorized to do business in Pennsylvania?

Q. Do you, as an insurance man, know whether there is a different rate for automobiles being used principally in Philadelphia than there is for automobiles principally used in Ventnor City, New Jersey?

A. There is a material difference; it is an increase in Philadelphia.

Q. The Philadelphia rate is higher?

A. Largely higher.

Q. Does your company take into consideration—I think you may have already answered this—the question of the outright ownership of an automobile by one person as against some other person? In other words, is an automobile is held out to you for insurance as being the property of a certain

person when it is in fact the property of some other person? Is that a factor considered by your company?

A. It is.

Q. In what way does that have a bearing?

A. Well, if we knew that somebody else owned the car other than the person applying for insurance it usually concludes us to investigate the insured and anybody else who may have an interest in the car because in most cases we find somebody has an interest in the car who is not an insurable risk, who could not secure insurance.

Q. Did you know of the issuance by your company of a policy of insurance to Milton Garfinkel?

A. I did.

Q. Do you have a copy of that policy?

A. I have.

(Policy produced.)

Q. Is there anything else in connection with this than just the policy?

A. I believe there is some correspondence for the recall of the policy.

Mr. Gaskill: I object to that.

The Court: Let that be stricken. Is that the original or the copy?

A. That is the original. We secured that back after cancellation.

Mr. Hanstein: I offer that in evidence.

(Policy offered, received in evidence and marked Exhibit C2.)

Q. Did your company, subsequent to the issuance of that policy, take any steps with regard to continuing the existence of that policy?

A. Yes.

Q. What did your company do?

A. We made an investigation of the assured because in the warranty as to what his business was the statement was made that he was a real estate broker and our——

Mr. Gaskill: I object to any further testimony, your Honor; the question has been answered.

The Court: Yes.

Mr. Hanstein: He hasn't completed his answer.

(Question repeated.)

The Court: I will permit it.

A. The warranty as to his business stated real estate——

Mr. Gaskill: I object.

The Court: I have sustained the question and permitted the question. I have ruled upon it.

A. —and due to our experience and that of all the companies we as a rule, when that warranty is

answered that way, real estate broker, it is the usual designation under which bootleggers and others have——

Mr. Gaskill: I object.

The Court: Sustain the objection. Let it be stricken. It is not responsive to the question.

Q. Tell us what your company did with regard to the policy, Mr. Kreps?

A. You mean as to the investigation?

Q. After you concluded your investigation as to Milton?

A. We wrote to our agent and asked them to get the policy back because our investigation disclosed it was not a desirable risk.

Q. What was it that your investigation disclosed with regard to Milton Garfinkel?

Mr. Gaskill: Your Honor, I object to that. This man didn't make the investigation.

The Court: Sustain the objection.

Q. Who made the investigation for you?

A. Retail Credit Company.

Q. Did you get a written report from that company?

A. I did.

Q. Did you rely on it?

A. I did.

Q. Is that the practice of your company?

A. Yes.

Q. Is that the method usually used by insurance companies in investigating risks?

A. Yes.

Q. Did you have that investigation of that company?

A. Yes.

Q. Will you produce it?

A. Yes.

(Paper produced.)

Mr. Hanstein: I would like to offer this.

Mr. Gaskill: I object to it.

The Court: Sustain the objection.

(Paper marked C3 for identification.)

Q. Upon the receipt of the investigation marked C3 for identification what did your company do with regard to the Milton Garfinkel policy?

A. We wrote to our agent on February sixth and asked him to get the policy back as it was a poor risk and we did not want to stay on it.

Q. Did you send any notice directly to Milton Garfinkel?

A. Yes.

Q. Could I see the notice, please?

(Paper produced.)

Mr. Gaskill: I object to it.

Mr. Hanstein: Will you produce the original notice of March 6, 1928, directed to Milton Garfinkel, Mr. Halpern? I believe you are Milton Garfinkel's attorney.

Mr. Halpern: Haven't been able to locate the original. I have no knowledge of the receipt of it.

Q. Was this notice sent out?
A. Yes.

Mr. Hanstein: I offer it in evidence.

Mr. Gaskill: I object to it. He says the notice was sent out. I think we are entitled to know by whom.

Q. Who sent this out, Mr. Kreps?
A. My employee under my supervision.

By Mr. Gaskill:

Q. You didn't know it went off yourself at the time?
A. No, but I have known it went out since.
Q. But at the time you didn't know?
A. Because the agent secured the policy back from Garfinkel after the receipt of the notice.
Q. But you don't know personally that this notice was ever sent out?
A. No, except that all notices follow that procedure and are sent out.

Mr. Gaskill: I object.

The Court: Sustain the objection.

(Paper marked C4 for identification.)

By Mr. Hanstein:

Q. As the result of sending out of notice, C4——

Mr. Gaskill: I object to the question, that there is no testimony of sending out a notice for identification C4.

The Court: The question is objectionable. How can this man telling anything is the result of that notice?

Q. Was the Martin Garfinkel policy subsequently returned to your company?

A. Yes, sir.

Q. How soon after the date of this notice C4?

Mr. Halpern: I object to that.

The Court: Permitted.

Q. Can you tell us the date on which the policy was returned?

Mr. Gaskill: Your Honor——

A. April ninth.

Mr. Gaskill: Unless he knows of his own knowledge, I object to it.

The Court: Yes, this must be of his knowledge, not on the records, as it is now asked, not on the records of the company.

A. This is of my knowledge.
Q. Of your own knowledge?
A. Yes, sir.
Q. The policy was received by your company on what date?
A. April tenth.
Q. What is the date of the notice of, demanding the return of the policy as appears in your file?

Mr. Gaskill: Your Honor, I object to that.

The Court: Sustain the objection. There is testimony that there were two notices one to the agent and one to the party, the one to the agent has not been testified to except that it was sent, the letter.

Q. Do you have knowledge of any information of an accident relating to the use of the Harry Garfinkel car?
A. I have.
Q. When was that notice received by you?
A. Notice of accident?
Q. Yes.
A. Why, I think we received it on the fifteenth of May.

Mr. Gaskill: Can't we add to that 1928?

A. Yes, that is right.
Q. When that was received——

A. I wish to correct that, that accident happened the morning of the fourteenth and somebody phoned our claim man down in this territory and he phoned into the office on the fourteenth.

Q. So you received notice on the fourteenth?

A. That is right.

Q. Did you take any steps then with regard to an investigation of that accident?

A. Except ordered and directed the usual investigation we do of all accidents.

Q. By whom was that done?

A. By the claim department.

Q. Is that under your direction?

A. Yes, sir.

Q. Do you know who it was who made that investigation for your company?

A. I believe an investigator by the name of Sterler handled that original investigation, later it passed into other hands.

Q. What other men on behalf of your company handled that investigation?

A. A Mr. Fuller.

Q. Did Mr. Fuller give you a report of his investigation?

A. Yes, sir.

Q. Did you cause any investigation to be made with regard to the warrantees of the policy?

A. Yes, sir.

Q. Who made that investigation?

A. Mr. Fuller.

Q. Did he report that to you?

A. Yes, sir.

Q. Do you know when it was he reported it to you?

A. Some time in June or July, I couldn't tell unless I referred to the claim file.

Q. Will you do that—it may save time if I let Mr. Kreps find a letter and from that letter I merely want him to fix the time when he received his report from Mr. Fuller.

A. I know definitely it was prior to August third, but the exact date I would have to look at the report.

Mr. Gaskill: I object to that.

Q. I wish you would look that up and we can state that into the record later. After you received a report from Mr. Fuller—by the way, was that report in writing?

A. No, typewriting, I believe.

Q. I mean was a typewritten report?

A. Yes, it was.

Q. Is that in your file, too?

A. I believe it is; it should be there.

Q. What did you do upon receipt of that report?

A. We wrote a letter of cancellation to Harry Garfinkel and returned a check for the full original premium paid which we assume had been paid.

Q. Will you produce the letter that was sent to Harry Garfinkel?

A. Yes.

(Letter produced.)

Mr. Hanstein: I think we will use the original.

Mr. Gaskill: What date is that?

A. August third.

Q. You have a copy of it, do you?

Mr. Gaskill: I have the original here.

(Original letter produced.)

Mr. Hanstein: I would like to offer this in evidence.

(Letter received and marked Exhibit C5.)

Q. Your letter says that you also enclose a check for $39.56 return premium, was that check in fact enclosed in this letter?

A. Yes.

Q. Why was it that this policy was cancelled?

Mr. Gaskill: I object, your Honor.

The Court: If this man knows I will permit it.

A. Because our investigation indicated that there had been misrepresentation in the securing of the policy.

Q. In what respects?

A. That Harry Garfinkel was not the unconditional owner of the car, that he was not operating the car principally in and around Ventnor and there was indication that his business was not what he said it was, which is a jewelry salesman, and the investigation further disclosed that Milton Garfinkel had an interest in the car, also disclosed that Harry Garfinkel never drove a car in his life, never had

any license to drive a car, and apparently all the information we got pointed to the fact that this policy was secured for the purpose of letting Milton operate it.

Mr. Hanstein: I also want to offer in evidence, Mr. Gaskill, a conditional sales contract.

(Paper admitted and marked Exhibit C6.)

Cross-examination.

By Mr. Gaskill:

Q. Now, Mr. Kreps, you say it is important for your company to know who the owner of the automobile is?

A. No, not who the owner is, but that the assured is the owner of the car insured.

Q. But I mean that your assured is the owner of the automobile?

A. Yes, sir.

Q. And that is a thing or one of the principal things in determining whether or not you will take the risk, isn't it?

A. Yes, sir.

Q. Do you instruct your agents to inquire as to the ownership of the automobile?

A. The agents are presumed——

Q. Just answer yes or no.

A. No, sir.

Q. You don't?

A. No, sir.

Q. Then, Mr. Kreps, if it is important, why don't

you have your agents inquire as to who is the real owner of the automobile?

A. They are presumed to do so when they place an order with the company, it is the usual practice with all companies and all agents.

Q. They are presumed to do it?

A. Yes, sir; it is a standard warranty in every insurance policy.

Q. I know. I understand that, but you didn't require your agent in this particular case, did you, to inquire of the ownership of the automobile when he was taking the insurance?

A. In this particular case?

Q. Yes.

A. We assumed he had done so because that is the practice.

Q. That is the practice?

A. Yes, sir.

Q. Now, then, does he convey that information to you?

A. He should.

Q. And if you don't get the information then what do you do?

A. The assumption is that——

Q. Not the assumption, what do you do?

A. Can I explain the practice?

Q. Just a minute. You answer my question.

(Question repeated.)

A. We follow the usual practice——

Q. What do you do?

A. We follow the usual practice——

The Court: Let that be stricken. What do you do?

A. We follow the usual——

The Court: Let that be stricken.

A. We issue the policy and answer the warranties with "no exceptions."

Q. In other words, when your agent, who you expect to get information as to the ownership of the automobile, sends you an order and doesn't say or tell you about the ownership of the automobile you voluntarily assume to answer the question, don't you?

A. No, sir; it isn't voluntary in that sense, no.

Q. You answer it without any information from your agent, don't you?

A. Because the practice——

Q. Answer that yes or no, if you can?

A. Yes.

Q. You do?

A. Yes.

Q. In other words, then, the statement in this policy of Harry Garfinkel as to the ownership of the automobile in Section 9, if you don't receive any information from the agent, is the answer of the company to that question, isn't it?

A. No, sir.

Q. Whose answer is it, then?

A. It is supposed to be the answer of the assured.

Q. All right; I am assuming that you haven't any information from your agent concerning the ownership of that automobile——

A. The lack——

Q. Just a minute.

(Question withdrawn.)

Q. I am assuming now that you have no information from your agent concerning the ownership of that automobile. Who puts the answer in there as to the ownership of it?

A. Why, sometimes the company does and sometimes the agent.

Q. Who did it in this case?

A. The company.

Q. The company did?

A. Yes, sir.

Q. Then, in other words, the answer to warranty No. 9 in that policy is the answer of the Hudson Casualty Company, isn't it?

A. No, sir.

Q. Whose answer is it?

A. The assured.

Q. How do you know that?

A. Because the agent is assumed to notify the company when the conditions are contrary to the specific warranties, within the policy, and when he doesn't the company's practice in nearly all cases is that there are no exceptions to those specific warranties, therefore it is the assured's answer, therefore they say "no exceptions."

Q. When you received the information from this agent in respect to the writing of this policy did he tell you whether or not Harry Garfinkel was the sole and unconditional owner of that car?

A. No, sir; he did not.

Q. And then, without more, your company answered that question, didn't it?

A. We typed the answer in, yes, if that is what you mean.

Q. You typed the answer in. Did you instruct your agent, after you had put in an answer to a question which you considered to be a warranty which you considered to be very important in issuing a policy, did you instruct your agent to tell Harry Garfinkel or anybody acting under him that "we have changed this contract?"

A. We hadn't changed it.

Q. You had decided about ownership without any information, hadn't you?

A. No, sir, if you will let me explain the practice.

Q. I don't care about the practice, I want to know about this case.

Mr. Hanstein: Your Honor, I think if the witness is going to be interrogated he should be permitted to answer.

The Court: No, I will sustain the objection. He isn't asked what the practice is of the different companies. He is asked what was done in this case.

Q. Did you have the application in this case?

A. Yes, sir.

The Court: I am wondering—admitting it because on the question of fraud—because I take it that it will develop later in the case at least that his accepting this policy is a confirmation of all that is in it. I am not ruling upon that point at the

present time, but I am admitting this question now without that point upon the question of fraud.

Mr. Gaskill: Witness produces automobile order Hudson Casualty Company which I ask to be marked for identification.

(Paper marked D1 for identification.)

Q. Mr. Kreps, I see on this marked for identification D1, it is called "automobile order" and "M. A. Kreps, general manager" that is you, isn't it?

A. Yes, sir.

Q. Is that the form that your company issues to agents and upon which they are supposed to send information for you to write policies?

A. Yes, sir.

Q. In that——

(Paper offered and admitted in evidence by consent, marked Exhibit D1.)

Q. Mr. Kreps, on that order blank why didn't you have printed the questions that you included in the schedule?

A. Because it isn't the practice to do so.

Q. I know it isn't the practice, but why didn't you do it?

A. Because we follow the practice followed by all companies.

Q. Then if the practice of all companies are wrong, then you followed that practice, is that right?

A. If that is so, yes.

Q. Was it important to you whether or not Mr.

Garfinkel had had insurance cancelled within three years, was that important to your risk?

A. Very important.

Q. Then, why didn't you have your agent to make the inquiry?

A. He was supposed to do so.

Q. Here I show you the order blank, is there anything on there for him to report to you whether or not he has made that inquiry or not?

A. Yes, sir.

Q. Where is it?

A. Remarks paragraph consisting of four lines for that purpose.

Q. Then under the heading of remarks he is to make the answers to four important warranties on which you base your risk?

A. Yes, sir. No, there are just two, the other two are answered up above in location.

Q. You instructed your agent to do that?

A. Yes, sir.

Q. And he had the authority to take contracts for you?

A. Yes, sir.

Q. And to bind risks?

A. Yes, sir.

Q. All your company did was merely to write the policy? I mean you didn't pass the risk when it came up there, you merely wrote the policy on the first?

A. No, sir; we passed the risk.

Q. Who passed it?

A. We did, the underwriting department under my supervision.

Q. Who is that?

A. Myself and two or three assistants, underwriting department.

Q. Isn't it a fact——

The Court: As a matter of fact the policies were issued by the agent in this locality?

A. Not in this instance, signed by the agent before delivered to the assured.

Q. Wasn't it issued by this agent?

A. No, sir.

Q. Who issued this, the company?

A. Company.

Q. You haven't seen it yet—which policy is this?

A. Milton Garfinkel.

Q. Just look it over now and tell me why you say the company issued that policy?

A. Because Taylor and Soloff did not write their own policies.

Q. Now, isn't it a fact that Taylor and Soloff had the authority from your company to write policies?

A. Yes, sir.

Q. They did have authority to write policies and you furnished them with blank policies, didn't you?

A. No, sir.

Q. Do you mean to tell me that your company did not furnish them with blank policies?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Never did?

A. No, sir; not to my knowledge.

Q. They had the authority to do it, though, didn't they?

A. Had the authority to write policies but a lot of agents don't write their own policies.

Q. Any time they wanted to they could have written a policy?

A. If they had had a form; I don't think they had any forms there.

Q. If they did have forms, as a matter of fact, they had a right to issue policies, didn't they?

A. Yes, sir.

Q. As a matter of fact wasn't it the custom of your company to appoint agents in some instances who did not have clerical forces, large clerical forces, and that your company had them send in the information and, just as an accommodation to them or a matter of your business that you do the actual typewriting of the policy in your office?

A. That is right.

Q. And that happened in this case?

A. That is right.

Q. In other words Taylor and Soloff here in Atlantic City had a right to bind your company?

A. Yes, sir.

Q. In other words, if I had applied to them for insurance on a Ford automobile they had the authority to say "you are bound now"?

A. That is right.

Q. And they sent you the information and you would return them a policy, they would sign it and issue it to me?

A. They were supposed to check the policy with their order to see the warranties are properly answered and then sign the policy and issue it to the insured.

Q. I will ask you again, Mr. Kreps, in this order

blank here you are very particular about the numbers of the car and if it is kept in a private garage and all that sort of thing, but will you tell me now why it is that you leave off of that blank these very very important warranties?

A. Because in the majority of cases, in the greatest percentage of cases we find our risks that are offered to us as acceptable risks and it is in a very small minority where there is misrepresentation made where risks have been cancelled for poor experience, for non-payment, where the occupation of the assured is questionable and undesirable risk for any reason. All agents then with that information, necessary to describe the car, location and operation of the car, and they are intended and supposed to inquire whether the policy had previously been cancelled and whether the, what the assured's business is and whether the assured is sole owner of the car and the lack——

Q. He is supposed to inquire that?

A. The agent is supposed to inquire.

Q. But you know, as a matter of fact, don't you, as a matter of public knowledge, that sixty-five percent or more of the automobiles in the United States, and that includes New Jersey, are owned by conditional sale, don't you?

A. I don't know that.

Q. You don't know the records?

A. No.

Q. You have never read that in the public records?

A. No.

Q. You would say a large percentage is covered by conditional sales?

A. I should think so, today.

Q. The mere fact a man bought an automobile and paid fifty dollars a month for it wouldn't make him an undesirable risk, would it?

A. Not that fact only.

Q. So you didn't consider it important to put in the blank for your agent to secure for you?

A. We do consider it important.

Q. Did you find out whether they were conditional owners or not?

A. Not in this case but in all cases they were supposed to. We did tell him that.

Q. You did tell him that?

A. Yes, our policy speaks for itself in that too.

Q. Did you tell Mr. Garfinkel, have word sent to your agent to tell Mr. Garfinkel that after you knew that Taylor and Soloff had accepted the risk on this particular automobile and for a very high limit, twenty-five and fifty thousand dollars, did you notify your agent that you were writing something into the policy that he hadn't given you any information about?

A. We weren't doing that.

Q. Did he tell you anything about the ownership of the car?

A. No, sir.

Q. You wrote that in, didn't you?

A. Yes, sir.

Q. You answered these questions, didn't you?

A. Yes.

Q. And you did not notify the agent that—before issuing this policy to the assured that you were sending down a contract different than the agent had ordered?

A. We did notify them.

Q. Notified who?

A. The agent, contract speaks for itself, the warranties are answered and policies can't go out and in effect until the agent has countersigned it, he is presumed to read those warranties and countersign it and check it with his information he gave us for the issuance of the policy.

Q. Mr. Kreps, I want to ask you this question, when that information came to you to write this policy did you know at that time whether or not Harry Garfinkel had made representations as to his ownership of the automobile, did your company know or did you know?

A. Except from practice.

Q. Did you know?

A. Definitely no.

Q. Did you know when that application was sent in to you to merely write this policy whether or not Harry Garfinkel had had insurance cancelled on an automobile within three years?

A. No, sir.

Q. And your agent didn't furnish you that information?

A. He did not.

Q. Harry Garfinkel never personally communicated with your company other than through your agent, did he, so far as you know?

A. I believe he did in the claim matters.

Q. You never saw Harry Garfinkel, did you?

A. I don't think I ever did, no.

Q. So the answers to this warranty, so-called, of Number 9 and Number 10 is not, so far as you know, the answer of Harry Garfinkel?

A. Yes, sir; it is.

Q. All right; explain how it is.

A. The policy starts off with the statement, by the making of these warranties, by the acceptance of the policy the assured warrants these statements to be true, this is a consideration.

Q. In other words your company hides behind the proposition that you answer questions in a warranty you don't know whether they are true or false, and then by stipulation in a policy—wait a minute—you are going to bind a man and say that he answered them when you answered them?

Mr. Hanstein: Wait a minute.

The Court: Sustain the objection.

Q. Did you have anything to do with that letter? (Referring to letter of July 24th.)

A. I knew of it.

Q. You knew of it?

A. Yes, sir.

Q. What was the misstatement in the warranties in the policy at that time on July 24, 1928?

A. That the car was operated and maintained, operated principally in and about Ventnor City, that he was the sole and unconditional owner and that he was a jewelry salesman.

Q. So then on July 24, 1928, you knew at that time that Mr. Garfinkel was not the sole and unconditional owner of the car, that the car was improperly operated or in a different place than specified in the policy and that he was not a jewelry salesman?

A. So far as our investigation went, yes.

Q. As a result of that your company denied liability?

A. Not as the result of that alone, no.

Q. That is what you stated—you didn't state anything in there, did you, in this letter, but that was what you knew?

A. Yes.

Q. Did you know anything else at that time?

A. Yes, our investigation led us to believe and disclosed the fact Milton J. had an interest in that car, that is secured information he couldn't secure it in his own name.

Q. You had all that information on July 24, 1928?

A. Somewheres around that time.

Q. Wrote him that letter?

A. Yes, we did.

Mr. Gaskill: Can we offer that in evidence?

Mr. Hanstein: May I see it?

(Letter admitted and marked Exhibit D2.)

Q. Mr. Kreps, in that letter you didn't tell Mr. Garfinkel in what respects he had violated the warranties, did you?

A. I didn't write the letter. The company didn't, no.

Q. Do you know whether or not they received a reply to that from Mr. Garfinkel?

A. I couldn't say. I know we received a reply to the cancellation notice.

Q. You don't know whether they replied to that letter or not?

A. I don't unless I refer to the claim file again.

Q. Isn't it your custom and your practice, immediately after your agents take insurance risks, that you immediately then begin an investigation?

A. No, sir.

Q. It is not?

A. No, sir.

Q. You did in the case of Milton Garfinkel in February?

A. Yes, sir.

Q. What caused you to do that particularly?

A. The statement that his occupation was a real estate broker.

Q. What has a real estate broker got to do with a quick investigation?

A. That is usually a blind used by a lot of people who can't secure insurance if they state their true occupation.

Q. Then a man who can't get insurance says he is a real estate broker?

A. Yes, in instances.

Q. Never mentions a lawyer?

A. Not lawyer, no.

Q. The fact that he mentioned jewelry salesman kind of lulled you to sleep, is that it?

A. No, sir.

Q. Why didn't you have your usual investigation?

A. Because—in Harry Garfinkel's case?

Q. Yes.

A. Because of the warranties, most of our insurance policies in our office are issued on good faith and proper interest represented and it is nice to say in most cases faith is kept, in this particular

case all the warranties led us to believe that this was a desirable and insurable risk providing they were true.

Q. Even the warranties that you didn't receive?

A. Sir?

Q. Even the warranties and statements you didn't receive?

A. I don't know what you mean by that.

Q. I mean the answer denying that you didn't have any information about led you to believe it was a good risk?

A. We did have information from practice, if you will let me explain that, and the assured also confirmed it by the acceptance of the policy.

Q. When did you start to make your investigation to find out whether there was a breach of warranties or not?

A. Of Harry Garfinkel?

Q. Yes.

A. After the accident case which immediately disclosed the fact——

Q. In other words you were beginning to find some way out of the accident?

A. No, the first notice of the accident disclosed the fact Milton was driving the car, a risk we had cancelled before because of poor moral hazard and that let us to immediately investigate his warranties for the issuance of this policy.

Q. After the time of the accident, after the cancellation did you still continue in charge of this matter?

A. Generally, yes.

Q. Did you have any communication with Milton Garfinkel after the fourteenth of May?

A. Did I have any? No, I believe our company did. I don't know. Our legal department may have.

Q. Is there anybody here that can testify to that?

A. I think somebody is here. I am not certain.

Q. You have the entire file?

A. Yes, I can tell by going through the file, yes, I can tell.

Q. Is there any communication with your company and Milton Garfinkel subsequent to May fourteenth, 1928?

The Court: Can't we save time, Mr. Gaskill? You evidently know whether they have or not.

Mr. Gaskill: I do know that they did not have but I want him to say so.

The Court: If that is the situation you are justified in the question.

Mr. Gaskill: I don't want to take the time, your Honor, but I think it is important to my examination to know whether they had or not.

The Court: The question is proper.

A. I think the file indicates correspondence with an attorney representing Milton Garfinkel after the accident asking us to do certain things.

Q. May I see that? What I mean is there any communication between your company and Milton Garfinkel?

A. I am looking now, I will tell you——

Q. Mr. Kreps, I will withdraw that question now. Now, when summons was served or received by your company it was served on Milton Garfinkel and received by your company some time in November, 1928, do you know whether they communicated with Milton then or not?

A. I cannot say offhand.

Q. Now, you do know that Mr. Higgins, F. Hobart Higgins, secretary of your company, also a counsellor-at-law of New Jersey, filed an answer in the matter, don't you?

A. I believe he did after he made reservations.

Q. I don't care anything about the reservations. Mr. Hanstein will talk to you about it.

A. I am not certain unless I would refer to the file right there.

Q. You can refer to the file if you care to, but do you know whether or not your company defended this case against Milton—I am leaving Harry out entirely when I say Milton Garfinkel.

Mr. Hanstein: The record of the case would show it and there is no use taking time on that.

Mr. Gaskill: Mr. Hanstein, I know the record but I am cross-examining this man. He knows everything about it.

Mr. Hanstein: It seems to me the record would be the best evidence.

The Court: There is no objection at all.

Mr. Hanstein: I do object to the question on the ground the record would be the best evidence.

The Court: The only question now is whether or not this man had knowledge of such fact.

Q. Do you know to your knowledge whether or not your company, Hudson Casualty defended Milton Garfinkel in a suit brought against him by Lydia A. Endicott, executrix, for the death of Thomas D. Endicott.

A. I couldn't unless I referred to the file because there are so many claims and counter-claim.

The Court: Question is only your knowledge.

A. I couldn't tell unless I refer to the file.

Q. Mr. Kreps, what is a jewelry salesman in your opinion?

A. Somebody that works either in a jewelry store or works for a wholesale house and sells jewelry to retailers or direct to consumer or somebody goes from house to house canvassing, taking jewelry orders.

Q. If a man buying precious metals and precious stones, buying and selling them, wouldn't he be a jewelry salesman in your opinion?

A. Not in that sense, no.

Q. What business would he be in then?

A. Well, there is a mercantile classification for it, dealer in precious metals which would indicate specific location and all, this indication of jewelry salesman——

Q. Is there any difference in the risk?

A. Under certain conditions there is, yes.

Q. Let me ask you, if Mr. Garfinkel had owned this automobile absolutely what would have been the rate for the insurance—I will withdraw that—does it make any difference in your rate whether or not Mr. Garfinkel was the sole and unconditional owner or the conditional owner of the automobile?

A. It did not, not in the rate.

Q. What do you calculate your premium on?

A. Based on experience.

Q. Experience?

A. Previous years.

Q. What do you mean experience of previous years?

A. The insurance companies compile proof of loss experience recorded by cars by territory and they use that as a basis for compiling their rates for ensuing years to which basis they add the proper amount for expenses and commissions for agents, takes, and then they promulgate a new rate which, after it receives the approval of the insurance department, becomes a fixed rate for that particular car in certain territories.

Q. You have read this policy before you?

A. I believe I have, yes.

Q. Isn't it a fact that the premium computation is based upon description and the purpose for which it is used and the extent of the insurance required by the insured, those three things only enter into the premium computation?

A. No, sir; into the premium computation, yes.

Q. Into your premium computation?

A. Yes, the territory and the purposes and the amount of insurance and kind of insurance.

Q. Are you adding to your policy that you publish?

A. Beg pardon?

Q. Are you beginning to add to your policy that you publish? Look at condition F and tell me whether or not that is the true statement as to on what you base your premium rates?

A. That is right.

Q. That is true, isn't it?

A. Yes.

Q. In other words, your premium is based upon a specific charge for each automobile dependent upon its description, that means a certain motor power and the body and the purpose for which it is to be used and the extent of the insurance required?

A. Yes.

Q. In other words, if it is to be used for business and pleasure and whether the limits are up twenty-five and forty thousand or not, that is on what you base your premium computation?

A. To the territory operated in.

Q. That is in addition to the printed?

A. That is generally included in the description, "where operated" because those rates are fixed by the insurance department.

Q. Does this mean the territory in which the car is operated, the premium for this policy is based upon a specific charge for each automobile dependent upon its description?

A. That generally means five-ton Mack truck in the coal business operating in Philadelphia, covers everything, the word description in that sense covers the territory.

Q. It covers the territory in the description of the automobile, does it?

A. Yes, sir, in that sense. That is a standard form policy.

Q. There is no question now, Mr. Kreps.

A. I beg pardon.

Q. Who instructs the agents to make out the policies and accept risks?

A. I don't know just what you mean.

Q. Who from your company tells your agent what you are willing to do about getting business, &c?

A. We have a man as a rule in charge of the agency department and activities and direct contact with agents, he is superintendent of agencies.

Q. He is under you, isn't he?

A. Yes, sir.

Q. Now Taylor and Soloff here in Atlantic City had the right to collect insurance premiums, didn't they?

A. Yes, sir.

Q. And transmit them to the company?

A. Yes, sir.

Q. And they also had the right to attach riders to the policies?

A. Endorsements, yes.

Q. In other words they were the general agents of the insurance company, weren't they?

A. They were.

Q. With authority to bind you in all respects so far as casualty insurance is concerned?

A. Not in all respects, no.

Q. I mean so far as automobiles go?

A. So far as their authority went.

Q. They were general agents for the company?

A. They had limited authority, yes, in connection with certain classes of business. They have no right to waive any particular——

Q. Just a minute. Let me ask you this, Mr. Kreps. If this policy is dated the sixth of April, who would put the date of the policy in there?

A. The effective date of the policy?

Q. Yes.

A. That is taken from the order submitted by the agent.

Q. That would be done by the typewriter in Jersey City?

A. No, sir. The order is submitted by the agent.

Q. I mean the actual typewriting would be in Jersey City?

A. Yes.

Q. Then this policy was actually given to the assured some time after the sixth because you put the date on the policy that he filed the order?

A. Not of necessity, no, sir.

Q. Let me see if you didn't in this case. What date does that order show it is received?

A. We received it April seventh.

Q. No, on the date of it, on the front.

A. We received it April seventh.

Q. Will you look at the front and give me the date of the order? It is the sixth of April, isn't it?

A. I don't know when this was made up but we received it April seventh.

Q. It says April sixth, doesn't it?

A. Yes.

Q. Then if it was received in Atlantic City on April sixth you couldn't possibly have written this policy until the next day?

A. Under certain conditions we could, yes.

Q. Then you dated it on the date the agent got the application, is that right?

A. That is right in that case, apparently.

LLOYD E. FULLER, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Fuller, where do you live?

A. In Avon, New Jersey.

Q. What is your business?

A. Investigator.

Q. With whom are you associated at the present time?

A. With Kenny, Parsons and Doremus of Red Bank.

Q. Were you previously connected with the Hudson Casualty Company?

A. No, sir.

Q. What was your connection with the Hudson Casualty Company?

A. I was employed as investigator by F. Hobart Higgins.

Q. Did you do some work for the Hudson Casualty Company in connection with the Garfinkels?

A. Yes, sir.

Q. What were you called on to investigate with regard to the Garfinkels?

A. The ownership and the purchase and the opera-

tion of the car and generally speaking the Garfinkels themselves.

Q. Where did you make that investigation?

A. In Trenton, Atlantic City, Philadelphia, Baltimore, Columbus, Ohio, Cleveland, Ohio, Geneva, New York, and other places, Baltimore, Maryland.

Q. Did you have any interviews or attempted interviews with Harry Garfinkel?

A. Yes, sir.

Q. Was that after the date of this accident?

A. Yes, sir.

Q. When was the first time you made contact with Harry Garfinkel?

A. On July seventh, 1928.

Q. When was the—where was that contact?

A. That was at the office of the Eastern Smelting and Refining Company at 728—712 Warnock street, Philadelphia.

Q. You found Harry Garfinkel up there?

A. Yes, sir.

Q. What was he doing up there?

A. Sitting in a chair when I saw him.

Q. Do you know if he was engaged in business there?

A. He was the only occupant of the office.

Q. Had you made any previous efforts to get in touch with Harry Garfinkel?

A. Yes, sir.

Q. What efforts had you made?

A. I attempted to get him in Atlantic City and then I attempted to get him at another address in Philadelphia.

Q. Had you had any earlier appointments with him than this one of July in Philadelphia?

A. No, sir.

Q. Had you attempted to make any appointments with him?

A. No, sir.

Q. The first time you saw him was in Philadelphia?

A. Yes, sir.

Q. What conversation took place between you and Harry Garfinkel at that time?

A. I asked Harry Garfinkel for a statement regarding the ownership and operation of the car and any facts that he knew in regard to the accident and Harry Garfinkel refused to give me the statement.

Q. What did he say to you?

A. He said that he didn't feel like giving me a statement.

Q. Did he tell you anything at that time about the ownership of the car?

A. He said he owned it.

Q. Did he tell you anything about the character of its ownership?

A. No, sir.

Q. Did he give you any information about the accident?

A. No, sir.

Q. What did he say in response to your request for information about it?

A. He said he did not feel like talking that day, come back some other time.

Q. Did you see him subsequently?

A. I did see him subsequently, yes.

Q. Where did you see him the next time?

A. I saw him at an office here in Atlantic City,

same month that was given and I saw him once again sometime I think in 1929 at the Eastern Smelting and Refining Company.

Q. Same place?

A. Same place; I didn't interview him; I just saw him there.

Q. Was he engaged in business there?

A. Yes, sir. I say he was engaged in business. He was there and only occupant of the office at the time.

Q. Both times you were there he was the only occupant?

A. Yes, sir.

Q. What was the nature of the business of the Eastern Smelting and Refining Company?

A. As I recall——

Mr. Gaskill: I object, your Honor.

The Court: Sustain the objection.

Q. Do you know what the business of that company was?

A. Buying and selling gold and silver.

Q. Was the name of that company on the door?

A. Yes, sir; it was on the window, as I recall it.

Q. Of what building was that?

A. 712 Warnock Street, Philadelphia, on the first floor.

Q. Did you have any interview with Milton Garfinkel?

A. I have had several interviews with Milton Garfinkel.

Q. Where did they take place?

A. At 712 Warnock Street, Philadelphia.

Q. The same address, the Eastern Smelting and Refining Company?

A. Same address, yes, sir.

Q. What conversation did you have with him?

A. That was at the time that the case was to be tried, the negligence case, and I interviewed him relative to coming to Atlantic City.

Q. Did you have any discussion with him as to the ownership of this automobile?

A. No, sir.

Q. Was there any discussion at that time of anything other than the accident itself?

A. No, sir. Well, I may qualify that, I was to arrange to have Harry Garfinkel, Isaac M. Garfinkel and Milton Garfinkel attend the trial.

Q. Now did you interview other people as to the place in which this automobile was to be operated and was operated and as to the ownership of that automobile?

A. Well, I interviewed——

Mr. Gaskill: The answer is yes or no to that and I object.

A. Yes, sir.

Q. Who did you interview?

A. I interviewed a Mr. Bartram and Mr. Kershaw of the firm of Bartram and Kershaw. I interviewed a Mr. Carroll.

Q. Bartram and Kershaw were whom?

A. Bartram and Kershaw were automobile dealers here in Atlantic City who sold the Chevrolet car to Harry Garfinkel, and I interviewed Mr. Carroll who

was introduced to me as the man who actually made the sale. I interviewed a Mr. Grossbeck of the General Motors Acceptance Corporation, Philadelphia, as to the ownership of the car, how it was paid for, and, of course made an investigation in Trenton as to the licenses, &c.

Q. Did you make an investigation as to whether or not Harry Garfinkel had a driver's license?

A. Yes, sir.

Q. Did you get a certified copy from the secretary of state?

A. I got a certificate from the Motor Vehicle Department in Trenton to the effect——

Mr. Gaskill: I object. I will admit without any proof he did not have a driver's license.

Mr. Hanstein: We won't need the certified copy.

Q. Who else did you talk to with regard to those elements.

A. Well, I think that is all.

Q. Did you make up a written report of your investigation?

A. Several of them, yes, sir.

Q. Did you submit your report to Mr. Kreps?

A. To Mr. Higgins.

Q. To Mr. Higgins, I mean?

A. Yes.

Q. Mr. Higgins was at that time the secretary of the company, is that correct?

A. Yes, sir, and my superior. I worked under his direction.

Q. Do you know the date of your report?

A. The first report was the telephone communication on June 29, 1928.

Q. You mean there was a telephone conversation?

A. That was a report I telephoned into the office, and the next report was on July fifth, 1928. Now then from then on up through the latter part of July there are several reports in the form of letters.

Q. You wrote subsequently letters?

A. There was one from Geneva, one from Columbus, Ohio, one from Cleveland, Ohio, and one from Baltimore, besides several telegrams just reporting my whereabouts.

Q. From your investigation did you ascertain whether or not Harry Garfinkel was the sole and unconditional owner of the automobile?

Mr. Gaskill: I object.

The Court: Sustain the objection.

Q. Did you ascertain whether or not Harry Garfinkel was using the car in the vicinity of Ventnor City?

Mr. Gaskill: I object.

The Court: Sustain the objection.

Q. Did you communicate your information to Mr. Higgins?

A. Yes, sir.

Mr. Gaskill: I object, your Honor.

The Court: I will permit that.

Q. Did you interview Taylor and Soloff in the course of your investigation?

A. Yes, sir.

Q. Did you interview John Soloff?

A. Yes, sir.

Q. In the preparation of this suit did you have John Soloff go to Newark?

A. Yes, sir.

Q. Did you there have him take an affidavit?

A. An affidavit was taken in the office of Merritt Lane.

Q. Who dictated the affidavit?

A. Mr. Lane.

Q. John Soloff there?

A. John Soloff had told him the facts.

Mr. Gaskill: I object, your Honor; the affidavit will speak.

The Court: It is not responsive to the present question.

Q. The question was, John Soloff there?

A. Yes.

Q. Were you there when the affidavit was dictated?

A. Yes.

Q. Was Soloff there?

A. Yes.

Q. Were you there when Soloff signed it?

A. Yes, sir. I will change that, I am not so sure I was there when John Soloff signed it.

Cross-examination.

By Mr. Gaskill:

Q. Mr. Fuller, can you by refreshing your recollection from any of your reports tell me what date you saw Bartram and Kershaw about the ownership of the Garfinkel car?

A. I can't fix the exact day, it was sometime between June 29, 1928, and July 5, 1928.

Q. June 29, 1928, and the reason you say that, I imagine, Mr. Fuller, your mind is refreshed by looking at your report on July 5th, 1928, you reported to Mr. Higgins, the secretary of the company, that Harry Garfinkel was not the sole and unconditional owner of the car, isn't that a fact?

A. No, that is not true.

Q. When did you discover that he was not the sole and unconditional owner of the car?

A. That he was not?

Q. Yes.

A. Sometime in that period from June 29th.

Q. Between June 29th and July 5th?

A. Right.

Q. There isn't any doubt about that, is there?

A. No.

Q. You reported that to Mr. Higgins?

A. I reported that to Mr. Higgins under memorandum dated July 5th, 1928.

Q. That Mr. Harry Garfinkel was not the sole and unconditional owner of the car?

A. That data is fixed definitely with the proviso that I might have told them on the telephone a day or so before reporting into the office.

Q. The thing I want to be sure about is some time prior to July 5, 1928, you informed Mr. Higgins, the secretary of the company, that Mr. Harry Garfinkel was not the sole and unconditional owner of that automobile that they had insured?

A. I wouldn't answer yes or no on that because I reported the circumstances surrounding the sale. I didn't say he was or wasn't or was that.

Q. Did you say he paid it down?

A. First down payment $119, paid by Harry Garfinkel, &c.

Q. You transferred that information to Mr. Higgins?

A. Yes, sir.

Q. That was sometime prior to July 5, 1928?

A. In that time from June 29th.

Q. Now, Mr. Fuller, were you ever employed by the Hudson Casualty Company?

A. Was I ever employed by the Hudson Casualty Company?

Q. I mean were you in their employ at the time you saw Harry Garfinkel?

A. Well, indirectly, yes. I wasn't paid by the Hudson Casualty.

Q. You wasn't paid by it?

A. No.

Q. Then you had a card, didn't you, of the Hudson Casualty Company?

A. Yes, for convenience.

Q. Then you represented to folks as you went around that you were Mr. Fuller of the Hudson Casualty Insurance Company, didn't you?

A. Yes, sir.

Q. And yet you didn't represent them, you say now?

Mr. Hanstein: You asked whether he was employed by them.

Q. But you represented them?

A. Yes.

Q. Mr. Garfinkel told you at the time you were in Philadelphia that he was ill that day and that he would write out a statement for you, didn't he?

A. Yes.

Q. You insisted on him doing it right then and there, didn't you?

A. Yes. I had been trying to get him for weeks.

Q. But he told you that if you would tell him what you wanted he would write out a statement and send to you, didn't he?

A. No, he did not.

Q. He did not?

A. No—that is what he said.

Q. Do you remember in this case that you filed an affidavit for a preliminary injunction and I am going to ask you if this question wasn't asked you, to him by you, and this answer returned by Mr. Garfinkel: "But, Mr. Garfinkel" ——

A. Just excuse me a minute; I don't understand the question.

Q. I am asking you if you did not ask that question to Mr. Garfinkel, to which he made the following reply: "Mr. Garfinkel, I came all the way from Jersey City just to get this statement from you, Mr. Garfinkel. But I cannot make it this minute. I just came from the shore. I don't feel so good. I

feel miserable. I will feel better tomorrow then I can make the statement out and send it to you." Did he make that declaration to you?

A. Yes, sir.

Q. In other words, he told you he wasn't feeling well physically and he would make out the statement and send it to you?

A. Yes, sir.

Mr. Hanstein: Did he ever do it?

A. No, sir.

Q. Did you tell him what you wanted included in the statement?

A. No.

Q. You knew at that time that Mr. Harry Garfinkel did not know anything about the accident himself, didn't you?

A. No, I didn't know that.

Q. You knew who the driver of the automobile was, didn't you?

A. Yes.

Q. You knew that Mr. Isaac Garfinkel was in the automobile?

A. Yes.

Q. You knew from your investigation that Harry Garfinkel was not anywhere near the scene, didn't you?

A. No.

Q. You didn't know that?

A. No, I didn't investigate the negligence end of this case.

Q. You had the folder before you of the negligence investigation, didn't you?

A. No.

Q. So then you went down to get the, to take a statement as to the negligence of the operation of the automobile, is that right?

A. No, I went down to get a statement from him what he knew about the accident; I didn't know what he knew.

Mr. Hanstein: He never sent you the statement?

A. No, sir.

JOHN C. CARROLL, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, Mr. Carroll?
A. 1509 Pacific Avenue, Atlantic City.
Q. How long have you lived there?
A. Fourteen years.
Q. What was your business in 1928?
A. Salesman.
Q. Of what?
A. Automobiles.
Q. Where did you work?
A. For Bartram and Kershaw.
Q. While there did you ever meet Milton Garfinkel?
A. Yes, sir.
Q. Do you know when you met him?

A. No, I don't.

Q. Do you remember the circumstances of meeting him?

A. Yes.

Q. What were they?

A. He came into the show-room and asked for a used car.

Q. Talk to you?

A. Yes, sir.

Q. Was he alone?

A. Yes, sir.

Q. Did you show him any used cars?

A. Yes, sir.

Q. What used cars did you show him?

A. A Chevrolet.

Q. The one that was subsequently sold by you?

A. Yes, sir.

Q. Did you demonstrate this car to him?

A. No, I don't think I did.

Q. How long did he stay there on that occasion?

A. Oh, I should say a half hour.

Q. Did he come back on any subsequent date?

A. Yes, sir.

Q. When was that?

A. The following day.

Q. Then what did he do?

A. He had his uncle with him, Mr. Harry Garfinkel, and negotiated for the purchase of that car.

Q. Who carried on the conversation with you?

A. They both did.

Q. What did the conversation relate to?

A. To the price of the car.

Q. Also to the terms of the sale?

A. Yes, sir.

Q. Was the car sold that day?

A. No, sir.

Q. The two of them went out?

A. Yes, sir.

Q. When did you see Milton Garfinkel again?

A. Following morning.

Q. About what time?

A. Well, probably about nine or ten o'clock, something like that.

Q. Was Harry Garfinkel with him at that time?

A. Yes, sir.

Q. What conversation took place?

A. The sale of the car was completed at that time.

Q. About what time of the day was it that the sale was completed?

A. Well, I should say about ten o'clock.

Q. Was the conditional sales contract executed that day?

A. Yes, sir.

Q. Who paid for the car?

A. Mr. Bartram concluded the sale, but it is my impression that ——

Mr. Gaskill: I object, your Honor, unless he knows.

A. Then I will say I don't know.

Q. What did you do with regard to licenses after that?

A. I took Harry Garfinkel and Milton Garfinkel to Pleasantville to the Motor Vehicle Agency and they obtained tags.

Q. Who drove the car?

A. Milton Garfinkel.

Q. Did you see the car subsequently?

A. Did I see it?

Q. Yes, was the car ever brought around to your place after that?

A. I couldn't say.

Q. Did you ever see the car on the street after that?

A. I don't think so.

Q. You never saw the car again?

A. I don't think so.

Q. Do you know what place Harry Garfinkel gave as his residence at that time?

A. I have forgotten.

Cross-examination.

By Mr. Gaskill:

Q. Mr. Carroll, on the morning when the sale was completed you were not with the Garfinkels all the time that they were in the place, were you?

A. No, it was in the show room, I think I was on the sales floor that morning, so that I was around there all the time.

Q. Some of their transaction was in the office, wasn't it?

A. Yes, sir.

Q. You were not in the office?

A. No, sir.

By Mr. Hanstein:

Q. What kind of an office was this?

A. What kind of an office?

Q. Yes, what separated that from the show room?

A. A partition.

Q. How high was the partition?

A. I think it reached the ceiling; I am not sure about that, either.

Q. Were the Garfinkels in that office with the door closed at any time?

A. I don't think so.

Q. Where was the telephone?

A. There was a telephone in the office and telephone on the sales desk outside.

Q. Did you see Milton Garfinkel at the telephone at any time?

A. He may have. I am not sure.

Q. Did you deliver this conditional sales agreement to the Garfinkels or either of them?

A. No, sir.

Q. You didn't do that?

A. I took it and went over with them and kept the conditional bill of sale myself.

Q. I didn't quite get that.

A. We don't deliver a conditional bill of sale to the purchaser of the car, we go with him and get his tags and keep the conditional bill of sale.

By the Court:

Q. Don't they have a copy of it?

A. Not the conditional bill of sale, no, sir.

Q. Conditional sale contract?

A. Contract, no, sir.

By Mr. Gaskill:

Q. Mr. Carroll, I am referring to C6 and ask you what that is, if you know?

A. That is the contract which is sent to the General Motors Acceptance Corporation, copies of this.

Q. So then there is another paper concerning the title to this car?

A. Yes, sir.

By Mr. Hanstein:

Q. What is the other paper, if you know, Mr. Carroll?

A. Well, there are two copies of that and the conditional bill of sale.

Q. This is the conditional bill of sale?

A. No, sir; that is the order.

Q. I beg pardon?

A. That is the order.

Q. This says it is the conditional bill of sale.

The Court: Oh, no.

Q. Conditional sales contract. There is another paper besides this?

A. Yes, sir.

By Mr. Gaskill:

Q. Do you have that paper?

A. No, sir.

Q. Do you know where it is now?

A. Which paper do you mean?

Q. The bill of sale.

A. Copies of this?

Q. No, the bill of sale.

A. No, the bill of sale would go to the General Motors Acceptance Corporation.

JOHN A. KERSHAW, sworn.

Direct examination.

By Mr. Hanstein:

Q. Where do you live, sir?
A. 104 South Franklyn Avenue, Margate City.
Q. What was your business in 1928?
A. Automobiles, retain, new car and used cars.
Q. And your firm name was what?
A. Bartram-Kershaw Company.
Q. You say you sold second-hand cars?
A. Yes, new and second-hand.
Q. Do you have the records of that firm relating to a sale of a second-hand Chevrolet car in around April of 1928?
A. Yes, sir.
Q. Will you produce that record?
A. (Produced.) That is a record of the ——

Mr. Gaskill: You are just asked to produce it.

Q. Did you have anything to do with the negotiations relating to this sale?
A. No, sir.
Q. Who did have?
A. Mr. Carroll sold the automobile and Mr. Bartram, he figured up the finance charges and one thing another and consummated the deal.
Q. He was your partner at that time?
A. Yes.
Q. Your partnership has since dissolved?

A. That is right.
Q. This is the record you have of that sale?
A. This is the record.
Q. Whose writing is on here?
A. That is the bookkeeper's writing.

Mr. Gaskill: I object—you mean to offer this?

Mr. Hanstein: Yes.

Mr. Gaskill: I object to the offer of it for the reason that they are endeavoring to prove the title to this automobile by a book account, which is an improper proof of it.

The Court: I will hear you.

Mr. Hanstein: Well, I don't know that we are trying to prove the title to this car. We are trying to point out to the Court all the links in this situation; however, if they object to it ——

Q. Were you present when this transaction was being discussed?
A. No, sir.
Q. Were you present in the office when the deal was closed?
A. I may have been; I don't remember.
Q. Do you remember seeing Milton Garfinkel in the office?
A. I remember seeing him in the show room.
Q. How many times did you see him there?
A. Oh, possibly once or twice. I don't know

whether it was the day the car was sold or when he was looking at it.

Q. Did you see him there at any time when Harry Garfinkel wasn't there?

A. The only time I did see him he was alone.

Q. He was alone the only time you did see him?

A. Yes.

Cross-examination.

By Mr. Gaskill:

Q. So you don't know whether he was there on the sixth of April, 1928, when you were not present, do you?

A. No, I don't know when he was there.

GEORGE FIEDLER, sworn.

Direct examination.

By Mr. Hanstein:

Q. What is your name, sir?

A. George Fiedler.

Q. You are employed where?

A. Ventnor National Bank.

Q. What capacity?

A. Bookkeeper.

Q. Have been for how long?

A. Five years.

Q. Do you have the records of the account of Harry Garfinkel with your bank?

A. I do.

Q. Will you produce it?

(Ledger sheet produced.)

Q. This is the ledger card kept by your bank?

A. That is the only ledger card kept by the bank.

Q. It is the only record?

A. Of the account.

Mr. Hanstein: I would like to offer this in evidence.

Mr. Gaskill: I object to it.

The Court: Sustain the objection at the present time, nothing at all to show any connection with this case, can't accept any person's account unless connected with the case in some way.

Q. Is this the only account of Harry Garfinkel with your bank?

A. That is the only account.

Mr. Hanstein: Our purpose, of course, is to show that Harry Garfinkel only had an account in this bank for a very short time as one link in the chain of evidence showing that ——

The Court: Where is there any connection whatever in that? There is no connection of any payment paid in funds of this bank. You could produce

every bank in the United States the same way to show he hasn't any account, unless you are going to connect it in the case. Bank accounts are, to some extent confidential, very little probably at this time, but, nevertheless, I can't admit it until it has some connection with this case.

(Ledger sheet marked C7 for identification.)

Q. Can you, by an examination of this ledger account, tell us when this account was opened?

A. Opened March 20, 1928.

Q. When was it closed?

A. It was closed on December 18, 1928.

Q. When was the last check drawn on that account, exclusive of the check closing the account?

Mr. Gaskill: I object to that, if it is not admissible in evidence.

The Court: I will sustain the objection unless there is some connection. Why is there any difficulty about it at all?

Mr. Hanstein: My only point, so far as this particular account, of course ——

The Court: You desire to show Harry Garfinkel paid out $119 on or about April sixth?

Mr. Hanstein: No, sir.

The Court: That is the proof of the papers you

are offering in evidence. It may be a coincidence, of course.

Mr. Hanstein: My purpose was to show, to prove that Harry Garfinkel, not intending to use this car in and around Ventnor City, to show he was only there in Ventnor City a very short time; this is one link in that chain of proof.

The Court: I will sustain the objection. It may that other links would make this admissible, but, as it is now, it is inadmissible for that offer.

JOSEPH L. SOLOFF, sworn.

Direct examination.

By Mr. Hanstein:

Q. Mr. Soloff, what was your business in 1928?
A. Real estate and insurance.
Q. Under what firm name did you do business?
A. Taylor and Soloff.
Q. What was your partner's name?
A. Julius Taylor.
Q. Has that partnership been dissolved?
A. Yes, sir.
Q. Are you continuing the business of that partnership?
A. I am.
Q. As a part of your business was your company

the agent for the Hudson Casualty Insurance Company?

A. Yes, sir.

Q. Do you have records of your office showing the issuance of a policy of insurance to Harry Garfinkel?

A. Book records, yes, sir.

Q. Did you personally take the order for this insurance?

A. No, sir.

Q. Did you personally deliver the policy?

A. No, sir.

Q. Will you produce your records relating to this policy?

(Records produced.)

Q. Is this the record your company has with relation to this policy?

A. And the expiration card.

Mr. Hanstein: I offer the expiration card.

Mr. Gaskill: What is this card you offer?

Mr. Hanstein: The expiration record.

Mr. Gaskill: I object to it as immaterial.

Mr. Hanstein: I don't know as it has any great materiality, it is merely connecting up the entire record. I offer the insurance register of Taylor and Soloff showing this car and showing the insurance

policy in question insofar as it relates to this automobile.

Mr. Gaskill: I object to it, your Honor.

The Court: What is the objection? You have admitted the issuance of the policy and issued by this agent. Now, what objection can there be to the written item?

Mr. Gaskill: All right; I withdraw my objection.

(Record admitted and marked Exhibit C8.)

Mr. Hanstein: The sheet is entitled, "Taylor & Soloff, Insurance register, No. 118, date April 1928;" under the column marked "date" appears 4/6/29, under the column policy, A. P. 15803, column expiration, 4/6/29, under the column amount word "auto," under the column assured, the name Harry Garfinkel, under the column premium, $39.56, under commission, $9.89, under the column amount, $29.67, under the column broker or company, ditto mark under the word Hudson, under the last column, which has no caption, the word "Hudson."

(No cross-examination.)

Mr. Hanstein: Complainant rests.

Mr. Hanstein: Vice-Chancellor, I have said that I rested, and I no sooner did than I received some information as to testimony that could have been given by a witness by the name of Bartram, a member of this firm of Bartram-Kershaw Company, who sold the automobile. We had talked to him previous to this trial, investigated just what he could testify to, and I must confess I am very much surprised to find that he has stated to someone else an entirely different version. Based on what he told us, there was no particular point in bringing him into court. Based on this new information that has been given to us, if it is true, it is vitally important to this case that he be produced, and I am advised that he is in Philadelphia. Now, I am naturally very much embarrassed, but it was after your Honor had left the room and we had said we rested, that this information came to me.

The Court: What is the application?

Mr. Hanstein: I would like an opportunity to produce him at a later date. We certainly have used —we are going to phone now to Philadelphia to see if we can get this witness to come right down here. We used every diligence. We knew of him as a potential witness and went to him and got a statement from him as to the situation, that had no particular relevancy here, but which is entirely different from what we are advised he would testify to.

The Court: Of course, the only difficulty is the

defense are entitled to know what they are to reply to.

Mr. Hanstein: I appreciate this and they ought not to be prejudiced. I think I can tell the defense just what it is I anticipate proving by him if he says what we are advised he would say.

The Court: I will hear that and give counsel for the defense the advantage of knowing you expect to present that testimony, so if during their testimony they desire to produce evidence against it or corroborating it, they may not be surprised.

Mr. Hanstein: The testimony would be by the witness, Bartram, who was a member of the firm of Bartram-Kershaw Company, he would testify that Milton Garfinkel came into the place of business of this firm to buy an automobile several days before the visit that was referred to by the witness, Mr. Carroll, on the stand, that he said that he wanted to buy a car under a conditional sales agreement, and this Bartram-Kershaw firm did its financing through, I don't recall the name of the firm, but the firm that financed this particular automobile, General Motors Acceptance. Mr. Bartram told Milton Garfinkel that it would be useless for him to try to buy a car from them on a financing plan, that the General Motors Acceptance Corporation would not sell him a car, would not finance a car to him, and he came in then, as indicated here, a day or two later, and the car was purchased in the name of Harry Garfinkel. And that is a very forcible bit of evidence, in our judgment, tending to show the

true status and true relationship between Harry and Milton Garfinkel in regard to this automobile.

The Court: I will permit the defense to proceed with that knowledge that later you will apply to have the opportunity to present this evidence. I won't rule upon it.

Mr. Gaskill: And to be done before the close of this case?

The Court: I can't rule upon that at the present time.

DEFENDANTS' TESTIMONY.

Mr. Gaskill: I offer in evidence a certified copy of all the records of the Endicott case against Harry and Milton Garfinkel, and counter-claims by the various parties.

(Certified copy received and marked Exhibit D3.)

Clarence L. Cole, sworn.

Direct examination.

By Mr. Gaskill:

Q. Judge Cole, in November of 1928 and until the trial of the case of Lydia Endicott, executrix,

against Harry Garfinkel and others for the death of Mr. Endicott, did you act as counsel for the Hudson Casualty Company?

A. Without being sure about dates, I defended the suit and prosecuted the rule to show cause.

Q. Now, in that suit, Judge, you on the record represented Harry Garfinkel and Milton Garfinkel, didn't you?

A. I think that is true.

Q. I mean you actually participated in the trial in which they were defendants?

A. Yes.

Q. You appeared as counsel for them?

A. Yes.

Q. Did either Harry or Milton Garfinkel pay you for your services?

A. Now, I don't object to answering these questions except I want to say I don't know whether this involves a confidential communication or not. If there is no objection to my answering, I will answer it.

Mr. Hanstein: We don't object to it.

(Question repeated.)

A. No.

Q. Who did pay you for your services for the defense of Harry and Milton Garfinkel in the case of Lydia Endicott, case wherein she was plaintiff, against these two named men?

Mr. Hanstein: I do object to that. The question

is more or less double-barrelled, which makes it rather difficult for us to let that go in.

(Question withdrawn.)

Q. Who paid you for your professional services in the defense of the case of Lydia A. Endicott, executrix of Thomas D. Endicott, deceased, against Harry Garfinkel, Milton Garfinkel and Timothy Cordery jointly and individually?

A. Hudson Casualty Company.

Q. At the trial of that issue in the Atlantic County Circuit do you remember how many days was taken up with the trial of the issue?

Mr. Hanstein: I object to that. That is immaterial.

The Court: Sustain the objection.

Q. In that matter did you file any of the pleadings in the case?

A. My recollection is I did not.

Q. Do you know who did file the pleadings?

Mr. Hanstein: I think the record will speak for itself.

The Court: Yes.

Q. Do you know Mr. F. Hobart Higgins?

A. Only by reputation, I don't know that I ever met him. I can't recall it. I know he is a member of the Bar.

Q. Do you know that a man by the name of F. Hobart Higgins was the secretary of the Hudson Casualty Company?

A. That is my understanding.

Q. Have you had telephone conversations with a man that answered to the name of F. Hobart Higgins?

Mr. Hanstein: I object to that. I don't see that is at all material.

The Court: How can that be admissible?

Mr. Gaskill: One thing, it may be material, secretary in the office of the company giving instructions to counsel as to what he should do in the trial.

The Court: Sustain the objection.

Q. Judge Cole, after the trial of this issue or at the trial of the issue, did Milton and Harry Garfinkel appear as witnesses and were they sworn and did they testify?

A. That is my recollection.

Q. After the trial of the issue and a verdict for the plaintiff in the amount of $20,000 for Mrs. Endicott and two hundred dollars for Timothy Cordery, did you take any steps regarding a rule to show cause or an appeal at the direction of the Hudson Casualty Insurance Company?

A. Yes.

Q. What did you do?

A. I applied for a rule to show cause and procured one as to why the verdict in favor of the plaintiff,

who was Mrs. Endicott, as I recall it, should not be set aside.

Q. Did you apply for any rule or did you take any appeal in the case wherein Timothy Cordery secured a verdict and judgment against Harry and Milton Garfinkel?

A. I think not.

Q. At whose direction did you apply for this rule to show cause?

A. I don't know that I can recall the individual, but the authority came from someone from the Hudson Casualty Company.

Q. In prosecuting that rule, printing and preparing briefs and the state of the case and all other expenses and your fee, who paid that?

A. Hudson Casualty Company.

Q. What was the result of that litigation, Judge Cole?

A. The rule to show cause required the plaintiff to accept fifteen thousand dollars in lieu of twenty thousand or a new trial.

Q. I show you a letter dated June 13, 1929, addressed to Milton Garfinkel, and ask you if you wrote that letter?

A. I dictated it and that is my signature to it.

Mr. Gaskill: I offer this in evidence.

(Letter admitted and marked Exhibit D4.)

Q. Judge Cole, I notice in this letter that you say, "Counsel for the plaintiff will move the case when called and I shall, of course, make the best defense possible, but it will be with the distinct understand-

ing that the company will disclaim liability to your uncle in the event of your father's failure to appear." You notified the defendants in that respect, didn't you?

A. I sent this letter, if that is what you mean, yes.

Q. And you notified them, as I asked you in that question? That is a part of the letter, isn't it?

A. Yes.

Q. From whom did you get the information on which to write this letter that the company would disclaim liability in the event that the father of Milton Garfinkel did not appear as a witness?

A. I haven't a present recollection whether I received it by letter from the Hudson Casualty or whether it came over the phone from somebody in the office or whether it may have been given to me by Mr. Fuller on one of his several visits to my office, about that all I can say with reasonable certainty is that I had instructions from someone to communicate that fact.

Q. Someone connected with the Hudson Casualty Company that if the father of Milton Garfinkel did not appear as a witness that company would disclaim liability to Harry Garfinkel in case there was a judgment against him?

A. Yes.

Q. Did the company advise you that it was very important to have the testimony of Isaac Garfinkel, the father, at the trial?

A. I really haven't a very vivid recollection of that now, Isaac was the ——

Q. Father of Milton and the occupant of the car.

A. Yes, my recollection of it is they wanted him there as a witness.

Q. And they insisted on him being a witness?

A. That is my recollection.

Q. Judge Cole, at the trial of this issue by the record it appears that Mr. Higgins filed a counter-claim for Milton and Harry Garfinkel against Timothy Cordery, the operator of the other car involved in the accident. Now, at the trial of the issue did you present or did you offer to present any testimony on behalf of Milton Garfinkel to sustain his counter-claim?

A. I think not.

Q. There was no evidence in the case of any injury presented in the case of injury to Milton Garfinkel, was there?

A. Of course, the record would be the best evidence, but I haven't any present recollection of it.

Q. Now, in the counter-claim of Cordery against Harry Garfinkel and Milton Garfinkel, as the record disclosed, was there any investigation on behalf of your office as to the injury to Timothy Cordery or to his person or to his automobile?

A. I don't recall any such.

Q. Did the Hudson Casualty Insurance Company present you with any evidence to present at the trial as to the injury to Timothy Cordery either to his automobile or to his person?

A. I don't presently recall any.

Q. Judge Cole, do you remember the amount of the damages asked by Timothy Cordery against Harry Garfinkel?

A. No.

Q. Referring to the record, the demand is $25,000

for personal injuries and $2500 for property damage, and in view of that demand against Harry Garfinkel and Milton Garfinkel, as the record shows, this company presented no evidence for you to present in court as to the injuries to Timothy Cordery either to his property or to himself?

A. I have no present recollection of any.

Q. Isn't it a fact that during the progress of this trial at the circuit, in the presence of Harry Garfinkel and Milton Garfinkel, that you called the home office of the Hudson Casualty Company and then and there advised them to settle the case for a sum of at least twelve thousand dollars?

Mr. Hanstein: I object to that. I don't see how that is material on this issue.

The Court: If you object to it I will sustain the objection.

Mr. Gaskill: Your Honor, may I explain where I think ——

The Court: Difficulty is this is certainly a confidential communication between counsel and client, and if it is objected to ——

Mr. Gaskill: Is that the ground, that it is confidential?

Mr. Hanstein: And immaterial.

The Court: I am not ruling upon the materiality.

It is objected to on the ground it is confidential, and I think it is inadmissible on that ground.

Mr. Gaskill: Then you object to it, you continue your objection?

Mr. Hanstein: I don't have to continue it; I just make it once.

Q. Judge Cole, is that a private communication between attorney and client?

Mr. Hanstein: I object to that.

The Court: I think that is admissible. You may answer that.

A. I will have to answer that maybe in two ways. Presently I don't recall that that happened.

Q. Then that disposes of it, doesn't it?

A. I think so. I don't say it didn't, but I don't recall it.

Cross-examination.

By Mr. Hanstein:

Q. Judge, when you took this case up on rule to show cause, was that on your advice to the company that it should be done?

Mr. Gaskill: I object.

The Court: What is the objection?

Mr. Gaskill: The objection I have to that question—no, I will withdraw that objection.

A. I think so.

Q. Was the fact that you did not take up the Cordery judgment also a part of your advice and judgment in this case?

A. I don't remember. I have thought about that and I sometimes wonder whether the Cordery phase of it wasn't lost sight of in the verdict in the other case. That is just a passing thought of mine; I don't recall.

Q. You were given charge of the trial of this case?

A. Yes.

Q. As you handle a number of other cases for insurance companies in the course of a year?

A. I do.

Q. And you handled it in the same way?

A. Exactly.

Q. Do you know anything about the stipulation having been entered into for the defense of this case by the Hudson Casualty Company with the reservation of a right to deny liability under the policy?

A. Well, I seem to know about it now, but whether that is after the fact or before or what, I don't recall. I seem to have the information now that there was some such stipulation, but I really can't tell you whether I knew that before the trial or during the progress or whether I have learned it since.

Q. This letter that you wrote to Mr. Milton Garfinkel which is offered in evidence, I don't know whether you recall the contents of it, but it refers to the fact that there was a conference in your office at which—you say this: "From the talk had at the

conference yesterday at which you and your brother Robert and your uncle, Harry, the defendant, were present, I concluded that no effort would be made by you to induce your father to appear as a witness.'' Who is this man Robert referred to as the brother of Milton, do you know?

A. I don't know, but I assume it is ——

Mr. Gaskill: Wait, if you don't know, Judge.

Q. Does this letter refresh your recollection as to the fact of there being a brother Robert present?

A. No.

Q. You have no present recollection of Robert being there?

A. Well, I can only say this, I think there were three persons in the room. I am sure of Milton and Harry and I don't recall the third, but I think there were three persons there.

Q. Do you recall that Robert Garfinkel is a lawyer practicing in Newark with Cohen, Lafferty and Campbell?

A. I do now recall that very clearly, now.

Q. Do you remember him being there now?

A. Oh, yes; I do now.

Q. As you state in the letter, he was the brother of Milton?

A. That is right.

Q. Was he a witness in this case in any sense?

A. I didn't so understand it.

Q. Was he there in any capacity as a lawyer?

Mr. Gaskill: Your Honor, I object.

The Court: What is the objection?

Mr. Gaskill: The objection is that having Judge Cole make a conclusion as to what capacity Robert Garfinkel was there; let him tell what Robert did and then the Court can draw the conclusion.

The Court: Of course, that is technically so, but it will save much time when you have counsel of the standing of Judge Cole on the witness stand, to save the necessity of drawing a conclusion. He can draw the conclusion as well as any of the rest of us.

Mr. Gaskill: He first didn't remember his being there.

A. I know I said that, but I remember it very distinctly now.

(Question repeated.)

A. I would prefer not to conclude as to why he was there. I will tell you what happened as I recall it.

Q. All right, do that.

Mr. Gaskill: Your Honor, I object.

The Court: You have just suggested that is the way the question should be reformed and it is now reformed.

Mr. Gaskill: I am making the objection it is not relevant to this issue in what capacity.

The Court: You have offered a letter in which he speaks of "your father, your uncle and your brother," the attorney, who was supposed to be present. I will admit the question.

A. The three persons named in that letter were in my office and, while a moment ago I did not remember Robert, after I was asked a question on cross-examination, immediately the matter became rather clear to me. Robert there with Mr. Garfinkel —who is an attorney, and he was then practicing in Newark—now, he came in with the other two persons and the substance of what he said to me was this, that he did not believe that Isaac—is that the uncle?

Q. That is the father.

A. —— the father, would appear as a witness, at least he would not appear without some consideration. He had been down to see him in Philadelphia, that he was not inclined to appear as a witness unless he was paid for coming and also unless he, Robert, was paid something for his services in the matter, and I remember I said to him I was rather surprised at his attitude ——

Mr. Gaskill: I object to the Judge's surprise and ask that be stricken out.

A. That is what I told him.

The Court: Proceed.

A. I told him I was surprised.

The Court: Proceed.

A. I told him I was surprised at the attitude he was taking, that I thought Isaac should be there to testify in the case. That is about the substance of what was said.

Q. Robert suggested that he ought to be paid as well?

A. Yes.

Q. Did he indicate for whom he was acting as attorney?

A. I don't recall that he said for whom he was acting, I assume ——

Q. Did he speak for either Milton or Harry?

A. Not specifically that I recall.

Q. Did he speak for both in general?

A. I would say in general terms, yes.

Q. He spoke for both as attorney?

A. They were both there while he was talking.

Q. Milton and Harry Garfinkel both were in your office prior to this trial, weren't they?

A. Oh, yes; this was prior to the trial.

Q. Talked to you about this case before the trial?

A. Yes.

Q. They were both present at the trial?

A. Yes.

Q. You said, Judge, on direct examination that you did not remember any evidence or did not recall offering any evidence on behalf of Milton on the counter-claim?

A. I said that, yes.

Q. You, of course, knew there was a counter-claim filed for Milton?

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A. I suppose so. I suppose I must have known that.

Q. Do you know why you didn't offer any proof of the damage to Milton in this case?

A. Not the slightest idea now.

Q. Did Milton, prior to this trial, tell you what his damage was?

A. Well, he may have and my present impression is that he probably told me. I think he did and that it wasn't regarded as of enough importance to press it in view of the larger claim, that is my present recollection.

Q. Was Robert Garfinkel at the trial?

A. I don't recall having seen him.

Q. He wasn't paid a fee, is that a fact?

A. No, not that I know of.

(Recess taken to 1.30 P. M.)

AFTERNOON SESSION.

(Trial of the cause resumed at 1.30 P. M.)

MILTON GARFINKEL, sworn.

Direct examination.

By Mr. Gaskill:

Q. Your name is Milton Garfinkel?
A. Yes, sir.
Q. You reside where now?
A. Philadelphia, 6229 Ellsworth Street.
Q. On May the—April the sixth, 1928, where did you live?
A. In Ventnor City.
Q. The address?
A. 4 South Surrey Place.
Q. How long did you live there?
A. Subsequent to that date?
Q. Prior to that date.
A. Oh, about four years.
Q. Mr. Garfinkel, on the seventh of February, 1928, did you apply to the Hudson Casualty Company for insurance on a Ford coupe?
A. Yes, I did.
Q. In response to that request was a policy issued to you?
A. Yes, there was a policy issued.

Q. I show you C2 and ask you if that is the policy that was issued on your Ford automobile?

A. This is the policy.

Q. With whom did you make this contract?

A. With Taylor and Soloff.

Q. And particularly whom?

A. John Soloff.

Q. Subsequent to February the second, 1928, did you have any conversation or did John Soloff have any conversation with you relative to this policy?

Mr. Hanstein: I object to that. There is no proof of any connection with the company.

Mr. Gaskill: The policy itself shows it was signed by John Soloff.

Mr. Hanstein: Testimony is Taylor and Soloff were the agents.

Mr. Gaskill: John Soloff was the man who signed the policy and issued the policy.

Mr. Hanstein: We object to that. The partnership was made up of Julius Taylor and Joseph Soloff and the proof shows it.

The Court: The difficulty is you have attempted to prove knowledge of a cancellation of this particular policy. The opening was that there had been no notice of cancellation but that there had been notice of a transfer from one company to another. Simply upon that point I will admit it.

(Question repeated.)

A. Yes, we had a conversation.

Q. Will you tell us what the conversation was respecting the policy which is in evidence marked C2?

A. Mr. Soloff, that is, John Soloff, called me up one day and told me that he was transferring the insurance into another company and that they would mail me a policy in the other company and to return the policy in the Hudson Casualty Insurance Company.

Q. In compliance with that conversation did you subsequently receive another policy?

A. Yes, I did.

Q. I show you policy marked number AL872404, automobile insurance, issued to Milton J. Garfinkel, Ventnor City, New Jersey, by the United States Fidelity and Guaranty Company, and ask you if that is the policy that you received from Taylor and Soloff to take the place of the one that had been issued to you by the Hudson Casualty Company?

Mr. Hanstein: We object to that on the ground it is incompetent, irrelevant and no bearing on this case.

The Court: I will permit it only as proof of what I have just suggested.

A. This is the policy, yes, sir.

Mr. Gaskill: I offer this policy in evidence.

Mr. Hanstein: I have stated my objection.

The Court: I haven't heard any objection to this offer.

Mr. Hanstein: I thought I had objected to it on the ground incompetent and irrelevant.

The Court: I will hear you, Mr. Gaskill.

Mr. Gaskill: The allegation in the bill for rescission is fraud, Milton Garfinkel knew that he could not get insurance on an automobile and that he and Harry Garfinkel conspired together to put the automobile in Harry Garfinkel's name, for the reason that Milton knew that he could not get insurance on a car if he owned one.

The Court: I will admit the paper limiting its effect as I have just stated.

(Policy admitted and marked Exhibit D5.)

Q. Mr. Garfinkel, what automobile was insured under this policy?

A. Ford coupe.

Q. Will you look at the date of the policy, and when was that policy issued to you, do you know?

A. This policy is dated the eighth of February, 1928, and was issued at that time.

Q. Received by you about that time?

A. Yes.

Q. Now, how long after February the eighth, 1928, did you own that Ford automobile?

A. About a month or six weeks, about a month, I should say.

Q. Can you tell particularly the time that you ceased to own it?

A. I should say around the first of March.

Q. First of March, 1928?

A. Approximately.

Q. Do you know or did you return this policy to the company?

A. No, I didn't return it when I ceased to own the automobile.

Q. How long did you keep it in your possession after that time?

A. About another month until about April first.

Q. Around April first, 1928?

A. Yes.

Q. Then you returned that policy to the company, is that right?

A. Yes.

Q. For cancellation?

A. Yes, I returned it to be cancelled.

Q. So then, on or about the first of April you actually had in your possession an automobile liability policy issued to you by the United States Fidelity and Guaranty Company, didn't you?

A. Yes, I did.

Q. At this time, on or about April first, or prior to that time, up until February the second, did you have any information that would lead you to believe that you could not get insurance on an automobile that you owned?

A. No.

Q. Did you have any information subsequent to April the first, until the date that this accident happened, that you could not get insurance on an automobile?

A. I had no such information.

Q. Did Harry Garfinkel and you ever discuss the question of whether you could or could not get insurance on an automobile?

Mr. Hanstein: I object. I don't see how we can be bound by a conversation between these two.

Mr. Gaskill: Your Honor, the allegation in the bill is that Harry Garfinkel and Milton conspired together to get insurance. My question is asking him whether or not he ever had any conversation with Harry Garfinkel relative to the inability of him to get insurance on an automobile.

The Court: I will hear you in view of that statement that that is your allegation.

Mr. Hanstein: Please your Honor, insofar as they meet our proof, that is one thing; insofar as they are meeting merely an allegation ——

The Court: If you withdraw that allegation and not attempting to prove it, all right, but counsel is not called upon to say that your proof does not extend to some of your allegations. He is justified in denying, by presenting proof to deny any allegation. He might say that you have no evidence and the Court might determine that you had. I will permit the question.

(Question repeated.)

A. We never had such a discussion.

Q. Now, prior to April the sixth did you investigate cars for your uncle, Harry Garfinkel, the buying of cars for your uncle, Harry Garfinkel?

A. Yes.

Q. Did you go to Bartram-Kershaw?

A. Yes, I did.

Q. Did you find an automobile there?

A. Yes, I found a Chevrolet car that I thought he would be interested in.

Q. When you found that what did you do, so far as your uncle was concerned?

A. I told him about the car and I told him the price they asked for it and I suggested ——

Mr. Hanstein: We can't be bound by that.

The Court: Sustain the objection.

Q. As a result of your looking at this car what did Harry Garfinkel do, if anything?

A. He went with me to Bartram and Kershaw and looked at the car, and later bought it.

Q. And later bought it?

A. Yes.

Q. Was the money used to buy that car your money, Mr. Garfinkel?

A. No, sir.

Q. Did you furnish any funds at all for the purchase of this automobile?

A. No, sir.

Q. Did you furnish the funds to procure insur-

ance placed—have the automobile placed in the name of Harry Garfinkel?

A. No, I did not.

Q. Were you present when the transaction was completed?

A. The transaction for the purchase of the car?

Q. Purchase of the car.

A. Yes, I was.

Q. Who paid for the car?

A. My uncle, Harry Garfinkel.

Q. Do you know how much money he paid for it?

A. In total?

Q. I mean the down payment.

A. The down payment, I believe it was around $119. I don't know the exact amount.

Q. Do you remember what day that was?

A. I believe that it was in the early part of April, possibly around April the sixth.

Q. Now, Mr. Garfinkel, did you have a conversation with Mr. Bartram prior to April sixth respecting the buying of an automobile by you?

A. By me? No.

Q. Did Mr. Bartram and you ever discuss the question of whether or not the General Motors Acceptance Corporation or any other financial corporation would or would not finance the car for you?

A. Never.

Q. Did you have any conversation at all with Mr. Bartram respecting the purchase of this car for Harry Garfinkel?

A. I possibly did, yes. I talked to several people in the organization there.

Q. You did about this particular car?

A. Yes.

Q. But not for the purchase of a car for yourself?

A. No, in fact, I probably asked Mr. Bartram whether he could finance the car through notes in the bank in order to save the finance charges for my uncle; that is the only conversation I had with him.

Q. Now, on the day that this car was contracted for by your uncle who was present at the final consummation of the negotiations?

A. My uncle was there and I was there, and Mr. Carroll, I believe, and then I think my uncle and I went into their private office in the rear of the sales room and there was a bookkeeper there and I believe one of the partners, just which one it was I don't remember, and the sale was consummated there, actually consummated.

Q. Now, at this time on April the sixth, that is the day of the purchase of the car, did you know at that time that the Hudson Casualty Company had cancelled an insurance policy issued to you?

A. No, I did not.

Q. Had anybody ever told you that the Hudson Casualty Company had cancelled an insurance policy on your automobile?

A. Nobody had ever told me that.

Q. Now, did you do anything for your uncle, Harry Garfinkel, before the removal of the car from the Bartram-Kershaw Company?

A. Yes, I did.

Q. Won't you tell the Court—what did you do?

A. Why I had insurance placed on the car for him.

Q. Won't you tell the Court exactly what you did, what was said about the insurance, and how you placed it, if you did?

A. Well, when the transaction was consummated

and my uncle gave the check and signed the papers we were ready to get a license and he refused to ——

Mr. Hanstein: I object to his uncle's disposition.

The Court: How can this be relevant what they did afterwards?

Mr. Gaskill: So far as it relates to the insurance I am talking about. They say that they procured this insurance by fraud and I have a right, I think, to show how they procured it.

The Court: You are now talking about the present insurance?

Mr. Gaskill: The present insurance involved.

The Court: I will permit it, not what was said between them but what was done.

(Question and answer repeated.)

A. ——have the car moved until an insurance policy was placed on it, he told me that ——

Mr. Hanstein: I object.

The Court: You can't tell us what he told you. What did you do?

Q. As a result of that what did you do?

A. I called up Taylor and Soloff and talked to John Soloff over the telephone and told him that

my uncle had just bought a Chevrolet car and he would like to have it covered by insurance. He asked me how much fire and theft we wanted on it and I told him that my uncle did not need any fire and theft because the finance company took care of that. He asked me what insurance we did want and I told him he wanted, my uncle wanted public liability and property damage in the limits of twenty-five and fifty thousand dollars public liability and the usual amount of property damage that such a policy covered. He asked my uncle's residence and I told him 4 South Surrey Place, and he asked my uncle's business and I told him was the purchase and sale of precious metals and precious stones, and that is all the questions he asked me and he said, "You are now covered," and I turned to my uncle and told him the car was covered by insurance and we could proceed to go and buy the tags for it.

Q. Now, Mr. Garfinkel, were any questions asked of you by John Soloff as to the numbers of the automobile?

A. Yes, he asked me right at the beginning of the conversation, he already had ascertained that the

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Mr. Hanstein: I object to what he had already ascertained.

The Court: Yes.

A. He asked me for the numbers of the car and I told him I didn't have the registration card yet, my uncle hadn't bought the license, but I could read it from the conditional sale contract which he had in

his possession and thereupon it was handed to me and I read the numbers off of the conditional sale contract and I told John Soloff, "I am reading these numbers from the conditional sales contract."

Q. After this conversation what did John Soloff tell you?

A. He said the car is covered by insurance, it is insured.

Q. Now, is the John Soloff—did you know John Soloff?

A. Oh, yes.

Q. Is he the John Soloff that issued a policy of the Hudson Casualty Company to you on the second of February, 1928?

A. Yes; that is the same John Soloff.

Q. Now, Mr. Garfinkel, after this transaction took place you went to Pleasantville and had the car licensed, didn't you?

A. Yes, that is right.

Q. And subsequent to the licensing of the car, that was on April sixth, I think, until May the fourteenth, what was this automobile used for?

A. It was used for pleasure and business principally around Ventnor City and around the county here, once or twice my uncle had me take him on a little trip. It was driven principally around town here and around Ventnor.

Q. Was this car driven on your business?

A. On my business?

Q. Yes.

A. No.

Q. Did you have any business at that time?

A. No. I was working for my uncle. I had no business of my own.

Q. Where was the car garaged?

A. It was garaged at the garage on the rear of the house 4 South Surrey Place.

Q. In Ventnor City?

A. In Ventnor City, yes.

Q. Now, was this car procured to be used as a business car for you?

A. For me?

Q. Yes.

A. No.

Q. Was it procured to be used as a pleasure car for you?

A. No.

Q. Now, on May 14, 1928, you had an accident in which Mr. Endicott was killed, didn't you?

A. Yes, I did.

Q. After that date did you have any conversation with an agent of the Hudson Casualty Insurance Company?

A. Yes, I did.

Q. Who was the agent?

A. First of all the accident was reported to their agents in town here, Taylor and Soloff, that was the first conversation and then it seems that one of their adjusters or field agents, whatever they call them, was in town and I believe on the very same day or the following day he got in touch with me and I had quite a few conversations with him.

Q. Did you use some time in assisting them in the investigation of the case?

A. Yes, I used several days.

Q. Now, Mr. Garfinkel, from the fourteenth of May until the filing of this suit did you have any communication withany agent of the company or

officer of the company in which you were told that the company denied liability to you so far as your rights under this policy were concerned?

A. No, there was no such conversation and I received no such notice.

Q. In this policy the driver of the car is made an assured under the policy, did you know that?

Mr. Hanstein: We object to that. That has no bearing on this, a legal question.

Mr. Gaskill: Your Honor, what I want to show is that under condition A, it says " the term named assured, shall apply to the assured named and described in statement one, but the term assured shall apply to any person or persons while riding in or legally operating any of the automobiles described," and it goes on to say it will pay any judgment rendered against a man operating an automobile.

The Court: What is the purpose of the question?

Mr. Gaskill: The purpose of the question is that he knew that under the policy, when the company had agreed to furnish him counsel and expenses and to pay any final judgment recovered against him by reason of any accident that happened while he was operating the automobile.

Mr. Hanstein: My point of objecting to the question whether this witness knew or whether he did not know could not have any legal effect on our rights for liability in this matter.

The Court: Sustain the objection.

Q. When the accident happened in which Mr. Endicott was killed why were you driving the automobile?

Mr. Hanstein: I object. I think that is immaterial and irrelevant.

The Court: I will permit that.

A. My uncle instructed me to drive the car to Philadelphia.

Mr. Gaskill: I probably have not made myself clear about this, but the reason I want to examine Mr. Garfinkel on this line at this time is this, under this policy it includes not only indemnity to the named assured, but any other person driving the automobile with the permission of the named assured.

The Court: Why are we interested if this man knew that that was in there or not?

Mr. Gaskill: Because he could rely the company would defend him and pay a judgment against him.

The Court: Suppose he did know, what effect does it have on this case?

Mr. Gaskill: It is held in effect, I think, he becomes, under this policy, just as soon as an accident happened, he became a beneficiary under the policy,

in other words, his rights were vested just as soon as this accident happened and the rights were that this company would defend him and pay a judgment against him and after his rights were vested and he proceeded to assist the company and they defended him and appealed the case, without any agreement, so far as he was concerned, and then agreed to pay the judgment, they are estopped now to deny the validity of the policy so far as he is concerned.

The Court: What is the difference whether he knew it or not so far as I am concerned? The law is just the same whether he knew it or whether he didn't know it, isn't it?

Mr. Gaskill: I would assume so, but I think, as a matter of proof on the record, that I would like to know he knew this was contained in this policy.

The Court: I have sustained the objection.

Q. Mr. Garfinkel, was there any communication between you and this company between May fourteenth until the date of the trial of the cause of Endicott against yourself and your uncle?

A. Yes, there was; Mr. Fuller came to see me once or twice, I don't remember.

Q. But there was no written communication so far as you know?

A. Oh, no.

Q. In November, 1928, were you served with any papers in connection with the Endicott case?

A. November, 1928?

Q. November, 1928.

A. Yes, I was served with, I guess, you would call it a summons.

Q. Summons and complaint?

A. Summons and complaint.

Q. What did you do with that?

A. I took it in to Taylor and Soloff and asked them to forward it to the Hudson Casualty Insurance Company and I asked Taylor and Soloff to ascertain whether they would ——

Mr. Hanstein: Just a moment.

The Court: Sustain the objection.

Q. You left it with Taylor and Soloff, the summons and complaint?

A. Yes.

Q. Did you, yourself, file any answer to that suit?

A. No.

Q. Was there an answer filed for you?

A. I suppose it was. I don't know.

Q. Finally it came up, did the case come to trial?

A. Yes, the case came to trial, and there was counsel there for me.

Q. Who was the counsel?

A. Judge Cole.

Q. Did you have to pay him for his services?

A. No, I did not.

Q. Did you select him to be your counsel?

A. No.

Q. It appears by the record that there was a counter-claim filed by F. Hobart Higgins in that suit in which you claim damages against Timothy

Cordery in the sum of five thousand dollars; did you authorize Higgins to file that counter-claim?

A. No, I did not.

Q. Did you know that he had filed it?

A. No, I did not.

Q. At the trial of the case in which Judge Cole appeared for you on the record, did you put in any testimony at all in respect to your injuries in this accident against Timothy Cordery?

A. I don't remember giving any testimony regarding my injuries.

Q. Did Judge Cole or anybody else offer to present any testimony?

A. No, sir.

Q. Did you know that there was a counter-claim filed?

A. I knew of no such counter-claim.

Q. It wasn't filed with your consent?

A. Without my consent.

Q. Do you know F. Hobart Higgins?

A. No.

Q. Do you know him now?

A. No.

Q. This gentleman over here, do you know him?

A. The first time I ever saw him was this morning.

Q. Did you authorize him to be your counsel to file an answer for you in the suit?

A. No, sir.

Q. And he wasn't authorized to file a counter-claim for you?

A. No, sir.

Q. Mr. Garfinkel, at the time of the trial of the so-called Endicott case or before that did you know

that Timothy Cordery had filed a claim against your uncle?

A. Not before.

Q. Did you know that in the counter-claim that Mr. Cordery filed against your uncle that Mr. Higgins answered that counter-claim and included you as one of the defendants?

A. No, I didn't know anything about that.

Q. When did you first learn that there had been a counter-claim by Timothy Cordery?

A. When a judgment was given for $20,200, I thought it was a peculiar question and I asked my brother, the attorney, to ascertain first of all what the judgment was for and subsequently found twenty thousand dollars awarded to Endicott and two hundred dollars was awarded to Cordery; that is the first time I knew he ever sued him.

Q. In the judgment of Endicott against you and Harry Garfinkel did you have any notice that you were not a party to that suit even though there is a judgment against you?

A. I found that out yesterday.

Q. After the Endicott case and the Cordery case was concluded did you authorize Judge Cole or anybody else connected with the Hudson Casualty Company to prosecute an appeal for you?

A. No, I did not.

Q. As a matter of fact did you know of an appeal or a rule to show cause?

A. No, I knew nothing about it.

Q. So then these proceedings were taken on appeal were entirely without your knowledge or consent?

A. Without my knowledge and consent then.

Q. When did you first learn that an appeal had been taken?

A. Why, I guess last December was really the first time I knew about it.

Q. From whom did you learn?

A. From you.

Q. Where did I see you?

A. You saw me at the office of the Eastern Smelting and Refining Company, 712 Warnock Street, Philadelphia.

Q. Did I make a request on you at that time for any papers?

A. Yes, you asked me whether ——

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. As a result of my visit to you at the Eastern Smelting office in Philadelphia did you send anything to me?

A. Yes, I did.

Q. What did you send?

A. I sent you an envelope which had been lost and left in the mail of my wife which contained the insurance policy and various papers pertaining to this case.

Q. Now, in the defense of this case of Endicott against you or Cordery against you did you have any, did you exercise any judgment as to who should defend you?

A. They never consulted me regarding that.

Q. Then the Hudson Casualty Company, they selected the counsel and defended the case?

A. They selected the counsel and defended the case.

Q. Did you pay any costs of the suit?

A. No, I paid nothing.

Q. Now, did you appear at the trial and testify?

A. Yes, I did.

Q. Did you secure the attendance of witnesses?

A. Yes, I did.

Q. All the witnesses that Judge Cole asked you to procure?

A. Yes, I did.

Q. I show you a letter marked D4, addressed to you, and ask you if you received that letter from Judge Cole?

A. Yes, I received this letter.

Q. As a result of that letter what did you do?

A. I made every effort to induce my father, who felt that he wasn't bound to be a witness in the case, to come to Atlantic City and finally induced him to come and appear as a witness for the defense.

Q. Did he come and appear as a witness?

A. He came and appeared.

Q. Mr. Garfinkel, from the time of the inception of this policy on April sixth to December of 1929 did any agent, officer, representative, counsel or anybody else connected with the Hudson Casualty Company advise you they would not pay a judgment against you if it was recovered?

A. Nobody ever told me that they would not pay a judgment.

Q. And you assumed that they would?

Mr. Hanstein: I object.

The Court: Sustain the objection.

Cross-examination.

By Mr. Hanstein:

Q. What business were you in prior to going into business with your uncle?

A. I didn't go into business with my uncle.

Q. What was your business relationship with your uncle?

A. I worked for him.

Q. What was your business prior to starting to work for your uncle?

A. I had no business for several months prior to that.

Q. When you did have a business, what was it?

A. Real estate broker.

Q. Where was your office?

A. One North Arkansas Avenue.

Q. Did you own that property?

A. Did I own it?

Q. Yes.

A. No, I didn't own it.

Q. One of the owners of it?

A. No, sir.

Q. Did you have a real estate office there?

A. Yes, sir.

Q. With your name out?

A. Yes.

Q. Were you a licensed broker?

A. Yes, I believe I was.

Q. Is there any doubt about it?

A. No, there is no doubt in my mind.

Q. In whose mind is there doubt?

A. Maybe there is in yours which is not in mine.

Q. Did you have any difficulty about this license?

A. No.

Q. When did you go to work with your uncle?

A. About in the early part of April.

Q. What year?

A. 1928.

Q. What work did you do with your uncle?

A. Why, when he bought the car I drove the car around for him at his direction and then we took this one trip to Williamstown, I think one trip and another possibly two hundred miles and while I was driving the car I called on trade trying to buy and sell jewelry and old metals, old precious metals and I receive a commission on any business I did.

Q. Do you always go with your uncle on these business excursions?

A. Yes, always.

Q. So whatever business you did was always while your uncle was along?

A. Yes.

Q. You and he went around together doing what? I would like to get that straight.

A. He was in a business of buying and selling precious metals such as gold, silver and platinum and precious stones and he called on jewelers, manufacturing jewelers, dentists and so forth he obtained the precious metals, he bought them and he also carried a stockof diamonds and he sold them to jewelers.

Q. Where did you carry on this business?

A. It was carried on by him by him when he travelled on these one or two trips he took and later around Atlantic City here and one time he went down to Maryland and around that.

Q. So he had one long trip down to Maryland?

A. I wouldn't say it was a long trip.

Q. Whatever distance it was it was done in the car?

A. Yes.

Q. He had one trip over to Ocean City?

A. Yes.

Q. Did you have any other trips off of Absecon Island in this automobile on business?

A. Might have gone to Tuckerton. Most always we rode in this immediate neighborhood.

Q. Are you positive then to say that you only had those two trips with a possible trip to Tuckerton?

A. I won't confine myself to those trips, right around here, I will say positively that we only had two long trips, what you call long trips.

Q. Who did you call on in Atlantic City in order to buy old metal?

A. My uncle had various customers here, he knew two or three of them in business here, jewelry, diamonds and so forth.

Q. You went with him on the boat and you went in the car, didn't you?

A. Yes.

Q. Who did you call on in Atlantic City?

A. Who did I call on personally?

Q. You and your uncle?

A. I don't remember who he called on.

Q. Can you give one that he called on in this jewelry business in Atlantic City?

A. Yes, I can.

Q. Who?

A. Mr. Folkman has the pen shop on Atlantic Avenue near Illinois.

Q. Did you call on him to buy from you or did you get anything off him?

A. Both I would say.

Q. Who else?

A. In Atlantic City?

Q. Yes, in Atlantic City.

A. That is all I know. I can't remember specifically.

Q. How long were you and your uncle engaged in this business?

A. I wasn't engaged in the business with him. I worked clean up to the time of this accident.

Q. So you started in the forepart of April, is that correct?

A. Yes.

Q. And it continued until May the fourteenth?

A. May the fourteenth, if that was the day of the accident.

Q. Thereafter you were not in business with your uncle or connected with him in business, is that right?

A. Yes, that is correct.

Q. What did you do after May fourteenth by way of business?

A. Well, my father was just opening up a business in Philadelphia, he was taking over a business to go into business from some other business and I helped him get started and afterwards another car was bought by my mother and she left me have the car to go up in some business for myself.

Q. So that after this accident your mother bought an automobile which you operated?

A. That is right.

Q. Used it in your business, is that so?

A. That is right.

Q. Title to that was in your mother, to the machine?

A. Yes.

Q. Used in your business, though?

A. Yes, sir.

Q. During this period beginning with April to the middle of May you have been only able to give one person whom you called on in your business this entire period from the time you went with your uncle until the time you started ——

A. April sixth.

Q. Whatever date it was you started for Ocean City?

A. I called on two or three dentists there and called on the jewelers there.

Q. I am asking you.

A. I don't remember the names of those, Mr. Hanstein.

Q. I am asking you upon whom you called in Atlantic City?

A. Whom I called on personally or whom he called on?

Q. On whom he called or upon whom you called?

A. I can't recollect calling anywhere myself in Atlantic City because I didn't want to do it.

Q. You were getting a commission on the business you did?

A. Yes.

Q. You weren't paid a salary, is that correct?

A. He paid me my expenses.

Q. What were your expenses in connection with this business?

A. Expenses, meals, &c.

Q. You never left Atlantic City but on these two occasions, did you?

A. Then I never collected any expenses.

Q. Did you collect any expense money?

A. I don't remember, Mr. Hanstein. I don't remember just what I collected.

Q. You don't even know if you collected any, do you?

A. Yes, I know I collected some.

Q. You don't have any recollection of the amount?

A. No, sir.

Q. Did you collect any commissions?

A. Between April sixth?

Q. While you worked for your uncle?

A. Yes, I did.

Q. You did?

A. Yes, sir.

Q. Do you know how much you collected in commission?

A. I don't remember.

Q. No idea?

A. No.

Q. Do you know on what transactions you collected commission?

A. I don't remember the individual transactions.

Q. Can you name any customers with whom you did business?

A. With whom I did business personally?

Q. Yes.

A. When we went on this trip down ——

Q. In Atlantic City we are.

A. In Atlantic City?

Q. Yes.

A. I don't remember of any person with whom I did business personally.

Q. You took your uncle to wherever he wanted, didn't you, on these business trips?

A. That is right, yes.

Q. Do you know any place to which you took your uncle on these business trips in Atlantic City?

A. What do you mean by any place?

Q. Any place to which you took him for the purpose of doing business?

A. I took him up town at Mr. Williams' cottage, he called on various people, I don't remember just who they are.

Q. Mr. Garfinkel, you have lived in Atlantic City how long prior to this?

A. Prior to 1928?

Q. Prior to April of 1928?

A. Oh, about six or seven years.

Q. Wasn't any mystery to you about the streets in Atlantic City, was there?

A. No.

Q. Been in the real estate business here?

A. Yes, I have.

Q. You knew the names of the stores on Atlantic Avenue and you knew the people in the stores, didn't you?

A. Knew some of them.

Q. How long were you in the real estate business?

A. I got my first broker's license in the fall of 1924, I believe.

Q. So that you were a real estate broker for four years before you went in business with your uncle?

A. Yes, and possibly one year I didn't have any license.

Mr. Gaskill: Your Honor, I object to that question. Mr. Hanstein keeps repeating it, the time he went into business with his uncle and he has distinctly said a number of times he didn't go into business with his uncle.

Mr. Hanstein: I want to show to your Honor there is nothing concealed in the expression.

Q. You have given us, I take it, the best answer you can give us with regard to these transactions by either you or your uncle, is that correct?

A. That is correct.

Q. Will you tell us how many real estate sales you put through as a real estate broker?

Mr. Gaskill: Your Honor, I object to that as immaterial.

The Court: Sustain the objection.

Q. Mr. Garfinkel, didn't you used to operate a drug store in Atlantic City?

A. Yes, I did.

Q. At Arkansas and Atlantic Avenue?

A. Yes, sir.

Q. Wasn't that your business?

A. It was my business, yes.

Q. Was that your business prior to 1928?

A. I believe that was in the summer of 1927, if I recollect right.

Q. How long were you in that business?

A. Why, about three and a half months, four months, something like that.

Q. While you had a real estate broker's license?

A. Yes, but I had the office in back, in a separate store altogether.

Q. Which were you giving your attention to, real estate ——

Mr. Gaskill: I object, your Honor.

The Court: Sustain the objection.

Mr. Hainstein: Your Honor, it seems to me we are entitled to some latitude for the purpose of testing the credibility of this witness.

The Court: But I can't see any question of credibility whether he was operating a drug store or real estate office.

Q. You had an automobile policy covering a Ford car that you owned, didn't you?

A. Well, I owned it conditionally.

Q. You had an automobile policy covering that, didn't you?

A. Yes, I did.

Q. What happened to that automobile?

A. They took it back, the people that sold it to me took it back, I couldn't make the payments on it.

Q. When did they take it back?

A. Around March first.

Q. 1928?

A. Yes.

Q. You had a Hudson Casualty policy, didn't you, on your car; isn't that right? Didn't you have a policy from the Hudson Casualty Company?

A. You want me to answer that from my present knowledge or my knowledge before?

Q. What do you know now about having a policy issued?

A. I had a policy in the Hudson Casualty, yes, I did have.

Q. You did have one?

A. Yes.

Q. There was no mistake about your having one, was there?

A. No.

Q. That policy was returned by you to the company, wasn't it?

A. Yes, it was.

Q. Prior to your return of that policy you got a policy in another company, didn't you?

A. Yes, I did.

Q. And you had two policies covering the car at the same time, didn't you?

A. Yes.

Q. Why did you return that policy to the Hudson Casualty Company?

A. A day or two after I received the policy Mr. John Soloff called me up and told me that he was transferring the insurance to another company and he would mail me the policy, send it back and I was negligent in returning it, that is the only reason I had two policies.

Q. Did he say why he was transferring your policy?

A. No, I didn't ask him why.

Q. Did you get any notice from the Hudson Casualty Company about that policy?

A. I don't remember ever having received it.

Q. Your address was 4 South Surrey Place, wasn't it?

A. That is correct.

Q. Did you ever receive a paper of which that is a duplicate?

A. I don't remember ever having received it.

Q. Will you say that you did not receive it?

A. All I will say I don't remember having received it.

Q. I want to know if you will say that you never did receive it?

A. I won't say anything more in addition to what I have already said.

Q. You may have received it then?

A. I don't remember having received it. If you can deduce that I may have received it from that, I guess that is, if it follows, all right, but I don't think that follows.

Q. You are not willing to say you did not get it, are you?

A. All I can say I don't remember having received it.

Q. You got mail regularly down at that address, didn't you?

A. I got all the mail addressed to me.

Q. All mail addressed to you at that address reached you?

Mr. Gaskill: I object.

The Court: Sustain the objection.

Q. When do you say this Ford car was taken away from you?

A. I think about the first of March, 1928.

Q. You have testified that you received a policy in the United States Fidelity and Guaranty Company, did you not?

A. Yes, I did.

Q. What happened to this policy?

A. Why ——

Q. Do you remember what you did with it?

A. They took the car away about the first of March and I guess I was negligent in turning it in for cancellation and finally I turned it in around the first of April so could be cancelled and if there is any credit I should receive it.

Q. Had you paid for it?

A. I don't believe I had paid for it yet.

Q. What credit was due you expected to receive?

A. For the unexpired portion.

Q. Did you ever read this policy?

A. No, I didn't.

Q. Did you ever read the policy from the Hudson Casualty Company?

A. No, I did not.

Q. Did you ever read your uncle's policy from the Hudson Casualty Company?

A. No.

Q. Never read any insurance policy through, did you?

A. No, I didn't. I read a life insurance policy through last year, that is the only policy I ever read through.

Q. You never paid for this policy of the United States Fidelity and Guaranty Company, did you?

A. When it was turned in for cancellation, owing to the fact that it was in force for a short time, didn't charge anything, and they, I think, called it, cancelled flat.

Q. You never paid anything for it, did you?

A. No.

Q. Prior to your turning it in there you hadn't given anybody a check?

A. No.

Q. The car which this policy insured was owned by you subject to a conditional sale agreement, was it not?

A. Yes, sir.

Q. When did you take the Hudson Casualty policy back to Soloff's office?

A. I don't remember the exact date it was, about three or four weeks subsequent to the time I received the new policy from the U. S. F. and G.

Q. You made no inquiry whatever as to why this policy was cancelled?

A. He called me up several times and said, "Why don't you bring that policy back so I can return it for credit?" and I never asked him why.

Q. Never bothered why?

A. No.

Q. Did you know why?

A. No, I just thought it was a matter of changing the office, something convenient to them, I didn't know.

Q. While you were in the real estate business did you also do insurance business?

A. The only insurance business I can remember I did, I wrote a little fire insurance for my father some times.

Q. That was the only insurance business you did?

A. Yes.

Q. You didn't authorize Mr. Higgins to file a counter-claim for you, you say?

A. I didn't authorize him.

Q. Therefore, you didn't expect any counter-claim to be prosecuted on your behalf, did you?

A. No, I didn't know anything about any counter-claim.

Q. So you have got no complaint about none being prosecuted, have you?

A. Since they filed it they might have been diligent about it and not lost any cause of action I might have had.

Q. You, of course, knew enough about insurance to know that an insurance company had no obligation to prosecute a counter-claim for you, didn't you?

A. I didn't know that much about law, Mr. Hanstein.

Q. Didn't you know that?

A. Yes.

Q. You have a brother who is a lawyer, haven't you?

A. Yes, I have.

Q. He is practicing in Newark?

A. Newark, yes.

Q. Did you discuss this matter with him?

A. Yes.

Q. Did he represent you in any connection in this matter?

A. I discussed it with him and I believe he talked to the adjuster that was here to investigate the

accident that first two or three days, afterwards I believe he talked to him about the case.

Q. Did you discuss with him anything about the legal phases of this case?

A. No.

Q. Did you tell him to take charge of this case for you?

A. Tell him to take charge of it?

Q. Yes.

A. There was no case as far as I was concerned until I was served with summons.

Q. I am talking about your counter-claim, for instance?

A. No, never discussed counter-claim with him.

Q. Never talked to him about that?

A. No.

Q. Did your brother go to Cole's office with you?

A. Yes, he was in Cole's office.

Q. How did he come to be there that day?

A. Well, that was the time I was trying to induce my father to appear as a witness and it happened, I think, he had to appear in Chancery, he made some kind of a matter and he happened to be in town on this day from Newark, so I suggested he go up there and try to arrange the matter for my father to come down because it wasn't until the last minute that he agreed to come.

Q. What did your brother have to do with Judge Cole in connection with getting your father down?

A. He wanted assurance from Judge Cole that they would pay his railroad fare down here.

Q. That is what it was, railroad fare from Philadelphia?

A. Yes.

Q. And so that is why the lawyer went up to see Judge Cole?

A. Yes.

Q. Hear him ask about a fee for himself?

A. I did not.

Q. You didn't hear that?

A. No, sir.

Q. Did you knowanything about your brother writing any letters to the Hudson Casualty Company?

A. No, I didn't.

Q. Didn't you know that your brother wrote to the Hudson Casualty Company about your counter-claim?

A. I don't know yet that he wrote about my counter-claim.

Q. Is this your brother's signature?

A. Appears to be, yes, sir.

Q. There is no doubt about that, is there?

A. I don't think there is any doubt about it.

(Letter marked C8 for identification.)

Q. Did you tell your brother what your injuries were and what your counter-claim for damages was?

A. No, I didn't.

Q. Will you read that letter?

Mr. Gaskill: Your Honor, I object—I withdraw the objection.

Q. Have you read it?

A. Yes, I have read it.

Q. Now, can you tell us whether you gave your

brother that information with regard to your injury and the amount of your claim?

A. He seems to have written that from his general knowledge about it.

Q. You didn't give your brother this information, I presume?

A. I don't remember having discussed it with him at all.

Q. Will you say you didn't?

A. Yes, I will say I didn't.

Q. You will say you didn't?

A. Yes.

Q. Did you know that Harry Garfinkel had entered into an agreement with the Hudson Casualty Company for the Hudson Casualty Company to defend this case?

A. No, I didn't.

Q. Never knew about that? Did you ever know that the Hudson Casualty Company had denied liability to Harry Garfinkel?

A. No.

Q. Never knew that?

A. No.

Q. Did you live down at the house, 4 North Nashville, is it?

A. 4 South Surrey, you mean.

Q. 4 South Surrey, for some time after this accident?

A. Yes, sir.

Q. How long after the accident?

A. I will just try to fix the date in my mind, I believe until around January first of the following year, 1929.

Q. How long did Harry Garfinkel live there after the accident?

A. After the accident which occurred in May, if I recollect rightly, the house was rented for the summer and the folks took a very small place down further and I don't believe there was room to accomodate him and I think he boarded that summer.

Q. Whereabouts?

A. On California Avenue, I believe, some place.

Q. In Atlantic City?

A. Yes.

Q. Stayed here for how long?

A. I don't know whether he was here continuously or went away or what.

Q. Did you have any conversation with Harry about this accident?

A. He was always talking about what a rotten company he thought it was and that is about all.

Q. Why did he think this company was so rotten?

A. Well, he seemed to think they ought to settle those things up out of court, I guess, and I don't know just what his grievance was.

Q. So that you and he had quite a few conversations after this accident about this being a rotten company?

A. No, we didn't have quite a few conversations about it.

Q. Not quite a few, how many did you have?

A. I don't know.

Q. Did you have more than one?

A. I think I heard him say it more than once.

Q. Was there anything said about this agreement on the part of the company to defend your uncle under special conditions?

A. No.

Q. Never heard that mentioned?

A. No.

Q. Is that right?

A. That is right.

Q. Did you ever hear your uncle say that the company denied liability?

A. I don't remember having heard him say that.

Q. Don't remember hearing him say that?

A. No.

Q. Did your brother, Robert, ever come down to Atlantic City after this accident?

A. I don't know.

Q. Do you know if you had any conversation with him about this accident in Atlantic City?

A. Did I have any conversations with him?

Q. Yes.

A. I don't remember any specific conversations.

Q. Do you have any idea how your brother, Robert, got the information that you suffered cuts and bruises around the ankles, knees, back, face, arms and a deep gash was inflicted behind your left ear, necessitating stitches to be taken to close the wound, as the result of your injuries you were caused pain and suffering, were permanently disfigured and lost several weeks work, your total damage being five thousand dollars; do you know how he got that information?

A. He saw me after the accident.

Q. Did you tell him that you had lost several weeks work?

A. I didn't tell him. I guess he saw I wasn't working, I was bandaged up for quite a while.

Q. Did you tell him that your damage was five thousand dollars?

A. He must have computed that himself.

Q. You didn't tell him that?

A. I don't remember having told him that.

Q. You may have?

A. I don't believe, I may have; I don't think I did.

Q. You don't thing you fixed any figure for your damage?

A. No.

Q. When was the first time you knew a counter-claim had been filed for you?

A. Counter-claim filed for me?

Q. Yes.

A. The first time I really understood all about these pleadings, counter-claim pleading, whatever you call them, was when Mr. Gaskill spoke to me about it, 712 Warnock Street, last December.

Q. That was the first you knew that there had been a counter-claim filed for you, is that correct?

A. Yes.

Q. Up to that time you didn't even know you had any claim for anything, is that right?

A. No.

Q. Will you just tell us what your conversation with John Soloff was from the automobile place?

A. Well, I was connected with him on the telephone I told him that my uncle had bought a Chevrolet car and it was to be covered by insurance by his firm. He asked me if I wanted fire and theft. I told him that the fire and theft was taken care of by the finance company. He asked me the name. I gave him the name.

Q. Name of what?

A. Name of the assured, Harry Garfinkel, asked me his address, asked me his business and I told him what his business was—shall I repeat that?

Q. Tell what you said to him at the time.

A. I told him his business was the purchase and sale of precious metals and precious stones. He asked me for the numbers of the car. I told him that my uncle didn't have the registration card yet, but I could give him the numbers off the conditional sales contract from which it was read, could get that information. He said, "The car is covered," it was insured.

Q. What papers did you get down at this automobile place?

A. I didn't get any papers.

Q. What papers did you see delivered to your uncle?

A. I think he got a copy of the conditional sales contract.

Q. What else did he get?

A. That is all I can remember.

Q. Who was present when this conversation took place?

A. I was there and my uncle was there and I don't know who was present from their office, because I didn't recognize any of them until they were on the stand. I don't remember who was in the office on their end of the transaction.

Q. Do you remember anything else you said to Soloff over the phone?

A. No, I don't.

Q. Can you tell us why it is that you can remember this conversation so exactly and you can't re-

member the names of people that you called on after this?

A. Well, this whole—I called on thousands and thousands of people between that day and now.

Q. I am asking you why ——

A. None of the names are fixed in my mind, this was a separate individual transaction, it was the only transaction of that kind that I was a witness to at that particular time and I remember it.

Q. You remember how you came to order the policy on your own car in the Hudson Casualty Company?

A. I didn't order it in the Hudson Casualty Company.

Q. Do you remember when you ordered the insurance on your own car?

A. What about it?

Q. Do you remember doing it, I say?

A. Do I remember ordering the insurance?

Q. Yes.

A. Yes, I believe I do.

Q. Where did you order that?

A. I think that was ordered from Ocean City.

Q. How was it to be placed?

A. By telephone to Taylor and Soloff.

Q. Who did you talk to?

A. I don't remember who I talked to then.

Q. You remember the conversation?

A. Same thing asked, limits, etc., I ordered limits twenty and forty.

Q. Do you remember the source from which you got the numbers which you gave him over the telephone?

A. I got it from the same place also, I didn't have a license then either.

Q. Tell us what you said to Taylor and Soloff on that occasion?

A. I don't remember the exact words, I told him I wanted insurance on a Ford coupe, asked me for the numbers and I gave him the numbers from the conditional sales contract and so forth and so on, asked the limits, I told him twenty and forty.

Q. On each and every occasion when you ordered a policy did you tell him, to whom you talked, that you were reading from a conditional sales contract?

A. Did I?

Q. Did you?

A. I don't remember.

Q. You don't remember whether you told them then or not?

A. No.

Q. Do you remember if you were then reading from a conditional sales contract?

A. I don't remember, might have been read to me by Mr. Kurtz or somebody in the office there.

Q. Was there any reason why you should so distinctly remember your conversation with John Soloff in this case, the case of your uncle's insurance, when you don't remember in the other case?

A. Yes, there is a reason.

Q. What was the reason?

A. First that I remember asking for the paper and secondly I made a direct effort to remember what happened that day because it was so important.

Q. What was so important?

A. It is important in this case here.

Q. Yes, I know, but what was so important about it prior to the fourteenth of May?

A. Beg pardon?

Q. What was so important about it prior to the fourteenth of May?

A. I don't understand your question about the fourteenth of May.

Q. That was the date of your accident. Before this accident this wasn't so important, was it?

A. That conversation? I suppose not.

Q. So that starting at the fourteenth of May you had to get back, isn't that true?

A. Starting on the fourteenth of May?

Q. Up to the time something happened with regard to this policy you didn't think that this was anything different than an ordinary transaction, did you?

A. No, what I meant to say was this, when this suit was brought up to make this policy void, I was a party to the suit, I am a party to the suit, and preparing the case with my attorney, that is the case we discussed and so wanted to see as I made a direct effort to remember what happened then and I think I do remember.

Q. You think you remember?

A. Yes.

Q. You might be wrong about it?

A. No, I might not be wrong. I do remember.

Q. You remember that very well?

A. Yes, sir.

Q. When was it that it came to your attention it was very important that you should remember what took place when this insurance was ordered?

A. When this case was to be prepared for trial, this present case.

Q. That is the first time it came to your attention that it was important?

A. Yes.

Q. When did you start the preparation of this case?

A. About, I should say, about eight weeks ago, something like that.

Q. About eight weeks ago?

A. Yes.

Q. That was more than two years after this occurrence and conversation from the automobile place, wasn't it?

A. Approximately that time.

Q. Mr. Garfinkel, this much is the fact that at the time you ordered that policy that was just an ordinary transaction to you, wasn't it?

A. It wasn't an ordinary transaction in this respect, I wasn't doing it for myself, I was doing it for some one else, and also made a little extraordinary anyhow.

Q. But there was no special reason why you should remember the exact phraseology that you used, was there?

A. I didn't repeat the exact phraseology; I just gave you the purport of the conversation or the gist of it, I would call it, but I didn't try to repeat the exact words.

Q. When did you find out that it was important that you should remember that you told John Soloff that you were reading from a conditional sales contract? When did you first know that?

A. Why, I don't know that that one point was

stressed over any other point, my attorney told me that the whole thing was important, the whole conversation, because that is the essence of the whole thing.

Q. When did you hire a lawyer in this?

A. It has been about around three months ago, I guess.

Q. Who did you hire?

A. Mr. Halpern.

Q. Mr. who?

A. Halpern.

Q. Did you pay him a fee?

A. I didn't pay him the fee yet; I will pay him the fee.

Mr. Gaskill: Your Honor, I don't think that is proper cross-examination.

The Court: Probably not but you seem to have no objection to it.

Mr. Gaskill: I do object to any further along this line.

Q. You found a policy up in Philadelphia after you had a conversation with Mr. Gaskill, didn't you?

A. Yes, I found a policy.

Q. Where did you find that policy?

A. I think it was in the safe there.

Q. Of what company, whose safe?

A. In whose safe? The safe of the Eastern Smelting and Refining Company.

Q. That is some place on Warnock Street?

A. 712.

Q. You employed there?

A. Am I employed there? I don't draw any salary there. I spend time there. I am the same as Mr. Fuller here, connected with it, but don't draw any salary.

Q. Are you still in the same business that you were in when you were working with your uncle or for your uncle?

A. Am I in that business now?

Q. Yes.

A. Right now I am not doing a thing, without any business.

Q. What do you mean you are connected with this Eastern Smelting and Supply Company?

A. Well, I spend my time there when I am in Philadelphia, that is a business, I go there, it is my father's livelihood and with whatever spare time I can possibly help him I do.

Q. Are you employed in anything now?

A. Right now, no.

Q. I don't mean today. I mean generally speaking are you in any business?

A. Not since October tenth I haven't been doing anything.

Q. October tenth of this year?

A. Yes.

Q. What were you doing prior to that?

A. I was managing a garage down here.

Q. In town where?

A. Atlantic City, from May first to October tenth.

Q. What garage?

A. Congress Garage.

Q. On Atlantic Avenue?

A. Yes.

Q. You were driving this car to Philadelphia on the day of this accident, weren't you?

A. Yes.

Q. Your uncle had instructed you to do it, you say?

Mr. Gaskill: Your Honor, I object to this line of questioning. I don't think it is material to this issue.

The Court: What materiality has it, Mr. Hanstein?

Mr. Hanstein: Well, he has testified to it as a fact, your Honor and it seems to me if they thought it was important enough to bring it out, we are entitled to cross-examine about it.

The Court: If you desire to do so, you may.

(Question repeated.)

A. Yes.

Q. When did your uncle, Harry Garfinkel, move to Atlantic City prior to the accident?

A. I don't remember the exact date he came here from California, possibly a year or a year and a half before that, but I can't fix the definite date.

Q. Don't have any idea, do you?

A. I told you possibly a year or a year and a half, but I wouldn't want to go further than that in fixing it.

Q. Did he ever have a car before to your knowledge?

A. Not to my knowledge.

Q. He didn't know how to drive a car, did he?

A. No.

Q. Had no license to drive?

A. No.

Q. Did he use a car in his business?

A. How is that?

Q. Did he use a car in his business?

A. When?

Q. Before he bought this car as you say?

A. No.

Q. He was engaged in the same business, wasn't he?

A. Yes, he was in that business for a while in Philadelphia, just dealing in Sansom Street there, if you are acquainted wholesale district there similar to Maiden Lane, New York, and he was doing most of his business there on the street.

Q. He didn't use a car?

A. No.

Q. Did he live at your father's house all the time prior to the accident after he came east?

A. Most all the time, there were times when he stayed in Philadelphia for a while, I would say to call his residence, he was away for periods sometimes two or three weeks.

By Mr. Gaskill:

Q. Mr. Garfinkel, since the verdict against you in the case of Endicott versus yourself and Harry Garfinkel, at any time between that time and now have you ever been able, financially able or otherwise, to

satisfy or pay this judgment obtained by Mrs. Endicott, executrix?

Mr. Hanstein: I object as not competent.

The Court: How is that competent, Mr. Gaskill?

Mr. Gaskill: Your Honor, the policy provides and they say in their reply to our answer that Mrs. Endicott has no interest in the enforcement of this contract. By the statutes of New Jersey, if a man has an insurance policy and the insurance policy is likely to be a judgment against him, if he is insolvent or a bankrupt, then the right of the injured party or his personal representatives, they have a right then to proceed against the insurance company directly, and that is what has been done in this case, and they have a temporary injunction against Mrs. Endicott restraining her from prosecuting that suit, and I have alleged in her answer that Milton and Harry Garfinkel are insolvent and I want to prove that fact that gives her a right to bring the suit.

Mr. Hanstein: Please your Honor, I don't think that suit at law has anything to do with the issues in this case, which are really to rescind on one side and claim for reformation on the other.

The Court: Is it true that you have a restraint preventing you from proceeding with that?

Mr. Gaskill: Yes, sir.

Mr. Hanstein: Consented to by Gaskill.

Mr. Gaskill: I knew you would get it, so I consented to it.

The Court: I will permit the question.

(Question repeated.)

A. I never have been able to pay the judgment.
Q. Are you able today?
A. No, sir, I am not able.
Q. Have you any money in bank, stocks or bonds?

Mr. Hanstein: I object.

The Court: Sustain the objection.

Max A. Kreps, recalled.

Cross-examination.

By Mr. Gaskill:

Q. Mr. Kreps, did you know that John Soloff was the manager of the insurance department of Taylor and Soloff?
A. No, sir.
Q. You didn't know that?
A. No, sir.
Q. Now, Mr. Kreps, you are certain about that, are you?

A. Yes, sir.

Q. And you are just as certain about that as any other testimony that you have given today?

Mr. Hanstein: I object to that. That is not proper cross-examination.

The Court: Sustain the objection.

Q. I show you a letter dated April 27, 1927 and ask you if you signed that letter?

A. Yes, sir, I did.

Q. To whom is the letter addressed?

A. Taylor and Soloff.

Q. And for whose attention?

A. Mr. John Soloff.

Q. And what else?

A. Manager Insurance Department.

Q. Then you did know he was manager of the insurance department, didn't you?

A. At that time apparently I did.

Q. You didn't know that before?

A. No, sir.

Q. Now I show you a letter dated April 8, 1927, and ask you to whom that letter is addressed?

A. Same thing.

Q. So then on April eighth you knew he was the manager of the insurance department?

A. That is right.

Q. Now did you know before that time?

A. I don't recall. What I am trying to tell you is this——

Q. I don't care what you are trying to tell me, did you know before April the eighth, 1927, that

John Soloff was manager of the insurance department of Taylor and Soloff?

A. Frankly I couldn't answer that now.

Q. This refreshes your recollection, doesn't it?

A. Yes, it does apparently did know then.

Q. How long did he continue in that capacity, do you know?

A. No, sir.

Q. You knew that Mr. Soloff signed policies for Taylor and Soloff, didn't you?

A. I don't think so.

Q. You don't?

A. No, sir, I don't think that——

Q. Just a minute; there is no question.

Mr. Hanstein: Let him answer.

The Court: He has answered.

Q. You say that you got this policy back cancelled, didn't you? You knew all about that?

A. Yes, sir.

Q. You knew that he was signing policies, didn't you?

A. No, sir.

Q. His signature is on it, isn't it?

A. Yes, sir.

Q. Then you knew that he signed it?

A. No, sir.

Q. Now explain that.

The Court: It will have to be stricken. You have asked the witness the question and he has answered it.

Q. You were manager of the insurance department, weren't you?

A. No, sir.

Q. Manager of the company?

A. I was manager of the company.

Q. Vice-president of the company?

A. Yes, sir.

Q. You are the man whose mane appears on the policy, printed on there?

A. Yes, sir.

Q. When this policy was cancelled did it come back to you?

A. Yes, sir.

Q. Personally?

A. No, sir.

Q. Didn't come back to you personally?

A. No, sir; we don't check signatures anyway when they come back for cancellation.

Q. In this bill—do you know anything about the filing of the bill in this matter?

A. Very little.

Q. In the files do you have the sheet that you retained in your office for your information about this policy?

A. You mean the original order blank?

Q. I mean the sheet that you typed.

A. Copy of the policy?

Q. Yes.

A. Yes, sir.

Q. Will you find that for me, please.

A. Yes, sir. You are referring to Harry Garfinkel now or Milton?

Q. I am referring to Harry Garfinkel.

A. Here it is.

Q. May I see it?

A. Yes (Producing paper.)

Q. That is not finally as issued by the agent, is it?

A. No, sir; that is what you had, this is a typewritten copy of it.

JOSEPH L. SOLOFF, recalled.

Direct examination.

By Mr. Gaskill:

Q. Mr. Soloff, was John Soloff on February 2, 1928 to April 7, 1928 an employee of your firm?

A. He was.

Q. What was his position with your firm?

A. In charge of the insurance department.

Q. What did he do in the insurance department?

A. Solicited insurance, took orders for it, supervised it generally.

Q. For your company?

A. For our office.

Mr. Hanstein: For Taylor and Soloff?

Q. And the policies issued by your company by whom were they signed?

A. By Taylor, myself and in some instances, John Soloff.

Q. You know his signature, don't you?
A. Yes.
Q. Is that his signature?
A. John Soloff.
Q. Was that, the issuance of that policy authorized by you?
A. Yes, sir.

Mr. Hanstein: I object to that. I don't see how that would be material at all.

The Court: There is no contest it wasn't originally.

No cross-examination.

WILLIAM J. WILSON, sworn.

Direct examination.

By Mr. Gaskill:

Q. Mr. Wilson, what is your business?
A. Insurance.
Q. What company do you represent principally?
A. Several.
Q. Do you represent the United States Fidelity and Guaranty Company?
A. Yes.
Q. I show you Exhibit ~~D8~~ D5 and ask you to tell me what that is?

Mr. Hanstein: Speaks for itself.

Q. Was this policy issued by your company?
A. Yes.
Q. What was the date of issue?
A. February eighth.

The Court: Why call a witness for that, Mr. Gaskill, already endorsed on it and cancellation endorsed on it?

Q. Do you know what time that policy or what date that policy was cancelled?
A. The credit memorandum was received back by us on the eleventh of April, 1928, which would indicate cancellation two or three days prior to that?
Q. Two or three days prior to that?
A. Yes.
Q. Was that cancellation at the request of the company or at the request of the assured?

Mr. Hanstein: I think that is immaterial.

The Court: I will permit that.

A. Cancelled at the request of the assured.
Q. The cancellation flat endorsed on the policy, what does that mean in insurance language?
A. It means at a loss; as a matter of courtesy in the insurance business policies returned promptly after having once been issued for any numerous reasons the company allows a flat cancellation the

theory being that no liability existed under the contract and it was issued in error.

Q. But from the date of its issue until it was cancelled this policy was an outstanding liability of your company on the automobile of the assured?

A. Yes.

Q. Mr. Wilson, are you the general agent of the United States Fidelity and Guaranty Company in Atlantic City?

A. Yes.

Q. Was there any notice to you or did you have any instructions from your company to get this policy from Milton Garfinkel for any reason that you know of?

Mr. Hanstein: I object.

A. No.

The Court: I will permit it.

Cross-examination.

By Mr Hanstein:

Q. Mr. Wilson, who ordered that policy from your company?

A. I can refer to other records and tell you.

Q. Will you do it, please?

A. Taylor and Soloff.

Q. Who in particular, do you know?

A. Particular officer of their company? No, I wouldn't know that.

Q. Wouldn't know who it was of that firm?

A. No.

Q. Was this policy signed by someone in your office?

A. Yes.

Q. It says "Edward A. Wilson Company, C. E. Harold, Authorized representative" that is your company?

A. Yes.

Q. Now if you had known that a policy issued to this same Milton J. Garfinkel on the same automobile had been cancelled within a few months prior would this policy of insurance have been issued?

Mr. Gaskill: I object, your Honor.

The Court: Sustain the objection.

Q. Were you advised by Taylor and Soloff that any policy of insurance on this antomobile in the name of Milton Garfinkel had been cancelled within three years?

Mr. Gaskill: I object.

The Court: What is the objection?

Mr. Gaskill: The objection is that the testimony in the case now presently shows that there had been no insurance cancelled on Milton Garfinkel's car at the time that this policy was issued. Their testimony is that Milton Garfinkel's policy was cancelled on March 7, 1928 and this policy was issued on the eighth of February, 1928.

Mr. Hanstein: Withdraw the question for a moment.

Q. Do your records show when this policy was ordered from you?

A. February 8, 1928; it may have been ordered the day before.

Q. What are you getting your information from, your daily report?

A. Yes.

Q. Does that show you definitely when the policy was ordered? Might a policy be dated back?

A. A policy wouldn't be dated back unless we had a definite order, we wouldn't date a contract back, a policy. An order may lie in the office several days for one reason or other before it is written, but the policy wouldn't be dated back on an order.

Q. You have no personal recollection of the date when this policy was ordered from you?

A. No.

LYDIE E. ENDICOTT, sworn.

Direct examination.

By Mr Gaskill:

Q. Mrs. Endicott, are you one of the defendants in this suit?

A. Yes, sir.

Q. Are you the executrix of the estate of Thomas D. Endicott, deceased?

A. Yes, sir.

Q. Do you personally hold a judgment of $15,000 against Harry and Milton Garfinkel?

A. Yes, sir.

Q. Has that sum been paid to you by anybody?

A. No, sir.

Q. Or any part of it?

A. No, sir.

Q. And the whole sum is due, including interest and costs, is it?

A. Yes, sir.

(No cross-examination.)

Mr. Gaskill: It is admitted on the record that the Ford automobile of Milton Garfinkel was repossessed on or about March 1, 1928.

JOHN SOLOFF, sworn.

Direct examination.

By Mr. Gaskill:

Q. Mr. Soloff, where do you live now?

A. Atlantic City.

Q. Where in Atlantic City?

A. 240 South Connecticut Avenue.

Q. How long have you lived in Atlantic City?

A. Three and a half years.

Q. At present what is your business or profession?

A. Life Insurance.

Q. For what company?

A. Fidelity Mutual Life Insurance Company of Philadelphia.

Q. Now on the sixth of April, 1928, what was your business?

A. Managing the insurance department for Taylor and Soloff.

Q. Where was that office located?

A. 1315 Atlantic Avenue, Atlantic City.

Q. How long before that time had you been the manager of the insurance department for Taylor and Soloff?

A. About February of 1927.

Q. About a year and two or three months?

A. That is right.

Q. Now, Mr. Soloff, in your business with the company or with Taylor and Soloff did you ever have occasion to go to the office of the Hudson Casualty Company in Jersey City?

A. Quite frequently.

Q. With whom did you talk there?

A. Mr. Kreps, on many occasions Mr. Higgins.

Q. Mr. who?

A. Mr. Higgins, Judge Higgins, also Mr. Higgins, isn't the attorney Mr. John Hogan, several other men.

Q. In what capacity did you talk to these men?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Did you have any connection with the Hudson Casualty Company?

Mr. Hanstein: I object to that.

The Court: What is the purpose, Mr. Gaskill?

Mr. Gaskill: I just want to show that he did work, that he was the manager of the casualty department for Taylor and Soloff and signed policies for them for the company and that the company knew about that and counselled him what to do and how to do it, that the officials of the company told him what to do and how to do it in the office of the company.

The Court: I will permit that.

Q. Now, Mr. Soloff, what duties did you perform in the insurance department of Taylor and Soloff so far as it relates to the Hudson Casualty Company?

Mr. Hanstein: I am going to object to that.

The Court: Sustain the objection.

Q. I show you D1 and ask you if you can tell me what that is?

A. An order for automobile insurance.

Q. Who prepared that order for automobile insurance?

A. I did.

Q. Where did you get the information to prepare that application?

A. It was given to me by a representative of the Hudson Casualty Insurance Company.

Q. Are you referring now to the form or the information?

A. The information given to me by Milton Garfinkel.

Q. But the form was given to you?

A. Supplied by the company.

Q. After you got that information what did you do with it?

A. Information pertaining—the order, Mr. Gaskill?

Q. Yes, the information on the blank; in whose handwriting is that blank?

A. My handwriting.

Q. After you got the information what did you do with it?

A. Forwarded that order to the Hudson Casualty to write the policy.

Q. Then after the Hudson Casualty wrote the policy then what became of the policy, if you know?

A. We entered the records in our books, compared the information on this order blank and the policy, forwarded it to the assured and, of course, collected the premiums and forwarded that to the company.

Q. Who signed the policy?

A. Joseph Soloff, Julius Taylor and myself.

Q. I show you policy marked C1 and ask you if you signed that policy and issued it?

A. Yes, sir; that is my signature.

Q. Now, Mr. Soloff, do you remember the application made by Milton Garfinkel for this insurance?

A. Yes, sir.

Q. Did you personally receive the information?

A. Information was given to me over the telephone by Milton Garfinkel.

Q. By whom was it given?

A. Milton Garfinkel.

Q. You know the voice of Milton Garfinkel?

A. Very well.

Q. You have known Milton for some time prior to this time?

A. Yes, sir.

Q. What information did you ask him respecting this risk that you were assuming?

A. The usual questions, the name of the assured, the address, make of the car, year of the car, style of the car, the motor number, serial number, liability amounts, property damage amounts, and so forth.

Q. When he made the application over the telephone did you ask him this question whether or not Harry Garfinkel was the unconditional and sole owner of the car?

Mr. Hanstein: I object to that. I don't think we are bound by whether or not he asked or whether he didn't. Of course the whole crux of this case is that this man took the policy.

The Court: I will permit it.

(Question repeated.)

A. I asked ~~Harry~~ Milton Garfinkel to give me the information, he told me he is giving me the information pertaining to serial and motor number from the conditional bill of sale.

Q. From a conditional bill of sale?

A. Yes, sir.

Q. You didn't ask him the question then whether or not he was the sole and unconditioned owner of the car?

A. No, sir, our application orders didn't provide for it.

Q. Did you ever have any instructions from the officers of the company as to what information you should get for the preparation of a policy?

A. Yes, sir.

Mr. Hanstein: I object to that. I don't see how we are going to be bound in this matter by whether or not the insurance manager or whatever he may have been of Taylor and Soloff, has received instructions from the company.

The Court: That is true but you allege there was fraud on the part of those other people and you have attempted to prove fraud. It is admissible, as I see it, on the point of fraud. As I said before, I don't see where it makes any difference in the case whether fraudulent or not, but, nevertheless, fraud was charged and they are entitled to defend as to fraud. I will permit the question.

(Question and answer repeated.)

Q. What information did they instruct you to get for the preparation of automobile policies similar to the one that is marked C1?

Mr. Hanstein: I want to note this objection to that question: I am not arguing the same objection,

your Honor, but the phrase "did they notify you to get" is really too broad a phrase to me and I think ought to be specific.

The Court: Yes, ought to be some officers.

(Question withdrawn.)

Q. Did you ever receive any instruction from any of the officers of the Hudson Casualty Company respecting what information you should secure for the Hudson Casualty Company to write an insurance policy?

A. Yes, sir.

Q. From whom did you receive those instructions?

A. Mr. John Hogan.

Q. Anybody else?

A. No.

Q. Who was Mr. Hogan?

A. I think at the time he was the agency supervisor.

Q. Did you ever talk to Mr. Kreps about the writing of insurance?

A. No.

Q. You didn't?

A. Not pertaining to the writing of any policies.

Q. What did Mr. Hogan—what was Mr. Hogan, you say he was the superintendent of agencies?

A. Supervisor or superintendent.

Q. Of Agents for the Hudson Casualty Company?

A. Of Agents for the Hudson Casualty Company.

Q. What information did he tell you to procure

for the writing of an insurance contract such as is in evidence marked C1?

A. We were to get the name of the assured, the address, numbers of the serial and motor number of the car, the amounts of liability, the occupation of the assured, also the date when the policy is to go into effect.

Q. I show you Exhibit C1 and direct your attention to paragraph 8, 9 and 10, and ask you whether or not you were instructed by the company or by Mr. Hogan to get information respecting those statements?

A. No, sir.

Q. Then you were never told, Mr. Soloff, to find out whether or not the car to be insured was to be rented to others or used to carry passengers for hire?

A. No, sir.

Q. Did you ask Milton Garfinkel over the telephone whether that car was going to be so used for the carriage of passengers?

A. No, sir.

Q. Did you ask him at that time or make any other inquiry of him whether or not any company had cancelled insurance for Harry Garfinkel within three years?

A. No, sir.

Q. And you didn't ask him, as I understand it, whether or not Harry Garfinkel was the sole and unconditional owner of the automobile?

A. I said it before, he read the information given me from the conditional bill of sale.

Q. So then at that time when this application

was made you knew that Harry Garfinkel was buying this car by installments, didn't you?

A. Yes, sir.

Q. After you had received the information what did you do?

A. Filled out the automobile order and forwarded same to the Hudson Casualty for the policy to be written.

Q. And then did they send the policy back to you?

A. Yes, sir.

Q. Did you sign the policy?

A. Yes, sir.

Q. And you sent it to Mr. Garfinkel?

A. Correct.

Q. You signed the policy for Taylor and Soloff by yourself?

A. Yes, sir.

Q. As the duly authorized agent of your company?

Mr. Hanstein: I object to that.

The Court: Strike it out. Overruled.

Q. Now, Mr. Soloff, I show you a letter and ask you if you signed that letter?

A. Yes, sir.

Mr. Gaskill: I offer this in evidence.

(Letter received and marked Exhibit D6.)

Q. Is this the letter you sent Mr. Harry Garfinkel when you sent the policy to him?

A. Yes, sir.

Q. "Mr. Harry Garfinkel, 4 South Surrey Avenue, Ventnor City, N. J.

Dear Sir:

Enclosed please find policy A. P. 15803 of the Hudson Casualty Insurance Company covering 1926 Chevrolet sedan for public liability and property damage. Thanking you for your valued patronage we beg to remain, Very truly yours, Taylor and Soloff, John Soloff."

Q. Mr. Soloff, at the time Milton Garfinkel called you on the telephone did you inquire of him the business of Harry Garfinkel?

A. Yes, sir.

Q. Do you remember what business he told you he was in?

A. Buying and selling precious metals.

Q. Did he tell you that he was a jewelry salesman?

A. That was my interpretation of his occupation.

Q. That was your interpretation of it?

A. Yes, sir.

Q. Was it your intention, Mr. Soloff, when you issued this policy and mailed it to Harry Garfinkel to cover the Chevrolet sedan of Harry Garfinkel for public liability insurance and property damage when you knew that the automobile of Mr. Garfinkel was being purchased on the installment plan?

Mr. Hanstein: I object to that, your Honor.

The Court: Sustain the objection.

Q. You knew at the time you sent this policy to

Mr. Garfinkel that he was purchasing the car on the installment plan, didn't you?

A. Yes, sir.

The Court: Let it be stricken. That has been answered several times. I don't see there is any use taking the time repeating.

Mr. Gaskill: I didn't know he had answered it.

The Court: Yes, he told once or twice before when he took the order he knew it, told the numbers came from the conditional contract and he knew it.

Q. Mr. Soloff, on February second, 1928, the evidence shows that you issued a policy to Milton Garfinkel on a Ford automobile?

A. Yes, sir.

Q. Subsequent to that did you get some information from the company concerning that automobile or that policy I mean?

A. Prior to that date or after that date?

Q. Subsequent to February second?

A. Yes, sir.

Q. In response to that information from the company what did you do with it or what did you do about the insurance policy?

A. Called up Mr. Garfinkel and asked him to send the policy back, that I replaced that insurance with another company.

Q. Did you replace the insurance with another company?

A. Yes, sir.

Q. What company was that?

A. U. S. F. and G.

Q. From the time that you placed the insurance with the U. S. F. and G. on this Ford car of Milton Garfinkel's was there any question that came to your notice about the cancellation of that policy, the one issued by the U. S. F. and G?

A. No, sir.

Q. Now, Mr. Soloff, how many policies or how many orders for the writing of policies did you send to the Hudson Casualty Company during your term as manager of the insurance department of Taylor and Soloff?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Mr. Gaskill: The reason I want that is that I want to show by the continual correspondence for over a year and three months with this company that they knew that Mr. Soloff was doing the business of the insurance company for Taylor and Soloff and signing policies for them and that they accepted that situation. Includes a course of conduct and they accept that and know about it they can't afterwards repudiate it.

The Court: Sustain the objection.

Q. Now in what risks that you accepted for the company were any of them ever refused?

Mr. Hanstein: I object.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, what I am trying to do is prove agency by a course of conduct.

The Court: Been no denial of agency as I see it.

Mr. Gaskill: There isn't any denial of the authority of John Soloff to sign policies as manager?

Mr. Hanstein: We don't admit John Soloff to be our agent by any means.

Mr. Gaskill: Your Honor, if that is so, Mr. Soloff is my last witness and I would like the opportunity at some future time—I am surprised because my information has been in the evidence, the documentary evidence that they have proven and filed in the case showed that they have adopted policies signed by John Soloff where he signed the name of Taylor and Soloff.

The Court: No question about that, is there?

Mr. Gaskill: Yes, they say that.

The Court: No, they don't at all. They say they don't accept him as their agent. That is manifestly so, Taylor and Soloff are their agents. They have accepted his signature but that don't authorize him to exceed his authority. What difference can it make one way or the other?

Mr. Gaskill: I think it makes a lot of difference.

The Court: I will overrule this question.

Mr. Gaskill: Your Honor, my theory has been upset and I ask that I have future time, near the adjournment time now.

The Court: Going to adjourn in fifteen minutes without doubt.

Mr. Gaskill: But if I have misconceived the legality of the thing, I don't want to prejudice this widow without an opportunity. Mr. Hanstein even asked the privilege of presenting a witness he don't even know what he is going to testify to.

The Court: Apparently will give you an opportunity to present any legal witnesses you have. There isn't any question about that.

Mr. Hanstein: I will even let you introduce any new agency contract if you are surprised by anything about this agency relationship.

Q. Mr. Soloff, after Milton had called you by telephone did he say anything to you about his uncle respecting the insurance?

(Question withdrawn.)

Q. Will you repeat to me to conversation, as nearly as you know it, between you and Milton Garfinkel respecting the placing of this insurance?

Mr. Hanstein: I think he has already testified to that at least once.

Mr. Gaskill: I know he hasn't.

The Court: Two or three times.

Mr. Gaskill: He hasn't completely testified to it.

The Court: You have asked him and he has given his answer. I don't know whether he hasn't given all that you expected him to give.

Mr. Gaskill: He hasn't.

The Court: I will permit you to ask it again.

Q. Was there any question about removing of the automobile when the question of insurance was talked about?

Mr. Hanstein: I object.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, Milton Garfinkel testified that he told John Soloff over the telephone that his uncle would not move the automobile until the car was covered by insurance.

The Court: The question is a leading question anyhow. This is your witness. I will sustain the objection.

Q. Mr. Soloff, can you tell us any other conversation had between you and Milton Garfinkel at the time of the placing of the insurance other than you have already testified to?

A. Yes, sir; I asked Milton Garfinkel whether he wants me to cover the car with fire and theft insurance, he told me that is covered by the finance company.

Q. The finance company?

A. Yes.

Q. Was there anything else said that you know that you haven't already testified to?

A. Not that I can recall.

Cross-examination.

By Mr. Hanstein:

Q. What makes your recollection of that conversation so very vivid today?

A. The questions asked in every instance.

Q. I don't hear you.

A. The very same questions are being asked in every instance when we cover a car.

Q. How do you come to remember that Milton said coverage as to fire and theft is taken care of by the finance company?

A. Because we asked in every instance where we get an order public liability and property damage we have always asked to place fire and theft insurance through our office.

Q. You always ask that same question?

A. Yes, sir.

Q. Do you remember all the answers given you?

A. In this case I remember.

Q. Why is it this case stands out so vividly in your memory?

A. Because he didn't give us the order for fire and theft.

Q. You always get the order for fire and theft when you get the order for liability?

A. If the car is bought outright, yes.

Q. When it isn't bought outright, you don't get it, do you?

A. If we get the public liability and property damage we usually get the fire and theft.

Q. If it is bought outright?

A. Yes, sir.

Q. I presume you have had a good many policies where you just get the public liability, haven't you?

A. Correct.

Q. Do you remember the conversation that took place with each one of them?

A. Between the information, yes, sir, because I have jotted it down on the order blank.

Q. What is that?

A. Pertaining to the information.

(Question repeated.)

Q. Each time you get a policy called in to you for public liability and you don't get the fire and theft do you remember the conversation as to each person with whom you deal?

A. No, in some cases.

Q. How is it you come to remember this one so very well?

A. I knew Milton Garfinkel well.

Q. Didn't you know most of your customers well?

A. No, sir.

Q. When did it occur to you that it was important for you to remember that this car was being bought under a conditional sale contract?

A. A few months ago.

Q. You just then realized that it was important for you to remember it?

A. Yes, sir.

Q. What brought it to your attention then that it was important for you to remember that fact?

A. Certain affidavit that I have signed in Merritt Lane's office in Newark.

Q. You told the truth when you signed that affidavit, didn't you?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Was there any reason why you didn't?

A. I told the truth as far as the affidavit is concerned, but there was a clause put in pertaining to the sole and absolute ownership of the car that I didn't understand at the time.

Q. Didn't you know what sole and unconditional ownership of the car meant at the time you swore to this affidavit?

A. I haven't paid much attention to that clause at that time.

Q. Do you know now what that clause means?

A. Yes, sir.

Q. What does it mean?

A. When the car is bought outright.

Q. When the interest is not sole and unconditional

al what kind of an interest does the man get in it then, do you know?

A. He holds title to the car I presume until it is paid for.

Q. What is that?

A. He holds title to the car until it is paid for.

Q. Who does?

A. Purchaser has an interest in the car until it is paid for but the title is reverted to the purchaser when it is paid for in full.

Q. Now the first time you found out what that sole and unconditional ownership meant was some time after you swore to this affidavit?

A. Correct.

Q. Up until that time, whether a man was buying a car under a conditional sales contract or whether or was not, did not mean anything to you, is that it?

A. Correct.

Q. Now where did you suddenly acquire this new information about sole and unconditional ownership?

A. When I discussed this matter with several people.

Q. Who were those people?

A. Mr. Halpern, Mr. Gaskill, Mr. Soloff, my brother, Mr. Taylor, several other people, and Mr. Kreps.

Q. So that—you knew what the cancellation of a policy meant, didn't you?

A. Yes, sir.

Q. You knew that the Hudson Casualty Company cancelled that first policy that Milton Garfinkel got, didn't you?

A. Yes, sir.

Q. When you went over to the U. S. F. and G. to get a new insurance policy for him you knew that Milton had had a policy cancelled, didn't you?

A. Yes, sir.

Mr. Halpern: Object to that, if your Honor please; the testimony is that the policy wasn't cancelled until April some time and the second policy in the U. S. F. and G. was in February.

The Court: Yes, but no objection to the question.

Q. Despite that fact you caused the U. S. F. and G. Company, through Edward Wilson Company, to issue a policy in which it was stated that no automobile insurance of any kind has been declined or cancelled for or on behalf of the assured by any company during the past three years except as follows and then "no exceptions" is that right?

A. Question was never asked by Wilson Company.

Q. What?

A. That question was never asked by Wilson Company.

Q. You knew as a fact that this statement was in this policy, didn't you?

A. I didn't read the policy.

Q. Did you ever read a Hudson Casualty policy?

A. Not the paragraphs, not the various paragraphs of the policy, I have only compared the number, serial numbers, the amounts of liability insurance and the rates .

Q. Didn't you ever sit down at a typewriter or

have or dictate to some one in your office all the data for the filling in of a policy of insurance?

A. Yes, sir.

Q. And didn't you, in order to fill in such policies, have to read these various paragraphs?

A. We used to give our orders on an order blank. Those questions were never contained.

Q. I am not talking about the order blank. I am talking about whether or not you, in dictating a policy to be written up in your office, never read paragraphs 7, 8 and 9 and ten?

A. I never read those paragraphs.

Q. Never in all the time you were in charge of that insurance department?

A. Yes, sir.

Q. Never read them?

A. Never read the policy.

Q. Never knew anything about the provisions relating to a previous policy having been cancelled?

A. No.

Q. Never read that?

A. No, sir.

Q. You knew at the time you got the Edward Wilson Company to issue this policy on Milton Garfinkel's automobile that he had a conditional sales agreement on it, didn't you?

A. On Milton Garfinkel's car?

Q. Yes.

A. I don't remember.

Q. Didn't you know that Milton Garfinkel's car was bought under a conditional sales contract?

A. I know it now. I didn't remember it then.

Q. Did you know it at the time?

A. I don't remember.

Q. This affidavit that you say you took in Mr. Lane's office, that was all information which you gave to Mr. Lane, was it not?

A. Yes, sir.

Q. You gave Mr. Lane the information that he put into that affidavit, didn't you?

A. I just outlined the story, how we accepted the order for insurance. This affidavit was dictated by Mr. Lane.

Q. In your presence?

A. Yes, sir.

Q. And your stayed there until it was written up, didn't you?

A. Yes, sir.

Q. And then signed it?

A. Yes, sir.

Q. And this affidavit annexed to the bill, being the affidavit of John Soloff, signed by you, was based on information given by you, dictated in your presence and signed by you?

A. Yes, sir.

Q. And after that was done you, sometime thereafter had a conversation with Mr. Gaskill and Mr. Halpern, isn't that right?

A. Yes, sir.

Q. And then you concluded that your affidavit was wrong, is that right?

A. No, I requested Mr. Halpern to get the copy of the affidavit so I could see again what I signed.

Q. Why did you want to see again what you signed?

A. I just wanted to analyze it more.

Q. Did you find anything else wrong?

A. That statement pertaining to the absolute ownership of the car.

Q. When you swore that falsely, when you said "I asked the usual questions and was informed that the car was to be driven for private and business purposes in the vicinity of Ventnor City and that the interest of the assured was that of unconditional and sole ownership," you told that?

A. I didn't at that time note the thing of this kind, I didn't understand it.

Q. Do you recall saying "I had no knowledge whatever but that Harry Garfinkel was the true and lawful owner of the car?" Remember saying that in your affidavit?

A. Yes,sir.

Q. Did you find out anything to the contrary of that?

A. No, the only thing is that the car was purchased on installment plan; I knew that at the time.

Q. You knew at the time you took this affidavit that Milton Garfinkel had had a policy of insurance cancelled, didn't you?

A. Yes, sir.

Q. When did you find that out that he had a policy of insurance cancelled?

A. While being connected with Taylor and Soloff.

Q. And the policy of insurance that was cancelled is the policy on the Ford car, wasn't it?

A. That is right.

Q. You didn't disclose that fact to Wilson Company when you ordered the insurance, did you?

A. They never asked me that question.

Q. I say you didn't disclose that fact

A. That is right.

Q. You wrote a good deal of insurance in your position with the company, didn't you?

A. Yes, sir.

Q. Do you remember all the conversations that relate to all the policies?

A. No, sir.

Q. Was there any particular reason why you should remember this so distinctly?

A. Yes, sir.

Q. What was the reason?

A. Garfinkel, Milton Garfinkel was one of the few friends, one of the few people I have known in Atlantic City at the time, I was a stranger before.

Q. Do you remember taking the order for the first policy of insurance?

A. Yes, sir.

Q. Where was that given to you?

A. Over the phone.

Q. From where?

A. I don't know.

Q. What conversation took place then?

A. The usual questions were asked, the make of the car, the amount of liability insurance, serial number, motor number and the date of the policy going into effect.

Q. From what source were the numbers given to you with regard to that policy?

A. From—I don't know.

Q. You don't remember from what source?

A. No, sir.

Further testimony adjourned to Friday, November 21, 1930,——

Atlantic City, New Jersey, November 21, 1930.

Trial of the cause resumed at 10 o'clock A. M.

F. Hobart Higgins, sworn.

Direct examination.

By Mr. Gaskill:

Q. Mr. Higgins, what is your position with the Hudson Casualty Insurance Company?

A. Secretary.

Q. Were you secretary of this company on May 6th, 1928?

A. I was.

Q. And continued until this time?

A. Yes.

Q. I show you, Mr. Higgins, Exhibit D2, and ask you if you signed that notice?

A. I did.

Q. Now, I notice that is signed by "Frank H. Higgins," Secretary, and the printed part, your name is made as "F. Hobart Higgins?"

A. Yes, sir.

Q. You signed either way?

A. Either way.

Q. Now, Mr. Higgins, this exhibit is dated July 24th; what was your information on that day as to the mis-statements in the warranties and lack of cooperation?

Mr. Hanstein: Can I see this letter on which you are examining? I object to this question. I don't see how it has any relevancy in this case at all.

The Court: I will sustain the objection as to the form of the question, not the line of questioning.

Q. On what, Mr. Higgins, did you base your letter of Exhibit D2, dated July 24th, 1928?

Mr. Hanstein: I object to that. I think that is entirely too indefinite, on what it might have been, on order from somebody or something else.

The Court: Sustain the objection.

Q. Mr. Higgins, referring to D2, what mis-statements in the warranties were you referring to by this communication?

Mr. Hanstein: I object to that, your Honor. I don't think it makes any difference what ones they were, if there were no breach of warranty the letter was not properly written, if there were breaches of warranty, didn't matter whether Mr. Higgins knew it or whether he didn't.

The Court: I will permit the question.

A. Breach of warranty on the ownership of the automobile described in the policy to which that referred.

Q. Breach of warranty on ownership?

A. Yes.

Q. Then on July 24, 1928, the date of this letter, your company was informed that Harry Garfinkel was not the owner of the automobile insured by your policy?

A. Our investigation tended to show that, yes.

Q. What other mis-statements did you base this letter on in the warranty?

A. My recollection that is the only one mis-statement.

Q. The only one?

A. Yes.

Q. Now, Mr. Higgins, do you know when that information was obtained by your company?

A. No, I can't tell you that without referring to the file.

Q. Will you refer to the file, please?

A. I based that on a report by Mr. Fuller, who investigated this case, but I don't see that report here. I think that is perhaps with some of those other papers, I don't know where.

Q. I would just like to have the date of the report, if I can.

A. I haven't got the report here.

Mr. Hanstein: I have some more papers of yours here, I presume they are yours.

A. At any rate, it was just before I wrote the letter. Several reports. Here is one dated July 5th.

Q. What I am referring to is the report which you have that Mr. Harry Garfinkel was not the owner of this automobile.

A. The first report is July 5th, which intimated

that Mr. Harry Garfinkel was not the owner of the car.

Q. Now, on securing that information, or being informed of that, Mr. Higgins, you wrote this letter of July 24th denying liability under your policy, didn't you?

A. That is right.

Q. When you denied your liability, did you send Mr. Garfinkel a check for the premiums that he had paid for the car, for the insurance?

A. Yes, sir.

Mr. Hanstein: That has already been developed, I think, by the testimony of another witness, that the other witness did it.

Mr. Gaskill: I am asking the secretary of the company, who sent out the notice, whether or not he sent the premiums or not.

The Court: I will permit it.

Q. Will you look at that letter and advise me whether or not you returned the premium that had been paid for this policy on the 24th of July?

A. Evidently not by this letter.

Q. Now why didn't you send the premium back when you discovered that man was not the owner of the automobile?

Mr. Hanstein: I object to that. This witness has not testified that he had charge of that department of the company.

The Court: Sustain the objection.

Q. Did you have—what was your business or what were your duties with the company, Mr. Higgins?

A. My duties were as secretary of the company, also in charge of claim department.

Q. In charge of the claim department? And you also, in proper cases, sent notices of denial of liability, didn't you?

A. Yes, sir.

Q. And returned premiums?

A. No, I did not.

Q. Who did that in your company?

A. The accounting department.

Q. Beg pardon?

A. The accounting department.

Q. I mean in cases where you denied liability, that you were under no liability under the policy, did your department return the premiums?

A. No.

Q. Do you know Mr. William C. Krumrey?

A. I do.

Q. What was his office with the company?

A. He was in the underwriting and accounting department, both.

Q. Was he not also an assistant secretary?

A. I think he was.

Q. Now, he would be, as assistant secretary, he would be under you as secretary, wouldn't he?

A. Normally, yes.

Q. Now, I show you a letter marked Exhibit C5, and ask you if you directed that letter to be sent?

A. Yes, I instructed Mr. Krumrey to send that letter.

Q. And you also instructed him to return the premium, didn't you?

A. I did.

Q. Then your department did return the premiums in cases of cancellation or ——

A. No.

Q. I mean you directed them to be returned, didn't you?

A. I informed the other department, when we notify the assured that he was not insured under the policy, that he was claiming to insure under, and then they would send back the premium.

Q. Then your department directed the return of premiums?

A. We did not direct it, no.

Mr. Hanstein: I object to it, some one has testified with regard to that.

The Court: Sustain the objection.

Q. But you knew of this letter C5, and directed it to be sent out, didn't you?

A. I didn't know of the letter, no, until you showed it to me.

Q. But you directed it to be sent?

Mr. Hanstein: I object.

The Court: Already said he did. Sustain the objection.

Q. Before August the 3rd you had not directed the

return of the premium paid for the policy to Mr. Garfinkel, had you?

Mr. Hanstein: I object to that. I don't see it is material whether he did it before one date or another.

The Court: Sustain the objection.

Mr. Gaskill: You Honor, may I be heard just a minute?

The Court: Yes.

Mr. Gaskill: The thing I want to develop, if I can, is that they claim that they had knowledge on July 5th Mr. Garfinkel was not the owner of the car, and that they delayed until August 3rd to return the premium.

The Court: You have already developed that, that has already been done.

Mr. Gaskill: I meant to do it more completely, if I could.

Q. Mr. Higgins, I show you a letter dated August 10th, 1928, and ask you if you signed that letter?
A. I did.

(Letter offered, received in evidence and marked Exhibit D7.)

Q. Mr. Higgins, on April 6th, 1928, and from that

time until now, were you a counsellor at law of New Jersey?

A. No.

Q. An attorney at law?

A. Yes.

Q. In addition to being secretary of the Hudson Casualty Company, did you also do legal work for them?

A. I did.

Q. Now, in the answer filed in the case of Lida Endicott, Executrix of Thomas B. Endicott, against Harry Garfinkel, Milton Garfinkel and Timothy Cordery, jointly and individually, did you file an answer for Milton and Harry Garfinkel?

Mr. Hanstein: I object. The record will speak for itself. The record is in evidence.

Mr. Gaskill: Your Honor, the thing is the pleadings are signed "F. Hobart Higgins," and the name on the notices ——

The Court: You have already had this witness testify he was F. Hobart Higgins.

Q. So then you are the man who, on behalf of the company, filed the answers for Harry and Milton Garfinkel in that suit?

A. No, sir.

Mr. Hanstein: I object.

The Court: Sustain the objection.

Q. By what—for whom did you file those answers?
A. For ——

Mr. Hanstein: I object. The record shows for whom the answers are filed.

The Court: Not necessarily, shows who the litigants are.

A. For the defendants at their attorney's request.
Q. Beg pardon?
A. For the defendants at their attorney's request.
Q. At their attorney's request?
A. Yes.
Q. Had you ever seen the defendants yourself?
A. I never did until the other day, one of them.
Q. Now, who was the attorney of the defendants?
A. Robert Garfinkel purported to be their attorney by telephone conversation and by letter.
Q. But so far as you know, except what he said, you don't know that he was the attorney for these two men, do you?
A. No, I don't.
Q. Now, you filed in this Endicott suit a counterclaim for Harry Garfinkel and for Milton Garfinkel, didn't you?
A. I did.

Mr. Hanstein: I object. The record speaks for itself.

The Court: Yes.

Q. From whom did you get the information to file the pleadings in that cause?

A. From one who purported to be Robert Garfinkel.

Q. You never saw him?

A. I never did.

Q. On receiving that information you filed the pleadings in that cause?

A. Yes, by phone and by letter.

Q. Now, Mr. Higgins, the record shows that you filed an answer for Harry and Milton Garfinkel in a claim or in a counter-claim brought by Timothy Cordery against Harry Garfinkel; why did you do that?

Mr. Hanstein: I object to that. I don't see that is material.

The Court: How is that admissible?

Mr. Gaskill: Your Honor, the record shows that there was a counter-claim by Timothy Cordery against Harry Garfinkel and Mr. Higgins filed an answer to that counter-claim for Harry and Milton Garfinkel, and the suit goes on to judgment against both Harry and Milton Garfinkel, when they were not, when Milton was not made a party in the counter-claim of Cordery. Now I want to find out where he got the information and by whose anthority he filed that answer.

The Court: Where is that evidential in this case, trying to get information for some other proceeding?

Mr. Gaskill: No.

The Court: How is that attributable or in any way evidential in this case?

Mr. Gaskill: It is in this respect: I am assuming that it is so, it is so up to now, that so far as Milton Garfinkel was concerned, the company defended him according to the terms of the policy, in other words, without any agreement with him they filed an answer.

The Court: Why do you say that?

Mr. Gaskill: Because ——

The Court: The testimony is that this man filed these pleadings by reason of his engagement by a Garfinkel who is a member of the bar. There was no connection in any way with the company in that action. It may be the company is by the policy supposed to do it, but the testimony that you have produced is that they did not do it, that this witness did it by direction of the attorney of these people or of somebody who said he was the attorney.

Mr. Gaskill: All right, then, I will withdraw that question.

Q. Mr. Higgins, isn't it true that you filed an answer for Harry Garfinkel by virtue of an agreement between the Hudson Casualty Company and Harry Garfinkel?

A. By reason of an agreement, letters and telephone calls.

Q. I mean an express agreement that the Hudson Casualty Company would defend this suit.

A. Yes, I believe there is such an agreement.

Q. I show you this agreement and ask you if that is the agreement signed in this matter?

A. Yes, sir.

Mr. Gaskill: I offer that in evidence.

(Agreement admitted in evidence and marked Exhibit D8.)

Q. Then you did not file the suit or answer the suit of Endicott against the Garfinkels by agreement with Robert Garfinkel, but rather by virtue of that agreement, is that a fact?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Now, Mr. Higgins, this agreement was the result of your negotiations about the defense of the Garfinkels in the Endicott case, isn't it?

Mr. Hanstein: I object to that. That is calling on the witness for a conclusion as to what that represents, and the agreement speaks for itself.

The Court: Sustain the objection.

Q. Did you have any agreement concerning the

defense of the Endicott case with the Garfinkels other than that expressed in D8?

A. I did.

Q. Was the agreement prior to the execution of D8 or subsequent to it?

A. I don't remember whether it was prior or subsequent.

Q. Was it in writing?

A. Partly.

Q. Have you the writing?

A. There are several letters in the file in connection with that.

Q. Now, Mr. Higgins, what I am directing your attention to is whether you had any agreement with Harry Garfinkel or Milton Garfinkel concerning the defense of this case other than this agreement marked D8.

A. Only through telephone conversation with his attorney or one who purported to be his attorney.

Q. You don't know whether it was before or after this agreement?

A. No, I don't remember. I don't know what the date of the agreement is, now. I have forgotten that. I don't know what date it was.

Q. The agreement has no date on it, the month is December, 1928.

A. Well, I couldn't tell you whether it was before or after. There were several telephone conversations.

Q. Who were those telephone conversations with?

A. With one who purported to be Robert Garfinkel.

Q. You are not sure it was Robert Garfinkel, are you?

A. I am not.

Q. Did you have any conversation with Milton or Harry Garfinkel?

A. I tried to but I couldn't.

Q. Did you have any conversation with them?

A. No.

Q. Now isn't it a fact as a result of that agreement that you filed answers, filed an answer for Harry Garfinkel in this Endicott suit?

Mr. Hanstein: I object to that. He has been all over this and it has been all ruled on.

The Court: I think it is already testified to. Sustain the objection.

Q. Do you know whether or not on December 20th, 1928, Harry Garfinkel was then the owner of the automobile that had been in the collision?

Mr. Hanstein: I object to that. I don't think that makes any difference, immaterial and irrelevant, and certainly the knowledge of this witness is immaterial in this case.

The Court: I will permit it.

(Question repeated.)

A. No, I don't know.

Q. Now, Mr. Higgins, to your knowledge did you ever secure from Milton Garfinkel an agreement about the defense of the Endicott case?

A. Through his attorney, or one who purported to be his attorney.

Q. And you don't know whether that was prior or subsequent to December, 1928, do you?

A. No, it was about that time, but I can't tell whether it was before or after.

Q. Then as a result, then you say, of the agreement between an attorney for Mr. Garfinkel, you defended Milton Garfinkel in the Endicott suit?

A. Yes, I did. I beg pardon, I filed the answer.

Q. During the trial of the case, did the company provide Judge Cole to represent it in the proceedings?

A. They did. I would qualify that. No, they did not have Judge Cole represent the company, Judge Cole represented the Garfinkels at the request of the company.

Q. All right, at the request of the company, and you paid his services?

A. Yes.

Q. For his services?

A. Yes.

Q. And you also paid for the rule to show cause to the Supreme Court, didn't you?

A. Yes, I think so.

Q. All counsel for expenses in connection with that trial was paid by the Hudson Casualty?

A. That was our agreement with the Garfinkels.

Mr. Gaskill: I ask that be stricken as not responsive.

The Court: I will strike it. It is not responsive.

Q. Now, did you have any agreement with Harry Garfinkel respecting the defense of a counter-claim

brought by Timothy Cordery against him, against Harry Garfinkel?

A. Specifically?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, this contract does not provide for any defense of any counter-claim by anybody except Lida Endicott. Now he has admitted that he filed an answer in this counter-claim and filed counter-claims. Now, I think I have a right to know whether or not there was an agreement between the company and the Garfinkels about subsequent suits.

The Court: That might be so, but that is not the question you have asked at all.

(Question repeated.)

Q. Under what conditions, Mr. Higgins, did the Hudson Casualty Company engage counsel to answer the counter-claim of Timothy Cordery against Harry Garfinkel?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Under what conditions did you file an answer for Harry Garfinkel, for Harry Garfinkel to the counter-claim of Timothy Cordery?

Mr. Hanstein: I object to that.

The Court: Permitted.

(Question repeated.)

A. As a matter of course under the original agreement.

Q. As a matter of course under the original agreement?

A. Yes.

Q. You had a copy of that agreement in your office, didn't you?

A. Are you referring to this agreement here?

Q. Yes.

A. Yes.

Q. Had been signed by the company and executed and you knew the contents of it?

A. Yes.

Q. Now under what conditions did you file an answer for Milton Garfinkel in the counter-claim of Timothy Cordery against Harry Garfinkel?

Mr. Hanstein: Just a moment. I am not altogether certain the record shows that. Isn't that what you say the record did not show?

Mr. Gaskill: It does show.

Mr. Hanstein: It does show an answer by Milton? I don't see that is at all material.

The Court: Sustain the objection.

Q. Did you notify Harry Garfinkel that Timothy Cordery had brought a counter-claim against Harry Garfinkel?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, may I be heard on that?

The Court: Yes.

Mr. Gaskill: We allege in our counter-claim that this company defended the suits and agreed to pay. Now it seems to me that under this agreement that has been introduced in evidence, that they assumed the defense in this matter, took it out of the hands of these defendants entirely, apparently. Now it seems to me that it is important for the record in this matter to know that the company defended or had counsel defend the suit of Cordery against Garfinkel and that these defendants themselves ——

The Court: Was there ever such a case?

Mr. Gaskill: Yes, sir, and there is a verdict against this man in it.

The Court: I thought it was a counter-claim in the suit of Lida Endicott.

Mr. Gaskill: It was exactly.

The Court: Then there was not a separate suit.

Mr. Gaskill: I always considered a counter-claim not as an original action, but an independent action.

The Court: How does that enter into this matter?

Mr. Gaskill: The attorneys provided by the company having been informed of something, an action against these defendants outside of the agreement that they had signed, they, without notice at all to them, assumed the defense of that suit and did not notify the defendants concerning it.

The Court: What does that have to do with this case?

Mr. Gaskill: It has this to do with it, that after a company, being apprised that there had been some violation of a policy, if then they do everything under the policy that they have agreed to do, and without notice to the assured under the policies, that they can't now be heard to say that the policy was void, but they have created for themselves an estoppel. In other words, the cases, I think, all hold that after a company is informed of the situation, if then they proceed to defend suits, and, as the cases all seem to say, gamble with the other man's money, and after judgment, then they can't come into Court and be heard to say that this policy was void and we had no liability under it. Now that is my theory of this case, that this company, so far as Milton Garfinkel is concerned—Milton Garfinkel under the terms of this policy was an assured, and they had

certain rights and obligations by virtue of this contract, and I want to show that the company apparently disregarded him except to protect its own interest.

The Court: You have not, so far as they are concerned, have not filed any such claim or counter-claim against the company?

Mr. Gaskill: Yes, I have.

The Court: You have so far as Endicott is concerned.

Mr. Gaskill: And so far as Milton Garfinkel is concerned.

The Court: Will you show me that?

Mr. Gaskill: Page 7 is the beginning of the counter-claim for Milton Garfinkel on the answer of Milton Garfinkel and counter-claim.

The Court: It is not endorsed so. It is endorsed answer.

Mr. Gaskill: Page 7 is the beginning of the counter-claim.

The Court: Not endorsed as a counter-claim at all, and I assumed it was no.

Now you say that in the face of the agreement with Harry Garfinkel wherein it was set forth what they should do, that there are other responsibilities?

Mr. Gaskill: Yes, sir.

(Question repeated.)

The Court: I will permit that.

A. I don't recall that I did.

Q. Well, did you have any communication with Harry Garfinkel after December 1st, 1928, up until the filing of that answer?

A. I don't recall. I don't remember that.

Q. Did you have any communication with Milton Garfinkel or did you communicate to Milton Garfinkel the fact that Timothy Cordery had brought a counter-claim against Milton Garfinkel?

A. I don't remember.

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Did you have any agreement with Harry Garfinkel respecting the defense of a counter-claim brought against him by Timothy Cordery?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Was there any agreement, written agreement, between the Hudson Casualty Insurance Company and Milton Garfinkel respecting the defense of Milton Garfinkel to the Endicott suit or the counter-claim by Timothy Cordery?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Cross-examination.

By Mr. Hanstein:

Q. You say that you received certain letters from one Robert Garfinkel?

A. Yes, sir.

Q. Will you produce those letters, please?

A. This is one.

Q. Do you have others?

A. In the files some place. Here is one.

Q. I that a letter which you received from Robert Garfinkel?

A. It purports to be from Robert Garfinkel.

Q. Will you take it out of the files?

A. I never saw the man. Here is another one.

Q. Will you produce that?

(Letter produced.)

Q. Using those letters to refresh your recollection, if necessary, will you tell me who it was, who delivered to you this executed contract, D8?

A. My recollection is that Robert Garfinkel delivered it, that is not in person, but by mail.

Q. Who drew that contract, do you know?

A. My recollection is that that contract was originally drawn by my father, I think, and that it was then changed by ——

Mr. Gaskill: Unless he knows of his own knowledge, I object to it.

Q. Was it drawn by the Hudson Casualty side of the picture or the other side?

A. Hudson Casualty.

Q. Do you know how it was got to Harry Garfinkel for signature?

A. Yes, it was mailed to Robert Garfinkel.

Q. How was it subsequently gotten back to the Hudson Casualty Company signed?

A. I believe it came back from Robert Garfinkel

Q. So that—this is all after, isn't it—now, then, did you have some other correspondence with Robert Garfinkel, being the same Robert Garfinkel who procured the signature of Harry Garfinkel on this contract?

Mr. Gaskill: I object, your Honor.

The Court: Sustain the objection to the form of question.

Q. When you received this letter of December 13, 1928, marked C8 for identification, did that letter come to your hands?

A. Yes, sir.

Q. Did you use that letter in the preparation of pleadings in this case?

Mr. Gaskill: I object, your Honor.

The Court: Permit it.

A. I did.

Mr. Gaskill: Your Honor, we have ——

The Court: You have had him testify that he obtained the information from Mr. Garfinkel. Now, upon cross-examination they are showing what that information was and how it was received from Garfinkel. It certainly is admissible.

Mr. Hanstein: I would like to mark these other two letters for identification.

(Letters marked C9 and 10 for identification.)

Q. What ones of the warranties in this policy were you informed had been broken by Harry Garfinkel?

A. Warranty as to ownership.

Q. What other one?

A. Warranty as to cancellation.

Q. Did you have any report in your files relative to a conditional sales contract on this car?

A. Yes, that is the warranty I referred to as to ownership.

Q. What is that?

A. That is the warranty I referred to as to ownership, sole ownership.

Q. You were talking about sole and unconditional ownership?

A. Yes, sir.

Q. That is what you meant all the time in your reference to ownership?

A. Yes.

Q. Did you have any information as to the place of use of this automobile?

A. Yes.

Q. What was your information in regard to that?

Mr. Gaskill: Your Honor, I object to that. That must have been not of his knowledge.

The Court: You asked him what reports were made. Now he is being cross-examined upon these reports, what appeared on the reports. You were willing to accept them on direct examination and can't object to cross-examining.

Mr. Gaskill: He didn't answer that question on direct examination.

The Court: He answered the question but not referring to this. Admitted.

(Question repeated.)

A. Yes, I had information with regard to the use of the automobile, the information was that the automobile was ——

Mr. Gaskill: I object.

The Court: Sustain the objection, what the report showed.

Q. Did you write this letter based upon the information you received?

A. Which letter is that, Mr. Hanstein? The letter of denial?

Q. Yes.

A. Yes, sir.

By Mr. Gaskill:

Q. One question I overlooked. Did you ever communicate for the company a denial of liability under the policy now in question to Milton Garfinkel?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, under the policy, Milton Garfinkel, on the happening of an accident, became an assured, and for that reason a third party beneficiary has some rights that have accrued to him on the happening of an accident, and it seems to me that he was entitled to notice of denial of liability if they meant to deny liability.

The Court: Sustain the objection unless you show that they had some notice of that to show that after they had notice of such fact, did or did they not.

Q. Now, Mr. Higgins, on July 5th, 1928, did your company know that Milton Garfinkel was the operator of Harry Garfinkel's automobile on May 14th that was involved in the case in which Mr. Endicott was killed?

A. Investigation showed that Milton Garfinkel —

Q. That Milton Garfinkel was the operator of the car?

A. Yes.

Q. And you had that information before that time, didn't you?

A. Yes, I believe so, shortly after the accident.

Q. Now did you after July 5, 1928, communicate to Milton Garfinkel a denial of the company's liability to him under the policy?

A. To his attorney ——

Mr. Hanstein: I object to that. It does not seem to me that they predicated on our case on our failure to do it. There is certainly no liability on our part to do it. Our policy, of course, is with Harry Garfinkel, and we had no obligation to Milton that rose higher than our obligation to Harry.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, may I direct the Court's attention to condition A on the first page of the policy?

The Court: I have read it.

Mr. Gaskill: Where it says, "The term, 'Named assured,' shall apply to the assured named, and the term 'assured' shall apply to any person or persons while riding in or legally operating the automobile described in Schedule 5, with the permission of the named assured," then agreement number 1, on the first page, "The company agrees to pay any loss by reason of the liability imposed by law upon the as-

sured for damages on account of bodily injuries or death resulting therefrom, including instantaneous death accidentally suffered or alleged to have suffered while this policy is in force by any person," and so forth and so on. Now, Milton Garfinkel under this policy at the happening of that accident became an assured under the terms of the policy. The company agreed to pay any judgment against him. It also agreed to pay counsel expenses. It also provided, the contract provides, that Milton Garfinkel could have nothing to do with the settlement of the case, that he must dance attendance to the company in the defense of the suit, in other words he stood in every respect as an assured under this policy, and there has been a recent case in New Jersey, I think it is 105 Law, on the question of an assured under a policy exactly like this, the company defended on the theory that they had no obligation to this man because they had issued the policy to A, and it was a suit and judgment against B, and they said under the policy, "We don't know B," but the Court of Errors and Appeals said, "Yes, you did, because under the policy you said anybody that is operating this automobile becomes an assured, and you must pay a judgment against that person." That is an opinion in, I think, 105 New Jersey Law, by Justice Bodine, in the Court of Errors and Appeals, case of Horn against Commonwealth Casualty Insurance Company.

The Court: Objection sustained.

Q. Did the company ever send notice or in any wise communicate to Milton Garfinkel after the hap-

pening of the accident to Mr. Endicott, on May 14, 1928, that you would not be liable to Milton Garfinkel under the terms of your policy?

Mr. Hanstein: Same objection.

The Court: Sustain the objection.

Q. Who in your company, Mr. Higgins, would send notice of denial of liability?

Mr. Hanstein: I object to that, if it is immaterial, whether the notice was sent, it is certainly immaterial who would send it.

The Court: That is the purpose, I am overruling it. It is immaterial whether the notice went to Milton or not. If it is for that purpose I will sustain the objection.

Q. Now, Mr. Higgins, in the preparation of the pleadings in the case of Endicott against Garfinkel, and others, did you rely on any of the information that was furnished you by the investigators of the Hudson Casualty Company?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

JOHN SOLOFF, recalled.

Direct examination.

By Mr. Gaskill:

Q. Mr. Soloff, you have testified that you were the manager for Taylor and Soloff in the insurance department?

A. Correct, sir.

Q. Now, were you such manager when Taylor and Soloff became the agents for the Hudson Casualty Insurance Company?

Mr. Hanstein: I object to that, at the time they became the agents certainly has no relevancy in this matter.

The Court: I will permit it.

A Yes, sir.

Q. Who carried on the negotiations between the Hudson Casualty Company and Taylor and Soloff respecting the agency?

A. I did.

Mr. Hanstein: I object to that.

The Court: Permitted.

Q. With whom in the Hudson Casualty Company did you carry on the negotiations?

Mr. Hanstein: I object to that on the ground that this agency began, and how it came about is entirely foreign to the issue.

The Court: There is page after page of testimony upon this very point taken the other day by this witness.

Mr. Gaskill: Your Honor, they denied at the testimony the other day that they knew anything about John Soloff.

The Court: But you have already had him testify to that, that he received instructions from Mr. Higgins, never had any talk with Mr. Kreps, with page after page exactly upon that point.

Mr. Gaskill: Your Honor, at the end of the testimony I notified the Court that I was surprised. I want now, and I do offer this testimony, and I want to show by this witness that the agency of the company, Hudson Casualty Company, the business was secured through the efforts of this man for Taylor and Soloff, that all through the business relations from the very inception of the agency down until the time that this contract was written, that this man John Soloff did all of the insurance business that Taylor and Soloff did for the Hudson Casualty Insurance Company, that the agents of the company knew that, that they knew that he was signing contracts for them, they knew that he was making contracts for them, they knew that he was assuring binders for them, they knew that he was collecting premiums for them, they knew that he was adding

endorsements to policies for them, that he was cancelling policies for them, and collecting, in other words that he was doing all the work in the agency of Taylor and Soloff.

The Court: The objection to all of that, Mr. Gaskill, is that you have already done that, at least attempted to. You have already asked this witness the same line of questions.

Mr. Gaskill: I asked him about his instructions from the company, but I have read over his testimony and I don't think that I have had the testimony of Mr. Soloff that the company knew what he was doing.

The Court: If you say that you overlooked questions that you should have asked this witness, I will permit you to recall him.

Mr. Gaskill: That is the reason I want him to testify now.

The Court: I will sustain the objection to the present question, because it has already been asked him.

Q. Mr. Soloff, did you ever have a communication with Mr. Hogan of the Hudson Casualty Company respecting the conduct of the business of the Hudson Casualty Company by Taylor and Soloff?

Mr. Hanstein: I object to that, that has all been covered by the previous examination.

The Court: Asked him before what information did he, Mr. Hogan, tell you to procure for the writing of an insurance contract such as in evidence marked C1, he answered it. I show you Exhibit C1, and direct your attention to paragraph 8, 9 and 10, and ask you whether or not you were instructed by the company, by Mr. Hogan, to get information, the answer is, no, sir.

Mr. Gaskill: Probably I have not framed my question right, but I have something different than that in my mind. What I want to show by this witness is that he did the work at Taylor and Soloff's office for the Hudson Casualty Company with the knowledge and consent of the officers of the company, and what I want to particularly show is that in making the contract that is alleged to have been made with Milton Garfinkel, that he was just as responsible as a member of the firm of Taylor and Soloff.

Mr. Hanstein: Please your Honor, this man has testified that he was the manager for Taylor and Soloff.

The Court: I will sustain the objection.

Mr. Gaskill: Your Honor, the cases, I have looked the cases up, and they seem to hold in New Jersey, it has not been decided, but in the case in 91 Law by the Court of Errors and Appeals, in that case it was where a stenographer in an agent's office was notified of business of the company to attach a rider, and the Court held in that case that we have assumed

in writing this opinion that the stenographer had authority to bind the agent and the company, but not deciding that point, and so far as I have been able to learn it has not been decided in New Jersey.

The Court: The difficulty is, Mr. Gaskill, you make one suggestion in what you are going to prove and then ask a question that does not apply to it at all, and I am ruling upon the questions, not upon what you hope to prove.

(Question repeated.)

The Court: I have already overruled that because the same question has been asked, perhaps not in exactly the same language, but the same question.

Q. Mr. Soloff, what did you do for the Hudson Casualty Insurance Company while you were manager of the insurance department of Taylor and Soloff, their agents?

Mr. Hanstein: I object to that.

The Court: Sustain the objection unless you can show he did anything for the Hudson Casualty Insurance Company. He was manager of Taylor and Soloff.

Q. What did you do regarding the issuing of Hudson Casualty Insurance Company's policies while you were manager of Taylor and Soloff?

Mr. Hanstein: Your Honor, he went over that page by page.

The Court: Sustain the objection.

Q. Did you sign policies of the Hudson Casualty Insurance Company, Taylor and Soloff, by yourself?

Mr. Hanstein: I object to that.

The Court: Sustain the objection. Is there any question that this policy is invalid because Taylor and Soloff signed by a manager and not by either party?

Mr. Hanstein: No, that point is not made at all.

The Court: I understood that point is not in the pleadings and was not raised.

Mr. Gaskill: My point I want to develop is in the contract, over the telephone, John Soloff, by the course of conduct known to the company was authorized just as much as Taylor and Soloff, the individuals, to make the contract.

The Court: That point is not raised at all. The company do not say this policy is not valid because it was not actually signed by a member of the firm of Taylor and Soloff. Why should we go into it? It is admitted it was binding as though signed by a member of the firm.

Mr. Gaskill: Also the further point that the

knowledge of John Soloff was the knowledge of the company.

Mr. Hanstein: That is another thing entirely.

Mr. Gaskill: That is what I hope to prove by this course of examination.

The Court: Proceed. I have overruled the question.

Q. Did you ever receive any instructions as to the insurance business from an office of the Hudson Casualty Insurance Company?

Mr. Hanstein: I object to that.

The Court: Sustain the objection. We have already gone over that.

Mr. Gaskill: Is it in the testimony what he was instructed to do?

The Court: Yes.

Mr. Gaskill: Your Honor, I am sorry I can't ask that question because the testimony as given by Mr. Soloff is not as complete as the facts actually exist. Now, if I am precluded from presenting that testimony because he was not complete, if the man has overlooked something in his previous testimony.

The Court: There is no indication that he has overlooked anything in his previous testimony.

Q. Mr. Soloff, have you testified to all of the instructions given you respecting the writing of insurance policies by Mr. Hogan of the Hudson Casualty Insurance Company?

Mr. Hanstein: I think it is entirely immaterial whether he has testified to all of them or whether he hasn't.

The Court: I will permit that.

(Question repeated.)

A. I don't recall the questions answered from the previous examination, Mr. Gaskill. I may have overlooked certain questions and certain answers.

Q. Mr. Soloff, while you were manager of the insurance department of Taylor and Soloff, what business did you do for the Hudson Casualty Insurance Company?

Mr. Hanstein: I object.

The Court: Sustain the objection.

Q. What business did you do, if any, respecting the taking of contracts and signing of policies and collection of premiums, issuing and signing of waivers for the Hudson Casualty Company?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Mr. Soloff, when you signed policy AP15803, which was issued to Harry Garfinkel, what was your thought as to whether a man was a sole and unconditional owner of an automobile or not?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Referring to that policy which is marked C1, did you sign that policy?

Mr. Hanstein: I object to that. That has already been testified to.

The Court: Already testified to that. Sustain the objection.

Q. From whom did you get the policy?

Mr. Hanstein: I object to that. That has already been testified to.

The Court: Sustain the objection.

(No cross-examination.)

ROBERT GARFINKEL, sworn.

Direct examination.

By Mr. Gaskill:

Q. Mr. Garfinkel, are you a brother of Milton Garfinkel?

A. Yes, I am.

Q. And you are an attorney at law of the State of New Jersey?

A. I am.

Q. In the Endicott case, did you represent Milton Garfinkel?

Mr. Hanstein: I object to that. I don't see how that is material, whether he did or not.

The Court: Sustain the objection.

Q. Concerning the defense of the suit of Lida Endicott against Milton Garfinkel and Harry Garfinkel, did you represent Milton Garfinkel in any negotiations with the Hudson Casualty Insurance Company?

A. I did not.

Q. You did not?

A. I did not.

Q. Were you employed or engaged by Milton Garfinkel to conduct any negotiation with the Hudson Casualty Insurance Company respecting the defense in that suit?

A. No, sir, I was not.

Q. Did you prepare the contract marked D8 for the defense of Harry Garfinkel?

A. Yes, I prepared this contract.

Q. At the time that you prepared that contract, did you represent Milton Garfinkel?

A. No, sir.

Q. What did you do with it after the contract was prepared?

A. If I recall the circumstances correctly, I mailed one copy to my father and the other to the Hudson Casualty Insurance Company.

Q. But you did not communicate the facts concerning this contract to Milton Garfinkel?

Mr. Hanstein: I object to that, leading the witness.

The Court: Yes.

Q. Did you ever communicate the facts concerning the contents of this agreement to Milton Garfinkel?

Mr. Hanstein: I object what further occurred, irrelevant and immaterial.

The Court: Sustain the objection.

Q. Did you mail the signed contract to the Hudson Casualty Insurance Company?

A. The contract signed by—I assume it was signed by Harry Garfinkel—no, I did not. If I remember correctly, mailed this to the Hudson Casualty Insurance Company.

Q. You did not?

A. Not signed by Harry Garfinkel. The only contract that I mailed to them was a blank copy unsigned by any one.

Q. Not signed by any one?

A. Yes.

Q. Did you ever get that contract back again?

A. I don't recall ever seeing a contract signed by Harry Garfinkel. I received from the Hudson Casualty Insurance Company the copy of the contract which I sent them signed by the Hudson Casualty Insurance Company.

Q. But you had never before seen a copy signed by Harry Garfinkel?

A. Never.

Cross-examination.

By Mr. Hanstein:

Q. Were you the attorney for Harry Garfinkel?

A. Yes, I would say that I was acting for him.

Q. What was, what is your father's name?

A. Isaac M. Garfinkel.

Q. Why did you mail a copy of this contract to Isaac Garfinkel?

A. My father was conducting all the negotiations for Harry Garfinkel. Harry Garfinkel was on the road almost continuously during this entire period of time and he was, my father told me ——

Q. I object to any conversation that your father told you. I think the question, as a matter of fact, has been answered. You wrote this letter, C8 for identification, didn't you?

A. Yes, I did.

Q. You wrote that on behalf of Milton Garfinkel, didn't you?

A. I never wrote any letters on behalf of Milton Garfinkel at this particular period of time.

Q. Well, how did you come to state in this letter that you are sending this letter in order to supply the necessary information for the Hudson Casualty Company to file a counter-claim on behalf of the defendants, Harry Garfinkel and Milton Garfinkel?

A. To answer that, Mr. Hanstein, I would have to go into the history of the negotiations leading up to the preparation of this contract.

Q. Who told you to send this information about Milton's counter-claim to the Hudson Casualty Company?

A. Who told me to do it?

Q. Yes.

A. I assume that it must have been my father.

Q. Was he acting for Milton as well as for your uncle?

Mr. Gaskill: I object.

The Court: What is the objection? Here is your witness, he wrote a letter in which he says he is doing it for the purpose, naming both of these defendants, now he is being cross-examined to find out by what authority.

(Objection withdrawn.)

A. As I said before ——

(Question repeated.)

A. As I said before, I was not acting for Milton Garfinkel during the period of these negotiations, at all.

Mr. Hanstein: I ask that be stricken and the question repeated.

(Question repeated.)

A. Was who acting for Milton?

Q. Your father?

A. That I can't say. As far as his information to me was concerned, he was acting for Harry Garfinkel.

Q. Who gave you the information with regard to Milton's claim was in, so far as the counter-claim was concerned?

A. You mean concerning the injuries?

Q. Yes, who gave you that information?

A. Well, I, at the time that this accident happened, I was practicing law in Atlantic City and the first that I knew of the accident was when I heard that Milton Garfinkel was in the hospital, when I called the hospital to ascertain what the extent of his injuries were.

Q. I ask that be stricken. Can't you answer responsively to that question?

A. I thought I had, Mr. Hanstein.

(Question repeated.)

Q. Who gave you that information?

A. The information—do you mean to say, do you mean to ask me that I knew that Milton Garfinkel had a counter-claim, or do you mean to question me concerning his injuries?

Q. Who gave you the information that Milton had a counter-claim at all in this?

A. Why, Mr—as I recall it, Mr. Higgins' secretary called me on the telephone and said they were filing a counter-claim for Milton and wanted to know the extent of his injuries.

Q. You were practicing law in Atlantic City at that time?

A. I was practicing law in Atlantic City at the time of the accident. I was practicing law in Newark at that time.

Q. Had you had any conversation with Milton with regard to the defense to this suit?

A. At that time?

Q. Yes.

A. No, sir.

Q. Did you expect this letter to be used by the Hudson Casualty Company in the filing of a counter-claim for Milton?

Mr. Gaskill: I object to what he expected, your Honor. That can't bind Milton Garfinkel. He says he wasn't the attorney.

Mr. Hanstein: I am entitled to cross-examine as to that.

The Court: I will permit it.

A. I don't know that I had any expectations on the subject, Mr. Hanstein.

Q. Now, you, of course, as a lawyer, knew that if Milton had any claim against the other party involved in this suit, the appropriate way to set it up was by counter-claim, didn't you?

A. Are you asking me an abstract question of law now?

The Court: He is asking you a question of fact in this case.

A. I did not represent Milton J. Garfinkel at the time.

The Court: Let that be stricken.

A. Your Honor please, may I have the question repeated?

The Court: Certainly.

(Question repeated.)

A. Well, yes, an appropriate way would be to set it up by counter-claim.

Q. And you expected that there would be a counter-claim set up for Milton, didn't you?

A. Did I expect that the Hudson would set it up?

Q. You expected that a counter-claim would be set up for Milton in this suit, didn't you?

A. I was not representing him.

The Court: Let that be stricken.

(Question repeated.)

A. Well, under the terms of the contract it seems to me there was something said about a counter-claim and I assume that I expected they would counter-claim under that, yes.

Q. For Milton?

A. For Milton, yes.

Q. And you thought that because of what appeared in the contract, is that right?

A. Yes, I suppose that was it.

Q. So that you expected that a counter-claim would be set up for Milton, didn't you?

A. Yes.

Q. Did you have any conversation with Milton about it?

A. I don't recall having any conversation with Milton.

Q. Didn't talk to him about this accident, at all?

A. No, Milton at that time resided in Philadelphia and was on the road a great deal of the time, while I resided and practiced law in Newark.

Q. Who did you get your information from with regard to the counter-claim?

A. The ——

Mr. Gaskill: Your Honor, I object unless he specifies which counter-claim.

Q. The counter-claim of Milton.

A. I don't know that I understand the question.

(Question repeated.)

A. You mean with regard to the fact that a counter-claim was to be filed on his behalf?

Q. Yes.

A. From my father.

Q. Your father advised you that a counter-claim was to be set up for Milton, is that correct?

A. The circumstances were these ——

Q. Did he advise you that a counter-claim was to be set up for Milton?

A. He suggested that a counter-claim be set up for him, yes.

Q. And you communicated that to the company, didn't you?

A. I communicated it to them? No, I didn't communicate it to them.

Q. Didn't you tell the company that your father suggested that there be a counter-claim set up for Milton?

A. I prepared a contract along those lines, a copy of which Mr. Gaskill showed me, and I think the next thing I did was to send a copy if it to the company and a copy of it to my father.

Q. Didn't you advise the company, I am asking you again, that your father said that a counter-claim was to be set up for Milton?

A. I don't recall having said that to them at all.

Q. You had been advised by your father that a counter-claim was to be set up, you say? Now, didn't you in the furtherance of your father's wishes in the matter advise the company to set up a counter-claim?

Mr. Gaskill: Your Honor, I object to that because the father's wishes in the matter could not bind Milton Garfinkel.

The Court: It isn't the question whether it binds him or not, it is a question what this witness did. I will permit it.

A. As I said before, Mr. Hanstein, the only thing that I recall having done in so far as the Hudson Casualty Insurance Company was concerned was to send them a copy of the contract and speak with Mr. Higgins once, I believe, on the telephone, and with his secretary once on the telephone, it may—my conversation with the secretary may have exceeded one call, but with Mr. Higgins I believe I spoke only once, and that was along several days prior to the preparation of any contract by me.

Q. Mr. Garfinkel, I am trying to find from you if you communicated to the company ——

A. I have already said no.

Q. —that your father wanted a counter-claim set up for Milton.

A. I have already said no, I don't recall having communicated.

Q. You did not tell that to the company at all?

A. I don't recall having communicated any such thing to them other than what was contained in the contract.

Q. You wrote this letter of December 13th in order to supply the company with the necessary information for it to file a counter-claim on behalf of Harry and Milton, didn't you?

A. No, I wrote that letter in answer to a telephone call from Mr. Higgins' secretary.

Q. Doesn't this letter say, "In conformity with my telephonic promise made to your secretary yesterday, this letter is to supply you with the neces-

sary information to enable you to file a counter-claim in the above entitled action on behalf of the defendants Harry and Milton Garfinkel. My assumption is, of course, that the form of agreement which you have at this time received from Harry Garfinkel is satisfactory to you and if you have executed the same or intend to do so'' —you wrote that, didn't you?

A. Absolutely.

Q. And this information was so that the company would have the necessary information to file the counter-claim?

A. No, the information was in reply to a telephone call from a person who said she was Mr. Higgins' secretary.

Q. You set out this information so that the company would have the information on which to file a counter-claim, didn't you?

A. I didn't know what they wanted the information for. They said that they wanted that in order to file a counter-claim, and so I gave it to them.

Q. Now, there isn't any doubt but that you knew a counter-claim was to be filed, is there?

A. On behalf of Milton J. Garfinkel?

Q. That is right.

A. There isn't any doubt that I knew that the Hudson Casualty Insurance Company intended to file one, according to their own statement.

Q. And you gave them the information with which to do it?

A. I did.

Q. And you knew at that time that Hudson Casualty Company had said that it was not liable under this policy, didn't you?

Mr. Gaskill: I object, your Honor. The contract that they make speaks for itself.

The Court: I will permit that question. You may answer that question.

(Question repeated.)

A. Yes, I knew that, certainly.

Q. And you knew that the company was going ahead to defend this case?

A. Did you say did I know it in so far as Milton was concerned?

(Question repeated.)

(Former answer repeated.)

A. May I correct my testimony?

The Court: Yes.

A. I knew it in so far as Harry Garfinkel was concerned. I didn't know of any dealings that they had had with Milton Garfinkel.

Q. Did you think that the company was denying liability to Harry Garfinkel but was not denying liability to Milton?

A. I don't recall what I thought at that time. My reaction ——

Q. Will you say that you thought the company was denying liability as to Harry but was admitting liability as to Milton?

A. I couldn't say what I thought because I don't remember what I did think.

Q. You don't remember your views on that subject?

A. No.

Q. Did you at that time think that the company denied its liability as to Harry?

A. Yes, I was quite certain that they attempted to deny liability as to Harry Garfinkel.

Q. And you didn't know whether it was liable to Milton despite that, did you?

A. I wasn't considering Milton in the picture at all. In the back of my head was the thought that if he were liable he was liable as agent for Harry Garfinkel.

Q. So that if the company was not liable to Harry, it was not liable at all?

Mr. Gaskill: Your Honor, I object to that.

The Court: I will sustain the objection.

Q. You expected this letter of yours of December 13th, containing this information to be relied upon, didn't you?

A. Well, I didn't know Mr. Higgins thought of my veracity or ability to set forth the facts correctly, when I write a letter to anyone I usually expect them to rely upon it, yes.

Q. You expected them to rely and act on this letter, didn't you?

A. Yes, I guess I did.

Q. I don't know whether I asked Mr. Garfinkel if all of these letters were signed by him, I think it

may have already been established, that is C8 for identification.

A. That is mine.

Q. C10 for identification and C9 for identification?

A. I signed that and I signed this.

Mr. Gaskill: I offer in evidence letter from Taylor and Soloff to Hudson Casualty Insurance Company dated November 20th, 1928.

(Letter admitted in evidence and marked Exhibits D9.)

Burton A. Gaskill, sworn.

Direct examination.

By Mr. Halpern:

Q. Mr. Gaskill, you are an counsellor-at-law of the State of New Jersey?

A. I am.

Q. As counsellor at law, did you represent Lida A. Endicott, executrix of the estate of Thomas D. Endicott, deceased, in the case in the New Jersey Supreme Court against Harry Garfinkel, Milton Garfinkel and Timothy Cordery?

A. I did.

Q. You prosecuted that cause until determination by the Supreme Court?

A. I did.

Q. After the determination in the Supreme Court,

did you have any telephonic conversation with Mr. Higgins, the secretary of the Hudson Casualty Company?

A. I did.

Q. How did you know that the person you spoke to was Mr. Higgins, the secretary?

A. I talked to him on two or three occasions before. When I made my telephone call I asked for him at the telephone, not a person to person call, but a specific person—yes, a person to person call, and I recognized the voice of Mr. Higgins.

Q. Will you tell me the date of the first telephone conversation you had with Mr. Higgins?

A. As I remember it now, it was either on the 7th or 9th of December, 1929.

Q. If I show you a record of the New Jersey Bell Telephone Company, would that refresh your memory as to the exact date?

A. It would. My telephone communication was with Mr. Higgins on December the 9th, 1929, and on December the 16th, 1929, and December the 17th, 1929.

Q. Will you tell the Court the conversation you had with Mr. Higgins on December 9th, 1929?

Mr. Hanstein: I object to that. I don't see what relevancy a conversation on December 9th, 1929, would have.

The Court: I would like to hear you on that.

Mr. Hanstein: Before the appeal was determined.

Mr. Halpern: If your Honor please, the conversa-

tion was a conversation prior to the bill filed in Chancery, prior to the suit at law brought by Lida A. Endicott against the Hudson Casualty, and prior to the bill that was filed in Chancery, and I want to show by this witness that there was a promise to pay the judgment, unequivocal promise to pay the judgment obtained in the Supreme Court, and this witness will testify to a conversation had between himself and Mr. Higgins who testifies that he was in charge of the claim department of the Hudson Casualty Company.

Mr. Hanstein: Please your Honor, I would say that is entirely immaterial, a promise to pay something, in the first place they didn't make it a basis of their cause of action, in the next place if they contend that constitutes a contract, a mere promise to pay, is certainly without consideration, and furthermore it has no relevancy in so far as the validity or invalidity of this policy is concerned.

The Court: I will permit the question.

(Question repeated.)

A. I called Mr. F. Hobart Higgins respecting the settlement of the judgment in the case of Endicott against Harry and Milton Garfinkel. The Supreme Court had discharged the rule to show cause on or about the 14th of October, 1929, in which the Supreme Court had reduced the verdict from twenty thousand dollars to fifteen thousand dollars. Mr. Higgins told me that the company would pay the judgment ——

Mr. Hanstein: I would like to now offer an objection, that is, that there is no proof of authority of Mr. Higgins to bind this company.

The Court: I will permit the testimony at the present time. There may be a motion to strike later.

A. We talked about the opinion of the Supreme Court. Mr. Higgins saying that he did not understand why that they were entitled to anything, that the plaintiff was not entitled to twenty thousand dollars, and he could not understand why the verdict had been reduced to fifteen thousand dollars. He told me that the company would send a draft for the sum of fifteen thousand dollars within a week's time. At the end of the week's time I had not received the draft, but I had done something at the request of the Hudson Casualty Company. I called again on the 16th of December, and again talked with Mr. Higgins, and he told me that there had been a little hold-up in the issuance of the draft, that he thought that they were going to pay, but he asked me then whether or not I would accept for Mrs. Endicott any sum less than fifteen thousand dollars, and I told him that I did not feel that there should be a reduction because the Supreme Court had reduced the judgment from twenty thousand to fifteen thousand dollars. He told me, he said, "You call me tomorrow and I will tell you definitely whether we are going to send the draft or not." He said, "There has been some talk about it since I first talked with you." I called him the next day and he said that they would not going to pay the judgment.

Q. Mr. Gaskill, at the time you had the conversation with Mr. Higgins on the 9th of December, was there any mention made at that time of any—at the time he promised to send you the draft, within a week, was there any mention made of any denial of liability?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Mr. Hanstein: Please your Honor, I would like to move to strike this testimony. On as broad a question as was asked, it is, of course, difficult to tell in advance just how improper an answer might be, but it seems to me that this is testimony that is improperly in this record, and certainly it adds nothing to the issue in this case, and is incompetent and irrelevant. In the first place, the company had acted officially and denied liability under this policy. Any promise to pay is certainly beyond the issue in this case. They might have an action at law on a promise to pay, if there is a valid consideration, but that has got nothing to do with whether or not this policy is void or whether it is not, and certainly it seems to me that this testimony is improperly in this record and it should be stricken.

The Court: I decline to strike.

Cross-examination.

By Mr. Hanstein:

Q. Mr. Gaskill, isn't it a fact that Mr. Higgins told you, when you called up and asked about the payment of this judgment, that this risk had been reinsured by the Hudson Casualty Company?

A. Not the first time he didn't tell me.

Q. At the time—when did he tell you that?

A. He told me that on the 16th of December, I think, by my reference to that I can be sure about that, yes, it was on the 16th of December.

Q. You knew when you called up that this company had denied liability in the case, didn't you?

A. I did not.

Q. Didn't you know that?

A. No, sir.

Q. You knew that Judge Cole represented this company in this litigation, didn't you?

A. I did.

Q. Did you take this matter of paying the judgment up with Judge Cole?

A. I tried to, but Judge Cole was ill down in Atlanta, Georgia, at the time, and his office asked me to take it up directly with the company.

Q. You found out when that this company had reinsured this risk?

A. On the, I didn't find out, I was informed by Mr. Higgins on the 16th of December that they had reinsured the risk.

Q. Did you make any record of those conversations?

A. You mean a pencil memorandum of it?

Q. Or any other kind of record.

A. No, I did not.

Q. What fixes it in your mind that it was the second time you were told about the reinsurance and not the first time?

A. Because I know that is so. I, when I called the first time, Mr. Hanstein, I was not informed that there was any complications about the case at all, I did not know that there had been a denial of liability by the company, and I did not know about reinsurance. I had no idea that they had reinsured and I had not been told at that time.

Q. Mr. Higgins say anything more to you than that he would take the matter up?

A. Yes.

Q. You say he told you he would pay it?

A. He said the company would pay the judgment.

By Mr. Halpern:

Q. You say the first time that you knew that they denied liability was on the 17th when you made your ——

A. I am not sure then whether I knew that they had denied—I am quite certain now that I did not know on the 17th that the company had denied liability. The first time that I knew about that was that on the very day, was the 17th or 18th of December to locate Mr. Garfinkel and to find out if he had the policy. I intended to bring a suit on the policy, and I saw him at the office, and he said that he just did not ——

Mr. Hanstein: I object to conversation.

The Court: Yes.

A. I am talking about no notice of their denial of liability.

MILTON J. GARFINKEL, recalled.

Direct examination.

By Mr. Gaskill:

Q. Mr. Garfinkel, do you know the date that you delivered the summons and complaint in the suit of Endicott against yourself and Harry Garfinkel and Timothy Cordery to Taylor and Soloff in Atlantic City?

A. No, I don't remember that date.

Q. Do you know approximately the date?

A. I believe it was the end of the summer of 1928.

Q. May I refresh your recollection by the date of the filing of the summons? The date of the service on you of the summons and complaint is November the 19th, 1928. Now, did you shortly after that time deliver the summons and complaint to Taylor and Soloff?

A. Yes, I delivered that, I believe, almost immediately after I was served.

Q. To Taylor and Soloff?

A. To Taylor and Soloff, yes.

Q. They were the agents for the Hudson Casualty Company, weren't they?

A. Yes.

Q. Now, did you tell them or did you notify them of the action besides the summons and complaint?

A. Well, I handed them the summons and I said so, told them evidently there was a suit brought as a result of the accident, and I asked them to get in touch with the Hudson Casualty Insurance Company and find out whether they would provide counsel because if they would not I wanted to engage counsel myself.

Q. To that communication did you ever receive any reply from Taylor and Soloff or the Hudson Casualty Company?

A. No.

Q. Now, in the defense of this suit against you, Mr. Garfinkel, if you had been paying for counsel and defending the suit of your own accord, would you have engaged the services of F. Hobart Higgins?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Would you have engaged for the defense of your suit Clarence L. Cole?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Mr. Garfinkel, in the defense of the Endicott suit, did you direct the course of the defense of the suit?

Mr. Hanstein: I object to that.

The Court: I will permit that.

A. No, I did not.

Q. In the defense of that suit, did the Hudson Casualty Company ask you to perform any services that you did not perform?

Mr. Hanstein: I object to that. This has all been covered before.

The Court: I don't recall whether it has or not. I will permit it.

A. I did everything they asked me.

Q. When did you notify the Hudson Casualty Insurance Company that you had been driving the automobile on May 14th that was involved in the accident in which Mr. Endicott was killed?

A. On the same day, I believe, May 14th, the date of the accident.

Q. With whom did you talk that day?

A. I talked with Taylor and Soloff and I notified them of the accident. They were the agents.

Q. Any one else?

A. With whom I talked about the accident?

Q. Not anybody connected with the Hudson Casualty Company?

A. I believe on the same day I talked with Mr. Sterla, or the following day, I believe was the same day.

Cross-examination.

By Mr. Hanstein:

Q. At the time you left this summons and complaint with Taylor and Soloff and told them that you wanted to find out if they were going to defend you, isn't that right?

A. That is right.

Q. Did you have any other talk and ask them if they were going to defend you?

A. I presume I was in there lots of times, I heard nothing to the contrary, so I assumed they were going to defend me.

Q. Did you ever ask if they were going to defend you?

A. I don't know whether I asked them or not, I don't remember.

Q. You had had litigation before, had you not?

A. Had I had litigation?

Q. Yes.

A. I presume I had. I don't recollect any specific litigation.

Q. And you knew that you had to file an answer?

A. Yes, I knew an answer had to be filed.

Q. You never took the trouble to inquire whether or not ——

A. Well, I gave them ——

Q. —whether or not they were filing an answer for you, did you?

A. I gave them the summons and it was up to them. If they didn't file an answer they would have gotten a judgment by default, it would have been their hard luck, the insurance company.

Q. You never asked them, did you?

A. I said I didn't remember.

Q. You don't remember whether you asked them?

A. No.

Q. Where was your uncle living at this time, at the time of this service of this summons and complaint on you?

A. If I remember correctly, he was living at the Surrey Avenue address.

Q. With you folks?

A. Yes.

Q. Did you know that the company had written to him saying that it was not defending him; did you know that?

A. No, I did not.

Q. Did you vere hear it discussed?

A. He was very emotional in his discussions about the company.

Q. Did you ever hear that feature of this case discussed?

A. I don't recollect having heard it discussed.

Q. You don't recall?

A. No.

Q. What was it made your uncle emotional about this company?

A. He seemed to think that they were trying to get admissions from him that would be damaging to him, I don't know in what respect.

Q. Is that all?

A. That is all that I can remember.

Q. You never got any detail about this, did you?

A. No, I never discussed the case very much with my uncle because he was always wrought up about it.

Q. Why was he wrought up?

A. I just explained before.

Q. What kind of statements did he say that they were trying to get from him?

A. I don't remember what specific statements.

Q. What did he say when he was in this wrought-up condition?

A. That has been quite a while ago, I can't remember his words.

Q. Do you remember the substance of what he said?

A. I wouldn't undertake to repeat them now because I do not believe even my idea of the substance would be very accurate.

Q. You have—can you say that you never heard your uncle say that this company had denied liability?

A. I believe I can say that up to the time of the trial of the case, and not until they filed this action here.

Q. Never heard him say it?

A. I don't think I remember having heard him say that.

Q. Did you ever know that your brother was representing him?

A. Yes, I knew my brother was representing him.

Q. Did you know that your brother got him to sign a contract?

A. No, I did not.

Q. Who is Anna Gruber, do you know?

A. Yes, I know.

Q. Who is she?

A. She is the stenographer in the office, 712 Walnut Street.

Q. Where?

A. 712 Walnut.

Q. That is your father's company or your uncle's company, whatever it is?

A. It is not my uncle's company.

Q. Whosever it is, that is that company in Philadelphia?

A. Whose it is now or then?

Q. Well, whose was it then? The Eastern Smelting and Supply Company, or whatever you call that company, is that the company you are talking about?

A. Yes.

Q. That is where that young lady was employed?

A. Yes.

Q. Were you present when this contract was signed?

A. No.

Q. Did you know that your father was giving your brother advice with regard to what was to be done as to your case?

A. No, I did not. In fact, I was away most of the time then. I was traveling around.

Q. How often did you get home?

A. Sometimes I was away five or six weeks at a time, and then came home a few days and go out again.

Q. Did you give your father any information as to what the extent of your injuries were?

A. No, I don't remember his asking me that question.

Q. Did you know that your father had told your brother Robert about a counter-claim for you?

A. No.

Q. Didn't know that?

A. No.

Q. You didn't even know a counter-claim was filed for you, did you?

A. No.

Q. Did you ever discuss this with Robert?

A. Discuss what?

Q. This accident and the ensuing litigation?

A. I discussed the accident with him immediately after it happened, when he was practicing down here, I mean his office was still in Atlantic City I talked with him.

Q. Did you discuss anything about whether or not you were to be defended by an insurance company?

A. I don't remember that. I took it for granted that the insurance company would defend me.

Q. Did you take it for granted?

A. Certainly.

Q. Why did you, then, ask that you be advised whether or not they would defend you?

A. I think that was a very reasonable question.

Q. So is mine; answer it.

A. I don't know why.

Q. Had no reason for thinking that there might be a question about it, did you?

A. No particular reason I can recall.

By Mr. Gaskill:

Q. Just a minute, Mr. Garfinkel. Were you hurt in this accident?

A. Yes.

Q. Will you describe what injuries you received?

A. Well, I——

Mr. Hanstein: I object to that. I don't see how that is material.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, it goes to my point that there was no defense, that they filed this counterclaim for him and then didn't prosecute it.

The Court: Sustain the objection.

Q. Did you engage Robert Garfinkel as your attorney to have any any negotiations with the Hudson Casualty Company respecting a defense for you?

Mr. Hanstein: This has all been covered.

Mr. Gaskill: If that has been covered, I will withdraw it.

Q. Mr. Garfinkel, would you have driven the automobile for Harry Garfinkel if you had known that there was no public liability or property damage insurance on the automobile?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Q. Did you have the permission of Harry Garfinkel to drive the car?

Mr. Hanstein: I object to that.

The Court: I will permit that.

A. I had the permission; instructions also.

(Recess taken until 1:30 P. M.)

AFTERNOON SESSION.

Trial of the cause resumed at 1:30 P. M.

Mr. Gaskill: I desire to offer at this time and read in the record the deposition of Harry Garfinkel taken before Herbert R. Voorhees, Master in Chancery, by consent, by solicitors in this case.

Mr. Hanstein: Subject to objections taken at the time.

Mr. Gaskill: Can we agree, Mr. Hanstein, that the testimony won't have to be actually read now, that it can be considered as being included in the record without reading?

The Court: Yes, I see no reason to read it. I probably will have to go over it anyhow.

STIPULATION.

IN CHANCERY OF NEW JERSEY.

Between

HUDSON CASUALTY INSURANCE COMPANY, a corporation, etc.,
Complainant,
and
HARRY GARFINKEL, *et als.*,
Defendants.

On Bill, Etc.
Stipulation.

It is stipulated by and between the parties hereto that the testimony of Harry Garfinkel, of the City of San Francisco, in the State of California, a witness on his own behalf and on behalf of the defendant, Lida A. Endicott, executrix, etc., shall be taken without any order of the Court pursuant to the State in such case made and provided, on the 14th day of October, 1930, at the hour of three o'clock in the afternoon, at the office of Herbert R. Voorhees, Esq., No. 608 Guarantee Trust Building, in the City of Atlantic City, County of Atlantic and State of New Jersey, before the said Herbert R. Voorhees, Esq.,

a Master in Chancery of New Jersey, signatures of witnesses to be waived.

THOMPSON & HANSTEIN,
Solicitor of Complainant.
MAURICE J. HALPERN,
Solicitor of Defendant, Harry Garfinkel.
BURTON A. GASKILL,
Solicitor of Defendant, Lida A. Endicott, Executrix, etc.

State of New Jersey, }
County of Atlantic, } ss.

VIRGINIA MOORE, being duly sworn according to law, upon her oath deposes and says that she will carefully, faithfully and impartially take the evidence to be given by Harry Garfinkel, a witness in his own behalf, and as a witness for Lida A. Endicott, one of the defendants in a cause pending in the Court of Chancery of New Jersey, wherein Hudson Casualty Insurance Company, a corporation, etc., is complainant, and Harry Garfinkel, *et als.*, are defendants, and make a true and correct transcript thereof.

VIRGINIA MOORE.

Subscribed and sworn to before me this 14th day of October, 1930, at Atlantic City, New Jersey.

HERBERT R. VOORHEES,
Master in Chancery of New Jersey.

DEPOSITION.

IN CHANCERY OF NEW JERSEY.

Between
HUDSON CASUALTY INSURANCE COMPANY, a corporation, etc.,
Complainant,
and
HARRY GARFINKEL, *et als.,*
Defendants.

Deposition.

(Deposition of Harry Garfinkel, of the City of San Francisco, in the State of California, a witness produced, sworn and examined on behalf of himself and of the defendant, Lida A. Endicott, executrix, on the 14th day of October, 1930, at the office of Herbert R. Voorhees, Esq., a Master in Chancery of New Jersey, No. 608 Guarantee Trust Building, in Atlantic City, Atlantic County, New Jersey, under and by virtue of a stipulation entered into by and between the parties to the above-entitled cause pursuant to the statute in such case made and provided, before Herbert R. Voorhees, Esq., the officer in said stipulation designated, and taken stenographically by Virginia E. Moore, the stenographer in said stipulation designated.)

APPEARANCES:

For the complainant, MESSRS. THOMPSON & HANSTEIN, by MR. HANSTEIN.

For the defendant, Harry Garfinkel, MAURICE J. HALPERN, ESQ.

For the defendant, Lida A. Endicott, executrix, BURTON A. GASKILL, ESQ.

(Virginia E. Moore, stenographer, sworn.)

HARRY GARFINKEL, one of the defendants, called as a witness on behalf of the defense, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Gaskill:

Q. Mr. Garfinkel, what is your home address?

A. 31 Homewood Terrace, San Francisco, California.

Q. San Francisco, California?

A. Yes.

Q. Mr. Garfinkel, are you the defendant in the matter of Hudson Casualty Company, complainant, against Harry Garfinkel and others, in the New Jersey Chancery Court?

A. Yes, sir.

Q. On or about April 6th, 1928, did you make

application to the Hudson Casualty Company or any other company for insurance on an automobile?

A. Yes.

Q. Do you know anything about the facts that an insurance company take into consideration when they issue a policy of insurance?

Mr. Hanstein: I object. I think it is irrelevant, incompetent and immaterial.

Mr. Gaskill: They have alleged it in the bill. That is the only thing; I was answering it. There are certain things they take into account. They allege it in the first paragraph of the bill, that certain things are taken into account.

The Master: My point is it is immaterial whether he knows anything about it. However, I presume the practice to be adopted is to note the objection on the record and have the witness answer the question. Wouldn't you say so?

Mr. Gaskill: I should think so.

(The question was read by the stenographer as follows: "Do you know anything about the facts that an insurance company take into consideration when they issue a policy of insurance?")

Q. You can answer that.

A. Yes, I know.

Q. What do they take into account when they issue a policy of insurance?

A. In the event of an accident, that they ——

Q. No. I say, do you know what they take into account before they issue a policy of insurance? Do you understand? Do you understand what my question is?

A. No, not quite.

Q. Before an insurance company will issue a policy of insurance, do you know the different facts that enter into the consideration of whether or not they will accept the risk or not?

A. Well ——

Mr. Hanstein: My objection goes to this question, of course.

A. Repeat that again, will you, please?

Mr. Gaskill: Will you repeat that again?

(The question was read by the stenographer as follows: "Q. Before an insurance company will issue a policy of insurance, do you know the different facts that enter into the consideration of whether or not they will accept the risk or not?")

Q. Do you understand that question?

A. I don't understand it, to be honest with you.

Q. All right; we will pass it, then. Before April 6, 1928, did you ever apply for insurance on any automobile?

A. No, sir.

Q. Prior to April 6th, 1928, did you ever own an automobile?

A. No, sir.

Q. Did you know on April 6th, or prior thereto,

that on February 2, 1928, or at any other time in the year 1928, that Milton Garfinkel applied to the Hudson Casualty Company for a policy of insurance to cover a Ford automobile?

A. No, sir.

Q. Did you know on April 6, 1928, or prior thereto, that Milton Garfinkel had represented to the Hudson Casualty Company that the Ford automobile was to be used only for private and business purposes in the vicinity of Ventnor City?

A. No, sir.

Mr. Hanstein: What was that question, again?

(The question was read by the stenographer.)

Mr. Gaskill: I am just doing it because of the allegation in the bill.

Q. Did you know prior to April 6, 1928, that the Hudson Casualty Insurance Company had conducted an investigation regarding Milton Garfinkel?

A. No, sir.

Q. Did you know on April 6, 1928, that the Hudson Casualty Company, on or about March 6, 1928, had cancelled Milton Garfinkel's policy on the Ford automobile because it was not wanted by the company?

A. No, sir.

Mr. Hanstein: What was that date?

Mr. Gaskill: The date of the cancellation?

Mr. Hanstein: Yes.

Mr. Gaskill: I am directing mine to the date he purchased the car and made the application; April 6th is the date.

Q. Did you, on April 6, 1928, purchase on a conditional sales contract a Chevrolet sedan?

A. Yes, sir.

Q. I show you a conditional sales contract and ask you if that is the contract by which you purchased the Chevrolet sedan?

A. Yes, sir; that is the one.

Mr. Gaskill: I offer that in evidence and ask that it be marked.

(Paper offered is marked Exhibit D1.)

Mr. Hanstein: That will be available for my use at the trial?

Mr. Gaskill: Oh, yes. There is a copy of it on record at Mays Landing, anyway.

Mr. Hanstein: I mean just by way of saving me the trouble of getting it.

Mr. Gaskill: Yes; sure.

Q. Mr. Garfinkel, whose money paid the down purchase price for this automobile which is described in Exhibit D1?

A. My money.

Q. Was any of the money used to purchase the automobile, the money of Milton Garfinkel?

A. No, sir.

Q. Was the down payment loaned by you to Milton Garfinkel for this automobile?

A. No, sir.

Q. Did he ever agree—did Milton ever agree to repay you for the money that you paid for this automobile?

A. No, sir.

Q. Now, according to the conditional sales contract, D1 in evidence, you bought this automobile on April 6th, 1928?

A. Yes, sir.

Q. Can you tell me on what day that you made application for insurance on the automobile?

A. On the very same day. We didn't remove the car—I didn't allow the car to be removed until it was covered by insurance.

Q. Now then, the insurance was placed on the car immediately that the car was purchased?

A. Yes, sir.

Q. Who suggested the agent?

Mr. Hanstein: I object. I don't think it is material.

Q. Who suggested the agent?

A. I told them to cover the car.

Q. No.

A. I didn't know any agents at all.

Q. Yes.

A. And he called up somebody. He called up somebody. I heard the name of John.

Q. He called him John?

A. John, he called him.

Mr. Hanstein: You are going to confuse the record. He says he called up somebody. Whom is he talking about?

The Witness: I am talking about my nephew.

Q. Milton Garfinkel?
A. Milton Garfinkel.
Q. You subsequently learned that the agent that was called up was Taylor & Soloff, did you not?
A. Something like that.
Q. Did you know at the time of making the application what companies Taylor & Soloff—what insurance companies Taylor & Soloff represented?
A. No, sir.

Mr. Hanstein: I object. It is irrelevant and immaterial.

Q. When you had Milton call for you for insurance, did you know what insurance company that the insurance on your automobile was to be placed in?
A. No, sir.
Q. Up to and including April 6, 1928, had you ever heard of an insurance company called the Hudson Casualty Insurance Company, with their offices in Jersey City, New Jersey?
A. No, sir.

Mr. Hanstein: I object to it as irrelevant, immaterial and incompetent.

Q. When you told Milton Garfinkel to insure the car, did you and he talk about what company the insurance was to be placed?

A. No, sir.

Q. Did you represent to the Hudson Casualty Insurance Company or to Taylor & Soloff, their agents, that the automobile—your automobile which you were asking for insurance, was to be used only for private and business purposes?

A. For private and business purposes only.

Q. And did you represent to the insurance company—did you talk to the insurance company or their agents and tell them that the car was to be used only for private and business purposes?

A. No, sir; no.

Q. Did Milton Garfinkel, so far as you know, represent to the insurance company or to Taylor & Soloff, their agents, that the car was to be used for private and business purposes only?

Mr. Hanstein: I object to that. It is incompetent, irrelevant and immaterial.

Q. You can answer the question.

A. No.

Q. Did you represent to the Hudson Casualty Insurance Company or to Taylor & Soloff, their agents, that you were the sole and unconditional owner of the automobile?

Mr. Hanstein: I object to that; incompetent, irrelevant and immaterial.

Q. I mean did you tell them that you owned that car by a clear bill of sale, and nobody had any liens against it or any outstanding notes or anything of that sort?

A. Well, I didn't tell them a thing.

Q. You didn't tell them a thing?

A. No, sir.

Q. Did Milton Garfinkel represent to the Hudson Casualty Insurance Company or to Taylor & Soloff, their agents, that your interest in the car was that of the sole owner and that nobody else had any interest in it but you?

Mr. Hanstein: Object to that, on the ground it is incompetent, irrelevant and immaterial.

Mr. Gaskill: Won't you read the question?

(The question was read by the stenographer.)

A. Yes.

Q. He did represent it to them?

A. He told them over the phone that the car was brought for mine, that it is my car, and that I want the insurance.

Q. Yes, and what else did he tell him over the telephone?

A. He told him over the telephone that, "I am reading you off the numbers of the motor," or whatever it is, you know, serial number, or whatever it is. He said, "I am reading it out off of the conditional sale—bill of sale."

Q. Conditional bill of sale. He said that to the agent?

A. To this man John, whoever he was. I didn't know at the time.

Q. When they were talking about insurance?

A. About the insurance.

Q. Yes. Did you represent to the Hudson Casualty Company or to its agents that no association or company had cancelled or refused to issue or renew automobile insurance to you during the past three years?

A. Me personally?

Q. Yes.

A. I never had anything to insure.

Q. Did you say to the company?

A. I did?

Q. Did you say?

A. No, sir.

Q. Did Milton in your presence tell the company over the phone, or their agents, that you had not had insurance refused during—or cancelled during the past three years?

A. No, sir.

Q. Did you represent to the insurance company or to their agent that the automobile was principally maintained and garaged in the City of Ventnor City?

A. That is where it was most ——

Q. Did you say that to the company?

A. Which company? No, sir; I said nothing to the company.

Q. The insurance company?

A. No, sir.

Q. Did Milton over the telephone tell the agent ——

A. No, sir.

Q. —— that the car was principally maintained

and garaged in the City of Ventnor, or that it was to be used principally in the City of Ventnor City?

A. No.

Q. And in the vicinity of said city?

A. No, sir.

Q. As a matter of fact, Mr. Garfinkel, what was the automobile used for?

A. Well, I bought it for the purpose of going out for business, of course.

Q. Business. And some pleasure uses?

A. Well, I am not of a pleasure—I didn't buy it for that purpose.

Q. I see. As a matter of fact, where was the car principally garaged?

A. At Surrey Avenue, my brother's place.

Q. In Ventnor City?

A. In Ventnor City, yes, sir.

Q. And where was it principally used?

A. In Atlantic County, Cape May, once in a while go down to Wildwood, and on two occasions I got him to drive me up to Salisbury, Maryland, Eastern Shore, rather, put it own; and one time to Oxford, Pennsylvania.

Q. But the principal use to which the car was placed was in Atlantic County?

A. In Atlantic County, yes, sir.

Q. And in the vicinity of Ventnor and Atlantic City?

A. Yes, sir.

Q. Now, as a matter of fact, Mr. Garfinkel, had any association or company refused to issue or renew any insurance, automobile insurance, for you three years prior to April 6, 1928?

A. Never owned a machine in my life, sir.

Q. Well, had they ever refused to issue?

A. No, sir.

Q. What was your business at the time you made application for the automobile insurance?

A. Buying precious metals.

Q. In a jewelry—did you buy and sell?

A. Jewelry, yes, precious metals.

Q. And was this automobile used in your business?

A. Yes.

Q. What was Milton Garfinkel's relation to you in so far as business was concerned?

A. Well, he was working for me; of course, I maintained the expense of the car, with gas and oil, and paid him—paid his expense and a share of the profits.

Q. Now, did you know anything concerning— I mean did you personally know anything concerning the accident in which Thomas G. Endicott was killed?

Q. You were not present ——

A. No, sir.

Q. —at all at that time?

A. No, sir; I had to go to Philadelphia that morning on a very important business, and I took the train, and then I ordered him to come up to Philadelphia.

Q. Yes. When the Chevrolet sedan was purchased from Bartram & Kershaw Company in your name, was it in fact purchased by you for Milton Garfinkel?

A. It was bought for me only.

Q. Was the car used in and about the business of Milton Garfinkel?

A. It was used for my business.

Q. Well, was it used for Milton Garfinkel's business?

A. No, sir.

Q. Did Milton drive it?

A. Yes, sir.

Q. And for whom did he drive it?

A. For me.

Q. Was it your intention that the automobile should be used by Milton Garfinkel in his own business?

A. No, sir.

Q. Did you and Milton Garfinkel ever discuss the question of whether or not Milton could or could not get insurance on an automobile?

A. No, sir.

Q. Did you have this automobile put in your name for the purpose of making application for insurance on it for Milton Garfinkel?

A. No, sir.

Q. Did you know that if application was made to the Hudson Casualty Insurance Company by Milton Garfinkel for an automobile, that the company would refuse to insure him?

Mr. Hanstein: I object to that; incompetent, irrelevant and immaterial.

Mr. Gaskill: Well, you allege it in the bill. I thought so myself. It is alleged in the bill.

(The question was read by the stenographer.)

A. No, sir.

Q. I mean, did you have any such information on May—April 6, 1928, or prior thereto?

A. No.

Q. Did you and Milton Garfinkel agree together to falsely represent the true situation concerning the ownership of the Chevrolet sedan to the Hudson Casualty Company in order to have this insurance company place insurance on the car?

A. Absolutely no.

Q. Now, Mr. Garfinkel, I show you a policy of the Hudson Casualty Company, numbered AP15803, and ask you if that is the policy which you received from the company.

A. Yes; that is the one.

Mr. Gaskill: I offer that in evidence and ask it be marked D2.

(Policy offered is marked D2.)

Q. Now, after this insurance had been placed with Taylor & Soloff, at the conclusion of Milton's conversation with John, who was at the other end of the telephone, did Milton say anything to you then?

Mr. Hanstein: I object to that, being incompetent, irrelevant and immaterial, and not binding on the complainant.

Q. You can answer it.

A. He told me that the car was covered.

Q. Was covered. Now, did you subsequently pay the premium on the policy?

A. Yes, sir.

Q. And subsequently to April 6, 1928, was the car involved in an accident, your car—your automobile involved in an accident?

A. Between the 6th——

Q. And May 14th?

A. No. May the 14th?

Q. Yes.

A. When did that accident occur?

Mr. Hanstein: Well, tell him.

Q. On the 14th of May.

A. No, not between—it was not involved in any accident up until the time this accident happened.

Q. The one in which Mr. Endicott was killed?

A. Yes.

Q. That accident happened on May 14, 1928.

A. Well,——

Q. And between that time did you ever receive any communication from the agents of the company respecting the insurance?

A. No, sir.

Q. Didn't you receive the policy?

A. The policy I did, yes.

Q. And didn't you receive a letter with it?

A. A bill.

Q. And a letter with the policy?

A. Yes.

Q. I show you letter dated April 10, 1928, addressed to Harry Garfinkel, and signed by Taylor & Soloff, by John Soloff, Manager of Insurance Department, and ask you if that is the letter that you received accompanying your policy?

A. Yes, sir, that is the letter, sir.

Mr. Gaskill: I offer that in evidence and ask it be marked D3.

Mr. Hanstein: And let me see the date of that letter.

Mr. Gaskill: April 10th.

(Letter offered is marked Exhibit D3.)

Q. Now, Mr. Garfinkel, when you received that letter, did you read it?

A. I certainly did.

Q. Did you read your policy?

A. Didn't have to read the policy after seeing the letter.

Mr. Hanstein: I object to the question on the ground it is incompetent, irrelevant and immaterial.

Q. What did you do with the policy?

A. Why, I laid it aside with other valuables, papers.

Q. Now, you say that you did not read your policy; will you give us the reason why you did not read it?

Mr. Hanstein: I object to the statement of the reason why he didn't read it, on the ground it is incompetent, irrelevant and immaterial.

Q. You can answer that.

A. Well, after reading the letter I took it for granted that everything was covered, and it was

perfectly all right. It comes from a—from a reputable office, and that is all that is necessary.

Q. And hadn't you also been told by Milton at the time that he placed the insurance for you that the car was covered?

Mr. Hanstein: Don't lead him. I object to the leading question.

Mr. Gaskill: All right; I guess that is a leading question. Strike that out.

Q. And did you have any other reason for not reading it?

A. No, I had no reasons at all.

Mr. Hanstein: I object to this, whether he read it or whether he didn't; irrelevant and immaterial.

Mr. Gaskill: Is it?

Q. Now, I show you a letter dated July 24th, addressed to you, and signed by Frank H. Higgins, Secretary, and ask you if you received that letter.

A. Yes, sir.

Mr. Gaskill: I offer that in evidence and ask it be marked D4.

(Letter offered is marked Exhibit D4.)

Mr. Hanstein: So as not to clutter up the record with these things, would you mind letting me have copies of some of these things?

Mr. Gaskill: Sure; you have copies of all of them in your file.

Mr. Hanstein: Well, I don't know that I have.

Mr. Gaskill: Certainly you have. You can have copies; I don't care about that. Sure.

Q. Mr. Garfinkel, I show you letter dated August 3, 1928, addressed to yourself and signed by William C. Krumrey, Assistant Secretary, and ask you if you received that letter?

A. Yes, sir.

Mr. Gaskill: I offer that in evidence and ask it be marked.

(Letter offered is marked Exhibit D5.)

Q. Now, Mr. Garfinkel, after you received this letter dated August 3, in which this Assistant Secretary said that he returned you a check of $39.58 for returned premiums, what did you do with the check?

A. Why, I enclosed the check in a plain envelope, without even a return address, and returned it to the company.

Q. And you have never cashed the check?

A. Well, I should say not.

Q. Now, some time after the third of August, were you served with papers in the suit of Lida A. Endicott, plaintiff, against Harry Garfinkel and Milton Garfinkel, in the New Jersey Supreme Court, Atlantic County?

A. Yes, sir.

Q. On receipt of those papers what did you do with them—of the papers that were served on you?

A. Why, I turned them over to the attorney.

Q. Which attorney?

A. To the attorney that defended us.

Q. And who was that?

A. I think it was Judge Cole, wasn't it?

Q. Judge Cole. Now, after you received the papers in the suit, were you presented with this paper for your signature?

A. Did I receive this, or that I saw that before, did you say? What was the question?

(The question was read by the stenographer as follows:

"Now, after you received the papers in the suit, were you presented with this paper for your signature?")

Q. So you may know what that paper is, that is an agreement between Hudson Casualty——

A. Yes, I saw this paper; I can recall that.

Q. And did you sign a copy of it?

A. I think I did.

Q. And sent it to the Hudson Casualty Company, didn't you?

A. Yes.

Mr. Gaskill: I offer this in evidence and ask it be marked.

(Paper offered is marked Exhibit D6.)

Q. Now, Mr. Garfinkel, after you signed that paper and sent it to the company, did they take up the defense—did it take up the defense of the suit against you by Lida A. Endicott, executrix?

Mr. Hanstein: I object to that on the ground it is incompetent, irrelevant and immaterial, and provided for by the instrument which has just been offered in evidence.

Q. You can answer that, Mr. Garfinkel.

(The question was read by the stenographer, as follows:

"Q. Now, Mr. Garfinkel, after you signed that paper and sent it to the company, did they take up the defense—did it take up the defense of the suit against you by Lida A. Endicott, executrix?")

A. I think they did.

Q. And was Judge Cole the counsel for the insurance company in that case?

A. Yes, sir.

Q. And as I understand it, they also agreed, the company did, that they would file for you a counter-claim against Timothy Cordery?

A. Yes.

Q. And did they do that?

A. No.

Q. Didn't they file a counter-claim for you against Timothy Cordery?

Mr. Hanstein: I object to this, being entirely in-

competent, irrelevant and immaterial; no bearing on this case.

Mr. Gaskill: I don't know whether it hasn't some bearing.

Q. Now, Mr. Garfinkel, did you subsequently learn that growing out of this same accident in which Mr. Endicott was killed, that Timothy Cordery filed a suit against you and Milton Garfinkel for the damages he alleged that Milton Garfinkel, as your agent, had caused him?

Mr. Hanstein: I object to that, as incompetent, irrelevant and immaterial.

Mr. Gaskill: Will you read that?

(The question was read by the stenographer.)

A. Not until the verdict was—or the judgment was given.

Q. And how much was that judgment?

A. $200.

Q. $200?

A. Yes, sir.

Q. And whom was it given against?

A. Against me.

Q. And Milton Garfinkel?

A. And Milton Garfinkel.

Q. Yes. So, then, the company defended a suit brought by Timothy Cordery against you, and you weren't notified of the proceedings?

A. No.

Q. Or you didn't know that papers had been filed until a judgment was recovered against you for $200?

A. No, sir.

Mr. Hanstein: I object to that as being leading, incompetent, irrelevant and immaterial.

Q. All right. Mr. Garfinkel, when did you first learn that Timothy Cordery had brought a suit against you?

A. Not until after the trial, when the judgment was rendered.

Q. Did the company or Judge Cole, its attorney, ever consult you respecting the defense of the suit that Timothy Cordery had brought against you?

A. Not at any time.

Mr. Hanstein: I object to that, as being incompetent, irrelevant and immaterial.

Mr. Gaskill: It may be, but I don't think so.

Q. Did you ever have any agreement with the Hudson Casualty Company, either written or oral, respecting their defending a suit that was brought against you by Timothy Cordery?

A. No.

Q. Did you—do you know the amount of the verdict against you and Milton Garfinkel in the so-called Endicott case?

A. $200.

Q. In the Endicott case?

A. In the Endicott case?

Q. In the case wherein the man was killed.

A. Well, that was $20,000.

Q. $20,000. Did the company subsequently take an appeal in that case, or a rule to show cause?

A. So I understood, and it was reduced to fifteen thousand.

Q. Reduced to $15,000. Did they take any appeal or any rule to show cause in the case of Timothy Cordery against you and Milton Garfinkel?

A. No.

Q. And that judgment is still outstanding against you?

A. Yes, sir.

Q. Do you know who paid the costs of the suit and attorneys in the Endicott case?

Mr. Hanstein: I object to that as being incompetent, irrelevant and immaterial.

Q. You can answer.

A. Who paid what?

Q. Attorneys' fees and the costs of suit in the Endicott case?

A. I don't know who paid it.

Q. Did you have an agreement with somebody to pay it?

A. I think Cole was supposed to foot the expense.

Q. For whom?

A. For Endicott and for myself.

Q. Well, what I mean was, did you pay anything for your lawyer's fees or——

A. I personally didn't pay a nickel.

Q. Well, who did pay; do you know?

A. I don't know exactly who paid it, but——

Q. All right. Did you pay anything to Cole for his defense of the case of Timothy Cordery against you and Milton Garfinkel?

A. Not a nickel.

Q. Now, Mr. Garfinkel, has the $15,000 judgment gotten against you by Lida A. Endicott, executrix, ever been paid by you?

A. By me?

Q. Yes.

A. No, sir.

Q. Has the judgment of $200, obtained against you by Timothy Cordery, ever been paid?

A. No, sir.

Q. Are you able today or have you been able at any time since the judgment was rendered against you to pay either of these two judgments?

A. No, sir.

Q. Now, after the accident had occurred, did the company call on you to aid them in their investigation?

A. Yes, there was a gentleman up there one day and I wasn't feeling good at the time, and he was trying to bull me, and I told him that I wasn't feeling good, and I am not in a position to give any statement; that I would be only too glad to do it; and as I turned my head sidewise I noticed a woman sitting there with a pad, unbeknowing to me, ready to—in fact, she was marking down everything I said, which I said nothing out of the way. But I said then, and repeat it now, and even worse than that, and I ordered the gentleman out of the office, and——

Q. Now, Mr. Garfinkel,——

A. Wait a minute. I want to finish this story before I go.

Q. I want to ask you questions.

A. All right.

Q. Prior to this time had the agents of the company ever made any appointments with you concerning an investigation of this accident?

A. Yes, sir.

Q. Had they kept the appointment?

A. Never kept an appointment. They made appointment with me on various occasions, "Come down to Atlantic City, I will meet you on a Monday, I will meet you on a Sunday," and never at any time did they keep an appointment.

Q. You were ready to keep an appointment?

A. At any time I was ready; when I said I would come, I would come.

Q. And you were ready and willing at all times to aid them?

A. Yes, sir, to give them any information that I know anything about.

Mr. Gaskill: Cross-examine.

Cross-examination.

By Mr. Hanstein:

Q. Where did you keep your policy when you got it?

A. Why, I keep it in the house.

Q. Whereabouts in the house?

A. Whereabouts in the house? 4 Surrey Avenue, South Surrey Avenue.

Q. What part of the house did you keep it in?

A. On the second floor, where I slept.

Q. Where did you keep the conditional bill of sale?

A. It was also there.

Q. Where has it been ever since this accident?

A. The which, sir?

Q. Both of these papers.

A. Well, those papers were eventually taken up to Philadelphia to the office, you know, when they were put in the safe.

Q. What I want to know is, where they have been since the accident.

A. Oh, they have been at the Philadelphia office.

Q. You have an office in Philadelphia?

A. Well, my brother has.

Q. You are not connected with your brother in business?

A. Not at this time.

Q. And you were in California and after the accident you sent the papers to Philadelphia?

A. I sent the papers to Philadelphia? No, sir.

Q. When did they get to Philadelphia?

A. Which?

Q. These papers, the conditional sale contract and the insurance policy.

A. Why, they were over there. I didn't take them with me.

Q. When did they get to Philadelphia, I say?

A. Which?

Q. The two papers I am talking about.

A. Why, they were there all the time.

Q. You just got through telling me you kept them in your house.

A. I am talking about at the time of the accident,

at 4 Surrey Avenue, when I lived down here at the time that we purchased the automobile. I am not talking about—this particular time about a month before. The papers were here all the time; I didn't take any papers with me when I went off to California.

Q. Will you tell me when those papers were taken to Philadelphia?

A. They were always in Philadelphia.

Q. All right. When you went—you spoke a little while ago about this Cordery claim. When this suit was first started, weren't you served with papers by the sheriff?

A. By the sheriff?

Q. Yes, when Endicott started a suit against you, weren't you served with some papers by the sheriff?

A. I?

Q. None other than you.

A. No, sir.

Q. You weren't served with papers?

A. No, sir.

Q. Well, did the sheriff leave some papers at your house?

A. I couldn't say that. I was never served with any, sir.

Q. Well, what papers was it that you turned over to Judge Cole?

A. There was a paper—there was this paper I just saw that was shown to me, that is the paper I got at 4 Surrey Avenue; but the sheriff never served them on me. Oh, I will tell you who served them. I remember now. Pardon me, sir. There was a gentleman named—if I can recall—he was introduced to

me. He says, "I am the sheriff." A fellow named Friedman.

Q. All right; then it was the sheriff?

A. He said he was the sheriff, but he wasn't.

Q. That is the only way you can tell some people.

A. That just came to me this minute.

Q. He came in and served you with some papers?

A. Yes, sir.

Q. What did you do with the papers?

A. I took them and sent them over to the insurance company, naturally.

Q. Did you read it?

A. Did I read the paper?

Q. Yes.

A. I did, yes.

Q. Did you know what was in it?

A. To the best of my knowledge.

Q. Well, it was a suit by Endicott against you and Cordery, wasn't it?

A. Yes.

Mr. Gaskill: And Milton Garfinkel.

The Witness: And Milton Garfinkel.

Q. And Milton Garfinkel. And then you had Judge Cole file a counter-claim for you, didn't you?

A. I presume so.

Q. Well, no doubt about it.

A. Yes, there is no doubt about that.

Q. You told him to do it, didn't you?

A. Well, I was taken care of by the insurance company.

Q. Not as to the counter—your counter-claim, you

weren't were you? Didn't you tell Judge Cole to file a counter-claim against Endicott?

A. I don't recall so.

Q. Do you know that he did it?

A. Not to my knowledge.

Q. Well, did you know that Judge Cole filed a counter-claim for you against Cordery?

A. Filed a claim against me?

Q. No, no. Did you know that Judge Cole filed a counter-claim—a claim for you against Cordery, claiming that your automobile was damaged; did you know that?

A. I can't recall that.

Q. Didn't you know that you were trying to recover back the damage done to your automobile?

A. I was trying to, yes, but——

Q. Well, didn't you tell Judge Cole to try to do it?

A. I don't recall ever telling Judge Cole anything like that.

Q. Well, you didn't think this accident was Milton's fault, did you?

Mr. Gaskill: I object to that. I object to that for the reason it is not competent or material.

Mr. Hanstein: All right.

Q. You didn't think this accident was Milton's fault, did you?

A. I couldn't express my opinion, sir, because I wasn't there, sir.

Q. Well, did you know whether it was Milton's fault or not?

New Jersey State Library

A. How could I know when I wasn't there?

Q. Did Milton tell you about it?

A. Milton tell me?

Q. Yes.

A. Yes, he told me.

Q. And did Milton tell you it wasn't his fault? Did he or didn't he?

A. Milton,—I don't recall what he told me at this time. This is over two years, you know. He told me there was an accident, that is all.

Q. That is all interested you?

A. That was all I was interested in. I was sorry, and that is all, but I couldn't——

Q. And you don't remember instructing Judge Cole to bring a suit against Cordery for you, do you?

Mr. Gaskill: Now, I object to that because the instrument introduced in evidence speaks for itself. You objected, Mr. Hanstein, when I examined him about it.

Mr. Hanstein: I don't object to your objecting.

Mr. Gaskill: The instrument provides that the company would file a counter-claim against Cordery for Mr. Garfinkel. That is the agreement with the insurance company and I object to the question on that ground.

(The question was repeated by the stenographer as follows: "And you don't remember instructing Judge Cole to bring a suit against Cordery for you, do you?")

New Jersey State Library

A. No, I don't.

Q. All right. Now, did you know when the Hudson Casualty Company started this suit against you it cancelled this policy?

A. Started suit against me?

Q. Yes.

A. When?

Q. Whenever it was.

A. They never started nothing against me, sir.

Q. Never did?

A. No.

Q. Did you ever hire a lawyer to represent you in the suit?

A. I?

Q. Of the Hudson Casualty Company against you?

A. No, sir.

Q. Never did?

A. No, sir.

Q. Did you ever know that a suit was started against Milton Garfinkel?

A. Against Milton?

Q. Yes.

A. No; I don't know a thing about it.

Q. Don't know a thing about that. And did you ever get any mail in this office in Philadelphia?

A. Yes, sir.

Q. Did you ever get a notice from the law firm of Thompson and Hanstein in Atlantic City, addressed to that address, advising that a suit had been started against you?

A. I? Never, sir.

Q. Never. Have you hired a lawyer in this very matter?

A. No, sir.

Q. You are here merely as a witness?

A. That is all.

Q. Not as a party to this suit?

A. I am just—I was asked to come here and I came.

Q. Who asked you to come?

A. I was asked to come by my brother.

Q. Who is your brother?

A. In Philadelphia.

Q. When did he ask you to come?

A. He wrote me when I was on the road.

Q. How long ago was that?

A. Oh, I got a letter, I think, the last time when I was in Detroit or Wheeling or some place on the road.

Q. What did he say in the letter?

A. He just asked me this case was about to come up again or something to that effect, and if I am in the neighborhood that I should—if it is convenient for me to come, stop off.

Q. Come where?

A. If I was in the neighborhood, you know.

Q. He wanted you to come where?

A. Come to Philadelphia, that is all. Come to Philadelphia, and then when this thing comes up, this here whatever you may call this—to come up.

Q. And then who told you to come here today?

A. What do you mean, who told me?

Q. Well, perfectly clear question.

A. Why, Mr. Gaskill asked me to come down.

Q. Mr. Gaskill asked you?

A. Yes.

Q. When did he ask you to come?

A. He sent word up to the office, left word at the office.

Q. What office?

A. My brother's office, as soon as I can that I should come down.

Q. That you should be here today?

A. Yes, sir.

Q. That is what the word was?

A. Yes, sir.

Q. And who told you that?

A. My brother.

Q. What brother?

A. My brother in Philadelphia.

Q. What is his name?

A. His name is the same as mine; Garfinkel.

Q. Well, does he have a first name?

A. I. M. Garfinkel.

Q. That Isaac Garfinkel?

A. Yes, sir.

Q. And he is the same one that wrote you the letter that you better come?

A. Yes, sir.

Q. You never authorized anybody to file an answer in this suit, did you?

A. But I never had anything ——

Q. I say, you never told anybody to file an answer for you, did you?

A. An answer to what?

Q. To any suit by the Hudson Casualty Company.

A. There was no suit against me, sir. You don't seem to understand me, Mr. Hanstein. I didn't receive any mail ——

Mr. Gaskill: I object to this. It is a matter of court record that Mr. Garfinkel is a defendant in this suit. It is a matter of record that Mr. Halpern is his attorney in this suit, and I think we are wasting a lot of time going over things that aren't essential, because it is a matter of record before us. That is what we are taking testimony in, a case of Hudson Casualty Company against Harry Garfinkel, the defendant, and it seems to me we are wasting time over something ——

The Witness: You are not trying me, I hope.

Mr. Gaskill: Well, that is what they are doing.

The Witness: But as far as receiving a letter that they entered suit against me, I am repeating again, sir, that I never saw a letter to that effect, so how could a lawyer write to me or anything else?

Q. You never hired a lawyer in this case?

A. I never hired a lawyer in my life, practically speaking.

Q. All right. Now, then, on the day that you bought this automobile, what date was it, do you know?

A. Well, the 6th of the month.

Q. What month?

A. On, what was it—was it April or July—what date was it? I can't recall now.

Mr. Gaskill: Refresh your recollection.

The Witness: It was on the 6th of the month, I remember that, about April or May.

(Paper shown to witness.)

The Witness: 6th of April, I think. Yes, 6th day of April, as I thought it was.

Q. 6th of April?

A. Yes, sir.

Q. What time of the day was it when you bought the car?

A. I can't recall the exact—I can't recall. It was either—I was bargaining for it, you know, a little while; you know how it is. Went there early in the morning and then again a little later, took a ride around with it, you know. And after the license was covered—after the insurance was covered I immediately got him to drive me over to get—there was no tags on it, you know, no license, and I got him to drive over to some lady over in—what is it, Hoboken, they call it, over here.

Q. Pleasantville.

A. Pleasantville, and the lady even remarked at the time—she said ——

Q. I don't care what the lady said. When was it that you paid the money on the car?

A. That very day, sir.

Q. Day or night, was it?

A. During that day, sir, the minute I got the car I gave them a check for $119—$100 was part payment on the car; six or eight dollars was for theft and insurance, and the rest of it was financing, whatever they may call it.

Q. And you gave a check for that?

A. Yes, sir.

Q. Your check?

A. My personal check, sir.

Q. On what bank, sir?

A. I think I deposited at the Ventnor National Bank at the time, in Ventnor.

Q. And do you have your check?

A. Do I have the check?

Q. Yes.

A. Well, the check—for a while the check was there. I don't know what you folks have done with it. Somebody must have it. And furthermore it can sure be verified by calling up the Ventnor National Bank, and you can verify that part of it, whether Harry Garfinkel had an account at that bank. It is right on the corner ——

Q. I will probably find it.

A. Yes, sir.

Q. Now, then, you, of course, wanted insurance on this car before you took it out?

A. Absolutely; I wouldn't make a move on that car, or if I had another car, if I bought another car I would do the very same thing. I wouldn't make a move on a car unless it was covered if it was mine.

Q. And you didn't know any insurance brokers at all?

A. No, sir; I didn't know anyone.

Q. And what did you tell Milton to do—was Milton with you at the time?

A. Yes, sir, it was Milton—I took him with me.

Q. In the automobile sales room?

A. Yes, sir; he is the one that knew a little more

about machines than I did. In fact, I don't know a thing about it, to be honest with you.

Q. What did you tell Milton to do?

A. I told Milton to cover the car immediately, that I wouldn't make a step away from the store unless that car is covered.

Q. Yes.

A. And he called up an insurance company. Of course, I didn't know at the time who they were; and he called up.

Q. Did you tell Milton how much insurance you wanted on it?

A. Yes, sir. Between twenty-five and fifty thousand, and a thousand for property damage.

Q. You told him you wanted that much?

A. Yes, sir.

Q. And did you authorize him to place this insurance for you?

A. Yes, sir.

Q. Did you hear him answering questions over the phone?

A. Yes, sir.

Q. And did you—may I see the policy, please? And could you hear the man at the other end talking to him?

A. No; that I could not.

Q. And did you hear Milton give this man the answers to some questions?

A. Yes.

Q. And you heard Milton say, "I am holding"—what was it Milton said?

A. When he called them up, he called up a certain number, whatever it might have been, and a party, a fellow named—I knew he called him John, that is

all, the only thing I know. He said, "John, my uncle just bought a Chevrolet car, and he wants it covered; between twenty-five and fifty thousand dollars." When Milton answered him back, he evidently asked him about fire and—of course, I didn't hear that, but he evidently asked him about fire and theft. So Milton told him, he says, "This is"—the company where I had the car, whatever the name was —can't think of their name.

Q. It doesn't matter.

A. That they have covered that end of it, fire and theft. See? That the only thing that I want is a policy between twenty-five and fifty, with the additional thousand dollars for property damage, and that is all, and the next thing came, Milton told me, he says, "Well, you are covered." And I says, "Now, then, since we are covered," I says, "let's go get the plates."

Q. All right.

A. And he drove me over to ——

Q. Pleasantville?

A. Pleasantville.

Q. All right. Is that all the conversation that took place between Milton ——

A. That is the only conversation.

Q. —and John?

A. That is all, sir; that is all.

Q. Well, you told us more than that before.

A. What did I tell you, sir?

Q. Well, this man, you said, was asking Milton some questions, and Milton says, "I am reading off of the condition sales contract."

A. That is what he did. Well, he couldn't possibly read it off of anything else. He couldn't re-

member or see the—didn't have the—it is not like a book that he could have the Chevrolet in front of him or remember the number.

Q. What things did Milton read off of the conditional sales contract?

A. The serial number of the motor, which is the important thing.

Q. And did he read anything else off?

A. Whatever else went with it. As I say, I am—I will admit I am ignorant when it comes to machines, I don't know a thing about them. It was my first offense, and I hope it will be the last.

Q. This was you first automobile?

A. Yes, sir.

Q. Now, you don't have any driver's license, do you?

A. I? No, sir.

Q. Did you—what did you do with this policy when you got it?

A. What I done with it?

Q. Yes.

A. I put it away.

Q. Well, didn't you look at it?

A. What is the use of looking at it? I had a letter with it and it explained everything.

Q. The letter didn't explain everything, did it?

A. Well, listen, when you place insurance with a reputable insurance company, when you receive a letter, "Enclosed please find your policy." why, I think that is sufficient. I am talking about a reputable concern. I am not talking about anything disreputable. I am not talking about a concern, you know, that has thousands of cases which they didn't settle. I am talking about real gentlemen, and that applies

to every other thing, not for insurance business, but every other thing. When I go into a first-class store, and want to buy a suit of clothes or whatever it is, they have one price, I don't have to barter with him, I pay my money and I know the price is the same thing for me as anybody else. I apply the same thing to an insurance agent.

Q. Who told you this insurance company had thousands of claims that it didn't pay?

A. I read about it.

Q. Where did you hear it?

A. I read it in the papers; I heard it in Atlantic City.

Q. What paper?

A. I know a friend of mine, I have known him forty years.

Q. I am not interested in your forty-year-old friend. What paper did you read it in?

A. I remember reading it in Atlantic City once.

Q. That this company ——

A. Off a friend of mine.

Q. What paper did you read it in?

A. I can't recall that. I haven't been in Atlantic City for over a year, sir.

Q. Well, now, you didn't have any letter from the insurance company, did you?

A. What insurance company?

Q. You didn't have any letter from this insurance company saying that it had covered your automobile, did you?

A. Yes, but even if I did ——

Q. Well, did you?

A. No.

Q. All you had was a letter from an agent?

A. Yes.

Q. And you were very particular that you should have a policy for twenty-five and fifty thousand dollars?

A. Yes.

Q. Did you look to see if it was for twenty-five or fifty thousand dollars?

A. Why, the premium was enough.

Q. Did you look?

A. In the policy?

Q. Yes.

A. I didn't have to look. The bill is enough; the premium is enough.

Q. The premium was only $39, wasn't it?

A. $39.50, and that is the price.

Q. Well, did you know that $39.50 bought your twenty-five and fifty-thousand-dollar policy?

A. The price, I knew it from other people that had taken insurance out, that twenty-five thousand is something like thirty dollars, and it is so little difference up to fifty that I thought I would take one for fifty thousand, being so little difference.

Q. Did you look at your policy to see if it covered it?

A. I didn't look at the policy at all, sir.

Q. Of course, you are able to read English, aren't you?

A. Somewhat, yes.

Q. Aren't you absolutely able to read English?

A. Yes, I think so.

Q. All right. Then the "somewhat" didn't mean anything particularly, did it?

A. No. All right.

Q. Now, at that time what business were you in?

A. In the jewelry business.

Q. And what business was Milton in?

A. Milton? Milton, I don't know what business he was in. I don't believe he was in anything, hardly.

Q. Don't think he was in any business. Where did you store this automobile?

A. At our—at my brother's home, at 4 South Surrey.

Q. You lived there, didn't you?

A. Yes, sir.

Q. And Milton lived there, didn't he?

A. Yes, sir.

Q. Milton had a Ford car which he stored there, didn't he?

A. Yes, he had a Ford car there.

Q. And he had gotten rid of that Ford car shortly before you bought your car, didn't he?

A. I presume he did.

Q. Don't you know that he did?

A. What does that interest me?

Q. Don't you know that he did?

A. No.

Q. You don't know that he did? Didn't you know that he stopped storing his car there?

A. I wasn't interested in that part of it.

Q. Can't you answer that question?

A. But why ——

Mr. Gaskill: He has a right to an answer to those questions, Mr. Garfinkel.

A. No, I didn't know anything about that, sir.

Q. How many car garage do you have at 4 South Surrey?

A. Why, there was room enough there for—my brother had a—what was it—yes, a Cadillac; there was room there for four cars.

Q. Room for four cars?

A. Yes.

Q. And you didn't know when Milton stopped storing his Ford car there, did you?

A. Didn't pay any attention to it.

Q. Didn't you? Well, when Milton got rid of his Ford car he didn't have any more car, did he?

A. Naturally not.

Q. And you then knew that he was without a car, didn't you?

A. Of course he was without a car.

Q. Well, you knew it, too, didn't you?

A. Yes; all right.

Q. And after Milton was without his car, he used yours when he wanted to, didn't he?

A. He used mine?

Q. Yes.

A. He never used my car unless we went out for business.

Q. The two of you went out for business?

A. Well, I couldn't go out myself with it, on my car, I am not a driver, I can't drive.

Q. All right. So you and Milton used it in your business?

A. Yes.

Q. And you went to Philadelphia every day, didn't you?

A. No.

Q. Did you stay down here some days?

A. Many days.

Q. And did Milton drive you around?

A. Milton was the only one that could drive me around.

Q. Well, did he?

A. Absolutely.

Q. And whenever you used the car Milton drove you?

A. Yes.

Q. Now, did Milton drive the car some time when you weren't down?

A. When I weren't down here?

Q. Yes.

A. I was always with him as long as I had the car.

Q. Well, Milton wasn't working?

A. He was working for me.

Q. Oh, he was?

A. Yes.

Q. Why, you just told us you didn't know what he was doing.

A. You are trying to get me previous to the—you are trying to tell me something about the Ford car, and now you are trying to mix me up with something else.

Q. No, Mr. Garfinkel, I don't want you to get the impression I want to mix you up.

A. That is the way I understood it.

Q. We will start over again.

A. All right; start over again.

Q. All right. After you bought the Chevrolet car——

A. Yes.

Q. —what business was Milton in?

A. After I bought my Chevrolet?

Q. Yes.

A. He was driving me around. That was his business, that I know of.

Q. Oh, he was just chauffeur for you?

A. Not exactly chauffeur. He drove the car and helped in my business, for which I paid him a commission.

Q. And what was the business buying jewelry?

A. Buying precious metals and selling.

Q. And he worked with you, did he?

A. He worked for me.

Q. For you and with you?

A. Naturally with me. He couldn't work for ——

Q. And he—did he as part of his duties have to go any place other than places where you went at the same time?

A. Only with me.

Q. He just went with you?

A. Yes, sir.

Q. Were you down here all the time or did you go to Philadelphia some time?

A. As I said before, we once made a trip to Eastern Shore, Maryland.

Q. Outside of that one trip?

A. On very rare occasions. We were almost—down here most of the time, around Jersey here, working around Jersey.

Q. And you dealt with whom, the retail jewelry stores?

A. Well, I call them jewelers; tinkers; banks, and so on.

Q. Buying old metals?

A. Precious metal.

Q. Now, until you got this car Milton didn't work for you, did he?

A. No, sir.

Q. And you got around without an automobile?

A. Well, up to about that time I had a nervous breakdown, and I came down from California down to Atlantic City. And it took me a year, a little over a year, before I recovered.

Q. Were you in business for yourself?

A. I was in business for myself in California, yes, sir.

Q. Well, when you moved east here, were you in business for yourself.

A. I didn't move east. I came here just for a change.

Q. Whatever happened that brought you here, were you in business for yourself then?

A. Yes, for myself; yes, sir.

Q. In connection with the purchase of this automobile, how many times did you go down to see the —to see this car?

A. Oh, I think we came down there that one day I don't know whether it was a couple of days or that very one day, that we looked at it different times, and drove around, and so on and so forth; I can't just recall how many exactly—whether it was all done in one day or not.

Q. Do you know how many times you were down at this place?

A. I can't recall right now.

Q. Was it more than once?

A. At this Bartram's?

Q. Yes.

A. I really couldn't. I can't remember that.

Q. Can't be sure about that?

A. No, sir.

Q. Were you in the real estate business down here at all?

A. No, sir.

Q. Had nothing to do with it?

A. No, sir.

Q. You have lived in California since when?

A. 1914.

Q. You moved to California whereabouts?

A. 1915. San Francisco. In fact, we lived in Oakland most of the time, across the bay. If you were there, no doubt you know.

Q. And you were in business out there?

A. Yes, sir.

Q. What business were you in?

A. Well, I was in the manufacturing business at one time.

Q. What manufacturing?

A. During the war I was manufacturing various things for the soldiers and whoever wanted it; military goods.

Q. Whom have you talked to with regard to this case before coming to this hearing?

A. Who did I talk with?

Q. Yes, about the cancellation of this policy.

A. About the cancellation of the policy?

Q. Yes.

A. I don't know as I talked with anybody.

Q. Didn't talk to anybody about the cancellation of this policy?

A. No.

Q. Whom did you talk to about Milton ordering this policy for you?

A. Not anyone that I know of.

Q. Not anybody that you know of?

A. No, sir, I did not.

Q. You don't remember ever telling anybody ——

A. Not, absolutely no, because it was done right in front of that place of business where that car was purchased.

Q. And you didn't mention that to anybody before you told that here?

A. How could I? It was done right on the spot.

Q. I don't know as you understand my question. Have you talked with anybody and told them about this before you walked into this room?

A. No.

Q. Who is paying your expenses for coming down here today?

A. Paying my expenses?

Q. Yes.

A. Myself.

Q. You paid your own expenses to come down?

A. Yes, sir.

Q. What time of the day was it that Milton made this phone call, do you know?

A. Which phone call, sir?

Q. To John, the insurance broker.

A. I can't recall now. I don't remember whether it was around noon time or thereabouts. I just—I can't remember.

Q. Do you know what time of the day it was that you went and got your license plates for the car?

A. I couldn't tell you that, sir. I know that after the—Milton got through talking with this fellow John, and he told me that "You are covered," I says, "Now, come on, let's go over and get the plates." I can't recall; you know it isn't yesterday or last week.

Q. Was there any reason why you didn't get those plates in Atlantic City?

A. Any reason?

Q. Yes.

A. No, there was no reason at all.

Mr. Hanstein: I think that is all.

Re-direct examination.

By Mr. Gaskill:

Q. Mr. Garfinkel, you talked with me about this case before you came up here today?

A. Yes; with you I did, yes.

Q. Did you talk with Milton Garfinkel before you came up here?

A. With Milton?

Q. Wasn't he in my office?

A. Yes; he was there.

Q. And Mr. Halpern?

A. Mr. Halpern was in your place, absolutely.

Q. Did you talk to your brother Isaac Garfinkel about the case?

Mr. Hanstein: Don't lead him.

A. Not about this case, not at all; not with my brother I didn't, because I didn't even see him before I left.

Q. Now, Mr. Garfinkel, I want to refresh you recollection and show you a letter addressed to me and signed by you, and ask you if you remember that letter.

A. Oh, yes; I wrote that from Nashville. That is my letter. That is right.

Q. Does that refresh your recollection?

A. Well, that is correct.

Q. Have you—then did you ask somebody to represent you in this case?

A. Yes; I never thought of that.

Q. Never thought of that. And do you remember my saying that I couldn't represent you and suggested Mr. Halpern?

Mr. Hanstein: I object to this as being purely hearsay so far as ——

A. That is what you told me. You told me ——

Mr. Hanstein: —so far as the Hudson Casualty Company is concerned.

Mr. Gaskill: That was developed in the cross-examination.

The Witness: I forgot all about that. I wrote that when I was in Nashville.

Q. Then you did know about this case; you had been notified by your brother?

A. Naturally I knew about the case. I was notified by my brother. It was through my brother that I written that letter to you. That is how it came about. You know, so many questions shot at you all the time, you know, that you—but I remember distinctly now, my brother wrote me a letter to some place on the road.

Mr. Hanstein: I object to this. We can't be bound by something that took place ——

The Witness: United States mail don't tell any stories.

Mr. Hanstein: I want to appear of record that I object to all this conversation between him and his brother and somebody else.

Q. Mr. Garfinkel, did you arrange for counsel to take care of your interest in this suit?
A. When? The first suit?
Q. No, this last—the present case.
A. This one right now?
Q. Yes.
A. Of course, I did.
Q. Who was your counsel?
A. Why, you are.
Q. Don't you know that I am counsel for Mrs. Endicott?
A. You are counsel for who?
Q. Mrs. Endicott.
A. No. I don't know anything about it.
Q. I see. All right; that is all.

Mr. Hanstein: That is all.

The Witness: Well, when I say you are—really it is Mr.—what is his name? He is in the room there.

Q. What is his name?
A. Mr. Halpern, isn't it?
Q. Yes; and he is your counsel in this case?

A. He is my counsel in this case.

Q. We talked about the matter when you—when you, Mr. Halpern and I were together?

A. Yes, sir.

I hereby certify that the foregoing deposition was taken, pursuant to stipulation, by Virginia E. Moore, a stenographer duly sworn to faithfully and truly take stenographically and reproduce in typewriting the testimony given; such deposition was taken in my immediate presence and hearing by said stenographer sworn as above stated, and I believe that it accurately states the evidence.

HERBERT R. VOORHEES,
Master in Chancery.

Mr. Gaskill: Your Honor, I am surprised. I understood that Mr. Hanstein would agree to a stipulation concerning the testimony in the case of Endicott against Garfinkel. May it be agreed, Mr. Hanstein, that at the trial of the case of Endicott against Garfinkel, at the Atlantic County Circuit on June 17th, 18th and 19th, that no testimony was produced on behalf of Milton Garfinkel or presented at the trial as to the injuries received by Milton Garfinkel at the time of the collision between the automobile of Timothy Cordery and the automobile of Harry Garfinkel, save the following of Milton Garfinkel's direct testimony, by Mr. Cole: "Were you hurt? A. Yes, I was hurt." Can't we agree that

that happened at the trial, subject to your objection it is not material?

Mr. Hanstein: Let me just clear my record for the help of the Vice-Chancellor, long as you stated that you were surprised I would not stipulate it. Mr. Gaskill told me he wanted to offer in evidence certain of the testimony that was taken at the trial, and he wanted to know if that could be done without burdening this record with all the testimony taken at the other trial, and I told him that, subject to my objection, that it would not be material, and as to those parts which he discussed to me, or subject to whatever other legal objection I might make, I was entirely willing that, instead of putting in this entire record, parts of the record might be read into it or handled in some other way. He produced to me as we walked in the court room this morning a stipulation which he now says he was surprised I would not sign, and the stipulation referred to a great number of bits of testimony, all of which I think are immaterial. Your Honor may not agree with me as to all of them, and I therefore do not want to stipulate that there might go into the record something which your Honor might specifically say was improper testimony, and I have no desire to clutter the record, so far as the testimony that you have just read is concerned. I say whether Judge Cole offered in evidence any proof of the actual damages suffered by Milton Garfinkel is concerned, I say that that is incompetent, immaterial and irrelevant to the issue being tried in this case, and I make no objection to the informality of the proof, and I am assuming, and it is no doubt the fact, when

Mr. Gaskill gets up and says here that is all the testimony that was offered, I am assuming that is all the testimony that was offered, but I say it is incompetent testimony because it has no materiality.

The Court: I will admit it subject to the objection made.

Mr. Gaskill: Will it further appear on the record, subject to objection of Mr. Hanstein as to its materiality, that at the said trial of Endicott there was no testimony produced on behalf of Harry Garfinkel and/or Milton Garfinkel respecting the injuries alleged to have been received by Timothy Cordery in said accident or the extent of the damage to the automobile of the said Timothy Cordery?

Mr. Hanstein: My objection to that is that that has no bearing on this issue and that whether or not there was testimony offered or not testimony offered is immaterial, and further than that I make this objection, going to the other question as well, this matter was placed in the hands of Judge Cole who tried the case, and I think your Honor will almost take judicial notice of the fact that Judge Cole is an eminent, distinguished and capable member of the bar, and if in the handling of this case he concluded to offer certain testimony or not to offer it, it in no sense could be binding on this company, it having employed competent counsel.

The Court: I will sustain the objection.

Mr. Gaskill: It is also to appear by the record,

subject to the objection of Mr. Hanstein as to its materiality or relevancy in this case, that counsel for the defendant Harry Garfinkel and Milton Garfinkel examined Robert A. Sterla as follows:

"What is your business?

"A. I am an investigator and adjuster.

"Q. Are you in the employ of the Hudson Casualty Company?

"A. I am.

"Q. Is that company defending this suit?

"A. It is."

Mr. Hanstein: I object.

The Court: Sustain the objection. What advantage can it be in this case? That has already been admitted.

Mr. Gaskill: I don't mean it on that point, your Honor. The reason I am offering that in testimony is to show that the rights of the defendants at this trial may have been prejudiced for this reason. It is the law in New Jersey that if I should have introduced at that trial that the Hudson Casualty Company was defending the suit for the defendants, it was ground for a mistrial on the theory that somebody else would pay the judgment other than the defendants. Now, these men have got a right now to say that the company under their agreement, taking up this defense, prejudiced their right by the introduction of testimony which may have resulted in a higher verdict against them than otherwise would have been because of the fact that the Hudson Casualty Company was defending the suit.

The Court: Overruled.

Mr. Gaskill: Then I offer in evidence, subject to the objection of Mr. Hanstein, all of the testimony of Harry Garfinkel in this case which is as follows:

"HARRY GARFINKEL, called as a witness on behalf of the defendants, being sworn, was examined and testified as follows:

"Direct examination.

"By Mr. Cole:

"Q. Did you own this car?
"A. Yes, sir.
"Q. When did you buy it?
"A. In April.
"Q. What year?
"A. 1928.
"Q. Was it new or a second-hand car?
"A. It was a second-hand car, sir.
"Q. What did you pay for it?
"A. $275.
"Q. What became of it?
"A. Well, I instructed my nephew Milton, that was working for me at the time to go to Philadelphia, I had to go.
"Q. Now what became of the car after the accident?
"A. The last time I saw it was a wreck in the garage.

"Q. Did you ever get any money back for it?
"A. No, sir.
"Q. Is this the bill?
"A. Yes, sir.
"Q. Did you pay $275?
"A. Yes, sir.
"Q. Where did you buy it?
"A. Bartlett & Curry, seen it on the avenue.

"Mr. Cole: I offer it in evidence.

"(Papers received in evidence and marked as exhibit for the defendant D8.)

"Q. Do you know anything about this accident?
"A. No, sir.

"Mr. Cole: Cross-examine.

"Mr. Gaskill: No questions.

"Mr. French: No questions.

"Witness excused."

Mr. Hanstein: I object.

The Court: Sustain the objection.

DEFENDANTS REST.

COMPLAINANT'S REBUTTAL.

F. HOBART HIGGINS, recalled.

Direct examination.

By Mr. Hanstein:

Q. Mr. Higgins, do you recall Mr. Gaskill telephoning to you relative to the payment of the judgment in the case of Endicott against Garfinkel?

A. I do.

Q. Will you tell us as nearly as you can recall it the conversation that you had with Mr. Gaskill?

A. Mr. Gaskill called me and asked me if we were going to pay the judgment. That was after the Supreme Court had discharged the rule. I told him that our company was involved for five thousand dollars and that the balance was reinsured and I could not state whether they would pay it or said that I would pay it because I had to take it up with them and get their approval of the payment in excess of five thousand dollars, and I told Mr. Gaskill that I would do that, and he called—and I did—and he called me the following week, and they had not as yet made their decision, and I think Mr. Gaskill testified he called me again, and he remembers it, I don't remember whether he called me three times or not, and I at no time said that we would settle the case, I had no authority to say it.

Mr. Hanstein: I want to offer in evidence Exhibits C8, 9 and 10, for identification, being the letters from Robert Garfinkel to the Hudson Casualty Company.

Mr. Gaskill: I object to the offer.

The Court: What is the objection?

Mr. Gaskill: The objection, there is nothing in the testimony, there is no statement on the part of counsel what the purpose of the offer is. I would imagine that it is to show a letter between Robert Garfinkel and the Hudson Casualty Company concerning Milton Garfinkel, and the testimony now is, by both Robert and Milton, that he had no authority to act as his counsel, and he did not authorize him to give any instructions as to the defense of any suit, and I object to the offer because it is—is it made to contradict Mr. Garfinkel?

Mr. Hanstein: It is made to show Mr. Garfinkel instructed us to file a counter-claim and that we relied on those instructions, and that we filed the counter-claim.

The Court: I will admit them.

(Letters admitted and marked Exhibits C8, 9 and 10.)

Q. Mr. Higgins, upon the receipt of this letter C8, did you file a counter-claim in this suit of Endicott against Garfinkel?

A. I did.

Q. Counter-claim that appears by the records in the case?

A. Yes.

Q. Did you rely upon this letter?

A. I did.

Mr. Hanstein: You have a letter that I produced, have you, this morning, from Taylor and Soloff?

(Letter produced.)

Q. Did Exhibit D9 come to your attention?

A. It did.

Q. Did you reply to it?

A. I did.

Q. I ask you if you can find in your files the reply that you made to that letter?

A. Here it is.

Mr. Hanstein: I served notice on both counsel on the other side requesting them to produce a letter of the Hudson Casualty Company to Taylor and Soloff, dated November 23, 1928, and being in answer to Taylor and Soloff letter to the Hudson Casualty Company, dated November 20, 1928, marked D9. Do you have such a letter?

Mr. Gaskill: Your Honor, I have no control over Taylor and Soloff to produce any letter. They could have been subpoenaed to be here. I don't represent them, and they were the agents of this company.

Mr. Hanstein: Your answer is neither one of you two has this letter, is that correct?

Mr. Gaskill: No, I don't have any letter.

Mr. Hanstein: We subpoenaed Mr. Soloff to produce the letter, your Honor, and subject to the testimony of Mr. Soloff with respect to the production of that letter I would like to use this copy for the purpose of having it marked for identification at this time.

Q. Is this a copy of your reply to Exhibit D9?
A. It is.
Q. Did you cause the original of that letter to be mailed?
A. I did.
Q. Had it been signed by you?
A. It had.

(Copy marked C11 for identification.)

Q. In your letter of November 23rd to Taylor and Soloff you say, "We are enclosing herewith"——

Mr. Gaskill: I object. How can we be bound by a communication sent by this insurance company to their agents, I object to it, any reference to it.

Mr. Hanstein: Your Honor, if he had made a different point I would have withdrawn the witness and put another witness on, but he has offered in evidence D9, which is a letter from Taylor and Soloff to the Hudson Casualty Company, and he

wants to play a while around it, and it seems to me we are clearly entitled to show our answer.

The Court: If that has been offered by Mr. Gaskill you are entitled to have the entire matter.

Mr. Gaskill: But there is no evidence, your Honor, as I see it, that this letter they are talking about now was ever received by Taylor and Soloff.

(Witness withdrawn.)

JOSEPH L. SOLOFF, recalled.

Direct examination.

By Mr. Hanstein:

Q. Mr. Soloff, you are under subpoena to produce here a letter of Hudson Casualty Company to your company, dated November 23, 1928, addressed to Taylor and Soloff. Do you have such a letter?

A. I have not.

Q. Have you searched through your files for it?

A. I have.

Q. And can't you find it?

A. I can't find it.

Mr. Hanstein: I would like to offer this letter in evidence upon the proof, please your Honor, that we have shown that it was mailed and that the original was mailed, that we have demanded that the

other side produce the original, we have subpoenaed to whom it was addressed, and they have been unable to find it, and now under the rules I think we are entitled to secondary evidence.

The Court: Having this witness upon the stand, I think you should go a little further to ascertain whether he received it or not. If he denies it, of course, that is a different situation, but so long as he is on the stand ——

Q. Will you read that letter, please, and tell me whether you received that letter?

A. I can't remember at this time, not handling the insurance department for Taylor and Soloff, I would not know whether or not such a letter came.

Q. Did you dictate this letter, D9?

A. Over signature. I don't remember dictating it, however.

Q. Do you have the complete file of Taylor and Soloff with respect to this matter?

A. Yes, sir.

Q. And the original of which I have just shown you a copy was not in that file, is that correct, the original of C11?

A. I can't find it.

Q. Did you find any response to D9?

A. No, sir.

JOHN SOLOFF, recalled.

Direct examination.

By Mr. Hanstein:

Q. Mr. Soloff, did you have any knowledge of the writing of that letter by Taylor and Soloff to the Hudson Casualty Company (D9)?

A. Yes, sir.

Q. You knew of its being written?

A. Yes, sir.

Q. Did you dictate that letter?

A. No, sir.

Q. Did you have any knowledge of a reply to that letter?

A. No, sir.

Q. Did you ever see this letter, the original of that letter (C11)?

A. No, sir.

Q. What was the first information that you had that the Hudson Casualty Company refused to defend this suit?

Mr. Gaskill: I object, your Honor. There is no testimony that he has any information that they had refused to defend the suit.

The Court: I don't know whether there is or not, this particular witness, I won't say.

Q. Did you know that the Hudson Casualty Com-

pany had refused to defend this suit, the suit of Endicott?

A. No, sir.

Q. You never knew that?

A. No, sir.

Q. Did you ever see this letter which was purported to have been enclosed with the letter of the Hudson Casualty Company to Taylor and Soloff?

A. No, sir.

Q. Never saw that?

A. No, sir.

F. Hobart Higgins, recalled.

Mr. Hanstein: Your Honor, it seems to me that we are entitled to offer this letter in evidence, and the reason I say it is that the cases hold—I don't have them right at my fingers' tips, but the cases hold that the proof of mailing of a letter is evidential, prima facie, of the fact that that letter was received. Now there were, of course, two members of the firm of Taylor and Soloff. The fact that Mr. Soloff does not remember the letter and the fact Mr. John Soloff does not remember the letter is no proof that the letter was not received, and in the light of that it seems to me that we are entitled to offer this C11 for identification into evidence.

The Court: Certainly not entitled to offer it unless you offer the enclosure at the same time.

Mr. Hanstein: Yes, of course. I have the enclosure right with it.

Mr. Halpern: If your Honor please, in order to establish the evidential value of the letter, it is necessary to show certain facts, that is, that the letter was sent at the direction of this man, that it was mailed at his direction or in the absence of his direction, by some one under his control, and these facts have not been shown, let alone the fact of the receipt. Now, the courts have even gone so far that a registered card that has not come to the knowledge of a man is not admissible in evidence unless you can show that he had knowledge, and I feel the absence of evidence Mr. Soloff says he was the manager of the insurance department, never remembers receiving it, Mr. Joseph Soloff, who is one of the partners of the firm of Taylor and Soloff, says he has no knowledge of the letter ever being received, cannot go behind that fact and say the letter was received and offer those facts in evidence, and then to go further than that, trying to bind these defendants by a communication between themselves, really a communication between themselves and their agents.

The Court: The last argument would be very effective were it not for the fact that a part of this correspondence was offered in evidence by you yourself and, therefore, the Court is entitled to have all of the correspondence in reference to that letter. Upon the proof of the mailing of a letter of which the offer is a copy, I will admit it. It does not of itself prove that it was received or not, but one of the elements.

By Mr. Hanstein:

Q. What can you say as to your knowledge as to whether or not that letter, C11 for identification, with its enclosure, was in fact mailed?

A. I signed the letter and gave it to my stenographer to mail it, with instructions to mail it in the normal course of business.

Q. Is that your usual method with regard to mailing letters?

A. Yes, it is.

Mr. Hanstein: I think that constitutes proof.

The Court: I will admit it in evidence.

(Letter admitted and marked C11. Enclosure admitted and marked C12.)

Cross-examination.

By Mr. Gaskill:

Q. Mr. Higgins, do you remember what the conversation you had with me on December the 16th was about?

A. I can't remember that the conversation was on that date. I have no way of remembering that except your testimony this morning, and if it was that day, my conversation with you was in connection with the settling of this case.

Q. Was in connection with the settling of this case?

A. That is correct.

Q. Isn't it a fact that the conference I had with you on the 16th of December was the one in which you informed me that you were reinsured and you were having some trouble with the other company about the settlement?

A. I can't say if that was that conversation or not.

Q. You won't say that was not the first time you told me about the reinsurance?

A. I can't remember if that was December 16th.

Q. So that may have been the first conversation you had about reinsurance or somebody else had a part of the judgment, was on the 16th of December?

A. It may have been. I am not sure.

Q. You remember what our conversation was on the 17th of December?

A. All the conversations were on the same topic in connection with the settling of this, at one time, in one conversation I asked you if you would accept less than the amount of the verdict, and I would take that up with the reinsured.

Q. Wasn't that on the 16th of December?

A. I don't know.

Q. You don't remember what date it was?

A. I don't remember what date, I couldn't tell you.

Q. Do you remember what the conversation was on December 7th, 6th or 7th?

A. I can't tell you what the conversation was or what the dates, because I have actually no recollection of the dates at all, and no way to refresh my memory.

Q. At that time do you remember our talking about certain bonds that had been filed in the case of Joslin against the Hudson Casualty Company?

A. Yes, I do remember that.

Q. Do you remember at that time that you talked with me about the releasing of the levy on your money in the bank in Jersey City?

A. That is right.

Q. That was the first time I talked with you?

A. I don't know.

Q. You don't remember?

A. No, it was just about the same time we talked about both matters, and I think the Joslin matter brought this one up, if I remember correctly.

Q. Do you remember our discussing the opinion of the Supreme Court about the reduction of the verdict, and so forth?

A. Yes, I do.

Q. I show you a letter of December 12th, 1928, and ask you if you received that letter?

A. Yes, sir.

Q. Is that the letter with which you received the agreement to defend in this case?

A. I believe it is, yes.

(Letter admitted and marked Exhibit C13.)

By Mr. Gaskill:

Q. Mr. Higgins, at the time of fthe case of Endicott against Garfinkel, did you send down your representative to assist Judge Cole at the trial?

Mr. Hanstein: I object to that. I think that is immaterial.

The Court: I will permit it.

A. Yes.

Q. Mr. Fuller?

A. I think both Mr. Fuller and Mr. Sterla, if I recollect.

Q. They were both representing your company?

A. Yes.

COMPLAINANT RESTS.

TESTIMONY CLOSED.

EXHIBIT C1.
11/13/30 L.

STOCK COMPANY

Hudson Casualty Insurance Company
As Reliable as the Hudson

HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City, New Jersey

In Consideration of the premium herein provided and of the statements contained in the Schedule hereinafter set forth, which statements the Named Assured makes and warrants to be true by the acceptance of this Policy, the HUDSON CASUALTY INSURANCE COMPANY, hereinafter called the Company,

HEREBY AGREES
with the Named Assured, subject to the limits and conditions hereinafter set forth.

(Agreement I—Legal liability for bodily injuries or death)

TO PAY ANY LOSS BY REASON OF THE LIABILITY IMPOSED BY LAW upon the Assured for damages on account of bodily injuries, or death resulting at any time therefrom, including instantaneous death, accidently suffered or alleged to have been suffered while this policy is in force, by any person or persons (except those persons referred to in Condition E.) by reason of the ownership, maintenance or use of any of the automobiles as described and enumerated in Statement 5 of the said Schedule; and including in the case of commercial automobiles, the loading, transportation and unloading of goods usual to the business of the Assured as defined in Statement 2 of said Schedule; and

(Agreement II—Legal liability for damage to property of others)

TO PAY ANY LOSS BY REASON OF THE LIABILITY IMPOSED BY LAW upon the Assured for damages (including damages allowed for loss or use of property damaged or destroyed) on account of damage to or destruction of property (except property of the Assured or property of others by or in charge of the Assured or any of the Assured's employees or carried in or upon the

automobiles covered hereby) as a result of the ownership, maintenance or use of any of the automobiles enumerated and described in Statement 5 of said Schedule; including in the case of commercial automobiles, the loading, transportation and unloading of goods usual to the business of the Assured as defined in Statement 2 of said Schedule. (This Agreement shall be effective only as provided in Statement 5 of said Schedule.)

And in addition, the Company agrees

TO DEFEND THE ASSURED AND PAY EXPENSES AND COSTS:

CONDITIONS
OMNIBUS COVERAGE

Condition A. The term "Named Assured" shall apply to the Assured named and described as such in Statement I of said Schedule, but the term "Assured" shall apply to any person or persons while riding in or legally operating any of the automobiles described in Statement 5 of said Schedule, and any other person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant, it being understood, however, that this policy shall not cover as provided in Item (2) of Condition E hereof, nor shall it be available to any Automobile Garage, Sales Agency

and/or Service Station nor to any Agent or Employee thereof, and provided further that indemnity under the said policy shall insure first to the named Assured, and then, (as to the remainder, if any) to any other persons entitled thereto. In the event an automobile covered by this policy is sold, transferred or assigned, it is agreed that this policy shall not extend to indemnify the purchaser, transferee or assignee, unless and until the consent of the Company in writing has been obtained.

NOTICE AND COSTS

Condition B. The Assured shall give the Company or its duly authorized agent immediate written notice of any accidents causing loss covered by this policy, with the fullest information obtainable. The Assured shall give like notice of claims for damages on account of such accidents. If any suit is brought against the Assured to recover such damages, the Assured shall immediately forward to the Company every summons or other process served upon him and the Company shall defend such suit (whether groundless or not) in the name and on behalf of the Assured. The expenses incurred by the Company in defending any suit or legal proceeding, including the interest on any verdict and any costs taxed against the Assured, and any expenses necessarily incurred and paid in money by the Assured for such immediate surgical aid as may be imperative at the time of any accident, irrespective of the limit of liability expressed herein, will be paid by the Company.

CLAIMS AND SUITS

Condition C. The Company shall have the exclusive right to contest or settle any of said claims or suits, and the Assured shall not incur any expense (except for such immediate surgical aid as may be imperative at the time of the accident) or settle any claim or suit without the written authority of the Company.

CO-OPERATION OF ASSURED

Condition D. The Assured shall not voluntarily assume any liability, nor incur any expense, other than for immediate surgical relief, nor settle any claim, except at the Assured's own cost. The Assured shall not interfere in any negotiation for settlement, nor in any legal proceeding, but whenever requested by the Company, and at the Company's expense, the Assured shall aid in securing information and evidence and the attendance of witnesses, and shall at all times co-operate with the Company (except in a pecuniary way) in all matters which the Company deems necessary in the defense of any suit or in the prosecution of any appeal.

EXCLUSIONS

Condition E. (1) This policy shall not cover in respect of any automobile: (a) while driven or manipulated by any person in violation of law as to age or, if there is no legal age limit, under the age of sixteen years; (b) while used for any other purposes than those specified in Statement 6 of said

Schedule; (c) while driven or manipulated in any race or speed test; (d) while being used for towing or propelling a trailer or any other vehicle used as a trailer, unless such privilege is endorsed hereon and a proper premium charged therefor, or such trailer is also insured by the Company, (incidental assistance to a stranded automobile on the road is permitted); (e) while used elsewhere than within the limits of the United States of America or the Dominion of Canada; or (f) while used other than during the policy period defined herein; (2) This policy shall not indemnify nor protect any firm, person or corporation other than the Named Assured if this policy is issued to cover automobiles while rented to others or used to carry passengers for a consideration; (3) the Company shall not be liable on account of bodily injuries or death suffered by Assured's domestic or household servants while operating or caring for any insured automobile or suffered by other employees of the Assured if engaged in the duties of their employment at the time of the accident; (4) nor shall the Company be liable for any liability assumed by or imposed upon the Assured under any Workmen's Compensation Plan, Law or Agreement.

PREMIUM COMPUTATION

Condition F. The premium for this policy is based upon a specific charge for each automobile dependent upon its description and the purposes for which it is to be used and the extent of the insurance required by the Assured.

CANCELLATION

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

SUBROGATION

Condition H. In case of payment of loss under this policy the Company shall be subrogated to all rights of the Assured against any person, firm or corporation as respects such loss, and the Assured shall do everything which may be necessary to secure to the Company such rights.

OTHER INSURANCE

Condition I. If the Named Assured carries a policy of another insurer against a loss covered by this policy, the Company shall not be liable for a larger proportion of the entire loss than the amount hereby insured bears to the total amount of the

Named Assured's valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.

INSPECTION

Condition J. Any of the Company's authorized inspectors shall have the right and opportunity to inspect at all reasonable times during the policy period any of the automobiles covered by this policy.

ACTION AGAINST COMPANY

Condition K. No action for the indemnity against loss provided for in Agreements I and II of this policy shall lie against the Company unless brought within two years from the date when the loss is made certain either by judgment against the Assured after final termination of the litigation or by agreement between the parties with the written consent of the Company. No action to recover under any other agreement shall lie against the Company, unless brought within twelve months after the right of action accrues.

BANKRUPTCY OR INSOLVENCY OF ASSURED

Condition L. The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries sustained or loss

occasioned during the term of this policy but in case of such insolvency or bankruptcy an action may be maintained by the claimant against the Company subject to the terms of this policy for an amount not exceeding the amount of this policy.

CONFLICTING STATUTORY PROVISIONS

Condition M. If any condition contained in this policy relating to the limitation of time for notice of accident or for any legal proceeding is at variance with any specific statutory provision in the State in which the accident occurs, such specific statutory provisions shall be substituted for such condition.

ASSIGNMENT OF INTEREST

Condition N. No assignment of interest under this policy shall be binding upon the Company unless such assignment is consented to by endorsement signed by its President and Vice President and countersigned by a duly authorized agent, but in the event of the death, insolvency or bankruptcy of the Named Assured within the policy period, the policy during the unexpired portion of such period shall cover the legal representative of the Named Assured, provided that notice in writing is given to the Company within thirty days after the date of such death, insolvency or bankruptcy.

CHANGES

Condition O. No change in the Agreements, Conditions, or Statements contained in the Schedule of

this policy, either printed or written, shall be valid unless made by endorsement signed by the President and Vice-President and countersigned by a duly authorized agent, nor shall notice to, or knowledge possessed by any agent or any other person be held to waive, alter or extend any of such Agreements, Conditions, or Statements contained in Schedule, nor to preclude the Company from asserting any defense under said Agreements, Conditions or Statements contained in the Schedule, unless set forth in a duly executed endorsement attached hereto.

ENDORSEMENTS MAY BE ATTACHED HERE

POL. No. A. P. 15803

SCHEDULE

1. Named Assured Harry Garfinkel
Address 4 South Surrey Ave., Ventnor City, N. J.
(Street and Number, City or Town, County and State)
Individual, Partnership, Corporation, Trustee or Estate Individual

2. The Named Assured's business or profession is Jewelry Salesman

3. The policy period shall be from the 6th day of April 1928, at noon, to the 6th day of April 1929, at noon, standard time at the place where this policy has been countersigned as to each of said dates.

4. The Company's liability, as respects each automobile covered hereby, shall be limited:

(a) UNDER AGREEMENT I, to Twenty five thousand Dollars ($25,000) as respects any one accident resulting in bodily injuries to or the death of one person, and, subject to that limit for each person, the Company's total liability on account of any one accident resulting in bodily injuries or death to more than one person is limited to Fifty thousand Dollars ($50,000)

(b) UNDER AGREEMENT II, to One Thousand Dollars ($1000.00) as respects any one accident, irrespective of whether property of one or more than one person is damaged or destroyed.

5. The automobiles covered by this policy and the premium charges for same are as follows:

Particulars	Automobile 1	Automobile 2
Trade Name of Automobile	Chevrolet	
Year of Model	1926	
Serial No.	2K47422	
Factory No. of Engine or Motor	1850670	
Kind of Power	gas	
Number of Cylinders	4	
Style of Body	Sedan	
Model of Car (If Private Passenger Car.)		
Load Capacity (If Commercial Car.)		

Automobile 3	Automobile 4

(NOTE—In accordance with Agreement II, such Agreement shall be effective as respects any automobile described above only if the premium therefor is specifically entered in the proper division provided below for such Agreement and for such automobile.)

Premium Charge on Account of		
Agreement I	$28.56	$
Agreement II	$11.00	$
Premium per Automobile	$39.56	$
$	$	

Total Premium Thirty nine and 56/100 ..... Dollars $39.56
100

6. The automobiles are used for the following purposes only Private & Business

7. The automobiles are principally maintained and garaged in the city or town of Ventor City, N. J. and are principally used in the city or town of Ventor, N. J. and in the vicinity of said city or town.

8. None of the automobiles described above are or will be rented to others or used to carry passengers for a consideration, except as herein stated: No exceptions.

9. The interest of the Named Assured in the automobiles herein described is that of unconditional and sole ownership, except as follows: No exceptions

10. No Company or Association has cancelled or refused to issue or renew automobile insurance to the Named Assured during the past three years, except as herein stated: No exceptions

In Witness Whereof, The HUDSON CASUALTY INSURANCE COMPANY has caused this policy to be signed by its President and Vice President, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

M A Kreps
Vice-President.

Frank J Higgins
President.

Countersigned at Atlantic City, N. J.
April 6th, 1928

By Taylor & Soloff by John Soloff
Agent

AUTOMOBILE POLICY
Liability and Property Damage
Hudson Casualty Insurance
Company
As Reliable as the Hudson
HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City New Jersey
M. A. KREPS
General Manager

Policy No. A. P. 15803
ISSUED TO
Harry Garfinkel
Premium, $39.56 Expiration 4/6/29

EXHIBIT C2.
11/13/30 L.

STOCK COMPANY

Hudson Casualty Insurance
Company
As Reliable as the Hudson

HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City, New Jersey

In Consideration of the premium herein provided and of the statements contained in the Schedule hereinafter set forth, which statements the Named Assured makes and warrants to be true by the acceptance of this Policy, the HUDSON CASUALTY INSURANCE COMPANY, hereinafter called the Company, hereby agrees, subject to the limits hereinafter set forth,

TO INDEMNIFY THE ASSURED

(Agreement I—Legal liability for bodily injuries or death)

AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW upon the Assured for damages on account of bodily injuries, or death resulting at any time therefrom, including instantaneous death, accidently suffered or alleged to have been suffered while this policy is in force, by any person or persons (except those persons referred to in Condition E.) by reason of the ownership, maintenance or use of any of the automobiles as described and enumerated in Statement 5 of the said Schedule; and including in the case of commercial automobiles, the loading, transportation and unloading of goods usual to the business of the Assured as defined in Statement 2 of said Schedule; and
(Agreement II—Legal liability for damage to property of others)

AGAINST LOSS FROM THE LIABILITY IMPOSED BY LAW upon the Assured for damages (including damages allowed for loss of use of property damaged or destroyed) on account of damage to or destruction of property (except property of the Assured or property of others used by or in charge of the Assured or any of the Assured's employees or carried in or upon the automobiles covered hereby) as a result of the ownership, maintenance or use of any of the automobiles enumerated and described in Statement 5 of said Schedule; including in the case of commercial automobiles, the loading, transportation and unloading of goods usual to the business of the Assured as defined in Statement 2 of said Schedule. (This Agreement shall be effective only as provided in Statement 5 of said Schedule); and

TO DEFEND THE ASSURED AND PAY EXPENSES AND COSTS:

Subject to the following conditions:

OMNIBUS COVERAGE

Condition A. The term "Named Assured" shall apply to the Assured named and described as such in Statement 1 of said Schedule, but the term "Assured" shall apply to any person or persons while riding in or legally operating any of the automobiles described in Statement 5 of said Schedule, and any other person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant, it being understood, however, that this policy shall not cover as provided in Item (2) of Condition E hereof, nor shall it be available to any Automobile Garage, Sales Agency and/or Service Station nor to any Agent or Employee thereof, and provided further that indemnity under the said policy shall insure first to the named Assured, and then, (as to the remainder, if any) to any other persons entitled thereto. In the event an automobile covered by this policy is sold, transferred or assigned, it is agreed that this policy shall not extend to indemnify the purchaser, transferee or assignee, unless and until the consent of the Company in writing has been obtained.

NOTICE AND COSTS

Condition B. The Assured shall give the Company or its duly authorized agent immediate written notice of any accidents causing loss covered by this policy, with the fullest information obtainable. The Assured shall give like notice of claims for damages on account of such accidents. If any suit is brought against the Assured to recover such damages, the Assured shall immediately forward to the Company every summons or other process served upon him and the Company shall defend such suit (whether groundless or not) in the name and on behalf of the Assured. The expenses incurred by the Company in defending any suit or legal proceeding, including the interest on any verdict and any costs taxed against the Assured, and any expenses necessarily incurred and paid in money by the Assured for such immediate surgical aid as may be imperative at the time of any accident, irrespective of the limit of liability expressed herein, will be paid by the Company.

CLAIMS AND SUITS

Condition C. The Company shall have the exclusive right to contest or settle any of said claims or suits, and the Assured shall not incur any expense (except for such immediate surgical aid as may be imperative at the time of the accident) or settle any claim or suit without the written authority of the Company.

CO-OPERATION OF ASSURED

Condition D. The Assured shall not voluntarily assume any liability, nor incur any expense, other than for immediate surgical relief, nor settle any claim, except at the Assured's own cost. The Assured shall not interfere in any negotiation for settlement, nor in any legal proceeding, but whenever requested by the Company, and at the Company's expense, the Assured shall aid in securing information and evidence and the attendance of witnesses, and shall at all times co-operate with the Company (except in a pecuniary way) in all matters which the Company deems necessary in the defense of any suit or in the prosecution of any appeal.

EXCLUSIONS

Condition E. (1) This policy shall not cover in respect of any automobile: (a) while used for any other purposes than those specified in Statement 6 of said Schedule; (b) while driven or manipulated by any person in violation of law as to age or, if there is no legal age limit, under the age of sixteen years; (c) while driven or manipulated in any race or speed test; (d) while being used for towing or propelling a trailer or any other vehicle used as a trailer, unless such privilege is endorsed hereon and a proper premium charged therefor, or such trailer is also insured by the Company, (incidental assistance to a stranded automobile on the road is permitted); (e) while used elsewhere than within the limits of the United States of America or the Dominion of Canada; or (f) while used other than

during the policy period defined herein; (2) This policy shall not indemnify nor protect any firm, person or corporation other than the Named Assured if this policy is issued to cover automobiles while rented to others or used to carry passengers for a consideration; (3) the Company shall not be liable on account of bodily injuries or death suffered by Assured's domestic or household servants while operating or caring for any insured automobile or suffered by other employees of the Assured if engaged in the duties of their employment at the time of the accident; (4) nor shall the Company be liable for any liability assumed by or imposed upon the Assured under any Workmen's Compensation Plan, Law or Agreement.

PREMIUM COMPUTATION

Condition F. The premium for this policy is based upon a specific charge for each automobile dependent upon its description and the purposes for which it is to be used and the extent of the insurance required by the Assured.

CANCELLATION

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

If cancelled by the Company the Company shall be entitled to the earned premium pro rata. Notice of cancellation in writing, mailed to or delivered at the address of the Assured as herein given, shall be a sufficient notice, and the check of the Company or of its duly authorized agent, similarly mailed or delivered, a sufficient tender of any unearned premium.

SUBROGATION

Condition H. In case of payment of loss under this policy the Company shall be subrogated to all rights of the Assured against any person, firm or corporation as respects such loss, and the Assured shall do everything which may be necessary to secure to the Company such rights.

OTHER INSURANCE

Condition I. If the Named Assured carries a policy of another insurer against a loss covered by this policy, the Company shall not be liable for a larger proportion of the entire loss than the amount hereby insured bears to the total amount of the Named Assured's valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be indemnified under this policy.

INSPECTION

Condition J. Any of the Company's authorized inspectors shall have the right and opportunity to inspect at all reasonable times during the policy period any of the automobiles covered by this policy.

ACTION AGAINST COMPANY

Condition K. No action for the indemnity against loss provided for in Agreements I and II of this policy shall lie against the Company unless brought within two years from the date when the loss is made certain either by judgment against the Assured after final termination of the litigation or by agreement between the parties with the written consent of the Company. No action to recover under any other agreement shall lie against the Company, unless brought within twelve months after the right of action accrues.

BANKRUPTCY OR INSOLVENCY OF ASSURED

Condition L. The insolvency or bankruptcy of the Assured shall not release the Company from the payment of damages for injuries sustained or loss occasioned during the term of this policy but in case of such insolvency or bankruptcy an action may be maintained by the claimant against the Company subject to the terms of this policy for an amount not exceeding the amount of this policy.

CONFLICTING STATUTORY PROVISIONS

Condition M. If any condition contained in this policy relating to the limitation of time for notice of accident or for any legal proceeding is at variance with any specific statutory provision in the State in which the accident occurs, such specific statutory provision shall be substituted for such condition.

ASSIGNMENT OF INTEREST

Condition N. No assignment of interest under this policy shall be binding upon the Company unless such assignment is consented to by endorsement signed by its President and Vice President and countersigned by a duly authorized agent, but in the event of the death, insolvency or bankruptcy of the Named Assured within the policy period, the policy during the unexpired portion of such period shall cover the legal representative of the Named Assured, provided that notice in writing is given to the Company within thirty days after the date of such death, insolvency or bankruptcy.

CHANGES

Condition O. No change in the Agreements, Conditions, or Statements contained in the Schedule of this policy, either printed or written, shall be valid unless made by endorsement signed by the President and Vice President and countersigned by a duly authorized agent, nor shall notice to, or knowledge possessed by any agent or any other person

be held to waive, alter or extend any of such Agreements, Conditions, or Statements contained in Schedule, nor to preclude the Company from asserting any defense under said Agreements, Conditions or Statements contained in the Schedule, unless set forth in a duly executed endorsement attached hereto.

ENDORSEMENTS MAY BE ATTACHED HERE

POL. No. A. P. 14306

SCHEDULE

1. Named Assured Milton J. Garfinkel,
Address 4 S. Surrey Place, Ventnor City, N. J.
(Street and Number, City or Town, County and State)
Individual, Partnership, Corporation, Trustee or Estate Individual

2. The Named Assured's business or profession is Real Estate Broker

3. The policy period shall be from the 2nd day of February 1928, at noon, to the 2nd day of February 1929, at noon, standard time at the place where this policy has been countersigned as to each of said dates.

4. The Company's liability, as respects each automobile covered hereby, shall be limited:

(a) UNDER AGREEMENT I, to TWENTY THOUSAND Dollars ($20,000.00) as respects any one accident resulting in bodily injuries to

or the death of one person, and, subject to that limit for each person, the Company's total liability on account of any one accident resulting in bodily injuries or death to more than one person is limited to FORTY THOUSAND Dollars ($40,000.00)

(b) UNDER AGREEMENT II, to ONE THOUSAND Dollars ($1000.00) as respects any one accident, irrespective of whether property of one or more than one person is damaged or destroyed.

5. The automobiles covered by this policy and the premium charges for same are as follows:

Particulars	Automobile 1	Automobile 2
Trade Name of Automobile	Ford	
Year of Model	1926	
Serial No.	13724154	
Factory No. of Engine or Motor	——	
Kind of Power	Gas	
Number of Cylinders	4	
Style of Body	Coupe	
Model of Car (If Private Passenger Car.)	T	
Load Capacity (If Commercial Car.)		

Automobile 3	Automobile 4

(Note—In accordance with Agreement II, such Agreement shall be effective as respects any

automobile described above only if the premium therefor is specifically entered in the proper division provided below for such Agreement and for such automobile.)

Premium Charge on Account of		
Agreement I	$27.93	$
Agreement II	$11.00	$
Premium per Automobile	$38.93	$
$	$	

Total Premium Thirty-eight and 93/100 .....Dollars $38.93
100

6. The automobiles are used for the following purposes only Private & Business

7. The automobiles are principally maintained and garaged in the city or town of Ventnor City, N. J. and are principally used in the city or town of Ventnor City, N. J. and in the vicinity of said city or town.

8. None of the automobiles described above are or will be rented to others or used to carry passengers for a consideration, except as herein stated: no exceptions

9. The interest of the Named Assured in the automobiles herein described is that of unconditional

and sole ownership, except as follows: no exceptions

10. No Company or Association has cancelled or refused to issue or renew automobile insurance to the Named Assured during the past three years, except as herein stated: no exceptions

In Witness Whereof, The HUDSON CASUALTY INSURANCE COMPANY has caused this policy to be signed by its President and Vice President, but the same shall not be binding unless countersigned by a duly authorized agent of the Company.

M A Kreps
Vice-President.

Frank J Higgins
President.

Countersigned at ATLANTIC CITY NJ
FEBRUARY 2nd, 1928

By Taylor & Soloff by John Soloff
Agent.

AUTOMOBILE POLICY

Liability and Property Damage
Hudson Casualty Insurance
Company
As Reliable as the Hudson
HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City New Jersey
M. A. KREPS
General Manager

Policy No. A. P. 14306
ISSUED TO
Milton J. Garfinkel
Premium, $38.93 Expiration 2-2-29

EXHIBIT C5.
11/13/30 L

Hudson Casualty Insurance
Company
As Reliable as the Hudson

HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City, New Jersey

August 3rd 1928.

Mr. Harry Garfinkel,
4 South Surrey Ave,
Ventor City, N. J.

Registered
NOTICE OF CANCELLATION

Dear Sir:

THIS IS TO NOTIFY YOU THAT, policy number AP-15803 issued to Harry Garfinkel by the HUDSON CASUALTY COMPANY, date April 6th 1928 is hereby declared null and void and cancelled as of date of issue namely, noon of April 6th 1928.

Herewith we enclose check for $39.56 return premium.

Very truly yours,
Wm. C. Krumrey
ASSISTANT SECRETARY

WCK/HMP

EXHIBIT C6.

CONDITIONAL SALE CONTRACT

For use in all states except Colo., La., Mich., Mo., Ohio, Indiana.

The undersigned Seller hereby sells, and the undersigned Purchaser hereby purchases, subject to the terms and conditions hereinafter set forth, the following property, complete with standard attachments and equipment delivery and acceptance of which is hereby acknowledged by purchaser, viz:
One New or Used; Used Year Model: 1926, Make, Trade Name; Chevrolet, Type of Body, If Truck, Give Tonnage: Sedan Model Letter of Number:— Motor No.: 1850670, Manufacturer's Serial No. 2k47422.
For $119.00 on or before delivery, leaving a Deferred Balance of $180.00, payable at the office of General Motors Acceptance Corporation, in 6, installments of $30.00 each on the same day of each successive month and commencing one month from the date hereof, or as indicated in Schedule of Payments below, with interest thereon after maturity at the highest lawful contract rate, and if this con-

tract be placed with an attorney for collection, 15% of the amount due hereunder as attorney's fees, or if Prohibited, the amount prescribed by law:

SCHEDULE OF PAYMENTS

$ — 1 Mo. hereafter
$ — 2 Mos. hereafter
$ — 3 Mos. hereafter
$ — 4 Mos. hereafter
$ — 5 Mos. hereafter
$ — 6 Mos. hereafter
$ — 7 Mos. hereafter
$ — 8 Mos. hereafter
$ — 9 Mos. hereafter
$ — 10 Mos. hereafter

1. Title to said property shall not pass to the purchaser until said amount is fully paid in in cash. If the purchaser is a resident of New Jersey, a regular bill of sale will be given to purchaser immediately upon completion of payments, in conformity with Chapter 168, P. L. 1919, New Jersey Statutes: the bill of sale thus to be delivered to the purchaser in conformity with Chapter 168, P. L. 1919, shall be the original bill of sale with all assignments of subsequent owneship noted thereon.

2. No transfer, renewal, extension or assignment of this contract or any interest thereunder, or

	loss, injury or destruction of said property
$ — 11 Mos. hereafter	shall release the purchasee from his obligation hereunder; the as-
$ — 12 Mos. hereafter	signee shall be entitled to all the rights of the seller.

3. In the event the purchaser defaults on any payment or fails to comply with any condition of this contract or a proceeding in bankruptcy, receivership or insolvency be instituted against the purchaser or his property, or the seller deems the property in danger of misuse or confiscation, the full amount shall, at the election of the seller, be immediately due and payable, and purchaser hereby authorizes any attorney-at-law to appear for said purchaser in any court of record in the United States, waive the issue and service of process, and confess judgment against said purchaser for the amount due hereunder in favor of the seller or assignee.

4. No warranties have been made by the seller unless endorsed hereon in writing.

5. The purchaser shall keep said property free of all taxes, liens and encumbrances; shall not use same illegally, improperly or for hire; shall not remove same from the state without permission of the seller; shall not transfer any interest in this contract or said property. The proceeds of any insurance, whether paid by reason of loss, injury, return premium or otherwise, shall be applied toward the

replacement of the property or payment of this obligation, at the option of the seller. Seller may insure said property against fire and theft to properly protect purchaser, seller and seller's assignee. The purchaser agrees to pay the premium upon demand and that on failure to do so, payment of said premium shall be secured by this contract.

6. Time is of the essence of this contract, and if the purchaser default in complying with the terms hereof, or the seller deems the property in danger of misuse or confiscation, the seller or any sheriff or other officer of the law may take immediate possession of said property without demand (possession after default being unlawful), including any equipment or accessories thereto, and for this purpose the seller may enter upon the premises where said property may be and remove same. The seller may resell said property, so retaken, at public or private sale, without demand for performance, with or without notice to the Purchaser (if given, notice by mail to address below being sufficient), with or without having such property at the place of sale, and upon such terms and in such manner as the seller may determine; the seller may bid at any public sale. From the proceeds of any such sale, the seller shall deduct all expenses for retaking, repairing and selling such property, including a reasonable attorney's fee. The balance thereof shall be applied to the amount due; any surplus shall be paid over to the purchaser; in case of deficiency the purchaser shall pay the same with interest and the purchaser does hereby confess judgment in the amount of such deficiency. Seller may take posses-

sion of any other property in the above described motor vehicle at the time of repossession and hold the same temporarily for the purchaser without liability on the part of the seller therefor.

7. Seller shall have the right to enforce one or more remedies hereunder, successively or concurrently and such action shall not operate to estop or prevent the seller from pursuing any further remedy which he may have hereunder, and any repossession or retaking or sale of the property pursuant to the terms hereof shall not operate to release the purchaser until full payment has been made in cash. Purchaser hereby waives the right to remove any legal action from the court originally acquiring jurisdiction and waives all homestead and other property exemption laws. Any provision of this contract prohibited by law of any state shall as to said state be ineffective to the extent of such prohibition without invalidating the remaining provisions of the contract.

Executed n triplicate, one copy of which was delivered to and retained by the purchaser, this 6 day of April, 1928.

BARTRAM KERSHAW. INC. (L. S.)
(Seller's Signature)
By: A. E. Snow, Sec'y.
(Official Title, if Company)
3604 Atlantic Ave. Atlantic City, N. J.
(Seller's Address)
(Street, Town, State)
Harry Garfinkel (L. S.)
(Purchaser's Signature)

4 S. Surrey Ave. Ventnor, N. J.
Purchaser's Address)
(Street, Town, State.)

WITNESSES:
Jno. C. Carroll
(Witness' Signature)
A. M. Bartram
(Witness' Signature)

EXHIBIT C8.

Telephone Mitchell 0240

16088-9-0

HOOD, LAFFERTY & CAMPBELL
Counsellors at Law
763 Broad Street
Newark, N. J.

Louis Hood
Francis Lafferty
Daniel L. Campbell

December 13th, 1928

Hudson Casualty Insurance Co.
921 Bergen Avenue
Jersey City, N. J.

Re: Endicott v. Garfinkel, et al.
Attention Mr. F. H. Higgins

Dear Sir:

In conformity with my telephonic promise made to your secretary yesterday this letter is to supply you with the necessary information to enable you

to file a counterclaim in the above-entitled action on behalf of the defendants Harry Garfinkel and Milton J. Garfinkel. My assumption is, of course, that the form of agreement which you have by this time received from Harry Garfinkel is satisfactory to you and that you have executed the same or intend to do so.

The claim of Milton J. Garfinkel is for injuries received by him as a result of Timothy Cordery's negligence in causing the accident as a result of which Mrs. Endicott's suit has been brought. Mr. Garfinkel suffered cuts and bruises around the ankles, knees, back, face and arms and a deep gash was inflicted behind his left ear necessitating stiches to be taken to close the wound. As a result of these injuries he was caused pain and suffering, was permanently disfigured and lost several weeks' work. His total damage is $5000.00.

Mr. Harry Garfinkel's car, of which you have the description, was wrecked so that its salvage value was nothing. As a result he claims the value of it, plus damages for the loss of its use in his business. His total claim is $1000.00.

I believe these facts are enough to enable you to draw the necessary pleadings, filling in the gaps with the allegations usual in these cases.

This matter is not an office case with the firm whose letter-head appears herewith so that to avoid delay I would suggest that you address all communications in the case to me in care of the firm.

Very truly yours,

Robert C. Garfinkel

EXHIBIT C9.
11/21/30

Dec. 11th, 1928.

Hudson Casualty Insurance Company,
921 Bergen Avenue,
Jersey City, N. J.

Attn:—Mr. F. Hobart Higgins, Sec'ty.
Re:—Endicott et als vs Garfinkel, et als.

Dear Sir:—

Pursuant to our telephone conversation I am forwarding an agreement to Mr. Harry Garfinkel for his signature today.

I have taken the liberty of altering the form of your agreement somewhat to make it more comprehensive but I believe the new form includes all the elements contained in your original draft and in fact in my estimation your company is better protected by the new contract.

To facilitate the execution of this agreement I am enclosing a copy to be signed by the proper officers of your company and am advising Mr. Harry Garfinkel to remit another copy signed by him directly to your office. Please return the copy to be signed by the officers of your company to me in care of the address appearing below.

Very truly yours,
Robert C. Garfinkel

16088-9-0

Robert C. Garfinkel,
c/o Hood, Lafferty & Campbell,
763 Broad Street, Newark, N. J.

P. S. The instrument to be signed and forwarded by Mr. Harry Garfinkel will have the date blank. You may fill in the date to conform with that upon which the agreement is executed by your company.

R. C. G.

EXHIBIT C10.
11/21/ 30

Telephone Mitchell 0240

16088-89-90

HOOD, LAFFERTY & CAMPBELL
Counsellors at Law
763 Broad Street
Newark, N. J.

Louis Hood
Francis Lafferty
Daniel L. Campbell

Dec. 21st, 1928.

Hudson Casualty Insurance Company,
921 Bergen Avenue,
Jersey City, N. J.

Attn:—Mr. F. H. Higgins,
Re:—Endicott vs Garfinkel et als.

Dear Sir:—

Under date of December 13th I wrote you concerning the above entitled cause but up to the time of this writing have not been favored with a reply from your company. I also have failed to hear from you relative to my letter of Dec. 13 under cover of which I sent you copy of an agreement which had been executed by Mr. Harry Garfinkel & forwarded

to your company and which copy was to be signed by the Hudson Casualty Insurance Company and returned to me.

Under the circumstances I am naturally ignorant of what disposition you intend making of the various questions raised in both of my letters and I would, therefore, appreciate hearing from you by return mail.

Address me in care of the firm upon whose letterhead this is written.

Very truly yours,
Robert C. Garfinkel

G:G

EXHIBIT C11.
11/21/30

This letter sent out registered mail
Return receipt requested.

Nov. 23rd, 1928.

Mr. Harry Garfinkel
109 S. California Ave.
Atlantic City, N. J.

RE: LIDA A. ENDICOTT ET AL. VS.
HARRY GARFINKEL, et al

Dear Sir:

We are herewith returning summons and complaint forwarded to us by Taylor & Soloff, for the reason that we deny liability under your policy, and are therefore not interested in the outcome of this suit. The papers are being returned to you so that you may obtain counsel to protect your interests.

We shall be very glad, however, to give you any information in connection with this accident that we have obtained through investigation of the case.

Yours very truly,

SECRETARY.

FHH:MW

EXHIBIT C12.
11/21/30

Nov. 23rd, 1928.

Messrs. Taylor & Soloff
303 Schwehm Building
Atlantic City, N. J.

RE: LIDA A. ENDICOTT ET AL. VS.
HARRY GARFINKEL, et al.

Gentlemen:

In reply to your letter of Nov. 20th in connection with the above case, we are enclosing herewith a copy of letter sent the assured.

Yours very truly,

encl.
MW

EXHIBIT C13.
11/21/30

Our New Method of Recla..able..Ship Them to US.
EASTERN SMELTING & REFINING CO.
Assayers, Smelters & Refiners of
GOLD-PLATINUM-SILVER

Reference
Bankers Trust Company

Established 1892
Incorporated 1928
712 Walnut Street
Philadelphia, Pa.

December 12, 1928.

Hudson Casualty Co.,
Jersey City,
N. J.

16088-9-0

Gentlemen:

You will find enclosed agreement, duly signed, which was forwarded to me by my attorney, and which I am returning to you, at his request.

Yours very truly,
Harry Garfinkel

M

EXHIBIT D1.

AUTOMOBILE ORDER

HUDSON CASUALTY INSURANCE COMPANY

Home Office
M. A. Kreps, General Manager
15 Exchange Place
Jersey City, N. J.
Montgomery 10130-1-2

Assured Harry Garfinkel
Address 4 South Surrey Ave. Ventnor City, N. J.
Term 1-year From Apr. 6-1928 To Apr. 6-1929
Name Chevrolet Year of Model 1926 Power Gas
Style of Body Sedan Motor No. 1850670 Serial No. 2K47422
Model of Car (if Priv.)..... No. of Cylinder 4
Load Capacity (if Com.) .....

PREMIUM

Liability Limits 25000 - 50000		$28.56
Property Damage,	$1000	$11.00
Collision Damage,	$	$.....
Add'l Assured		$.....
	Total	$39.56

Name of Bumpers .....
(If Collision is ordered)
Trade or Business Jewelry Salesman
Kept at Public & Private Garage

Remarks.....
.....
.....
.....
Broker..... Agent Taylor & Soloff
Bound By Taylor & Soloff Date April 6, 1928

EXHIBIT D2.
11/13/30L.

Hudson Casualty Insurance
Company
As Reliable as the Hudson

HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City, New Jersey

Ofice of the
Secretary

July 24th, 1928.

Mr. Harry Garfinkel
Eastern Smelting & Refining Co.
712 Walnut St.
Philadelphia, Pa.

Dear Sir:—

This is to advise you that the Hudson Casualty Insurance Company hereby denies any liability under its policy No. AP 15803 dated April 6th, 1928, as the result of an accident which occurred on or about May 14th, 1928, at or near the intersection of Indiana Avenue and Absecon Blvd. Absecon, N. J. for misstatement in the warranties contained in the

said policy, and for the further reason that you have failed to cooperate with the company as provided for in condition D of said policy.

Yours very truly,
Frank H. Higgins,
Secretary.

FHH: MW

EXHIBIT D3.
11/13/30L

STATE OF NEW JERSEY, to
HARRY GARFINKEL, MILTON GARFINKEL, and TIMOTHY CORDERY, jointly and individually,

(SEAL) YOU ARE SUMMONED, to answer the annexed complaint of LIDA A. ENDICOTT, Executrix of Thomas D. Endicott, Deecased, in an action at law in the SUPREME COURT.

AND TAKE NOTICE, that unless you file an answer to the said complaint with the Clerk of the Supreme Court, at Trenton, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in her suit and judgment may be entered against you.

WITNESS, Honorable William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this twenty-eighth day of September in the year of 1928.

FRED L. BLOODGOOD,
Clerk.

BURTON A. GASKILL
Attorney.

NEW JERSEY SUPREME COURT
ATLANTIC COUNTY

Lida A. Endicott, Executrix of Thomas D. Endicott, deceased, Plaintiff, vs. Harry Garfinkel, Milton Garfinkel, and Timothy Cordery, jointly and individually, Defendants.	ACTION AT LAW. COMPLAINT.

Plaintiff, residing in the Township of Galloway, County of Atlantic and State of New Jersey, says that:—

COUNT ONE:—

1. On May 14, 1928, and for a long time prior thereto, Harry Garfinkel, one of the defendants herein, was the owner of a certain automobile, and on the same day Timothy Cordery, also a defendant herein, was the owner of a certain automobile.

2. On the said day plaintiff's testate was riding in the automobile owned and operated by Timothy Cordery, and being driven in an easterly direction

on the south side along a public highway in the City of Atlantic City, known as the Absecon Boulevard, at or near a point where the said highway is intersected by Indiana Avenue, another public highway in said city. Said testate was riding in the car of the said Timothy Cordery at the special instance, request and invitation of Timothy Cordery.

3. On the same day, the automobile of Harry Garfinkel was operated by one Milton Garfinkel, who was the servant, agent or employee of the said Harry Garfinkel, and about his business.

4. On the said day, the said Milton Garfinkel, who was proceeding along Indiana Avenue and going in a general northerly direction at a high and unlawful rate of speed, and without giving any signal or warning, and without due regard for others using said highway, and not having his car under proper control ran into and against the automobile driven by Timothy Cordery along the Absecon Boulevard aforesaid, and as a result of the negligent, unlawful and reckless driving of the said Milton Garfinkel, plaintiff's testate, who was riding in the car of Timothy Cordery, was killed.

5. At the time of the death of the plaintiff's testate, he was of the age of fifty years, and was employed as a carpenter, and was receiving at the time of his death and for a long time prior thereto, the sum of Sixty Dollars a week.

6. On June 11, 1928, plaintiff was granted Letters Testamentory as the executrix of the estate of

Thomas D. Endicott, deceased; the said letters having been issued to her by the Surrogate of the County of Atlantic, which letters she here and now brings into Court.

7. That plaintiff's testate left him surviving, the plaintiff, his widow, and the following named next of kin: Helen J. Loveland, daughter, Frank S. Endicott, son, Carrie Endicott, daughter, Thomas G. Endicott, Jr., son, and Rebecca V. Endicott, daughter, who have suffered pecuniary injury because of his death.

8. Plaintiff's action against the said defendant was commenced within twenty-four calendar months from the date of the decease of the said Thomas D. Endicott.

Plaintiff demands damages on this count against Harry Garfinkel in the amount of $50,000.

COUNT TWO:

Paragraphs 1 and 2 of Court One are hereby made paragraphs 1 and 2 of this count.

3. On the same day, Milton Garfinkel was the operator of the automobile of Harry Garfinkel with the consent and permission of the said Harry Garfinkel.

Paragraphs 4, 5, 6, 7 and 8 of Count One are hereby made paragraphs 4, 5, 6, 7, and 8 of this count.

Plaintiff demands damages on this count against Milton Garfinkel in the amount of $50,000.

COUNT THREE:—

Paragraphs 1 and 2 of Court One are hereby made paragraphs 1 and 2 of this count.

3. On the said day Milton Garfinkel, was operating the automobile of Harry Garfinkel as his servant, agent or employee, and with his permission and consent, and on his said business, in a general northerly direction on Indiana Avenue, and the said Milton Garfinkel operated the said automobile and ran the same on to a public highway known as Absecon Boulevard.

4. On the same day Timothy Cordery was operating his automobile in an easterly direction on the Absecon Boulevard in a careless and negligent manner and ran into and against the automobile being operated by the said Milton Garfinkel in a northerly direction. The defendant, Timothy Cordery, was negligent in this: that he operated said automobile at a high, excessive and unlawful rate of speed, in that, said automobile was operated without due regard for the rights of others using said highway; in that, said automobile was not under proper control; in that, no warning or signal of any kind was given by said defendant; and as a result of defendant's negligent and careless operation of his said automobile, plaintiff's testate was killed.

Paragraphs 5, 6, 7 and 8 of Count One are hereby made paragraphs 5, 6, 7 and 8 of this count.

Plaintiff demands damages on this count against Timothy Cordery, in the amount of $50,000.

COUNT FOUR:—

Paragraphs 1 and 2 of Count One are hereby made paragraphs 1 and 2 of this count.

3. On the same day, the defendant, Milton Garfinkel, as servant, agent or employee of Harry Garfinkel, and Harry Garfinkel were operating the automobile owned by the said Harry Garfinkel.

4. The defendants, Harry Garfinkel, Milton Garfinkel and Timothy Cordery, operated their said automobiles at a point on the Absecon Boulevard where the same is intersected by Indiana Avenue in a negligent and careless manner, in this, to wit: that the said defendants without regard for the rights or safety of plaintiff's testate drove and operated their said automobiles at an excessive, unlawful and dangerous rate of speed, and without slackening the speed of said automobiles at the said intersection, or blowing the horn or giving a signal with the hand, ran into annd collided with each other, and by reason of the careless or negligent manner of the operation of the said automobiles, plaintiff's intestate was killed.

Paragraphs 5, 6, 7 and 8 of Count One are hereby made paragraphs 5, 6, 7 and 8 of this count.

Plaintiff demands damages on this count against Timothy Cordery, Harry Garfinkel and Milton Garfinkel, in the amount of $50,000.

BURTON A. GASKILL,
Attorney of Plaintiff.

I hereby deputize and appoint Samuel Freedman to serve the within writ. Witness my hand and the seal this 28 day of Sept. 1928.

JAMES CIMINO (L. S.)
Sheriff of Atlantic Co. by
— — — — — — — Under Sheriff.

Duly served within Summons & Complaint November 19, 1928, personally on Milton Garfinkel at the Schwehm Building, Corner New York and Atlantic Avenues, Atlantic City, Atlantic County, New Jersey and also duly served within summons & complaint November 21, 1928 personally on Harry Garfinkel at 4 South Surrey Place, Ventnor City, Atlantic County, New Jersey.

JAMES CIMINO
Sheriff of Atlantic County
By: Samuel Freedman
Special Deputy Sheriff.

I hereby deputize and appoint Charles Walters to serve the within writ. Witness my hand and seal this 24 day of Nov. 1928.

JAMES CIMINO
Sheriff of Atlantic County
— — — — — Under Sheriff.

Duly served within Summons & Complaint November 24th, 1928 on Timothy Cordery by leaving a copy at his residence in Oceanville, Atlantic County, New Jersey, with a member of his family above the age of 14 years, to wit: his wife.

JAMES CIMINO, Sheriff, by
CHARLES WALTERS
Special Deputy Sheriff.

Sheriff's Fees $9.22
Received Sep. 28, 1928— Sheriff.

[ENDORSED]

Filed Nov. 28, 1928.
Fred L. Bloodgood,
Clerk.

REPLY TO ANSWERS OF HARRY GARFINKEL & MILTON GARFINKEL.

Plaintiff, replying to answers of Harry Garfinkel and Milton Garfinkel denies each and every an-

swer to the complaint in Count One, Two, Three and four, as well as she denies the First Separate Defense of the said answer and joins issue.

BURTON A. GASKILL,
Attorney for Plaintiff.

[ENDORSED]

Filed Dec. 18, 1928.
Fred L. Bloodgood,
Clerk.

REPLY.

Plaintiff, replying to Answers of Harry Garfinkel and Milton Garfinkel, denies each and every answer to the complaint in Count one, two, three, and four as well as she denies the First Separate Defense to the said answer, and joins issue.

Plaintiff denies each paragraph of the First Count of the Counter-claim, so far as it relates to the plaintiff, and also denies each paragraph of Count Two of the counter-claim, so far as it relates to the plaintiff and joins issue.

BURTON A. GASKILL,
Attorney for Plaintiff.

[ENDORSED]

Filed Dec. 20, 1928.
Fred L. Bloodgood,
Clerk.

ANSWER.

Defendant, Timothy Cordery, residing in Ocean-ville, County of Atlantic and State of New Jersey, says that:—

COUNT ONE:—

1. He denies paragraph 1 of count one of the plaintiff's complaint.

2. He denies paragraph 2 of count one of the plaintiff's complaint.

3. He admits paragraph 3 of count one of the plaintiff's complaint.

4. He admits paragraph 4 of count one of the plaintiff's complaint.

5. He has no knowledge or information with which to form a belief of the allegations contained in paragraph 5 of the plaintiff's complaint and therefore denies same.

6. He has no knowledge or information with which to form a belief of the allegations contained in paragraph 6 of the plaintiff's complaint and therefore denies same.

7. He has no knowledge or information with which to form a belief of the allegations contained in paragraph 7 of the plaintiff's complaint and therefore denies same.

8. He admits paragraph 8 of count one of the plaintiff's complaint.

COUNT TWO:—

The answers to paragraphs 1 and 2 of Count one are hereby repeated and made part hereof.

3. He admits paragraph 3 of count two of the plaintiff's complaint.

The answers to paragraphs 4, 5, 6, 7 and 8 of Count One are hereby repeated and made part hereof.

COUNT THREE:—

The answers to paragraphs 1 and 2 of Count One are hereby repeated and made part hereof.

3. He admits paragraph 3 of count three of the plaintiff's complaint.

4. He denies paragraph 4 of count three of the plaintiff's complaint.

The answers to paragraphs 4, 5, 6, 7 and 8 of Count One are hereby repeated and made part hereof.

COUNT FOUR:—

The answers to paragraphs 1 and 2 of Count One are hereby repeated and made part hereof.

3. He admits paragraph 3 of count four of the plaintiff's complaint.

4. He denies paragraph 4 of count four of the plaintiff's complaint.

The answers to paragraphs 5, 6, 7 and 8 of Count One are hereby repeated and made part hereof.

FIRST SEPARATE DEFENSE TO ALL COUNTS:—

1. Defendant Timothy Cordery performed each and every duty and obligation that he owed to the plaintiff's testate.

SECOND SEPARATE DEFENSE:—

1. Said accident was caused solely by reason of the negligence of the operator of the automobile

owned by Harry Garfinkel, then and there being driven by his servant, agent or employee; in that said automobile was being driven at a high and reckless rate of speed under the circumstances; in that he gave no warning or signal whatever of his approach, in utter disregard of the rights and safety of other users of the said highway, and in that, although said defendant Timothy Cordery, endeavored to escape the collision, the defendant Harry Garfinkel by and through his servant, agent or employee, without any reason or cause whatsoever, deliberately followed the defendant Timothy Cordery, and drove the said automobile directly into and against the automobile of the said defendant, Timothy Cordery.

WILLIAM C. FRENCH,
Attorney for Defendant,
Timothy Cordery.

[ENDORSED]

Filed
Dec. 21, 1928
Fred L. Bloodgood, Clerk.

REPLY.

Plaintiff, replying to answer of Timothy Cordery, says that she denies all the matters contained in Count one, two, three and four as well as the First

Separate Defense to all counts and the second separate defense, and joins issue on the said answer.

BURTON A. GASKILL,
Attorney for Plaintiff.

ANSWER AND COUNTERCLAIM.

Defendant, Harry Garfinkel, residing in the City of Atlantic City, County of Atlantic, State of New Jersey, in answer to the complaint says:—

COUNT ONE:—

1. He admits that he was the owner of a certain automobile on May 14th, 1928.

2. He has no knowledge or information sufficient to form a belief as to contents of paragraph two.

3. He admits that said automobile was being operated by one Milton Garfinkel, but denies that he was the servant, agent or employee of the said Harry Garfinkel, and about his business.

4. He denies paragraph four.

5. He has no knowledge or information sufficient to form a belief as to contents of paragraph five.

6. He has no knowledge or information sufficient to form a belief as to contents of paragraph six.

7. He has no knowledge or information sufficient to form a belief as to contents of paragraph seven.

8. He admits paragraph eight.

SECOND COUNT:—

Defendant, Milton Garfinkel, residing in the City of Atlantic City, County of Atlantic, State of New Jersey, in answering the complaint says that:—

1. The same answer is made to paragraphs 1 and 2 of this count as heretofore made to paragraphs 1 and 2 of the first count and made a part hereof as though herein written in full.

3. He admits paragraph three.

4. He makes the same answer to paragraphs 4, 5, 6, 7 and 8 of this count as heretofore made to paragraphs 4, 5, 6, 7 and 8 of the first count, and makes the same a part hereof as though herein written in full.

THIRD COUNT:—

1. Defendant Harry Garfinkel and Milton Garfinkel make the same answer to paragraphs 1 and 2 of this count as heretofore made to paragraphs 1 and 2 of the first count, and make the same a part hereof as though herein written in full.

3. They deny paragraph three.

4. No answer is made to paragraph four as no allegations are contained therein as against these defendants.

5. They make the same answer to paragraphs 5, 6, 7 and 8 of this count as heretofore made to paragraphs 5, 6, 7 and 8 of the first count, and makes the same a part hereof as though herein written in full.

FOURTH COUNT:—

1. Defendants Milton Garfinkel and Harry Garfinkel make the same answer to paragraphs 1 and 2 of this count as heretofore made to paragraphs 1 and 2 of the first count and make the same a part hereof as though written in full.

3. They deny paragraph three.

4. They deny paragraph four.

5. They make the same answer to paragraphs 5, 6, 7 and 8 of this count as heretofore made to paragraphs 5, 6, 7 and 8 of the first count and make the same a part hereof as though herein written in full.

FIRST SEPARATE DEFENSE:—

Defendants say and will offer to prove at the trial that the alleged injuries from which it is al-

leged that the plaintiff died were contributed to by his own negligence.

COUNTERCLAIM:—

The defendant, Harry Garfinkel, residing in the City of Atlantic City, County of Atlantic, State of New Jersey, complaining of the defendant Timothy Cordery, says:—

1. That on May 14th, 1928 and a long time prior thereto Timothy Cordery was the owner of a certain automobile.

2. That on the said day the defendant Timothy Cordery was unlawfully operating the said automobile in a generally easterly direction on a public highway known as Absecon Blvd. Atlantic City, at or near the intersection of Indiana Avenue in said city.

3. That at the said time and place defendant, Harry Garfinkel, was the owner of a certain automobile which he was having operated by Milton Garfinkel in a generally northerly direction along Indiana Avenue in the City of Atlantic City.

4. That the defendant Timothy Cordery was so negligently, carelessly and recklessly operating the said automobile that he caused the same to come into collision with the automobile of Harry Garfinkel. Said negligence consisted in that:—

a. He operated the said automobile at a high and excessive rate of speed.

b. That he operated the said automobile without using the proper observation and without due regard for the safety of other vehicles on the highway.

c. That he operated the said automobile with defective appliances.

d. That he did not give the proper warning or signals.

e. That he did not have the said car under proper control.

f. That he operated the said automobile on the wrong side of the road violating the statutes in such case made and provided.

That as a result of the said negligence the automobile of the defendant, Harry Garfinkel, was bent broken and damaged to the extent that the same is beyond repair, and that the said Harry Garfinkel lost the use thereof.

WHEREFORE he claims damages in the sum of Two Thousand ($2000) Dollars of the defendant, Timothy Cordery.

COUNT TWO:—

Defendant, Milton Garfinkel, complaining of the defendant Timothy Cordery says that:—

1. He repeats the allegations contained in paragraphs 1, 2 and 3 of Count One and makes the same a part hereof as though herein written in full.

2. That as a result of the said negligence of the defendant, Timothy Cordery, the defendant Milton Garfinkel was severely injured about the head, back, neck, legs and suffered many bruises, abrasions and contusions, accompanied by severe shock and other injuries, and as a further result received a deep gash behind the left ear.

That as a result of the said injuries defendant Milton Garfinkel was confined to his bed for a long period of time and was forced to expend large sums of money in effecting a cure of the said injuries; that he has suffered great pain and will continue to suffer great pain for a long time in the future.

WHEREFORE Milton Garfinkel demands of the defendant, Timothy Cordery the sum of Five Thousand ($5000) Dollars for damages.

F. HOBART HIGGINS,
Attorney for Defendants,
Milton Garfinkel and
Harry Garfinkel.

[ENDORSED]

I hereby consent that the within answer be filed as *if* in time.
Burton A. Gaskill,
Atty. for Plaintiff.
Filed
Dec. 24, 1928
Fred L. Bloodgood,
Clerk.

ANSWER TO COUNTERCLAIM OF HARRY GARFINKEL AND COUNTER-CLAIM.

Defendant, Timothy Cordery, residing in Oceanville, County of Atlantic and State of New Jersey, answering the counter-claim of defendant Harry Garfinkel, filed herein, says that:—

1. He admits the allegations set forth in paragraph 1 of the counterclaim.

2. He denies the allegations set forth in paragraph 2 of the counterclaim.

3. He admits the allegations set forth in paragraph 3 of the counterclaim.

4. He denies each and every allegation set forth in the 4th paragraph of the counter-claim.

Answering the second count of the counter-claim of defendant Harry Garfinkel, defendant Timothy Cordery, says that:—

1. The answers to paragraphs 1, 2 and 3 of Count One are hereby repeated and made part thereof.

2. He denies each and every allegation contained in paragraph 2 of the second count of the counterclaim.

FIRST SEPARATE DEFENSE:—

Defendant, Timothy Cordery, performed each and every duty and obligation that he owed to the defendant Harry Garfinkel.

SECOND SEPARATE DEFENSE:—

Defendant, Timothy Cordery, was in no wise negligent in the premises.

THIRD SEPARATE DEFENSE:—

Defendant, Harry Garfinkel was the sole cause of and wholly responsible for the said accident.

FOURTH SEPARATE DEFENSE:—

Defendant, Timothy Cordery, says that defendant, Harry Garfinkel violated the statutes and traffic regulations of the State of New Jersey and contributed to the said accident and to his injuries, if any, sustained therefrom.

Defendant, Timothy Cordery, by way of counterclaim against the defendant Harry Garfinkel says that:—

1. On May 14th, 1928, said defendant, Timothy Cordery, was the owner of a certain automobile which he was operating along Absecon Boulevard,

at, near or about its intersection with Indiana Avenue, public highways, in the City of Atlantic City, County of Atlantic and State of New Jersey.

2. At the time and place aforesaid, Harry Garfinkel, one of the defendants herein, owned and operated his automobile along Indiana Avenue, aforesaid, by his servant, agent or employee.

3. It then and there became the duty of the said Harry Garfinkel, by his servant, agent or employee, to operate, manage and control his said automobile with a reasonable degree of care.

4. Yet the said defendant, Harry Garfinkel, wholly failed and neglected so to do, but operated his said automobile in a careless, negligent and improper manner, at a high and excessive rate of speed under the circumstances of the case, without having his said automobile under proper control and without the necessary application of brakes, without any signals or warning of his approach, and in violation of the traffic rules and regulations of the State of New Jersey, and in utter disregard of the rights of other users of the said highway, including the defendant, Timothy Cordery, and otherwise so negligently, improperly and carelessly ran, operated and controlled his said automobile, so that a collision occurred, between the automobile of the defendant Harry Garfinkel and the automobile of defendant Timothy Cordery, whereby the latter was struck, and without his fault.

5. So that, by the means aforesaid, the automobile of the defendant Timothy Cordery was wrecked, destroyed and damaged to such an extent that defendant was obliged to lay out and expend much money in an endeavor to have same repaired and he was deprived of the use of same both for business and pleasure, and the said automobile was greatly depreciated in value, and said defendant Timothy Cordery, was seriously and permanently injured, both internally and externally, and suffered, still suffers and will continue to suffer great pain, was obliged to lay out much money for medicine and medical expenses, and was prevented from following his occupation, whereby he was deprived of the wages and profits therefrom, and was disfigured and incapacitated for the future.

6. The cause of the accident aforesaid was the negligence of the defendant Harry Garfinkel, as hereinbefore set forth.

7. So that defendant, Timothy Cordery, says that an action has accrued to him and he has sustained damage by reason of the damage to his automobile in the sum of Twenty-five Hundred Dollars ($2500.00) and by reason of his personal injuries in the sum of Twenty five Thousand Dollars ($25,000.00) and therefore he brings this suit.

WILLIAM C. FRENCH,
Attorney for Defendant,
Timothy Cordery.

[ENDORSED]

Consent is hereby given to the filing
Answer and Counterclaim as of time.
F. Hobart Higgins,
Atty. for Defendants, Harry
Garfinkel and Milton Garfinkel.
Filed
Jan. 24, 1929
Fred L. Bloodgood, Clerk.

REPLY TO ANSWER TO COUNTERCLAIM.

Defendants Harry Garfinkel and Milton Garfinkel deny each and every allegation contained in counterclaim filed in the above entitled action.

F. HOBART HIGGINS,
Attorney for Defendants, Harry
Garfinkel & Milton Garfinkel.

[ENDORSED]

Filed
Jan. 25, 1929
Fred L. Bloodgod, Clerk.

ANSWER TO COUNTERCLAIM OF TIMOTHY CORDERY.

Defendants, Harry Garfinkel and Milton Garfinkel, in answer to the counterclaim of Timothy Cordery, say that:

1. They admit paragraph one.

2. They admit that Harry Garfinkel was the owner of an automobile which was being operated in a generally northerly direction along Indiana Avenue in the City of Atlantic City, N. J.

3. They admit paragraph three.

4. They deny paragraph four.

5. They deny paragraph five.

6. They deny paragraph six.

7. They deny paragraph seven.

FIRST SEPARATE DEFENSE:

Defendants say and will offer to prove at the trial that the damages and injuries received by the plaintiff were contributed to by his own negligence in that:

a. He operated the said automobile at a high and excessive rate of speed.

b. That he operated the said automobile without using the proper observation and without due regard for the safety of other vehicles on the highway.

c. That he operated the said automobile with defective appliances.

d. That he did not give the proper warning or signals.

e. That he did not have the said car under proper control.

f. That he operated the said automobile on the wrong side of the road violating the statutes in such case made and provided.

F. HOBART HIGGINS,
Attorney for Defendants,
Harry Garfinkel and
Milton Garfinkel.

[ENDORSED]

Filed Jan. 25, 1929
Fred L. Bloodgood,
Clerk.

REPLY.

Defendant, Timothy Cordery, replying to the answer to counterclaim, filed by plaintiffs, Harry Gar-

finkel and Milton Garfinkel, denies each and every allegation contained in the separate defenses of the answer aforesaid.

WILLIAM C. FRENCH,
Attorney for Defendant,
Timothy Cordery.

[ENDORSED]

Filed Jan. 31, 1929
Fred L. Bloodgood,
Clerk.

POSTEA.

This case was tried before Judge William Frank Sooy, with a jury at the Atlantic Circuit on June 17th, 18th and 19th, 1929. The jury rendered a general verdict against the defendants, Harry Garfinkel and Milton Garfinkel, in favor of the plaintiff, Lida A. Endicott, Executrix of Thomas D. Endicott, deceased, for twenty thousand dollars ($20,000.00) and a general verdict against the defendants, Harry Garfinkel and Milton Garfinkel, in favor of Timothy Cordery in the sum of Two Hundred Dollars ($200.00).

W. F. SOOY,
C. C. J.

[ENDORSED]

Filed June 21, 1929
Fred L. Bloodgood,
Clerk.

JUDGMENT FOR PLAINTIFF AND FOR DEFENDANT, T. CORDERY.

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendants Harry Garfinkel and Milton Garfinkel, on the plaintiff's complaint for the sum of twenty thousand dollars, besides costs to be taxed nisi; and in favor of Timothy Cordery, defendant and against the defendants Harry Garfinkel and Milton Garfinkel, on the counterclaim for the sum of two hundred dollars besides costs to be taxed nisi.

Entered: June 21, 1929

On motion of
Burton A. Gaskill,
Atty. for Pltff.
William C. French,
Atty. for Deft. T. Cordery.

Damages of Pltff.	$20,000.00
Costs	85.32
	$20,085.32
Damages of T. Cordery	$ 200.00
Costs	
	$

JUDGMENT FOR PLAINTIFF AND FOR DEFENDANT, T. CORDERY.

Damages of Pltff.	$20,000.00
Costs	85.32
	$20,085.32
Damages of T. Cordery	200.00
Costs	
	$
Deft's R. to S. C. Above R. to S. C. discharged and verdict of plaintiff reduced to	$15,000.00
Costs	85.32
	$15,085.32

See Min. Oct. Term 1929 under date of Oct. 18, 1929 Costs on R. to S. C. $33.25

Judgment entered this twenty-first day of June, A. D. nineteen hundred and twenty-nine in favor of plaintiff and against the defendants Harry Garfinkel and Milton Garfinkel on the plaintiff's complaint for the sum of twenty thousand dollars damages and eighty-five dollars and thirty two cents costs; and in favor of Timothy Cordery defendant and against the defendants, Harry Garfinkel and Milton Garfinkel on the counterclaim for the sum of two hundred dollars damages and costs.

WM. S. GUMMERE,
C. J.

RULE TO SHOW CAUSE.

Application to this end having been made by counsel for defendants Harry Garfinkel and Milton Garfinkel within the time required by law;

It is on this 15th day of August, 1929, on motion of Cole & Cole, Attorneys of defendants Harry Garfinkel and Milton Garfinkel, ORDERED that the plaintiff show cause before the Supreme Court at the October Term next why the verdict should not be set aside and a new trial granted.

Defendants may assign for cause that the verdict is against the weight of the evidence, excessive, and alleged trial errors.

Let this rule be entered in the minutes of the court.

W. F. SOOY,
C. C. J.

Entered: Aug. 17, 1929
On motion of
Cole & Cole,
Attorneys for Defts.
Harry Garfinkel &
Milton Garfinkel.

REASONS.

The defendants Harry Garfinkel and Milton Garfinkel assign the following reasons why the verdict should not be set aside and a new trial granted.

1. The verdict is against the clear weight of the evidence.

2. The verdict is excessive.

3. The court permitted witness Crawford to express an opinion as to what caused the sudden lurch-

ing of the Chevrolet car. The answer called for a conclusion, or the opinion of an expert and the witness was not an expert.

4. The court refused to permit counsel for defendants to cross-examine witness Crawford as to the source of his knowledge to give an opinion as to what caused the Chevrolet car to lurch.

5. On re-cross-examination of witness Crawford, the court overruled this question:

> "So that when the Cordery car passed you you were about opposite Ohio or Venice Avenue, and if Mr. Cordery was looking he could of course, have seen what you saw, if his eyesight was good; couldn't he?"

6. The court improperly and to the damage of defendants, permitted a non-suit as far as defendant Cordery was concerned.

7. The court erred in its charge to the jury by saying in substance that there was no evidence of a joint enterprise between Cordery and the deceased.

8. The court erroneously charged the jury and to the damage of the defendants by saying that because of the non-suit Cordery was released.

COLE & COLE,
Attorneys for Defendants,
Harry Garfinkel & Milton Garfinkel.

[ENDORSED]

Filed Aug. 21, 1929
Fred L. Bloodgood,
Clerk.

NOTICE OF ARGUMENT.

TO BURTON A. GASKILL, ESQ.,
ATTORNEY OF PLAINTIFF:

Notice the argument of the rule to show cause in the above entitled cause on the opening day of the October Term next, at the State House, Trenton, New Jersey, at eleven o'clock in the forenoon or as soon thereafter as the same can be heard.

Dated: August 17, 1929

COLE & COLE,
Attorneys of Defendants.

[ENDORSED]

Service acknowledged this 17th day Aug. 1929.

Burton A. Gaskill,
Attorney of Plaintiff.

Filed Aug. 19, 1929
Fred L. Bloodgood,
Clerk.

TESTIMONY

(OMITTED BY CONSENT OF MR. BURTON GASKILL)

Filed Sept. 5, 1929
Fred L. Bloodgood,
Clerk.

CONSENT TO REDUCTION OF VERDICT.

Whereas the court, by its order of October 14, 1929, in the above entitled cause, directed that if the plaintiff would accept a verdict of Fifteen Thousand Dollars ($15,000.) in lieu of the verdict rendered by the jury of Twenty Thousand Dollars ($20,000.) that the rule heretofore entered in the above entitled cause would be discharged; otherwise the rule to be made absolute,

Therefore, be it known that the plaintiff hereby accepts the sum of Fifteen Thousand Dollars ($15,000.) for a verdict in the above entitled cause in lieu of the sum of Twenty Thousand Dollars ($20,000.) heretofore entered and hereby consents to the entry of a judgment in her favor as executrix against the defendants, Harry Garfinkel and Milton Garfinkel in the sum of Fifteen Thousand Dollars ($15,000.).

LIDA A. ENDICOTT,
Executrix of the estate of
Thomas D. Endicott, Deceased, Plaintiff.

Signed in the presence of
BURTON A. GASKILL,
Attorney for Plaintiff.

[ENDORSED]

Filed Oct. 18, 1929
Fred L. Bloodgood,
Clerk.

ORDER.

The rule to show cause obtained by Harry Garfinkel and Milton Garfinkel, having been duly argued at the October Term, 1929, of this court by Cole & Cole, of counsel for defendants, and Burton A. Gaskill, of counsel for plaintiff and the court having considered same, and by its order made on October 14, 1929, ordered that the rule to show cause be discharged if the plaintiff would accept a verdict of Fifteen Thousand Dollars ($15,000.) instead of Twenty Thousand Dollars ($20,000.) and the plaintiff having consented in writing to accept the sum of Fifteen Thousand Dollars ($15,000.) in lieu of the verdict of Twenty Thousand Dollars ($20,000.);

IT IS, therefore, ORDERED and adjudged that the rule to show cause heretofore entered, be discharged with costs, and that a judgment be entered for the plaintiff against the defendants, Harry Gar-

finkel and Milton Garfinkel for the sum of Fifteen Thousand Dollars ($15,000.).
Entered: Oct. 18, 1929

On motion of
Burton A. Gaskill,
Attorney for Plaintiff.

AFFIDAVIT.

State of New Jersey, } SS—
County of Atlantic, }

BURTON A. GASKILL, being duly sworn according to law, upon his oath deposes and says:—

That he was the attorney for the plaintiff in the above entitled cause, and that he incurred the expense of Fifteen Dollars ($15,00) to I. F. Huntzinger Co. Camden, New Jersey, for the printing of the brief used on the argument before the Supreme Court.

BURTON A. GASKILL

Sworn and subscribed to :
before me this 17th :
day of Oct. A. D. 1929 :
Marie B. Kelly, :
Notary Public of N. J. :

[Endorsed]

Oct. 18, 1929
Fred L. Bloodgood, Clerk.

New Jersey, ss.

THE STATE OF NEW JERSEY TO OUR SHERIFF OF OUR COUNTY OF ATLANTIC GREETING:

We Command you That of the goods and chattels, rights and credits of Harry (Seal) Garfinkel, Milton Garfinkel, Defendants in your County, you cause to be made the sum of Fifteen thousand, one hundred eighteen dollars and fifty-seven cents which to Lida A. Endicott, Executrix of Thomas D. Endicott, deceased, Plaintiff lately in our Supreme Court, at Trenton, before the Justices of our same Court, for her damages which she has sustained and which were adjudged to her in an action at law, and also for her costs and charges by her about her suit in this behalf expended, whereof the said defendants are convicted, as appears of record; and if sufficient goods and chattels, right and credits of the said defendants cannot be found in your County, whereof the damages aforesaid may be made, THEN we further command you that you cause the whole, or the residue, as the case may require, of the said damages to be made of the lands, tenements, hereditaments and real estate whereof the said defendants seized on the twenty-first day of June nineteen hundred and twenty-nine or at any time afterwards, in whose hands soever the same may be; and that you have that money before our Justices aforesaid, at Trenton aforesaid, on the third Tuesday in January next, to render unto the said plaintiff for her damages aforesaid, and have you then and there this writ.

Witness, WILLIAM S. GUMMERE, Esquire, Chief Justice, at Trenton aforesaid, the eighteenth day of December A. D. nineteen hundred and twenty-nine.

Fred L. Bloodgood Clerk.

Burton A. Gaskill, Attorney.

This execution returned into Court unsatisfied as to both defendants Harry Garfinkel and Milton Garfinkel, for the reason that I am unable to find any goods, chattels, rights, credits, lands, tenements, hereditaments or real estate of said defendants, or either of them on which to make levy.

DANIEL D. CONWAY, Sheriff.

Dated: December 20, 1929

Sheriff's Fees $.12

Recorded in the office of the Clerk of the Snpreme Court, in A 60 of Process, page 228.

Fred L. Bloodgood

Clerk.

NEW JERSEY SUPREME COURT

Atlantic County.

Lida A. Endicott, Executrix, &c.,		Action at Law.
	vs.	Fi. Fa. de bonis et terris.
Harry Garfinkel, et als.,		Filed: Dec. 20, 1929
		Fred L. Bloodgood, Clerk.

Ret'ble January Term, A. D. 1930
Burton A. Gaskill, Att'y.

Levy Damages	$15,000.00
Costs	118.57
	$15,118.57

Interest thereon from June 21, 1929 $
Besides Sheriff's exe'n fees.
Delivered to me Dec. 19th, 1929 at 9:43 o'clock A. M.
Daniel D. Conway Sheriff.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the entire proceedings in the above stated cause as the same remain on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this eleventh day of November A. D. nineteen hundred and thirty.

(Seal)

Fred L. Bloodgood,
Clerk.

EXHIBIT D4.
11/13/30 L.

COLE AND COLE
Counsellors at Law
ATLANTIC CITY, N. J.

Guarantee Trust Building

C. L. Cole
C. L. Cole, Jr.
Maurice Y. Cole

June 13, 1929.

Mr. Milton Garfinkel,
4 S. Surrey Place,
Ventnor City, N. J.
Dear Sir:

The case of Endicott against your uncle Harry Garfinkel will be reached Monday morning next. This morning Judge Sooy announced that he would not call the case today, owing to the fact that there are two cases ahead of it for trial.

In reading the correspondence and the record before me, I am impressed that there is no disposition

New Jersey State Library

on your part or that of your uncle, the defendant, or your father, who was with you in the automobile, to assist the insurance company. Whether you are justified in taking this position, I will not undertake to say because I know nothing of your relations. But, in order to protect the insurance company against any future claim that may be made, I am advising you that unless you and your uncle appear at the trial to testify as to the occurrence, that the company may refuse to pay the verdict, in the event there is one against your uncle. The company feels that the testimony of your father is important and that you and your uncle will be able to produce him as a witness. From the talk had at the conference yesterday, at which you and your brother Robert and your uncle Harry, the defendant, were present, I concluded that no effort would be made by you to induce your father to appear as a witness.

Counsel for plaintiff will move the case when called and I shall, of course, make the best defense possible, but it will be with the distinct understanding that the company will disclaim liability to your uncle, in the event of your father's failure to appear.

A copy of this letter is being sent to your father, your uncle and your brother, the attorney.

Very truly yours,

(Signed) C. L. Cole.

(Envelope):

COLE AND COLE
Counsellors at Law
ATLANTIC CITY, N. J.

Guarantee Trust Building

(Cancelled Stamp)

New Jersey State Library

Mr. Milton Garfinkel,
4 S. Surrey Place,
Ventnor City, N. J.
712 Walnut St
Phila.
Pa.

(Postmarked):
ATLANTIC CITY
JUN 13
6 PM
1929
2
N. J.

(Postmarked on Back):
VENTNOR
JUN 14
12 M
N. J.
1929

EXHIBIT D5.
11/13/30 L.

LIABILITY AND PROPERTY DAMAGE FORM.

(Seal)
We Will Bond and Insure You
FIDELITY
BURGLARY SURETY CASUALTY

UNITED STATES FIDELITY AND GUARANTY COMPANY
BALTIMORE, MARYLAND.

(Hereinafter Called the Company)

IN CONSIDERATION OF THE PREMIUM AND SUBJECT TO THE TERMS, LIMITS AND CONDITIONS SET FORTH HEREIN DOES HEREBY INSURE

the Assured named and described as such in the Schedule of Statements hereto,

Against liability for loss and / or expense, arising or resulting from claims upon the Assured for damages in consequence of an accident occurring within the limits of *the United States and Canada* during the term of this policy, by reason of the *ownership, maintenance* or *use,* (including the carrying of goods thereon and the loading and unloading thereof when commercially used) *of the auto-*

mobile or any of the automobiles enumerated and described herein resulting in

INJURY TO PERSONS

(A) BODILY INJURIES, OR DEATH resulting at any time therefrom, suffered by any person or persons, excepting: (a) the Assured's employe or employes while engaged in operating or caring for any of the Assured's automobiles, (b) any other employe of the Assured who is injured when engaged at the time of such injury in performing any duty for the Assured in connection with the trade, business or occupation of the Assured.

DAMAGE TO PROPERTY OF OTHERS

(B) DAMAGE TO OR DESTRUCTION OF PROPERTY, including the loss of use thereof, excepting property of the Assured or property in the custody of the Assured and for which the Assured is legally responsible; or property carried in or on any automobile of the Assured.

LIMITS OF LIABILITY FOR PERSONAL INJURY

THE COMPANY'S LIABILITY to one or all Assureds under Clause A above is limited to

FIVE THOUSAND DOLLARS ($5,000.00)

to any one person; and subject to the same limit for each person, the Company's total liability from loss from any one accident is limited to

TEN THOUSAND DOLLARS ($10,000.00)

LIMITS OF LIABILITY FOR PROPERTY DAMAGE

The Company's liability to one or all Assureds under Clause B above on account of any one accident is limited to

ONE THOUSAND DOLLARS ($1,000.00)

irrespective of whether property of one or more than one person is damaged or destroyed.

HIGHER LIMITS PERMITTED.

The above limits of liability under Clauses (A) and (B) shall apply to each of the automobiles covered hereunder, unless other limits are specified in the Schedule of Statements.

IN ADDITION TO THE ABOVE, THE COMPANY DOES HEREBY AGREE

DEFENSE OF SUITS

(1) To DEFEND in the name and on behalf of the Assured *any suit* brought against the Assured to enforce a claim, *whether groundless or not,* on account of damages suffered or alleged to be suffered under the circumstances hereinbefore described;

PAYMENT OF EXPENSES

(2) TO PAY THE EXPENSES incurred in defending any suit described in the preceding paragraph, also the *interest* on any judgment within the limits of the insurance hereby granted and any *costs* taxed against the Assured on account thereof;

REIMBURSEMENT OF EXPENSE

(3) TO REIMBURSE the Assured for the *expense* incurred in providing such *immediate surgical relief* as is imperative at the time of any accident covered hereunder;

OMNIBUS COVERAGE

(4) TO EXTEND THE INSURANCE provided by this policy so as to be available, in the same manner and under the same conditions as it is available to the named Assured, to any person or persons while riding in or legally operating any of the automobiles covered hereunder, and to any person, firm or corporation legally responsible for the operation thereof, (excepting always a public garage, automobile repair shop and/or sales agency and/or service station and agents and employes thereof), provided such use or operation is with the permission of the named Assured; or, if the named Assured is an individual, with the permission of an adult member of the named Assured's household other than a chauffeur or a domestic servant. In no event shall the extension of insurance provided in the foregoing clause be construed to cover the purchaser of the automobile or automobiles covered by this policy, if sold, or the transferee or assignee of this policy except by the written consent of the Company endorsed hereon.

INSOLVENCY PROVISION

(5) THE INSOLVENCY OR BANKRUPTCY of the Assured hereunder shall not release the Com-

pany from the payment of damages for injuries sustained or loss occasioned during the life of this policy, and in case execution against the Assured is returned unsatisfied because of such insolvency or bankruptcy in an action brought by the injured or his or her personal representative in case death results from the accident, then an action may be maintained by the injured person or his or her personal representative against the Company under the terms of the policy for the amount of the judgment in the said action, not exceeding the amount of the policy.

THIS POLICY IS SUBJECT TO THE FOLLOWING CONDITIONS:

EXCLUSIONS

PARAGRAPH A.

THE POLICY SHALL NOT COVER ANY LIABILITY OF THE ASSURED

1. Under any Workmen's Compensation agreement, plan or law; or,

2. While any of the insured automobiles is being used for other purposes than specified in the Schedule of Statements of this policy; or,

3. While being operated by any person under the age limit fixed by law, or under the age of sixteen years in any event; or,

4. While rented to others or used to carry pas-

sengers for a consideration, actual or implied; or,

5. When used in any race or speed contest; or,

6. When used for towing or propelling a trailer unless such privilege is endorsed hereon, or such trailer is also insured by the Company (incidental assistance to a stranded automobile on the road is permitted); or,

7. When used to transport high explosives (carry- of loaded cartridges for gun or pistol, permitted); or,

8. For any liability assumed by the Assured for others under any oral or written contract or agreement.

ACCIDENTS, CLAIMS, SUITS, SETTLEMENTS

PARAGRAPH B.

1. Immediate written notice of any accident with the fullest information obtainable at the time must be forwarded to the Home Office of the Company or to its authorized representative. If a claim is made on account of such accident, the Assured shall give like notice thereof, and if suit is brought to enforce such a claim, the Assured shall immediately forward to the Company every summons or other process as soon as same shall have been served on him.

2. No action by the Assured shall lie against the Company until the amount of the damages for which the Assured is liable by reason of any casualty covered by this policy is determined, either by a final judgment against the Assured or by agreement between the Assured and the plaintiff with the written consent of the Company; nor unless such action is brought within two years after the rendition of such final judgment.

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

3. The Company reserves the right to settle any claim or suit.

4. The Assured shall not voluntarily assume any liability; nor interfere in any negotiations or legal proceedings conducted by the Company on account of any claim; nor, except at Assured's own cost, settle any claim; nor, without the written consent of the Company previously given, incur any expense, except as provided herein for immediate surgical relief at time of accident.

5. Whenever requested by the Company, the Assured shall aid in securing information, evidence and the attendance of witnesses in effecting settlements and in defending suits hereinbefore referred to.

The Assured shall at all times render to the Company all reasonable co-operation and assistance.

6. In case of payment of loss and/or expense under this policy the Company shall be subrogated to all rights of the Assured against any person, copartnership, corporation or estate as respects the amount of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company such rights.

CHANGES, WAIVERS, ENDORSEMENTS.

PARAGRAPH C.

1. NO CHANGE OR WAIVER of any of the terms, conditions or statements of this policy shall be valid unless set forth in an endorsement attached hereto and signed by an executive officer of the Company, or the Superintendent of the Automobile Department.

2. NOTICE GIVEN TO OR THE KNOWLEDGE of any agent or any other person, whether received or acquired before or after the date of the policy, shall not be held to waive any of its terms, conditions or statements; nor to preclude the Company from asserting any defense under said terms, conditions or statements unless set forth in a duly executed endorsement attached hereto.

CANCELATIONS

PARAGRAPH D.

1. This policy may be canceled at any time by either of the parties hereto upon written notice to the other party stating upon what date thereafter (*not less than five days thereafter when canceled by the Company*) cancelation shall be effective, upon which date, at twelve o'clock noon, the policy shall terminate.

2. Registered mailing of such notice by the Company or the Assured to the stated address of the other party or the return of the policy by the Assured shall be sufficient notice.

3. If canceled by the Company, the earned premium shall be computed upon a pro rata basis; if canceled by the Assured, it shall be computed upon the short rate table printed hereon and the Company shall repay to the Assured in either event the unearned portion of the premium so determined.

ASSIGNMENT

PARAGRAPH E.

1. No assignment of interest under this policy shall bind the Company unless the consent of the Company shall be endorsed hereon.

GENERAL

PARAGRAPH F.

1. If the named Assured carries a policy of another insurer against loss covered by this policy, the named Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of the named Assured's valid and collectible insurance. If any other person, firm or corporation included in this insurance is covered by valid and collectible insurance against a claim also covered by this policy, such other person, firm or corporation shall not be entitled to indemnity or protection under this policy.

2. The Company shall be permitted, at all reasonable times during the policy period, to inspect any of the automobiles covered hereunder; and if the premium herefor is subject to adjustment, the accounts and records of the Assured in relation thereto shall also be available for inspection and audit by any authorized representative of the Company during the life of this insurance or within one year after the expiration thereof.

For Endorsements

FORM Nos. OF ENDORSEMENTS ATTACHED AT DATE OF EXECUTION

The following statements numbered one to eleven, inclusive, are hereby made a part of this policy,

and are warranted by the assured to be true by the acceptance of this policy.

SCHEDULE OF STATEMENTS

Statement 1. Name of Assured Milton J. Garfinkel

Statement 2. Address of Assured 4 So. Surrey Place, Ventnor City, New Jersey
(Give street, town and State where Assured resides or head office is located.)

Statement 3. The Assured is Individual
(State whether individual, co-partnership, corporation, receiver, assignee or trustee.)

Statement 4. Assured's occupation or business is Real Estate Broker
(Particular information desired, general terms not satisfactory.)

Statement 5. The term of this policy begins at noon on the 8th day of February, 1928, and ends at noon on the 8th day of February, 1929, Standard time.

CHANGE IN LIMITS

Statement 6. In lieu of the limits of liability printed in the body of this policy, the following stated limits shall prevail:
FOR PUBLIC LIABILITY:—First Limit TWENTY thousand dollars ($20,000:—).
Second Limit FORTY thousand dollars ($40,000:—).
FOR PROPERTY DAMAGE:—

Highest Limit ONE thousand dollars ($1,000:—).
(If no change in limits is required, indicate in each coverage by word "No Exceptions.")

Statement 7. The automobiles covered by this policy and the premium charges therefor are:—

Trade Name and Number of Cylinders		1 Ford
Type of Body Load Capacity if Truck		Coupe-Mdl. T
Serial Number		13724154
Year Model		1926
List Price		
Date of Purchase (If Collision is Carried)		2/1926
Premiums		
Public Liability		$27.93
Property Damage		11.00
Collision		Nil
TOTAL PREMIUMS:—Public Liability		$27.93
Property Damage		$11.00
Collision		$ Nil

2 3 4

Statement 8. The Automobiles herein described will be principally used and garaged in the City of Atlantic City, New Jersey and Ventnor City, N. J.

Statement 9. The Automobiles herein described will be used for the following purposes Pleasure or business—Any driver

Statement 10. The interest of the named Assured in the Automobiles herein described is that of unconditional and sole ownership, except as follows: no exceptions

Statement 11. No Automobile insurance of any kind has been declined or canceled for or on behalf of the Assured by any company during the past three years, except as follows: no exceptions

IN WITNESS WHEREOF, The UNITED STATES FIDELITY AND GUARANTY COMPANY has caused this Policy to be signed by its President and its Secretary, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

R. Howard Bland
President.

Countersigned By
Edward A. Wilson Co.
C. V. Harrold
Authorized
Representative.

W. W. Symington
Secretary.

(On Back):

APR 19 1927
CREDIT MEMORANDUM
UNITED STATES FIDELITY AND

GUARANTY COMPANY
127-129 South Fifth Street
Phila., Pa., 4-11-28
Messrs. E. A. Wilson Co.,
Guarantee Tr. Bldg.,
Atlantic City, N. J.

———

(Stamped Across Face):

CANCELED FLAT ————
Name of Assured Milton J. Garfinkel,
No. of Policy AL—872404
Date of Policy 2-8-28
Date Canceled 2-8-28

———

(Stamped Across Face):

CANCELED FLAT ————
How Canceled Flat
Why Canceled Not wanted,
Amount of Premium $38.93
Earned Premium

———

(Stamped Across Face):

CANCELED FLAT ————
PL-27.93
Return Premium PD-11.00
AT.

IMPORTANT

No credit will be allowed unless full premium has been paid to Company.

(Stamped Across Face):

REPORTED ON SHEET No. 13
No. AL 872404
AUTOMOBILE
POLICY
Liability & Property Damage Form
Expires February 8th 1929
Issued to
MILTON J. GARFINKEL
Ventnor City, N. J.
UNITED STATES FIDELITY
and
GUARANTY COMPANY
Cash Capital $6,000,000.
(Seal)
(Written Around Seal)
We Will Bond and Insure You
FIDELITY
BURGLARY SURETY CASUALTY
BALTIMORE, MD.
CANCELED FLAT
RET PREM. 4/11/28
Not Wanted
PLEASE READ YOUR POLICY

EXHIBIT D6.
11/13/30 L.

Phones Marine 5646-5647

Julius Taylor — Joseph L. Soloff

Notary Public

INSURANCE
TAYLOR & SOLOFF
REALTORS
1315 Atlantic Avenue
Atlantic City, N. J.

April 10th
1928

Mr. Harry Garfinkel,
4 So. Surrey Avenue,
Ventnor City, N. J.

Dear Sir:

Enclosed please find policy #AP-15803 of the Hudson Casualty Insurance Company, covering a 1926 Chevrolet Sedan for public liability and property damage.

Thanking you for your valued patronage, we beg to remain

Very truly yours,
TAYLOR & SOLOFF
By John Soloff
Manager of Ins. Dept.

JS:AA
Enc.

A Business Whose Foundation is Built Upon
Confidence and Honesty

EXHIBIT D7.
11/21/30 L.

Hudson Casualty Insurance
Company
As Reliable as the Hudson
HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City, New Jersey

August 10th, 1928.

Mr. Harry Garfinkel
109 S. California Ave.
Atlantic City, N. J.

Dear Sir:—

We are in receipt of a letter from you dated August 7th, 1928 in which you returned check voucher in the sum of $39.56 being the premium due you on an automobile policy No. AP 15803 which was cancelled from inception. We disagree with contents of your letter, and herewith notify you that we are holding subject to your order the sum of $39.56, the amount already transmitted to you and returned to us.

Yours very truly,
Frank H Higgins
Secretary

FHH:MW

EXHIBIT D8.
11/21/30 L.

THIS AGREEMENT made this day of December, Nineteen Hundred and Twenty-Eight, by and between HARRY GARFINKEL, of Atlantic City, New Jersey, party of the first part, and HUDSON CASUALTY INSURANCE COMPANY, a New Jersey corporation with its principal place of business in Jersey City, New Jersey, party of the second part,

WITNESSETH:

1. WHEREAS, a certain automobile owned by said party of the first part and driven by one Milton J. Garfinkel was involved in an accident on May 14th, 1928 with a certain automobile owned and driven by one Timothy Cordery, and,

2. WHEREAS, as a result of said accident said party of the first part claims the benefits accruing to him under the terms of policy No. AP 15803 issued to him by said party of the second part, and,

3. WHEREAS, said party of the second part denies all liability under the terms of said policy, and,

4. WHEREAS, as a result of said accident an action for damages has been instituted in the Supreme Court of New Jersey against said Harry Gar-

finkel, Milton J. Garfinkel and Timothy Cordery, jointly and individually, by Lida A. Endicott, executrix of Thomas D. Endicott, deceased, and,

5. WHEREAS, said Harry Garfinkel and Milton J. Garfinkel are desirous of filing a counter-claim against said Timothy Cordery for the recovery of damages resulting to each of them because of the negligence of the said Timothy Cordery in causing the accident aforesaid, and,

6. WHEREAS, said party of the second part regardless of its denial of liability as set out in paragraph 3 hereof deems it advisable for its better protection to defend the action mentioned in paragraph 4 hereof, therefore:

In consideration of the facts set out in paragraph 6 hereof it is mutually agreed and understood by and between the parties hereto that the said party of the second part shall defend the above mentioned action on behalf of the said Harry Garfinkel and Milton J. Garfinkel and shall also file a counterclaim for each of them in said action against the said Timothy Cordery, all without charge or cost to said Harry Garfinkel and Milton J. Garfinkel, and it is further agreed and understood that nothing in these premises shall be construed either as an admission of liability to pay damages on the part of the party of the second part under its policy as aforesaid, or as a waiver on the part of the party of the first part to any of his rights under the terms of said policy, in the event of a recovery by the plaintiff in the above-entitled action.

This agreement shall take effect only when it shall have been signed and sealed by both parties hereto.

IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal and the party of the second part has caused these presents to be signed by its President, attested by its Secretary and its corporate seal hereunto affixed, all the day and year first above written.

Harry Garfinkel (Seal)

HUDSON CASUALTY INSURANCE COMPANY,
By Frank J. Higgins
President.
Attest Frank H. Higgins
Secretary.

Witness
Anna Gruber

EXHIBIT D9.

Julius Taylor Joseph L. Soloff

INSURANCE

TAYLOR & SOLOFF

REALTORS

Suite 303 Schwehm Building
New York and Atlantic Aves.
Atlantic City, N. J.

November
20th,
1928.

Hudson Casualty Insurance Co.,
Journal Square,
Jersey City, N. J.

Attention: Legal Department

Gentlemen:

Mr. Milton J. Garfinkle called at our office today and advised me that he was served with the enclosed Summons and Complaint, yesterday. Mr. Garfinkle is the person who drove the car of Harry Garfinkle, which was involved in an accident on May 14th, 1928. Mr. Harry Garfinkle carried insurance with your company covering public liability and property damage to him resulting from use of the car involved in the above mentioned accident. The policy number is AP 15803.

Mr. Milton J. Garfinkle informs me that Harry Garfinkle is out of town for a few days, and he, therefore, thought it advisable to turn the Summons and Complaint over to our office so that we might forward it to your Company, according to the terms

of the policy. I am accordingly taking this means to do so.

Please advise me whether or not you intend to defend this action, as I have promised Mr. Milton J. Garfinkle to advise him in either event so that he may know whether or not to hire counsel.

Very truly yours,

J. L. Soloff

JLS:AMM TAYLOR & SOLOFF

STIPULATION.

IN CHANCERY OF NEW JERSEY.

Between

HUDSON CASUALTY INSURANCE COMPANY, a corporation of the State of New Jersey, *Complainant,*

and

HARRY GARFINKEL, *et als.,* *Defendants.*

On Bill, Etc.
Stipulation.
77-48

It is stipulated and agreed, by and between counsel of complainant and defendant, as follows:

That Exhibit D1, referred to in Harry Garfinkel's testimony, taken before trial, was introduced at the trial by complainant and is marked Exhibit C6.

That Exhibit D2, referred to in Harry Garfinkel's testimony taken before trial, was introduced at the trial by complainant and is marked Exhibit C1.

That Exhibit D3, referred to in Harry Garfinkel's testimony taken before trial, was introduced at the trial by defendant and is marked D6.

That Exhibit D4, referred to in Harry Garfinkel's testimony taken before trial, was introduced at the trial by defendant and is marked D2.

That Exhibit D5, referred to in Harry Garfinkel's testimony taken before trial, was introduced at the trial by complainant and is marked C5.

That Exhibit D6, referred to in Harry Garfinkel's testimony taken before trial, was introduced at the trial by complainant and is marked

THOMPSON & HANSTEIN,
Solr. of Complainant.
BURTON A. GASKILL,
Solr. of Defendants.

CONCLUSIONS.

(Filed Jul. 14, 1931.)

IN CHANCERY OF NEW JERSEY.

Between
HUDSON CASUALTY INSURANCE COMPANY, a corporation, etc.,
Complainant,
and
HARRY GARFINKEL, *et als.,*
Defendants.

On Bill, &c.
Conclusions.

THESE CONCLUSIONS ARE NOT TO BE PUBLISHED IN THE OFFICIAL OR UNOFFICIAL REPORTS.

MESSRS. THOMPSON & HANSTEIN for complainant.
MR. MAURICE J. HALPERN for defendants, Milton J. Garfinkel and Harry Garfinkel.
MR. BURTON A. GASKILL for defendant, Lida A. Endicott.

INGERSOLL, V. C.

The complainant is an insurance company and is engaged in the business of insuring against loss or damages for personal or property damage which may be occasioned by the operation of automobiles.

The bill alleges that on or about the 6th day of April, 1928, an application was made to complainant through its representative in Atlantic City, ostensibly by one Harry Garfinkel, for insurance upon a Chevrolet car, and thereupon complainant issued its policy of insurance insuring the said Harry Garfinkel with respect to said Chevrolet car, against loss, as set forth in the bill of complaint, subject to certain terms and conditions, a copy of which said policy of insurance is thereto annexed and made a part of the bill of complaint, and marked Exhibit 1; That at the time of the making of the said application it was represented to complainant, as appears by the schedule annexed to said policy, that said automobile would be used for the private and business purposes of the assured in the vicinity of Ventnor City, New Jersey, and that the interest of the assured was that of unconditional and sole ownership and that no company or association had cancelled or refused to issue or renew automobile insurance to the assured during the then past three years, except as therein stated. Complainant issued its said policy of insurance as aforesaid upon the representation that the said Harry Garfinkel was the sole and unconditional owner of said car and that it would be used as hereinbefore set forth, and believing that the said Harry Garfinkel was the true and rightful owner of said car and that the said car would be

used in his business, which was represented to be that of a jewelry salesman.

That on May 14, 1928, said automobile was in a collision with a car driven by one Timothy Cordery and as a result of said collision one Thomas D. Endicott was killed. Complainant, upon being notified of the accident, set in progress an investigation and then discovered that while said car was purchased in the name of said Harry Garfinkel, it was, in fact, purchased by and for Milton J. Garfinkel, and that it was to be used in and about the business of Milton J. Garfinkel, and that it was used by the said Milton J. Garfinkel principally in the vicinity of Philadelphia, Pennsylvania, and that such was the intention of the said Milton J. Garfinkel and Harry Garfinkel at the time of the purchase of said car.

Complainant charges that the application for the insurance was made to complainant in the name of said Harry Garfinkel because said Milton J. Garfinkel and Harry Garfinkel knew that complainant would not issue its policy to the said Milton J. Garfinkel; that on the discovery of the fact aforesaid and the fraud perpetrated upon it, complainant notified the said Harry Garfinkel of the cancellation of said insurance on or about the 3rd day of August, 1928, as of the date of its issue, namely, April 6, 1928.

It was also claimed that the said Harry Garfinkel was not the sole and unconditional owner of said car but that he held only a conditional bill of sale of said car; that a suit was brought in the New Jersey Supreme Court against Harry Garfinkel, Milton J. Garfinkel and Timothy Cordery, to recover damages for the death of said Endicott, and on the 17th

day of June, 1929, a verdict in favor of the plaintiff, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against Harry Garfinkel and Milton J. Garfinkel was entered in the sum of $20,000, and in favor of the defendant, Timothy Cordery against the defendants for $200.

Thereafter a rule was taken and argued before the Supreme Court which resulted in a reduction in favor of the complainant to $15,000 and judgment was thereafter entered for $15,000, and in favor of Timothy Cordery for $200.

Complainant shows said judgments have not been paid; that under the terms of the policy complainant may be charged to be liable for the payment thereof, and prays that it may be adjudged that the policy of insurance was obtained from the complainant by fraud; that it is under no liability under said policy.

Without further restating the testimony, I am convinced that the complainant is entitled to the relief sought. Should it become necessary, I will amplify this memoranda.

FINAL DECREE.

(Filed Aug. 18, 1931.)

IN CHANCERY OF NEW JERSEY.

Between
HUDSON CASUALTY INSURANCE COMPANY,
Complainant,
and
HARRY GARFINKEL, *et als.*,
Defendants.

On Bill, etc.
Final Decree.

This cause coming on to be heard before Honorable Robert H. Ingersoll, Vice-Chancellor of the Court of Chancery of the State of New Jersey on the 13th day of November, A. D. 1930, and the 21st day of November, A. D. 1930, at the Chancery Chambers in the City of Atlantic City, County of Atlantic and State of New Jersey, in the presence of Walter Hanstein, Esquire, of Thompson & Hanstein, of counsel with the complainant, and Burton A. Gaskill, of counsel with the defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, and Maurice J. Halpern, solicitor for the defendants, Milton J. Garfinkel and Harry Garfinkel; and the

complainant's bill of complaint having been taken as confessed against the defendants, Isaac M. Garfinkel and Timothy Cordery, on the 10th day of July, A. D. 1930; and the pleadings having been read and the testimony having been heard and considered, and the arguments of the respective counsel having been heard and considered, and the Court having duly considered the said pleadings, proof and arguments, and it appearing to the Court that the policy of insurance set forth in complainant's bill of complaint, was obtained from the complainant through the fraud of the defendants;

And it further appearing that the complainant is entitled to the relief sought and prayed for by it in its bill of complaint, and that the said defendants, Lida A. Endicott, executrix of the estate of Thomas D. Endicott, deceased, Harry Garfinkel and Milton J. Garfinkel, are not entitled to the relief prayed for by their respective counter-claims;

It is, on this 18th day of August, A. D. 1931, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the policy of insurance referred to in the bill of complaint, be and the same hereby is cancelled as of the date of issue, and held to be of no binding force or effect upon the complainant; and

It is further ordered, adjudged and decreed that the defendants, to wit: Harry Garfinkel, Milton J. Garfinkel, Isaac M. Garfinkel, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, Timothy Cordery, their agents, attorneys, solicitors and representatives be and hereby are enjoined and restrained from instituting any suits at law or otherwise, or from prosecuting any pending or future

suits upon or to recover under said policy of insurance.

It is further ordered, adjudged and decreed that the counter-claims of the defendants, Harry Garfinkel, Milton J. Garfinkel and Lida A. Endicott, executrix of Thomas D. Endicott, deceased, respectively, praying for the reformation of the policy of insurance aforesaid and praying for injunctions and other relief against the complainant, be and the same are hereby dismissed.

It is further ordered, adjudged and decreed that the defendants pay to the complainant the costs of this suit to be taxed, including a counsel fee of $250.00 and that execution issue therefor, according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised:
R. H. INGERSOLL,
V. C.

NOTICE OF APPEAL.

(Filed August 26, 1931)

IN CHANCERY OF NEW JERSEY.

Between HUDSON CASUALTY INSURANCE COMPANY, *Complainant,* and HARRY GARFINKEL, *et als.*, *Defendants.*	On Bill, etc. Notice of Appeal. 77-48.

To Thompson & Hanstein, Solicitors of Complainant:

The defendants, Harry Garfinkel, Milton Garfinkel, and Lida A. Endicott, executrix of Thomas D. Endicott, deceased, hereby appeal from the final decree made in the above-entitled cause on the 18th day of August, nineteen hundred and thirty-one, made by the Chancellor on the advice of Vice-Chancellor, Robert H. Ingersoll, and from the whole and every

part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated: August 24, 1931.

MAURICE J. HALPERN,
Solicitor for Defendants, Harry Garfinkel and Milton Garfinkel.

BURTON A. GASKILL,
Of Counsel with Defendants, Harry Garfinkel and Milton Garfinkel.

BURTON A. GASKILL,
Solicitor for Defendant, Lida A. Endicott, Executrix of Thomas D. Endicott, deceased.

BURTON A. GASKILL,
Of Counsel with Defendant, Lida A. Endicott, Executrix of Thomas D. Endicott, deceased.

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

BURTON A. GASKILL,
Of Counsel with Defendants, Harry Garfinkel and Milton Garfinkel.

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

BURTON A. GASKILL,
Of Counsel with Defendant, Lida A. Endicott, Executrix of Thomas D. Endicott, deceased.

[ENDORSED]

Service of a copy of within Notice of Appeal acknowledged this 24th day of August, 1931.

Thompson and Hanstein,
Solicitors for Complainant.

PETITION OF APPEAL.

(Filed August 27, 1931)

10

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

HUDSON CASUALTY INSURANCE COMPANY, *Complainant-Respondent,*

and

HARRY GARFINKEL, *et als., Defendants-Appellants.*

On Bill, etc. Petition of Appeal. 77-48.

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To the Honorable, the Court of Errors and Appeals in the last resort in all causes:

The petition of Harry Garfinkel, Milton Garfinkel and Lida A. Endicott, executrix of Thomas D. Endi-

cott, deceased, the appellants in the above-entitled cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of the Hon. Robert H. Ingersoll, Vice-Chancellor, bearing date the 17th day of August, 1931, in a cause wherein the said appellants were defendants and Hudson Casualty Insurance Company, was complainant, in this respect, to wit, that in the said decree there is a finding that the policy of insurance set forth in complainant's bill of complaint, was obtained from the complainant through the fraud of the defendants; and in this respect, to wit, that in the said decree there is a finding that the defendants are not entitled to the relief prayed for by their respective counter-claims; and in this respect, to wit, that the said decree orders, adjudges and decrees, that the policy of insurance referred to in the bill of complaint be and the same hereby is cancelled as of the date of issue, and held to be of no binding force or effect upon the complainant, and in this respect, to wit, that the said decree orders, adjudges and decrees that the defendants, Harry Garfinkel, Milton Garfinkel and Lida A. Endicott, executrix of Thomas D. Endicott, deceased, their agents, attorneys, solicitors and representatives, be and hereby are enjoined and restrained from instituting any suits at law or otherwise upon or to recover under said policy of insurance, and in this respect, to wit, that the said decree orders, adjudges and decrees that the counter-claims of the defendants, Harry Garfinkel, Milton Garfinkel

and Lida A. Endicott, executrix of Thomas D. Endicott, deceased, respectively, praying for the reformation of the policy of insurance aforesaid and praying for injunctions and other relief against the complainant, be and the same are hereby dismissed; and in this respect, to wit, that the said decree orders, adjudges and decrees that the defendants-appellants herein, pay to complainant the costs of suit to be taxed, including a counsel fee of $250.00, and that execution issue, therefore, according to the practice in said Court.

Your petitioners, therefore, humbly appeal from the decree of the Chancellor, which decrees as aforesaid, for the reasons that the same is erroneous for that the decree granted the relief prayed for in the bill of complaint and enjoined defendants from proceeding by action at law, or otherwise, against complainant on its policy of insurance when it should have dismissed said bill of complaint, and for the further reason that the decree dismisses the defendants' counter-claims when it should have granted the relief therein prayed for, and for that it appeared from the evidence that complainant filed an answer and defended a counter-claim for damages in excess of its policy limits brought by Timothy Cordery against Harry Garfinkel without agreement so to do and without the knowledge or consent of Harry Garfinkel, and complainant is thereby estopped, and for that it appeared from the evidence set up in a pleading in an action at law filed by complainant that Harry Garfinkel was the owner of the automobile described in the policy, and complainant is thereby estopped from asserting other-

wise, and for that it appeared from the evidence that complainant had defended a suit at law according to the terms of its policy, brought by Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against Milton Garfinkel, an assured under the policy, without any notice to Milton Garfinkel of any alleged invalidity of its policy of insurance or of the alleged non-liability of complainant thereunder, and also pleaded said Milton Garfinkel without notice to him or authority from him as a defendant to a counter-suit brought by Timothy Cordery, when he was not made a party to said counter-suit, and suffered a judgment to be entered against him for $200.00, by which acts complainant is estopped.

Your petitioners, therefore, pray that the said decree of the said Chancellor may be reversed, set aside, and for nothing holden, and that the petitioners' prayer for relief in the counter-claims filed by them, be granted, and that the sum of money due to defendant, Lida A. Endicott, executrix of Thomas D. Endicott, deceased, from the complainant, be fixed and determined, and that the record be remitted to the Court of Chancery, with instructions to enter a decree dismissing complainant's bill of complaint with costs and counsel fees to defendants, and with further instructions to enter a decree in favor of defendants on their counter-claims, and that judgment be entered for Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against complainant in the sum of her recovery against Harry Garfinkel and Milton Garfinkel in the New Jersey Supreme Court, all of which is in evidence in this suit, and that your petitioners may have such

relief in the premises as to this Honorable Court shall seem meet.

MAURICE J. HALPERN,
Solicitor for Defendants-Appellants, Harry Garfinkel and Milton Garfinkel.
BURTON A. GASKILL,
Of Counsel with Defendants-Appellants, Harry Garfinkel and Milton Garfinkel.
BURTON A. GASKILL,
Solicitor for Defendant-Appellant, Lida A. Endicott, Executrix of Thomas D. Endicott, Deceased.
BURTON A. GASKILL,
Of Counsel with Defendant-Appellant, Lida A. Endicott, Executrix of Thomas D. Endicott, Deceased.

[ENDORSED]

Service of a copy of within Petition of Appeal acknowledged this 26th day of August, 1931.

Thompson and Hanstein,
Solicitors for Complainant-Respondent.

AFFIDAVIT USED TO OBTAIN A TEMPORARY RESTRAINING ORDER.

State of New Jersey, }
County of Essex, } ss.

JOHN SOLOFF, of full age, being duly sworn according to law upon his oath, deposes and says:

At the time of the issuance of the policy of insurance to Harry Garfinkel, I was manager of the Casualty Department of Taylor & Soloff, who were insurance agents located in Atlantic City, New Jersey. On or about the 6th day of April, 1928, Milton J. Garfinkel called me up and stated that he was acting for Harry Garfinkel and that Harry Garfinkel desired insurance upon a Chevrolet car, model 1926. I asked the usual questions and was informed that the car was to be driven for private and business purposes in the vicinity of Ventnor City and that the interest of the assured was that of unconditional and sole ownership. I put the application through in due course. I had no knowledge whatever but that Harry Garfinkel was the true and lawful owner of the car and that the car was to be used by the said Harry Garfinkel for his own private purposes or for his own business purposes. Had I known that Milton J. Garfinkel was the owner of the car, I would not have put through the application because I knew that a policy of insurance issued to Milton

J. Garfinkel in 1928 had been cancelled by the company upon investigation because it was found that the said Milton J. Garfinkel was not a desirable risk.

I had only been in Atlantic City about six months prior to the issuance of the policy and I had no knowledge of the business of Harry Garfinkel or of Milton J. Garfinkel, and knew nothing about them myself. I did know that the records showed that the company had cancelled a policy issued to Milton J. Garfinkel, as above set forth, but I had no personal knowledge of the facts.

I live at 240 South Connecticut Avenue, Atlantic City, New Jersey.

JOHN SOLOFF.

Sworn and subscribed to before me this 20 day of December, 1929.

ELIZABETH A. COONS,
Notary Public of New Jersey.

BURTON A. GASKILL
Counsellor at Law
Atlantic City, New Jersey.

Guarantee Trust Building
January 29, 1932.

Hon. Robert H. Ingersoll,
Vice-Chancellor,
Atlantic City, N. J.

Dear Vice-Chancellor:

I received respondents' brief in the case of Hudson Casualty Company vs. Harry Garfinkel, et al., and I was amazed to find that respondents throughout the brief argue that counsel for the appellants did not apply to your Honor to amplify your conclusions. If you will remember, I applied to you immediately after the conclusions were filed, telling you that I expected to take an appeal, and at that time you told me you did not intend to amplify your conclusions.

May I not ask you to confirm this in writing, so I may have it printed and made a part of the state of the case?

Very respectfully yours,
BURTON A. GASKILL

BAG:CB

COURT OF CHANCERY OF NEW JERSEY
ROBERT H. INGERSOLL
Vice Chancellor
Atlantic City, N. J.

January 29, 1932.

Burton A. Gaskill, Esq.,
Guarantee Trust Building,
Atlantic City, New Jersey.

Dear Sir:

In reply to your letter of January 29th in regard to my memorandum in Hudson Casualty Insurance Company, Complainant, and Harry Garfinkel, Defendant.

I note at the end of my conclusions I say—"Should it become necessary, I will amplify this memorandum."

My recollection is that you informed me that you were about to take an appeal and asked if I desired to amplify those conclusions. I did not deem it necessary to add to the conclusions which had then been filed and, therefore, did not do so.

I am giving you this information in reply to your letter, but I do not understand how it can be of avail either to you or to your opponent, as the record will show that no additional conclusions were filed.

Very truly yours,
R. H. INGERSOLL
V. C.

RHI/w

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

HUDSON CASUALTY INSURANCE COMPANY,

Complainant-Respondent,

and

HARRY GARFINKEL, MILTON J. GARFINKEL, ISAAC GARFINKEL and LIDA A. ENDICOTT, executrix of THOMAS D. ENDICOTT, deceased, and TIMOTHY CORDERY,

Defendants-Appellants.

ON APPEAL FROM CHANCERY DECREE FOR COMPLAINANT.

APPEAL OF DEFENDANTS HARRY GARFINKEL, MILTON J. GARFINKEL AND LIDA A. ENDICOTT, EXECUTRIX, ETC.

Sat below: INGERSOLL, V. C.

BRIEF FOR APPELLANTS.

(Italics, etc., ours, except where otherwise noted.)

STATEMENT OF THE CASE.

This is an appeal by defendants Harry Garfinkel, Milton J. Garfinkel and Lida A. Endicott, executrix, from a decree of the Chancellor advised by Vice-Chancellor Ingersoll (pp. 511, 512, 513), upon conclusions (pp. 507 to 510, inc.), after a hearing upon bill (pp. 1 to 21, inc.), and answer and counter-claim (pp. 22 to 36, inc.), of Lida A. Endicott, executrix, and answer to counter-claim (pp. 76 to 80, inc.); also answer and counter-claim (pp. 37 to 56, inc.), of Harry Garfinkel and answer to counter-claim (pp. 81 to 85, inc.); also answer and counter-claim (pp. 57 to 75, inc.), of Milton J. Garfinkel and answer to counter-claim (pp. 86 to 90, inc.).

The notice of appeal is printed (pp. 514 to 516, inc.), and the petition of appeal (pp. 517 to 521, inc.).

This case from the record has this history: On May 14, 1928, Thomas D. Endicott, an invitee (p. 445), was riding in the automobile of Timothy Cordery, on the Absecon Boulevard in Atlantic City, when the Cordery automobile was struck by an automobile owned by Harry Garfinkel (p. 456), and negligently operated by Milton J. Garfinkel (p. 456), his nephew. As a result of the collision Thomas D. Endicott was killed (445). Suit was instituted September 28, 1928, by Lida A. Endicott as executrix of Thomas D. Endicott, deceased, against Harry Garfinkel, Milton J. Garfinkel and Timothy Cordery, jointly and severally. Answers were duly filed for each defendant.

Counter-claims (pp. 459 to 461, inc.), against Cordery were filed for defendants Garfinkels, and Cordery filed a counter-claim against Harry Garfinkel (463), only. This counter-claim was answered by both Harry and Milton J. Garfinkel and a verdict for $200 was entered against Milton J. Garfinkel in favor of Cordery even though he was not made a defendant to the counter-claim. The defense of the Garfinkels was conducted by the Hudson Casualty Insurance Company, the complainant herein (p. 164), who had issued a liability policy to Harry Garfinkel (Ex. C1, pp. 402 to 414, inc.), on April 6, 1928.

The issue was tried at the Atlantic Circuit on June 17 to 19, 1929 (p. 469), and resulted in a general verdict in favor of Lida A. Endicott, executrix of Thomas D. Endicott, deceased, against Harry Garfinkel and Milton J. Garfinkel for $20,000.00, and a general verdict against the same defendants in favor of Timothy Cordery for $200. It will be noticed that in this counter-claim Milton J. Garfinkel was not a party defendant except as he was made so by an answer filed for him. Judgments were duly entered on the verdicts (pp. 470-471), on June 21, 1929, in the New Jersey Supreme Court. A rule to show cause on behalf of Harry Garfinkel and Milton J. Garfinkel in the Endicott case was obtained and argued, with the result that the rule to show cause was discharged, the plaintiff, Lida A. Endicott, executrix, agreeing to accept a reduction of the verdict from $20,000.00 to $15,000.00 (pp. 475-476). See opinion of New Jersey Supreme Court—*Endicott &c. v. Garfinkel,* 147 Atl. Rep., page 382, etc.

No rule or appeal was taken on the judgment of Cordery against the defendants (p. 166).

On April 6, 1928, Harry Garfinkel purchased and took possession of a Chevrolet automobile from Bartram Kershaw, Inc. (Ex. C6, p. 429); on the same day he applied, by telephone through Milton J. Garfinkel, to Taylor and Soloff, general agents of complainant, for public liability and property damage insurance on the automobile. The agent asked certain questions, respecting the insurance of the automobile, etc. (pp. 240 to 243, inc.), also (pp. 186 to 188, inc.), which answers were reduced to writing on a form provided by complainant and produced by them (p. 116), by the agent (Ex. D1, pp. 441-442), and forwarded to the home office of the complainant in Jersey City, merely for the purpose of having the blank spaces in the policy filled in, in accordance with an arrangement between complainant (p. 119), and Taylor and Soloff, its general agent. At the time of making the application, the agent was informed, not in answers to a question, however, that the automobile was purchased under a conditional bill of sale (p. 242). At the conclusion of the negotiations respecting this insurance, complainant's agent advised Milton J. Garfinkel (p. 188), that the automobile was insured; Milton, in turn, so advised Harry Garfinkel. This fact is confirmed by automobile order produced by complainant (Ex. D1, p. 441), in which it appears, referring to the car insurance, "Agent Taylor & Soloff *Bound* By Taylor and Soloff *Date April 6, 1928.*"

Complainant undertook to do the typewriting on the policy and were confronted with the fact that they had no information to complete certain statements, particularly 9 and 10 in Exhibit C1 at page

414. The testimony concerning this is quite evasive (pp. 111 to 123, inc.), but we quote excerpts:

At p. 111:

"Q. Do you instruct your agents to inquire as to the ownership of the automobile?

A. The agents are presumed——

Q. Just answer yes or no.

A. No, sir.

Q. You don't?

A. No, sir."

And at pp. 112-113:

"Q. And if you don't get the information then, what do you do?

A. The assumption is that——

Q. Not the assumption, what do you do?

A. Can I explain the practice?

Q. Just a minute. You answer my question. (Question repeated.)

A. We follow the usual practice——

Q. What do you do?

A. We follow the usual practice——

The Court: Let that be stricken. What do you do?

A. We follow the usual——

The Court: Let that be stricken.

A. We issue the policy and answer the warranties with 'no exceptions.'

Q. In other words, when your agent, who you expect to get information as to the ownership of the automobile, sends you an order and doesn't say or tell you about the ownership of the automobile you voluntarily assume to answer the question, don't you?

A. No, sir; it isn't voluntary in that sense, no.

Q. You answer it without any information from your agent, don't you?

A. Because the practice——

Q. Answer that yes or no, if you can?

A. Yes.

Q. You do?

A. Yes."

And at pp. 114-115:

"Q. When you received the information from this agent in respect to the writing of this policy did he tell you whether or not Harry Garfinkel was the sole and unconditional owner of that car?

A. No, sir; he did not.

Q. And then, without more, your company answered that question, didn't it?

A. We typed the answer in, yes, if that is what you mean."

And at p. 122:

"Q. Mr. Kreps, I want to ask you this question: When that information came to you to write this policy, did you know at that time whether or not Harry Garfinkel had made representations as to his ownership of the automobile, did your company know or did you know?

A. Except from practice.

Q. Did you know?

A. Definitely, no.

Q. Did you know when that application was sent in to you to merely write this policy whether or not Harry Garfinkel had had insur-

ance cancelled on an automobile within three years?

A. No, sir.

Q. And your agent didn't furnish you that information?

A. He did not."

Notwithstanding complainant's lack of information concerning the true situation as to Harry Garfinkel's ownership in the automobile or whether or not similar insurance had been cancelled within three years, they filled in the blank space in statements 9 and 10, with the answer "no exception" and returned the policy to the agents to be signed and issued, which was done and delivered to Harry Garfinkel, by mail, on April 10, 1928, with a letter from the agents containing a declaration as follows: "Enclosed please find policy No. AP15803 of the Hudson Casualty Insurance Company, covering a 1926 Chevrolet Sedan for public liability and property damage" (Ex. D6, p. 499).

Defendant, Harry Garfinkel, did not read the policy. We quote from his testimony at pages 348-349:

"Q. What did you do with the policy?

A. Why, I laid it aside with other valuables, papers.

Q. Now, you say that you did not read your policy; will you give us the reason why you did not read it?

Mr. Hanstein: I object to the statement of the reason why he didn't read it, on the ground it is incompetent, irrelevant and immaterial.

Q. You can answer that.

A. Well, after reading the letter I took it for granted that everything was covered, and it was perfectly all right. It comes from a—from a reputable office, and that is all that is necessary."

After the accident and death of Mr. Endicott the complainant was duly notified and set in motion an investigation of the accident, assisted by Milton J. Garfinkel.

On or before July 5, 1928, a Mr. Fuller, an investigator, reported to complainant (p. 142), that Harry Garfinkel was not the sole and unconditional owner of the automobile. Nineteen days later, or on July 24, 1928, complainant notified defendant, Harry Garfinkel, by letter (Ex. D2, pp. 442-443), that it denied liability under the policy, "for misstatements in the warranties contained in said policy, and for the further reason that you have failed to cooperate with the company as provided for in Condition D of said policy." The complainant retained the premium. Then on August 3, 1928—twenty-nine days after complainant had information as to the title of the automobile, complainant addressed a "notice of cancellation" to Harry Garfinkel (Ex. C5, pp. 428-429), which reads as follows:

"This is to notify you that, policy number AP-15803 issued to Harry Garfinkel by the HUDSON CASUALTY COMPANY, date April 6th 1928 is hereby declared null and void and cancelled as of date of issue namely, noon of April 6th, 1928.

Herewith we enclose check for $39.56 return premium.

Very truly yours,
Wm. C. Krumrey
ASSISTANT SECRETARY."

Mr. Garfinkel refused the tender of the check and returned it to complainant (Ex. D7, p. 500).

Milton J. Garfinkel, the driver of the automobile, under the terms of the omnibus coverage of the policy (Ex. C1, pp. 404-405), was an "assured" and complainant agreed to "pay any loss by reason of the liability imposed by law upon the assured" (p. 403), and required of him certain obligations in Conditions B, C and D (pp. 405, 406). It is further provided in condition A (p. 404), that the term "assured" throughout the policy shall mean among others, any person legally operating the automobile with the permission of the named assured.

Milton J. Garfinkel was served with a summons and complaint at the suit of Lida A. Endicott, executrix, etc., November 19, 1928. On November 20, 1928, he handed the papers to Taylor & Soloff, the agents of complainant, who forwarded them to complainant the same day, enclosing a letter (Ex. D9, pp. 504-505). The complainant filed an answer in behalf of Milton, also a counter-claim for him against Cordery, as well as pleaded him to a counter-claim filed against Harry Garfinkel by Cordery, when Milton was not made a party to that branch of the suit.

The record is entirely bare of any attempt by the complainant to deny liability under its policy to Milton Garfinkel. The only communication, verbal

or written, to him from the complainant, or its agents, appearing in the record, is a letter from C. L. Cole, Esq., who was engaged and paid (p. 164), by complainant to defend the suits. The letter (Ex. D4, pp. 481-482), advised him that if he did not secure the attendance of his father as a witness at the trial that the complainant would disclaim liability to his uncle (Harry Garfinkel).

The complainant defended the cases and prosecuted the rule for Harry Garfinkel under a written agreement (Ex. D8, pp. 501-502-503), but without any agreement or denial of its liability as to Milton J. Garfinkel.

The rule to show cause was discharged on October 18, 1929 (pp. 476-477), and complainant agreed to pay the judgment (pp. 314 to 317, inc.), but changed its position, and after suit had been brought on December 20, 1929, by Lida A. Endicott against it, filed the bill in the present case on December 24, 1929 (p. 1).

The bill in this cause charged that defendants, Harry and Milton J. Garfinkel, procured the policy under consideration by fraud and prays:

> "2. That it may be adjudged and decreed that the policy of insurance hereinbefore referred to was obtained from complainant by fraud and that said policy of insurance had no binding force and effect from the date of its issue and that its cancellation by complainant as of the date of issue be confirmed, and that complainant is under no liability under said policy and never was under any liability under said policy to the defendants or any or either of them.
>
> 3. That the defendants and each of them and

each of their agents and attorneys be enjoined and restrained from instituting any suits at law or otherwise to recover upon said policy of insurance."

Defendants, Lida A. Endicott, Harry Garfinkel and Milton J. Garfinkel, answered the bill denying any fraud in the procuring of the policy and each of these defendants filed a counter-claim in which they charge, in paragraph 7 at pages 32, 52 and 72, that:

"7. Although the said assured, when he applied to the said agents of the complainant who were authorized as aforesaid, to agree and act for the complainant in the matter of the issuing of said policy, and informed said agents fully and completely of all the facts the said agent deemed material to the subject-matter of said policy, and the said parties agreed upon the provisions to be contained therein, and the said policy was duly issued and delivered to the assured and the premium therefor fully paid, yet the said policy so issued fails to express the agreement so made and on which the minds of the parties met, because of the insertion in said schedule of the policy the statements numbered 6 to 10 referred to in paragraph 6 herein, which statements had not or were not agreed upon and the insertion of which was a mistake in preparing said policy, or by fraud or other inequity on the part of the complainant or its agents, said statements were inserted into said schedule of the said policy contrary to said agreement between the parties, thereby entitling the assured

to the equitable remedy of reformation of said policy."

This paragraph is the same in each counter-claim.

The prayer for relief in the Endicott counter-claim is found (pp. 34 to 36, inc.).

The prayer for relief in the Harry Garfinkel counter-claim is found (pp. 54 to 56, inc.), and in the Milton J. Garfinkel counter-claim is found (pp. 73 to 75, inc.).

Harry Garfinkel, in paragraph 9 (p. 54) and Milton J. Garfinkel, in paragraph 9 (p. 73) allege:

> "9. Defendant alleges that complainant had defended the suit brought against him by Lida A. Endicott, executrix, etc., and Timothy Cordery and he was led to believe by complainant's agents that complainant would pay any judgment rendered against him if he, the said defendant, co-operated with the complainant in the defense of the said suit, and did not know that the complainant had refused to pay the judgment it had contracted to pay under its policy until the time of filing the bill in this cause."

Which allegation was proved and entitles the defendants to have applied in their behalf against complainant the doctrine of equitable estoppel.

Defendants in their petition of appeal (p. 520) pray that this Honorable Court will dismiss complainant's bill, and order that the Court of Chancery enter a decree for defendants on their respective counter-claims as well as judgment in favor of Lida A. Endicott, executrix, in the sum of her recovery against Harry Garfinkel andMilton J. Gar-

finkel in the New Jersey Supreme Court, a record of which judgment is in evidence in this cause (p. 471).

ARGUMENT.

I.

THE COURT ERRED IN ITS FINDINGS THAT DEFENDANTS, HARRY GARFINKEL AND MILTON J. GARFINKEL, PROCURED THE POLICY OF INSURANCE (EXHIBIT C1) BY FRAUD.

The conclusions of the Vice-Chancellor finding that fraud was perpetrated by defendants, Garfinkels, in procuring the policy (Ex. C1, p. 402), is not sustained by any evidence in this cause. The charge of fraud is found in paragraphs 2 to 9, inc., in the bill (pp. 2, 3, 4, 5, 6), and it will be noted that the Vice-Chancellor's conclusions closely follow the bill.

The foundation of the charge of fraud is (p. 2, par. 3):

(1) That Milton J. Garfinkel had insurance with the complainant (Ex. C2, p. 415) which was cancelled by complainant because it was "not wanted by the company."

The testimony in answer to this charge is, the policy provides the method of cancellation (Ex. C2, p. 420) under Condition G, which reads as follows:

"This policy may be cancelled at any time

by either of the parties upon written notice to the other party stating when *thereafter* cancellation shall be effective and the date of cancellation shall then be the end of the policy period."

The record is bare of any evidence that complainant sent a notice of cancellation of policy C2 (p. 415) to Milton J. Garfinkel, and he testified (p. 208) that he didn't remember ever receiving any notice of cancellation from the complainant but was told by John Soloff (p. 207), who signed the policy C2 that he (Soloff) was transferring the insurance to another company and to return complainant's policy. That the insurance was, in fact, transferred by Soloff is evidenced by a policy of the United States Fidelity and Guaranty Co. (Ex. D5, pp. 484 to 498, inc.), issued to Milton J. Garfinkel, dated February 8, 1928 (p. 494), and Mr. Soloff testified (p. 248) that he merely called Garfinkel up and asked him to send the policy back because he was replacing it with another company. There is no testimony to show that any one communicated the fact to Milton J. Garfinkel that his insurance was "not wanted by the company."

(2) In paragraph 4 of the bill (pp. 2-3), it is charged that in furtherance of the fraud Harry Garfinkel represented to complainant to procure the policy:

(a) That the automobile would be used for private and business purposes in the vicinity of Ventnor City.

(b) That his interest was that of unconditional and sole owner.

(c) That no company had cancelled or refused to renew insurance in the past three years.

That complainant issued its policy relying on the representation that Garfinkel was the sole and unconditional owner, etc.

The proof, some of it from complainant's vice-president and its own file, corroborated by the agent who took the application, is exactly the opposite of the charge of fraud and, in fact, indicates constructive fraud on the part of complainant.

John Soloff, the man who took the order for the insurance and bound the risk for complainant, testified (pp. 245, 246, 247) that he did not ask whether or not other insurance had been cancelled within the past three years; that he did not ask whether or not Harry Garfinkel was the sole and unconditional owner of the automobile; but that he (Soloff) knew the car had been bought under a conditional bill of sale and that Harry Garfinkel was buying the car on installments, and that he filled in an automobile order and forwarded it to complainant merely to do the typewriting on the policy. The complainant produced the order blank from its own files (p. 116) and it appears in this case as Exhibit D1 (pp. 441-442). We believe this exhibit to be very important because it is the written evidence of the application for the insurance in question, and the only data for the complainant to fill in the blank spaces in the policy. It will be noted that no space in the order blank is

provided for the kind of ownership of the assured or respecting prior cancellations.

To the above we add the testimony of the vice-president and general manager of the complainant as follows:

At p. 111:

"Q. Do you instruct your agents to inquire as to the ownership of the automobile?

A. The agents are presumed ——

Q. Just answer yes or no.

A. No, sir.

Q. You don't?

A. No, sir."

And at pp. 112-113:

"Q. And if you don't get the information then, what do you do?

A. The assumption is that ——

Q. Not the assumption, what do you do?

A. Can I explain the practice?

Q. Just a minute. You answer my question.

(Question repeated.)

A. We follow the usual practice ——

Q. What do you do?

A. We follow the usual practice ——

The Court: Let that be stricken. What do you do?

A. We follow the usual ——

The Court: Let that be stricken.

A. We issue the policy and answer the warranties with 'no exceptions.'

Q. In other words, when your agent, who you expect to get information as to the ownership of the automobile, sends you an order and

doesn't say or tell you about the ownership of the automobile you voluntarily assume to answer the question, don't you?

A. No, sir; it isn't voluntary in that sense, no.

Q. You answer it without any information from your agent, don't you?

A. Because the practice ——

Q. Answer that yes or no, if you can.

A. Yes.

Q. You do?

A. Yes."

And at pp. 114-115:

"Q. When you received the information from this agent in respect to the writing of this policy did he tell you whether or not Harry Garfinkel was the sole and unconditional owner of that car?

A. No, sir; he did not.

Q. And then, without more, your company answered that question, didn't it?

A. We typed the answer in, yes, if that is what you mean."

And at p. 122:

"Q. Mr. Kreps, I want to ask you this question, when that information came to you to write this policy did you know at that time whether or not Harry Garfinkel had made representations as to his ownership of the automobile, did your company know or did you know?

A. Except from practice.

Q. Did you know?

A. Definitely no.

Q. Did you know when that application was sent in to you to merely write this policy whether or not Harry Garfinkel had had insurance cancelled on an automobile within three years?

A. No, sir.

Q. And your agent didn't furnish you that information?

A. He did not."

The foregoing surely disposes of the charge of misrepresentation and fraud alleged in paragraph 4 of the bill.

(3) In paragraph 6 of the bill (p. 4) the charge is made generally:

(a) That the automobile while bought in the name of Harry Garfinkel was actually bought by and intended to be used solely in the business of Milton J. Garfinkel.

(b) It was intended that the automobile was to be used principally in the vicinity of Philadelphia and not Ventnor City.

The complainant failed to produce any testimony to sustain these charges. It did put in evidence (p. 111) a conditional sales contract for the purchase of the automobile (Ex. C6, pp. 433-434), signed by Harry Garfinkel. (In Mr. Garfinkel's testimony

taken before trial, this contract is marked Exhibit D1 (see stipulation, p. 506) and at the trial was marked C6.) Mr. Garfinkel testified (pp. 344, 345, 346) that his money purchased the car and it was for his own use. Milton J. Garfinkel testified (p. 183) that the car was purchased by his uncle and that he (Milton) had no interest in it, financial or otherwise.

As to the use of the automobile in Philadelphia, we have searched all the testimony and fail to find any competent testimony that the automobile was ever in Philadelphia except on two occasions; but, on the contrary, it appears that the automobile was principally used in Ventnor City and in the vicinity of said city (p. 343).

4. In paragraph 7 (p. 4) the charge of fraud in short is that the purchase of the automobile was made in the name of Harry Garfinkel and application for insurance in his name for the reasons:

(a) That Milton J. Garfinkel and Harry Garfinkel knew that complainant would not issue a policy to Milton.

(b) That Milton J. Garfinkel and Harry Garfinkel conspired to deceive the complainant in issuing the policy.

Complainant failed to produce any evidence to show that Milton J. Garfinkel knew or should have known that complainant would not issue a policy of insurance to him and Milton testified (p. 185)

that he did not know complainant had cancelled an insurance policy on his automobile and Harry Garfinkel also testified (pp. 345-346) that he did not know that the complainant would not issue its policy to Milton.

The charge of fraud is made ridiculous by the documentary evidence in this case.

The record shows complainant's policy (Ex. C2, pp. 415-427), issued to Milton on February 2, 1928, insuring a Ford coupe. As we have before stated in this brief, complainant's agents asked for the return of it, saying they were transferring his insurance to another company (p. 248), and sent him a policy of the United States Fidelity & Guaranty Co., dated February 8, 1928, insuring the same automobile (Ex. D5, pp. 484 to 498).

In the testimony it is admitted (p. 238) that the Ford automobile was repossessed from Milton on or about March 1, 1928.

Mr. William J. Wilson, general agent in Atlantic City for the United States Fidelity & Guaranty Co., testified that the policy issued by that company (pp. 233 to 237, inc.), to Milton J. Garfinkel was voluntarily surrendered for cancellation by Milton a few days before April 11, 1928. The exhibit itself shows cancellation on April 11, 1928 (Ex. D5, p. 498, line 30). He also testified (p. 235) there was no discussion by his company concerning the policy.

These facts present this situation: Here was Milton J. Garfinkel with a policy in his possession on April 6, 1928 (the day Harry Garfinkel purchased and insured the automobile) which would have been transferred to any other car Milton might have bought, yet the charge is that notwithstanding his

possession of a valid policy of one of the leading casualty companies of this country, he and Harry conspired to get the same sort of insurance from complainant that he already had. We repeat the charge of fraud in this case is made ridiculous by the record.

5. In paragraph 8 (p. 5) complainant alleges cancellation on August 3, 1928, as of the date of issue; namely, April 6, 1928. The facts seem to be different.

When the complainant became informed on July 5, 1928, of the several alleged violations of the terms of its policy by Harry Garfinkel, it then became its duty to make a decision, which it apparently did, on July 24, 1928, in a letter of that date addressed to Harry Garfinkel (Exhibit D2, p. 442), in which letter it denied liability under its policy, as follows:

"July 24th, 1928

Mr. Harry Garfinkel
Eastern Smelting & Refining Co.
712 Walnut St.
Philadelphia, Pa.

Dear Sir:—

This is to advise you that the Hudson Casualty Insurance Company hereby denies any liability under its policy No. AP 15803 dated April 6th, 1928, as the result of an accident which occurred on or about May 14, 1928, at or near the intersection of Indiana Avenue and Absecon Blvd. Absecon, N. J. for misstatement in the warranties contained in the said policy, and for the further reason that you have failed

to cooperate with the company as provided for in condition D of said policy.

Yours very truly,

Frank H. Higgins
Secretary

FHH:MW"

This was a plain election not to forfeit the policy, but merely to rely for a defense on the alleged misstatements in the so-called warranties, and also because of failure to co-operate. This intention is further evidenced by a retention of the premium on this date. The law seems to be settled that once a party, with full knowledge of the facts, elects to take a certain definite position, it cannot thereafter assume a different position. Contrary to this rule, the complainant attempted to cancel the policy on August 3rd, 1928, having at this time no other or further information concerning the alleged breaches than it had on July 5th, 1928. The notice of cancellation reads (Ex. C5, p. 428):

"August 3rd 1928.

Mr. Harry Garfinkel,
4 South Surrey Ave.,
Ventnor City, N. J.

Registered

NOTICE OF CANCELLATION

Dear Sir:

THIS IS TO NOTIFY YOU THAT, policy number AP-15803 issued to Harry Garfinkel by the HUDSON CASUALTY COMPANY, date April 6th 1928 is hereby declared null and void and cancelled as of date of issue namely, noon of April 6th 1928.

Herewith we enclose check for $39.56 return premium.

Very truly yours,

Wm. C. Krumrey

WCK/HMP ASSISTANT SECRETARY"

In complainant's bill, it alleges a cancellation. It has utterly failed to prove it. Cancellation of insurance contracts can only be made in three ways: 1st, by consent of the parties; 2nd, by operation of the statute; and 3rd, by a reservation in the policy. 32 *C. J.* 1245, Sec. 431. In this case there is no evidence of a cancellation by the parties. There is no statute in New Jersey covering cancellation of such policies. Therefore, the only legal way to cancel the policy in this case would be found in the policy itself. By the policy, Ex. C1 (p. 408), we find:

Condition G. Cancellation.

"This policy may be cancelled at any time by either of the parties upon written notice to the other party stating when *thereafter* cancellation shall be effective and the date of cancellation shall then be the end of the policy period. * * * ."

By this we must conclude that a cancellation cannot be made effective for a date prior to the date of the cancellation notice. Therefore, there has been no cancellation of this policy according to the terms thereof. It is no answer to now say they intended to rescind when all through the case they relied on a cancellation. It will also be noted that Harry Garfinkel returned the premium sent to him by complainant in its letter of August 3, 1928, as is evi-

denced by letter from complainant (Ex. D7, p. 500) under date of August 10th, 1928:

"August 10th, 1928.

Mr. Harry Garfinkel
109 S. California Ave.
Atlantic City, N. J.
Dear Sir:—

We are in receipt of a letter from you dated August 7th, 1928 in which you returned check voucher in the sum of $39.56 being the premium due you on an automobile policy No. AP 15803 which was cancelled from inception. We disagree with contents of your letter, and herewith notify you that we are holding subject to your order the sum of $39.56, the amount already transmitted to you and returned to us.

Yours very truly,
FRANK H. HIGGINS
FHH:MW Secretary"

Then, in December, 1928, Harry Garfinkel and the Hudson Casualty Co. entered into an agreement (Ex. D8, p. 501, paragraph 3), "Whereas said party of the second part (Insurance Company) denies all liability under the terms of said policy." Here is an admission after an attempt to cancel, of an existing policy.

From the foregoing, it is argued that no cancellation has ever been made of this policy and that it is in effect today. And further, that its attempted cancellation was a change of position from that taken on July 24th, when it elected to stand on the policy; and again in December, 1928, it recognized the policy, but affirms its non-liability thereunder. *Joslin*

v. Hudson, 149 Atl. Rep. 262; *Fritz v. Ins. Co.*, 85 N. J. Law, 171; 88 Atl. 1065.

II.

THE COMPLAINANT IS ESTOPPED BY ITS CONDUCT TO DENY LIABILITY UNDER ITS POLICY, EXHIBIT C1.

The policy in question provides for "Omnibus Coverage" under Condition A (Ex. C1, p. 404):

> "And in addition, the company agrees to defend the assured and pay expenses and costs:
>
> Conditions
>
> Omnibus Coverage.
>
> Condition A. The term 'Named Assured' shall apply to the Assured named and described as such in Statement 1 of said Schedule, but the term 'Assured' shall apply to any person or persons while riding in or legally operating any of the automobiles described in Statement 5 of said Schedule, and any other person, form or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant, * * * and provided further that indemnity under the said policy shall insure first to the named Assured, and then, (as to the remainder, if any) to any other persons entitled thereto. * * *"

Milton J. Garfinkel was operating the automobile with the permission of Harry Garfinkel (p. 344) and became an assured under the terms of the policy, and was thereby entitled, on the happening of the Endicott accident, to indemnity for any loss from liability imposed by law, and second, under Condition B (p. 405) the company agreed to defend any suit, to pay costs, etc. The same provisions contained in this policy were present in the case of *Horn v. Commonwealth Casualty Co.*, 105 N. J. Law, 616, and it will be noted that the Court held that the word "assured" meant anyone using the car described in the policy with the permission of the named assured. Likewise, in *Joslin v. Hudson Casualty Insurance Co.*, 149 Atl. Rep. 262; in that case the present complainant was the defendant and a suit was brought on an identical policy as is involved in this suit, and the facts were almost the same, except in the Joslin case a son was driving the father's (assured's) automobile, while in this case the nephew was driving the uncle's (assured's) automobile. In both the Horn and Joslin cases the omnibus coverage is disposed of—in the first by opinion of the Court, and in the second, it is apparently conceded by the defendant.

To like effect, the Supreme Court in *United Roofing Co. v. Independent Bonding & Casualty Ins. Co.*, 155 Atl. Rep. 140, holds that under practically the same circumstances and conditions as in the policy in the present case, the driver of the automobile, who was operating it with the permission of the named assured, became an assured under the policy.

So, therefore, we must conclude on the happening

of the accident on May 14, 1928, in which Thomas D. Endicott was killed by the automobile driven by Milton Garfinkel, that he, Milton, immediately became an assured under the terms of the policy. This was a valuable right and could not be taken away from him without direct notice or agreement. Even an agreement between the company and Harry Garfinkel could not have taken away the right. The record in this case fails to show any attempt on the part of the complainant to deny its liability under the policy to Milton J. Garfinkel. Any agreement it had with Harry Garfinkel would not have this effect. That Milton J. Garfinkel had permission to drive the car that killed Mr. Endicott, is true beyond question (p. 344). Being unidentified, he had no rights under the policy until the happening of the accident on May 14th, when he distinctly became an assured and a beneficiary under the terms of the contract. The testimony shows that the company knew of his driving, and secured statements from him, together with assistance in securing other witnesses (p. 189). After giving the information to the agent of the company, the next connection of Milton J. Garfinkel with the company appears on November 20, 1928, when he took a summons and complaint in the Endicott case to Taylor & Soloff, agents of the complainant, and the agents thereupon wrote to the company, as follows:

> "Mr. Milton J. Garfinkle called at our office today and advised me that he was served with the enclosed summons and complaint, yesterday. Mr. Garfinkle is the person who drove the car of Harry Garfinkle, which was involved in an accident on May 14th, 1928. Mr. Harry

> Garfinkle carried insurance with your company covering public liability and property damage to him resulting from use of the car involved in the above mentioned accident. The policy number is AP 15803. Mr. Milton J. Garfinkle informs me that Harry Garfinkle is out of town for a few days, and he, therefore, thought it advisable to turn the summons and complaint over to our office so that we might forward it to your company, according to the terms of the policy. I am accordingly taking this means to do so. Please advise me whether or not you intend to defend this action, as I have promised Mr. Milton J. Garfinkle to advise him in either event so that he may know whether or not to hire counsel, etc." (Ex. D9, pp. 504-505).

This was notice to the company that Milton J. Garfinkel relied on its policy. The record is barren of any answer the company ever made to Milton J. Garfinkel regarding its defense of his case. It is true that there is an Exhibit D8, p. 501, in which the company, by its officers, agreed to defend Milton and Harry Garfinkel in the Endicott suit without an admission of liability, but the instrument itself shows that it was signed by Harry Garfinkel, and there is no evidence to show any authority on the part of Harry Garfinkel or anyone else to contract for Milton J. Garfinkel for his defense of this suit or that the agreement was brought to his attention. We find also a counter-claim filed for Milton J. Garfinkel in the Endicott matter against Timothy Cordery, and the complainant attempts to justify this action; that they

did it by direction of Robert Garfinkel, a member of the Bar, and a brother of Milton J. Garfinkel. Both Robert Garfinkel (p. 300) and Milton J. Garfinkel (p. 212) deny that Robert Garfinkel had authority to act for Milton J. Garfinkel, and the record fails to show that he was his attorney, and so we conclude from the evidence that any information that Robert Garfinkel gave the company to be used in the counter-claim was wholly unauthorized by Milton. Then, too, we find that the company answered (p. 467) for Milton J. Garfinkel a counter-claim filed against Harry Garfinkel (p. 463) by Timothy Cordery, and that without any notice to Milton J. Garfinkel that the same had been filed, and that he knew nothing of it until after a judgment had been rendered against him (p. 195), in a suit to which he was not a party. It will be noted that the counter-claim is for the sum of $25,000.00 personal injuries, which was within the policy limit, and a property damage of $2,500.00, which was $1,500.00 in excess of the company's liability for property damage. Next, we find the trial of the issue at the Atlantic County Circuit, in which Milton J. Garfinkel was called upon and did secure the attendance of witnesses (p. 197) and himself at the trial. We also find that no evidence is presented on his counter-claim (p. 168) and that no investigation or evidence was produced on behalf of the defendants by the company in contradiction of Timothy Cordery's (pp. 168-169) counter-claim. These facts are drawn to the Court's attention for the reason that, under the policy, Conditions C and D, Milton J. Garfinkel did not have the right to participate in the case except at the direction of the company, because the

policy expressly provides that he shall not interfere in any way, and in the Endicott case they took complete control of the defense and other proceedings. There is an exhibit in the case, D4 (p. 481), that C. L. Cole, Esquire, who was counsel for the company, advised Milton J. Garfinkel that the company would disclaim liability to Harry Garfinkel in the event of the failure of Isaac Garfinkel to appear as a witness, and also he was advised by Mr. Cole that the insurance company would refuse to pay a judgment in case he and Harry Garfinkel did not appear to testify. Mr. Cole had been so informed by some officer of the company. After a verdict was rendered against Harry Garfinkel and Milton J. Garfinkel, jointly, of $20,000.00 in the Endicott case and $200.00 in the Cordery case, the company proceeds to get a rule to show cause (p. 166) in the Endicott case alone. They argue this in the Supreme Court and have the verdict reduced to $15,000.00, no attention being paid to the Cordery verdict of $200.00. There is also testimony in the case that shortly after the rule to show cause was discharged, an officer of the company agreed to pay the verdict of $15,000.00 (pp. 313-317); that he later advised that it would not pay because some (p. 319) reinsurance company would not contribute to the sum to be paid.

In the very recent decision of this Court in *Textileather Corp. v. American Mutual Liability Ins. Co., et al.,* not yet officially reported, but found in 9 N. J. Adv. R. 533, defendant's defense was that its policy did not cover the risk. This Court, in passing upon the legality of a direction of a verdict for plaintiff, for the reason "that the defendant is

estopped to deny its liability because it took over the entire defense of the proceedings brought against the plaintiff for compensation," held that the motion was properly granted, citing *Horn v. Commonwealth,* 105 N. J. L. 616. This opinion seems to exactly apply.

In the present case, Milton J. Garfinkel being an assured under the policy, it became the duty of the complainant, if it desired to deny liability as to him, to have declared to him, not someone else, that it would not defend the suit brought against him. This it did not do, but defended the matter until final judgment, and by the authority of the case just above cited it is estopped from setting up any alleged invalidity of the policy or to deny its liability to Milton J. Garfinkel.

We have been unable to find a case where a company has assumed, without an agreement, the defense of a suit, and has continued the defense until after judgment against an assured, that a Court has refused to estop it from denying liability under its policy, when the insurance company was in possession of facts to assert a breach of warranty or forfeiture.

In the very recent case of *Malley v. American Indemnity Corporation,* 146 Atl. Rep. 571, almost the identical situation was presented, and we quote at length from that case, at page 573, beginning at paragraph number 4:

> "The accident occurred on August 30, 1926, and the damage case was tried January 10, 1928. At the trial, appellant appeared and actually engaged in the defense, and it was not until after the suit was lost that it abandoned the

case and claimed plaintiff had violated the absolute warranty of the policy concerning total ownership of the car. It further stated it had no knowledge of the falsity of the statements made by the plaintiff until after the trial of this case. Where an insurance company, under an indemnity contract, takes charge of the defense of an action on which liability rests, it will be estopped from thereafter questioning the claim, either because it was beyond the terms of the policy or because the latter was procured by a breach of some warranty. *Fairbanks v. London Guaranty & Accident Co.,* 154 Mo. App. 327, 133 S. W. 664; *Globe Nav. Co. v. Maryland Casualty Co.,* 39 Wash. 299, 81 P. 826; *Patterson v. Adan, supra; Frank & Co. v. New Amsterdam Casualty Co.,* 175 Cal. 293, 165 P. 927; *Tulare County Power Co. v. Pacific Surety Co.,* 43 Cal. App. 315, 185 P. 399; *Royle Min. Co. v. Fidelity & Casualty Co. of New York,* 161 Mo. App. 185, 142 S. W. 438; *Utterback-Gleason Co. v. Standard Accident Ins. Co., of Detroit, Mich.,* 193 App. Div. 646, 184 N. Y. S. 862 (affirmed in 233 N. Y. 549, 135 N. E. 913); *American Indemnity Co. v. Fellbaum* (Tex. Civ. App.), 225 S. W. 873. When an insurance company or its representative is notified of loss occurring under an indemnity policy, it becomes its duty immediately to investigate all the facts in connection with the supposed loss, as well as any possible defense on the policy. It cannot play fast and loose, taking a chance in the hope of winning, and, if the results are adverse, take advantage of a defect in the policy. The insured loses sub-

stantial rights when he surrenders, as he must, to the insurance carrier the conduct of the case. The insurance carrier is not placed in any disadvantageous situation, especially as the lack of ownership did not contribute to the loss. The estoppel to assert the breach of warranty as to title is no higher in right than an estoppel generally to deny that the claim came under the policy. In effect, both are of equal merit. With a little diligence and within a brief time, the carrier could have procured the exact knowledge on which it now relies, and in most cases may similarly prepare a defense. Here an inquiry from public officials, at the State capitol, would have revealed plaintiff's exact relation with regard to ownership. With these facts before it, had they been deemed sufficient, it could have declined to defend the case, resting its right on the supposed breach of warranty; in deciding what course it should pursue, it is guided as any person confronted by similar circumstances; but, once having made its decision, the rights of others in relation thereto cannot be prejudiced. The Court below was amply warranted in entering the judgment here appealed from. Judgment affirmed."

In *Employers' Liability Assur. Corp. v. Chicago & B. M. Coal & Coke Co.*, 73 C. C. A. 278, 141 Federal, 962 (note is found in 34 L. R. A. N. S., page 492), it was held

"that the act of the insurer in taking control and dominion of the action, and keeping such control and dominion until judgment was en-

> tered, without notice to the insured that it did not consider itself liable under the policy, was such a construction of the policy by contemporaneous acts as estopped the insurer from denying liability after the action was at an end."

To the same effect is *Tozer v. Ocean Accident & Guaranty Corporation,* 94 Minn. 478, 103 N. W. 509; also to the same effect as *Royle Min. Co. v. Fidelity & C. Co.,* 126 Mo. App. 104, 103 S. W. 1098, "in which the insurer, with full knowledge of the nature of the liability asserted against the insured, instead of denying any obligation under the policy, assumed full control of the defense of the action against the insured." The same doctrine is also in *Fairbanks Canning Co. v. London Guaranty & Acci. Co.,* 154 Mo. App. 327, 133 S. W. 664, and also in *Globe Nav. Co. v. Maryland Casualty Co.,* 39 Wash. 299, 81 Pac. 826. This doctrine seems to be the general law, and will be found in 36 *C. J.,* page 1077, Section 49, where it is set out that

> "By taking over the defense of an action against insured and conducting it to a final determination, insurer may be precluded from avoiding liability on the policy on the ground which would otherwise have been available, etc."

This is a view held in *Frances v. London Guaranty Co.,* 138 Atlantic, 780, on page 782, where the Court held that:

> "All the facts regarding the violations of conditions of the policy were known to the insurance company, but notwithstanding this knowl-

> edge, it went to trial without asserting the forfeiture, and the company took the chance of a trial, and only after a verdict was rendered adverse to its interests that it insisted that it was relieved from liability. The Court held that this action was so inconsistent with a purpose to assert the forfeiture, that it amounted to a waiver as a matter of law, and in our present case we feel that it creates an estoppel."

This view is also held in New York in many cases, one of which we will cite—*Utterback-Gleason v. Standard Accident Insurance Company,* 184 N. Y. Sup. 862, in which case the insurance company was warned, notwithstanding its disclaimer under the policy it would be held to the contract and need not continue under any other circumstances. The company kept in and defended the case, prepared and argued it on appeal, and took all chances, according to theory, upon insured's money, until it was finally determined that someone must pay the insured person for her injuries. Then the company refused to pay. The Court held that it could not keep control of the action and thus gamble with the release and its idea of suppression of evidence in a former action brought against a third party and covered by another's insurance contract.

Defendants argue that in addition to the estoppel as to Milton Garfinkel, complainant by its course of conduct respecting the defense of Harry Garfinkel in the suits growing out of the Endicott accident, have created an estoppel which precludes complainant from questioning the validity of the insurance policy or its non-liability thereunder.

(a) On July 5, 1928, complainant knew that Harry Garfinkel was in possession of the automobile by virtue of a conditional sales contract (p. 142), but notwithstanding this knowledge, in a counter-claim filed by it for Harry Garfinkel against Timothy Cordery, on December 24, 1928, it alleged (Ex. D3, p. 459, par. 3):

> "3. That at the said time and place, defendant, Harry Garfinkel, was the owner of a certain automobile which he was having operated by Milton Garfinkel, etc., * * *."

And claimed for damage for said Garfinkel the sum of $2,000.00 for the loss of the automobile (p. 460).

On December 24, 1929, complainant, in the bill filed in this cause, alleges (p. 5) that Milton Garfinkel was the real owner of the automobile and (at p. 6) that Harry Garfinkel only held a conditional bill of sale for said car.

The rule in this State is stated in *Cleaves v. Yeskel,* 141 Atl. Rep. 814, as follows:

> "While defendant may take alternate positions as to certain matters or things, he cannot take inconsistent ones with reference to the very same identical matter or thing."

This rule is cited *in re Allison's Estate,* 150 Atl. Rep. p. 52.

We urge that complainant is estopped in the present proceeding to deny that Harry Garfinkel was the owner of the insured automobile.

(b) By the terms of the agreement made in December, 1930, between complainant and Harry Gar-

finkel (Ex. D8, pp. 501-503) complainant, the agreement reads, par. 6 (p. 502):

> "Whereas said party of the second part (complainant) regardless of its denial of liability as set out in paragraph 3 hereof *deems it advisable for its better protection* to defend the action mentioned in paragraph 4 hereof."

By reference to paragraph 4 we find the only reference to any action is the suit of Lida A. Endicott, executrix, etc., against Harry Garfinkel, Milton Garfinkel and Timothy Cordery, jointly and individually, which action was then pending in the New Jersey Supreme Court, the summons and complaint having been served November 21, 1928, on Harry Garfinkel (p. 449). The agreement above referred to does not take into consideration a defense to any other suit or action.

On January 24, 1929, Timothy Cordery filed a counter-claim against Harry Garfinkel (pp. 463-466) for damages for personal injury to Cordery as well as property damage. This counter-suit was served on and answered by complainant's (pp. 467-468) secretary, who was also an attorney at law.

Harry Garfinkel knew nothing of this suit being filed (pp. 354-5) until after trial, when Cordery was awarded a $200.00 verdict against both Garfinkels, from which verdict complainant failed to appeal or otherwise set aside.

Defendants argue that any act of complainant in recognizing liability under the policy (Ex. C1) estops complainant from now denying liability under its said policy. *Textileather Corp. v. American Mutual Liability Ins. Co., supra.*

REFORMATION OF POLICY BECAUSE OF A MISTAKE IN PREPARING IT, OR FRAUD OR OTHER INEQUITY ON THE PART OF THE COMPLAINANT OR ITS AGENTS.

III.

MISTAKE.

(a) In the case of *Simeone v. Varloro,* 107 N. J. Equity 204, and particularly at page 208, adopting the language of the case of *Hunt v. Rhodes,* 26 U. S. 1 (which cites several New Jersey decisions) as follows:

> "Where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill or which violate the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement."

Applying the above rule to the present case, it must be conceded that policy (Ex. C1) was drawn and executed professing or intending to carry into execution the parol agreement made by Milton J. Garfinkel and the complainant's agent on April 6, 1928. The makers of this agreement are in accord that the agreement was for public liability and property damage insurance on a Chevrolet sedan, con-

ditionally owned (pp. 186 to 188 and p. 242) by Harry Garfinkel and fully described in Exhibit D1, page 441, and on page 442 it will be noted that the risk was bound on April 6, 1928, by complainant's agents, and Harry Garfinkel so notified, which agents had the authority to bind risks (p. 119, ll. 20-30) and that the draftsman (p. 119, ll. 10-20), by a mistake of fact, inserted an answer to statement 9 in schedule without information from the agent or anyone else on that subject (p. 114, ll. 32-36, p. 115, ll. 1-4), which answer violated the manifest intention of the parties to the agreement in that it created a breach of warranty at the very outset, and the policy was signed and issued by the agent (p. 256) who did not understand the meaning of sole and unconditional ownership (the courts disagree on the subject also) to Harry Garfinkel with the declaration (Ex. D6, p. 499), "Enclosed please find policy #AP-15803 of the Hudson Casualty Insurance Company covering a 1929 Chevrolet sedan for public liability and property damage," confirming a statement made on April 6, that the automobile was insured (p. 188). Defendants respectfully argue that equity should correct the mistake, so as to produce a conformity of the policy C1 to the agreement.

FRAUD OF COMPLAINANT.

(b) The case of *Lloyd v. Hulick,* 69 N. J. Eq. 784, is the basis of our argument of fraud on the part of the complainant. Admittedly, by Exhibit D1 (p. 441), which is the automobile order which Taylor & Soloff sent to complainant for it to merely do the

typewriting on the policy, is entirely silent on the question of ownership of the automobile and it will be noted throughout the policy (Ex. C1), that the subject of ownership is not mentioned, except in paragraph 9 in the schedule. There is no difference in the rate for insurance on a conditional or unconditional owned automobile (p. 130). When this order was received by the Hudson Casualty Insurance Company, this company was without information as to the kind of ownership that Harry Garfinkel had in the automobile, and Mr. Kreps testified (p. 115) that "the company typed the necessary information in," and without notice to its agent, and without any direction to notify Harry Garfinkel (p. 115) the policy was sent in this condition. The doctrine in the above-cited case certainly can be applied to this case, because in the *Lloyd* case, after the agreement had been made, the defendant inserted conditions in the deed which were not included in the original agreement and which lessened the value of the real estate conveyed. The Court in the *Lloyd* case said that complainant had a right to believe they were dealing with honest people, and the mere fact that they did not examine the deed when delivered, was not such negligence as would bar the equitable remedy of expunging from the deed, matters that were inserted without agreement of the parties. May we draw a parallel case from this very same order blank? Let us assume, for the moment, that the name of the automobile had been left blank and that the company, in preparing the policy, without seeking any information as to the name of the automobile, had put into this policy that it was a Packard automobile, when, in truth and fact it was

a Chevrolet. Surely, no one would contend that the company's act was that of any honest person if it had sent the policy back without informing the agent or the assured of its guess. The same identical situation is present in our case. The company guessed at an answer to a warranty and it did not notify its agent, who seemed to be uninformed as to what the warranty meant, and he did not notify the assured, except as to advise him that the policy covered the automobile (Ex. D6, p. 499). This certainly was constructive fraud, and it would seem that the objectionable matter should be stricken from the policy. We have in mind the equitable doctrine that "no one shall profit from his own wrong." The particular application in this case would be that the company, without any information, and without seeking any information, and without notice to their assured, answers, on its own initiative, a question, that is supposed to be answered by the assured; *and after the accident happens it attempts to take advantage of its own wrong answer.* 32 *C. J.* 1334, is authority for this statement. Designation as warranties. *The rule that the company cannot take advantage of false answers placed in the application or policy by its agent applies, notwithstanding the statements are specifically made warranties.* Numerous cases cited thereunder. We argue that if the company cannot take advantage of false answers of its agent, it surely should not have the right to take advantage of its own false answers, and when we say "false," we mean answers to questions made without inquiry. It seems to the defense that this conduct is such that it would shock the conscience of a Court of equity and that the Court would, in its decree,

order that the complainant be not allowed to take advantage of its inequitable conduct.

The instant case is different in principal from other cases reported in New Jersey for this reason: Most of the cases on reformation have some complaint about the printed matter in the usual policy issued by the company, that is, that the interest of the assured was inconsistent with the general printed policies; for instance, in fire policies and the like, there is a printed condition that it is void if the insured's interest is other than that of "sole and unconditional owner." The point we want to make is that in such cases, the company is not required to do anything but to furnish its usual printed policy, and is not required to answer questions. But, the contrary appears in the case now considered, in that the company had to make a decision outside of its usual printed form, in other words, by virtue of its policy, paragraphs 1 to 10 in the schedule require an answer, and in this case the company did not have the information to answer certain questions which it assumed to answer for the assured, and when it did answer we insist that it thereby took unto itself all the responsibility for the correctness of the answer; that the company by answering as it did in this case, contrary to the facts as were known by its agent, thereby committed a constructive fraud.

It is not enough to say that the opening paragraph of the policy says that the assured made the statements in the schedule and warranted them to be true by the acceptance of the policy. Still referring to the *Lloyd* case, we find the present Chief Justice discussing this very same phase:

"It is true that the complainants might

readily have discovered, by an examination of the deed before accepting it, that it was not what they had bargained for, and it may be conceded that prudence upon their part required a scrutiny of the deed before its acceptance by them. But I am not able to perceive that their failure to discover the fraud disentitles them to relief. In the transaction of business, men ordinarily deal with one another in the belief that each is honest. If the opposite belief prevailed in such dealings, attempted frauds would rarely be successfully carried into execution and courts would seldom be called upon to grant relief against them. Failure to discover an intended fraud before it has been actually perpetrated must necessarily exist in every case where the courts are appealed to, to relieve the wronged party from its effects, and the fact that the exercise of a greater degree of prudence on the part of him who has been defrauded would have prevented the fraud from being successfully carried through, affords no ground for refusing relief."

It seems highly inequitable that a man applying for insurance in a case of this kind, is tendered a policy in which the company has answered questions and made them warranties and then failed to notify him, and in which he is supposed to have made statements which are made warranties, statements which have never been brought to his attention. It seems to the defense that this in itself constitutes huge fraud, especially in view of the uncontradicted testimony that Mr. Garfinkel was told on April 6, 1928,

by the agent of complainant, that the automobile was insured (p. 188) and this statement was confirmed by letter D6 (p. 499), from the same source that the policy covered the car for public liability and property damage.

IV.

THE COMPLAINANT WAIVED ANSWERS TO STATEMENTS 9 AND 10, INC., EXHIBIT C1.

In the case of *Carson v. Jersey City Insurance Company,* 43 N. J. L. 300, the applicant for insurance failed to answer one question in the application. The company issued the policy and the Court held in *Syllabus #3* that the policy issued on the written application for insurance in which one of the questions propounded is left unanswered is a waiver of the right to the information called for by such a question and a contract of insurance will be considered as based on answers given to inquiries to which the applicant has responded.

In our present case it is admitted that no one asked Milton Garfinkel as to the kind of ownership Harry Garfinkel had in the automobile to be insured. Under the authority of this case we argue that failing to ask the question waives the right to the information and the mere fact that the company wrote the answer in would seem not to change the situation but merely to preclude them from asserting a forfeiture or a breach of warranty.

The foregoing case is quoted with approval in the case of *Bush v. New Amsterdam Casualty Com-*

pany, 2 N. J. Miscellaneous Report, p. 880, in which case an application for insurance was *filled in by the company and in answer to a question*: "I am in sound condition mentally and physically, except as follows (wrote in); no exception."

The application was not signed by the applicant and the *question had been answered by the company.* The Court held that the company had waived the requirements for the application in this respect.

V.

THE INTEREST OF HARRY GARFINKEL IN THE INSURED AUTOMOBILE WAS THAT OF SOLE AND UNCONDITIONAL OWNERSHIP.

We quote from the case of *Martin v. State Insurance Company,* 44 N. J. L., p. 485, in the second syllabus, "the naked legal title of the property insured was in a third party, but the whole beneficial interest and the possession were in the assured. *Held,* that the latter had the *entire unconditional and sole ownership* of the property." The Court, in discussing the kind of ownership, at page 490, referred to the facts found in a Court of Errors decision in *Franklin Fire Ins. Co. v. Martin,* 40 N. J. L., p. 568, which are as follows:

> "The property was described in the policy as his property. The proof was that the insured had contracted to purchase the property of one Fowler, and had paid him all the purchase money except $2,000; that by his procurement,

> Joseph Wilson advanced for him that sum, and the conveyance was made by Fowler to Wilson, who gave to the plaintiff an agreement in writing, to convey to him on the repayment of the sum advanced; that the plaintiff had repaid the money advanced by Wilson before the policy was issued, and had been in the exclusive possession and control of the property from the time of the conveyance to Wilson, and had expended on it $7,000 in improvements."

We recognize the fact that the foregoing opinion concerns ownership in *real estate,* not *personal property,* but how very similar to the facts in the instant case. Garfinkel had purchased the automobile by a conditional sales contract (Ex. C6, p. 429) from Bartram Kershaw, Inc., by a payment of $119.00, and deferred payments of $180.00 to be made to General Motors Acceptance Corporation. It does not appear who held the legal title.

On April 6, 1928, the day of the sale, Mr. Garfinkel was put into possession of the automobile by the agent of the seller (pp. 146-149) who accompanied him to a motor vehicle agency for tags, and he was then recognized by the State of New Jersey as the owner when it issued him a license for the automobile. Complainant also recognized him as owner in its pleadings (Ex. D3, p. 459, par. 3). By these acts we argue that Mr. Garfinkel became the equitable owner of the automobile, and since it was not held (using the words of *Martin v. State Ins., supra,* at page 490) jointly or in common with another, it was entire and sole, and to be absolute is to be unconditional.

Many of the courts of this country have held that sole and unconditional ownership requirements in policies is complied with by a showing that the assured has the equitable title. We quote from several of these decisions, as follows: In *Arkansas Ins. Co. v. McManus,* 86 Ark. 119, 110 S. W. 798, the Supreme Court of Arkansas wrote:

> "It is well settled by authority that conditions in insurance policies that the assured shall have 'unconditional and sole ownership' of the property insured, or that he shall have 'the title in fee simple,' are complied with by showing that the assured has the equitable title. It is held in many cases that possession under a contract to convey is 'unconditional and sole ownership,' and also that it is 'title in fee simple,' within the meaning of that requirement of the policy. 2 *Cooley's Briefs on Insurance,* pp. 1354, 1376; *Ostrander on Insurance,* Sec. 72. *It is so held as to a parol contract to convey: Milwaukee, etc., Ins. Co., v. Rhea & Son,* 123 Fed. 9, 60 C. C. A. 103."

In *Scott & Callaway v. Insurance Company,* 70 W. Va. 533, 537, 74 S. E. 659, 661 (40 L. R. A. (N. S.) 152), the Court said:

> "This clause (sole and unconditional ownership) is held to refer to character and quality of title—to the actual and substantial ownership, rather than the strictly legal title; in other words, the insured's interest must be such that he would sustain the whole loss if the property is destroyed."

Virginia has repeatedly held that sole and unconditional ownership does not even refer to the legal title, but only to the interest of the insured. *Insurance Company v. Rodefer,* 92 Va. 747, 751, 752, 24 S. E. 393, 53 A. M. St. Rep. 846.

To like effect is held in *Socicer v. National Union Fire Insurance Company,* 90 Fla. 820, 106 S. O. 879; *Pac. State Fire Insurance Company v. Rowan Motor Company,* 122 Oreg. 665, 260 Pac. 441; *Sims v. American Cent. Ins. Co.* (C. C. A.), 296 Fed. 115; *Wyman v. Security Insurance Company,* 262 Pac. 329. In New Jersey we do not have any case in point, but quote *Savarese v. Hartford Fire Insurance Company,* 99 N. J. L. 435, and *Norris v. Alliance Insurance Company,* 123 Atl. 762, as indicating the trend of decisions in this State.

The fact that the automobile was purchased under a conditional sales contract did not affect the premium rate the complainant (p. 130) would charge, and the premium computation is found in the policy under Condition F (p. 407).

The entire loss of the automobile would have been sustained by Mr. Garfinkel under his contract (p. 429), and he could not personally gain one penny under the policy issued in this case. His effort was for the benefit of the public. The only case in which complainant would be called on to pay was personal injury or property damage claim to someone else.

CONCLUSION AND PRAYER.

We respectfully submit that the decree below should be reversed and the record remitted with di-

rection to enter a decree granting the relief prayed for by defendants in their respective counter-claims, and decreeing that the complainant be estopped to assert forfeiture or non-liability under its policy of insurance.

We further respectfully submit that since some of the witnesses, who would be called to establish the complaint of Lida A. Endicott, executrix, against the complainant, are non-residents of the State, Harry Garfinkel residing in California (p. 333) and Milton Garfinkel in Pennsylvania (p. 177), that this Honorable Court direct that a decree be entered in favor of Lida A. Endicott, executrix, etc., against complainant, for the sum of $15,000.00 damages, and costs of $118.57, together with interest on said sums from June 21, 1929 (p. 478).

In conclusion, we pray this Honorable Court will use the wide and complete authority it has so that these defendants may have such further or other relief as may be equitable and appropriate.

Respectfully submitted,

MAURICE J. HALPERN,
Solicitor for Harry Garfinkel and Milton Garfinkel.

BURTON A. GASKILL,
Solicitor and of Counsel with Lida A. Endicott, Executrix, etc., and of Counsel with Harry Garfinkel and Milton Garfinkel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

HUDSON CASUALTY INSURANCE COMPANY,
Complainant-Respondent,

and

HARRY GARFINKEL, *et al.*,
Defendants-Appellants.

ON APPEAL FROM COURT OF CHANCERY.

BRIEF OF COMPLAINANT-RESPONDENT.

(Italics, etc., ours, except where otherwise noted.)

THE FACTS.

On February 2, 1928, complainant, Hudson Casualty Company, issued its policy of liability insurance to one Milton Garfinkel (Ex. C2, p. 415). Complainant investigated Mr. Garfinkel and found him

an undesirable risk (S. C. 103, ll. 15-20) and cancelled the policy.

On or about March 1, 1928, Milton Garfinkel's automobile was repossessed by a finance company (S. C., p. 181, ll. 1-10). On April 6, 1928, he picked out a Chevrolet car (S. C., p. 183, ll. 2-20) which was purchased in the name of his uncle, Harry Garfinkel. Milton then ordered a policy of insurance in Harry Garfinkel's name (S .C., p. 186, l. 34) which was issued by complainant's agents, Taylor and Soloff, through John Soloff, an intimate friend of Milton Garfinkel (S. C., p. 261, ll. 10-18).

The policy warranted that Harry Garfinkel was the sole and unconditional owner, whereas in fact the automobile was purchased under a conditional sales contract (Ex. C6). The policy further warranted that no company or association had cancelled a policy to the named assured within three years, and that the automobile was principally maintained in Ventnor City.

On May 14, 1928, while Milton Garfinkel was driving the automobile with his father, Isaac, as a passenger, it collided with an automobile driven by one, Timothy Cordery, and one, Endicott, riding with Cordery, was killed.

Complainant commenced an investigation. Harry Garfinkel evaded the investigator for some time ( ) and when finally interviewed, refused to give any information ( ).

The investigation revealed that the warranties had been broken.

Complainant thereupon on July 24, 1928, notified Mr. Garfinkel that it denied liability under the policy (Ex. D2, S. C., p. 442). On August 3, 1928, a check

for the premium was mailed to Mr. Garfinkel (Ex. C5, S. C., p. 428), but Mr. Garfinkel rejected it.

In November action was instituted against Harry Garfinkel, Milton Garfinkel and Timothy Cordery for Endicott's death. The summons and complaint was sent to complainant, who rejected and returned it (Ex. C11, S. C., p. 438).

Thereupon, one Robert Garfinkel, a brother of Milton, and an attorney, communicated with complainant, and after some negotiation he prepared a non-waiver agreement under the terms of which complainant was to defend the action against the Garfinkels, and file a counter-claim against Cordery without waiving its denial of liability under the policy (S. C., p. 301, ll. 1-3; Ex. D8, p. 501). Robert Garfinkel then furnished the information for the filing of a counter-claim for Milton and Harry (Ex. C8, p. 434). Whereupon complainant retained Clarence L. Cole to represent the Garfinkels.

Robert Garfinkel advised Mr. Cole that Isaac would not come to the trial as a witness unless he were paid, and Robert demanded a fee for himself (S. C., pp. 174-175). The trial came on and resulted in a verdict of $20,000 against the Garfinkels, which was later reduced to $15,000.

Mrs. Endicott, as executrix, then instituted an action against complainant to recover the amount of the judgment. Complainant thereupon filed its bill to rescind the policy and to enjoin Milton, Harry, Isaac and Mrs. Endicott from instituting or prosecuting any actions upon the policy. The defendants filed almost identical answers and counter-claims seeking the reformation of the policy to show Harry

Garfinkel as conditional vendee. The Vice-Chancellor concluded:

> "Without further restating the testimony, I am convinced that the complainant is entitled to the relief sought."

A decree was thereupon entered cancelling the contract. From this decree, defendants now appeal.

I.

COMPLAINANT IS NOT ESTOPPED TO DENY LIABILITY UNDER ITS POLICY.

Defendants argue that since complainant defended the actions against Milton J. Garfinkel and Harry Garfinkel, it is now estopped to deny the validity of the policy.

It is well settled that where the insurer has given notice that it reserves its rights based on insured's default, the participation by insurer in the defense of the action by the injured person against insured will not create an estoppel: *St. Louis Iron Co. v. New Amsterdam Casualty Co.*, 40 Fed. (2) 344 (C. C. A.), certiorari denied 282 U. S. 882, 51 Sup. Ct. Rep. 86, 75 L. Ed. 778; *Commercial Casualty Insurance Co. v. Fruin Conlon Contracting Co.*, 32 Fed. (2) 425 (C. C. A.); *Basta v. United States Fidelity & Guaranty Co.*, 140 Atl. 816 (Conn.); *Sargent Manufacturing Co. v. Travelers Insurance Co.*, 165 Mich. 87, 130 N. W. 211, 34 L. R. A. (N. S.) 491 and note; *Mann v. Employers Liability Assurance Corp.*, 123 Minn. 305, 143 N. W. 794; *Royle Mining Co. v. Fidel-*

ity and Casualty Co., 161 Mo. App. 185, 142 S. W. 438; *Weatherwax v. Royal Indemnity Co.,* 250 N. Y. 281, 165 N. E. 293; *Weiss v. New Jersey Fidelity and Plate Glass Insurance Co.,* 228 N. Y. S. 314, 320; *Edgefield Manufacturing Co. v. Maryland Casualty Co.,* 78 S. C. 73, 58 S. E. 969; 36 C. J. 1109, Sec. 98; 36 C. J. 1078 note 6.

In the case at bar complainant unquestionably did reserve its right to avoid the policy before entering upon the defense of Milton J. Garfinkel and Harry Garfinkel, and they both acquiesced therein.

Immediately after it had investigated the accident, complainant on July 24, 1928, notified Harry Garfinkel in writing that it denied liability under the policy because of the breach of warranties (Ex. D2, S. C., p. 442). On August 3, 1928, complainant tendered the full premium to Mr. Garfinkel, declaring that the policy was null and void from its inception (Ex. C5, S. C., p. 428). Mr. Garfinkel rejected the premium, but complainant wrote him on August 10th, telling him that the policy was nevertheless void and that the premium would be paid him whenever he chose to accept it (Ex. D7, S. C., p. 500).

There were no further communications between the parties until November 20, 1928, when Milton Garfinkel brought the summons and complaint to Taylor and Soloff, the agents who had written the policy, telling them that "Harry Garfinkel is out of town for a few days and he therefore thought it advisable to turn the summons and complaint over" (Ex. D9, S. C., p. 504). Immediately upon receipt of the summons and complaint, complainant sent it back to Mr. Harry Garfinkel "for the reason that we deny liability under your policy, and are therefore

not interested in the outcome of this suit. The papers are being returned to you so that you may obtain counsel to protect your interests'' (Ex. C11, S. C., p. 438). A copy of this letter was sent to Taylor and Soloff (Ex. C12, S. C., p. 439).

Robert Garfinkel, an attorney, brother of Milton J. Garfinkel, and nephew of Harry Garfinkel, then communicated with complainant, and after some negotiation *Robert Garfinkel* drafted a non-waiver agreement and submitted it to the complainant (S. C., p. 301, ll. 1-3). Complainant approved it, and it was signed. That non-waiver agreement (Ex. D8, p. 501) reads in part as follows:

> ''3. WHEREAS, said party of the second part (complainant) denies all liability under the terms of said policy, and,
>
> 4. WHEREAS, as a result of said accident an action for damages has been instituted in the Supreme Court of New Jersey against said Harry Garfinkel, Milton J. Garfinkel and Timothy Cordery, jointly and individually, by Lida A. Endicott, executrix of Thomas D. Endicott, deceased, and,
>
> 5. WHEREAS, said Harry Garfinkel and Milton J. Garfinkel are desirous of filing a counter-claim against said Timothy Cordery for the recovery of damages resulting to each of them because of the negligence of the said Timothy Cordery in causing the accident aforesaid, and,
>
> 6. WHEREAS, said party of the second part regardless of its denial of liability as set out in paragraph 3 hereof deems it advisable for its better protection to defend the action mentioned in paragraph 4 hereof, therefore:

In consideration of the facts set out in paragraph 6 hereof it is mutually agreed and understood by and between the parties hereto that the said party of the second part shall defend the above mentioned action on behalf of the said Harry Garfinkel and Milton J. Garfinkel and shall also file a counter-claim for each of them in said action against the said Timothy Cordery, all without charge or cost to said Harry Garfinkel and Milton J. Garfinkel, and it is further agreed and understood that nothing in these premises shall be construed either as an admission of liability to pay damages on the part of the party of the second part under its policy as aforesaid, or as a waiver on the part of the party of the first part to any of his rights under the terms of said policy, in the event of a recovery by the plaintiff in the above-entitled action."

Robert Garfinkel then on December 13, 1928, wrote complainant (Ex. C8, S. C., p. 434) "to supply you with the necessary information to enable you to file a counter-claim in the above-entitled action on behalf of the defendants, Harry Garfinkel and Milton J. Garfinkel." The letter set forth in detail Milton J. Garfinkel's injuries, and demanded $5,000.00 damages for him; and outlined Mr. Harry Garfinkel's damage in the amount of $1,000.00.

After the execution of this non-waiver agreement and the receipt of the letter from Robert Garfinkel, complainant's attorneys filed the answer and the counter-claim against Cordery called for by the agreement. Cordery (who was the owner and driver

of the automobile which had collided with the Garfinkel car) in turn filed an answer to the counter-claim against him and a counter-claim against Harry Garfinkel. To this cross counter-claim, complainant then filed an answer.

In spite of the express terms of this non-waiver agreement, and in spite of complainant's consistent denial of liability, defendants nevertheless argue that complainant is estopped to deny its liability for two reasons. First, in filing an answer to Cordery's cross counter-claim, complainant did more than the non-waiver agreement authorized. Second, Milton J. Garfinkel knew nothing of complainant's denial of liability nor of the reservation of its rights.

The first reason is so unfair that it refutes itself. Under the non-waiver agreement complainant was expressly authorized to file a counter-claim against Cordery. When Cordery filed his counter-claim, it was complainant's duty to file an answer. The authority to do so was necessarily included in the authority to file the counter-claim. It was a necessary step in the maintenance of the counter-claim and a part thereof.

The agreement did not purport to specify every step to be taken in the actions from demand to judgment. Complainant was called upon to defend Harry Garfinkel and Milton J. Garfinkel, and to prosecute for them. Its attorneys did what every capable and diligent attorney would have done. Nothing was done which cannot be referred to the non-waiver agreement. There was therefore no waiver nor estoppel on this ground.

Defendants then argue that Milton J. Garfinkel knew nothing of the non-waiver agreement, nothing

of complainant's consistent denials of liability, nothing of complainant's reservation of its rights. The record demonstrates the incredibility of this tale.

The testimony of Harry Garfinkel, Milton J. Garfinkel and Robert Garfinkel, evasive as it is, reveals the following facts:

Harry Garfinkel is Milton Garfinkel's uncle. They both lived with Milton's father, Isaac, at 4 South Surrey Place, Ventnor City, and were there until after the Endicott action was begun (S. C., p. 214, ll. 30-35; S. C., p. 324, ll. 7-12; S. C., p. 449, ll. 29-31). Harry and Milton were intimate. Milton picked out the automobile (S. C., p. 183, ll. 2-20) and ordered the insurance (S. C., p. 186, l. 34). Milton worked for his Uncle Harry (S. C., p. 344, ll. 15-19) and drove about with him daily, occasionally taking long trips (S. C., p. 199, ll. 10-35) to Williamstown and to Maryland. Milton reluctantly admitted that after the accident he had discussed the position taken by complainant with Harry.

He testified (S. C., p. 215):

> "Q. Did you have any conversation with Harry about this accident?
>
> A. He was always talking about what a rotten company he thought it was and that is about all.
>
> Q. Why did he think this company was so rotten?
>
> A. Well, he seemed to think they ought to settle those things up out of court, I guess, and I don't know just what his grievance was.
>
> Q. So that you and he had quite a few conversations after this accident about this being a rotten company?

A. No, we didn't have quite a few conversations about it.

Q. Not quite a few; how mnay did you have?

A. I don't know.

Q. Did you have more than one?

A. I think I heard him say it more than once."

A moment later he testified that he "didn't remember" whether his uncle mentioned complainant's denial of liability (S. C., p. 216, l. 10).

Then (on page 324) he testified:

"Q. Where was your uncle living at this time, at the time of this service of this summons and complaint on you?

A. If I remember correctly, he was living at the Surrey Avenue address.

Q. With you folks?

A. Yes.

Q. Did you know that the company had written to him saying that it was not defending him; did you know that?

A. No, I did not.

Q. Did you ever hear it discussed?

A. He was very emotional in his discussions about the company.

Q. Did you ever hear that feature of this case discussed?

A. I don't recollect having heard it discussed.

Q. You don't recall?

A. No.

Q. What was it made your uncle emotional about this company?

A. He seemed to think that they were trying to get admissions from him that would be damaging to him, I don't know in what respect.

Q. Is that all?

A. That is all that I can remember.

Q. You never got any detail about this, did you?

A. No, I never discussed the case very much with my uncle because he was always wrought up about it.

Q. Why was he wrought up?

A. I just explained before.

Q. What kind of statements did he say that they were trying to get from him?

A. I don't remember what specific statements.

Q. What did he say when he was in this wrought-up condition?

A. That has been quite a while ago; I can't remember his words.

Q. Do you remember the substance of what he said?

A. I wouldn't undertake to repeat them now because I do not believe even my idea of the substance would be very accurate.

Q. You have—can you say that you never heard your uncle say that this company had denied liability?

A. I believe I can say that up to the time of the trial of the case, and not until they filed this action here.

Q. Never heard him say it?

A. I don't think I remember having heard him say that."

Isaac Garfinkel, the father, was in the automobile at the time of the collision, in which a man was killed. Can it be believed that these three men, so closely related and living together, did not discuss the situation in detail, particularly the attitude of the insurance company? And is it likely that the matter was not discussed with Robert Garfinkel, Isaac's son, and a lawyer?

It is admitted that after complainant refused to defend the Garfinkels, Robert undertook negotiations with complainant which resulted in the preparation by him of the non-waiver agreement. But, say defendants, Robert was then acting as agent for Harry and not as agent for Milton. To that the answer is that it is not necessary that an agency should have existed; it is sufficient that Milton knew what was done or was being done and did not object. It is well settled that there need not be express assent to the insurer's reservation of its rights—failure to demur is sufficient.

In *Weiss v. New Jersey Fidelity and Plate Glass Insurance Co.,* 228 N. Y. S. 314, the Court held:

> "The defendant company accepted these summonses and complaints only upon a specific reservation of its right to disclaim liability because of the failure of the assured to give prompt written notice of the accident, and has never changed its attitude in this respect. Oppenheimer, when interviewed and examined by the company's claim agent on November 20, 1920, and during all the subsequent proceedings taken by the insurance company in the defense of this action, including the preparation of the answers, as far as the record discloses, never

protested or declined to allow the company to proceed in the conduct of the defense of this action under its expressed and specific reservation of rights, of which there can, on this record, be no question but that the assured had full knowledge. The consent of the assured that the company may undertake the defense of the litigation and reserve its right to repudiate its liability thereafter may be either expressed or inferred from the acquiescence of the assured. Farrell v. Merchants' Mutual Automobile Liability Insurance Co., 203 App. Div. 118; 196 N. Y. S. 383. From the evidence in this record it is clearly apparent that Max Oppenheimer, the insured, fully understood and acquiesced in this reservation of rights by the defendant insurance company * * *

I am definitely of the opinion that upon this record this defendant company explicitly reserved its rights in undertaking the defense in the primary action, and that the assured understood and consented to such reservation without objection, and that, under the circumstances here existing, there was no waiver by the insurance company of its reservation of rights."

In *Royle Mining Co. v. Fidelity and Casualty Co.*, 161 Mo. App. 185; 142 S. W. 438, 444, cited by defendants, the Court held:

"If the plaintiff understood that the defendant reserved its rights under its indemnity policy at the time it assumed charge of the defense of the McDaniels action, then there never

existed any estoppel against the defendant * * *"

The New York Court of Appeals in *Weatherwax v. Royal Indemnity Co.*, 250 N. Y. 281; 165 N. E. 293, said:

> "No doubt a waiver may often be inferred from the assumption of the defense of such a claim without reservations or conditions. Here reservations or conditions were imposed by the insurer, and assented to by the insured *through tacit acquiescence.* Hermance v. Globe Indemnity Co., 221 App. Div. 394; 223 N. Y. S. 93; Farrell v. Merchants Mutual Automobile Liability Insurance Co., 203 App. Div. 118, 121; 196 N. Y. S. 383; Gordon, Inc., v. Massachusetts Bonding and Insurance Co., 229 N. Y. 424; 128 N. E. 204."

It is apparent that not only did Milton know what Robert was doing, but Robert was in fact acting as Milton's agent. If not, why was Robert so careful to provide in the non-waiver agreement that the complainant should defend Milton and file a counter-claim on his behalf? Why did Robert submit such detailed instructions on the filing of Milton's counter-claim, even down to the amount of damage to be demanded; and from whom did he get the information? (Ex. C8, S. C., p. 434). Why did Robert appear at the office of Clarence L. Cole (who had been retained by complainant to defend the accident suits) with *both* Milton and Harry, and refuse to produce Isaac as a witness in the impending trial

unless Isaac and he, Robert, both were paid (S. C., pp. 174-175)? Milton admits that Robert was there at his express request (S. C., p. 211, l. 32).

From immediately after the accident until at least after the judgment was entered in the Endicott suit, Milton looked to Robert for advice and assistance. Milton testified (S. C. p. 211, l. 32):

> "Q. Did you discuss this matter with him?
>
> A. Yes.
>
> Q. Did he represent you in any connection in this matter?
>
> A. I discussed it with him and I believe he talked to the adjuster that was here to investigate the accident that first two or three days, afterwards I believe he talked to him about the case."

Later he testified (S. C. p. 327, ll. 7-29):

> "Q. Did you ever discuss this with Robert?
>
> A. Discuss what?
>
> Q. This accident and the ensuing litigation?
>
> A. I discussed the accident with him immediately after it happened, when he was practicing down here, I mean his office was still in Atlantic City I talked with him.
>
> Q. Did you discuss anything about whether or not you were to be defended by an insurance company?
>
> A. I don't remember that. I took it for granted that the insurance company would defend me.
>
> Q. Did you take it for granted?
>
> A. Certainly.

Q. Why did you, then, ask that you be advised whether or not they would defend you?

A. I think that was a very reasonable question.

Q. So is mine; answer it.

A. I don't know why.

Q. Had no reason for thinking that there might be a question about it, did you?

A. No particular reason I can recall."

And after the judgment was entered Milton testified (S. C. p. 195, ll. 12-20):

"A. When a judgment was given for $20,200, I thought it was a peculiar question and I asked my brother, the attorney, to ascertain first of all what the judgment was for and subsequently found twenty thousand dollars was awarded to Cordery; that is the first time I knew he ever sued him."

Since the only question between Harry Garfinkel and the company was whether the company would represent Harry Garfinkel in the Endicott action, it is significant that Milton admitted (S. C. p. 325, ll. 26-29):

"Q. Did you ever know that your brother was representing him?

A. Yes, I knew my brother was representing him."

If Milton knew that Robert was representing Harry he must have known why he was representing him.

Robert's testimony is as obviously untrustworthy

as Milton's. Through ten pages of testimony (S. C. pp. 302-312), he quibbled and evaded. For example, he testified (S. C. p. 302, l. 23—S. C. p. 304, l. 20):

"Q. Were you the attorney for Harry Garfinkel?

A. Yes, I would say that I was acting for him.

Q. What was, what is your father's name?

A. Isaac M. Garfinkel.

Q. Why did you mail a copy of this contract to Isaac Garfinkel?

A. My father was conducting all the negotiations for Harry Garfinkel. Harry Garfinkel was on the road almost continuously during this entire period of time and he was, my father told me ——

Q. I object to any conversation that your father told you. I think the question, as a matter of fact, has been answered. You wrote this letter, C8 for identification, didn't you?

A. Yes, I did.

Q. You wrote that on behalf of Milton Garfinkel, didn't you?

A. I never wrote any letters on behalf of Milton Garfinkel at this particular period of time.

Q. Well, how did you come to state in this letter that you are sending this letter in order to supply the necessary information for the Hudson Casualty Company to file a counterclaim on behalf of the defendants, Harry Garfinkel and Milton Garfinkel?

A. To answer that, Mr. Hanstein, I would have to go into the history of the negotiations leading up to the preparation of this contract.

Q. Who told you to send this information about Milton's counter-claim to the Hudson Casualty Company?

A. Who told me to do it?

Q. Yes.

A. I assume that it must have been my father.

Q. Was he acting for Milton as well as for your uncle?

Mr. Gaskill: I object.

The Court: What is the objection? Here is your witness, he wrote a letter in which he says he is doing it for the purpose, naming both of these defendants, now he is being cross-examined to find out by what authority.

(Objection withdrawn.)

A. As I said before ——

(Question repeated.)

A. As I said before, I was not acting for Milton Garfinkel during the period of these negotiations at all.

Mr. Hanstein: I ask that be stricken and the question repeated.

(Question repeated.)

A. Was who acting for Milton?

Q. Your father?

A. That I can't say. As far as his information to me was concerned, he was acting for Harry Garfinkel."

Then (S. C. p. 305, l. 19—S. C. p. 308, l. 22):

"Q. Had you had any conversation with Milton with regard to the defense to this suit?

A. At that time?

Q. Yes.

A. No, sir.

Q. Did you expect this letter to be used by the Hudson Casualty Company in the filing of a counter-claim for Milton?

Mr. Gaskill: I object to what he expected, your Honor. That can't bind Milton Garfinkel. He says he wasn't the attorney.

Mr. Hanstein: I am entitled to cross-examine as to that.

The Court: I will permit it.

A. I don't know that I had any expectations on the subject, Mr. Hanstein.

Q. Now, you, of course, as a lawyer, knew that if Milton had any claim against the other party involved in this suit, the appropriate way to set it up was by counter-claim, didn't you?

A. Are you asking me an abstract question of law now?

The Court: He is asking you a question of fact in this case.

A. I did not represent Milton J. Garfinkel at the time.

The Court: Let that be stricken.

A. Your Honor please, may I have the question repeated?

The Court: Certainly.

(Question repeated.)

A. Well, yes, an appropriate way would be to set it up by counter-claim.

Q. And you expected that there would be a counter-claim set up for Milton, didn't you?

A. Did I expect that the Hudson would set it up?

Q. You expected that a counter-claim would be set up for Milton in this suit, didn't you?

A. I was not representing him.

The Court: Let that be stricken.

(Question repeated.)

A. Well, under the terms of the contract it seems to me there was something said about a counter-claim and I assume that I expected they would counter-claim under that, yes.

Q. For Milton?

A. For Milton, yes.

Q. And you thought that because of what appeared in the contract, is that right?

A. Yes, I suppose that was it.

Q. So that you expected that a counter-claim would be set up for Milton, didn't you?

A. Yes.

Q. Did you have any conversation with Milton about it?

A. I don't recall having any conversation with Milton.

Q. Didn't talk to him about this accident at all?

A. No, Milton at that time resided in Philadelphia and was on the road a great deal of the time, while I resided and practiced law in Newark.

Q. Who did you get your information from with regard to the counter-claim?

A. The ——

Mr. Gaskill: Your Honor, I object unless he specifies which counter-claim.

Q. The counter-claim of Milton.

A. I don't know that I understand the question.

(Question repeated.)

A. You mean with regard to the fact that a counter-claim was to be filed on his behalf?

Q. Yes.

A. From my father.

Q. Your father advised you that a counter-claim was to be set up for Milton, is that correct?

A. The circumstances were these ——

Q. Did he advise you that a counter-claim was to be set up for Milton?

A. He suggested that a counter-claim be set up for him, yes.

Q. And you communicated that to the company, didn't you?

A. I communicated it to them? No, I didn't communicate it to them.

Q. Didn't you tell the company that your father suggested that there be a counter-claim set up for Milton?

A. I prepared a contract along those lines, a copy of which Mr. Gaskill showed me, and I think the next thing I did was to send a copy of it to the company and a copy of it to my father."

And then he said (S. C. p. 310, l. 34—S. C. p. 311, l. 25):

"Q. And you knew at that time that Hudson Casualty Company had said that it was not liable under this policy, didn't you?

Mr. Gaskill: I object, your Honor. The contract that they make speaks for itself.

The Court: I will permit that question. You may answer that question.

(Question repeated.)

A. Yes, I knew that, certainly.

Q. And you knew that the company was going ahead to defend this case?

A. Did you say did I know it in so far as Milton was concerned?

(Question repeated.)

(Former answer repeated.)

A. May I correct my testimony?

The Court: Yes.

A. I knew it in so far as Harry Garfinkel was concerned. I didn't know of any dealings that they had had with Milton Garfinkel."

From all the testimony the conclusion must be that Isaac, Milton, Harry and Robert were familiar with the situation from the time of the accident until the time of the trial, that they discussed it among themselves and that it was on Robert's advice and through Robert's negotiations that the complainant was induced to enter upon the defense in the Endicott snit. Both Milton and Harry knew of complainant's reservation of its rights and did not object. There is therefore no estoppel.

The determination of the questions of fact in this case depended particularly upon the credibility of the witnesses. Great weight should be given to the determination by the Vice-Chancellor who had an opportunity to see the witnesses. *Cavanna v. Brooks,*

97 N. J. Eq. 329, 127 Atl. 247; *Riddle v. Clabby,* 59 N. J. Eq. 573; *Grunt v. Weissman,* 107 N. J. Eq. 107, 151 Atl. 729. The finding of the Vice-Chancellor that there was no estoppel is amply supported by the testimony and should be affirmed.

II.

THE COURT WAS JUSTIFIED IN SETTING ASIDE THE POLICY ON THE GROUND OF THE BREACH OF WARRANTIES AS TO THE CHARACTER OF THE TITLE OF HARRY GARFINKEL.

The policy provides:

"HUDSON
CASUALTY INSURANCE COMPANY
Home Office, Jersey City, New Jersey

In Consideration of the premium herein provided and of the statements contained in the Schedule hereinafter set forth, *which statements the Named Assured makes and warrants to be true by the acceptance of this Policy,* the HUDSON CASUALTY INSURANCE COMPANY, hereinafter called the Company,

HEREBY AGREES," etc. (S. C., p. 402).

The ninth statement contained in the schedule referred to in said policy (p. 414) reads as follows:

"9. The interest of the Named Assured in the automobiles herein described is that of un-

conditional and sole ownership, except as follows: No exceptions."

The proof established beyond a question that the defendant, Harry Garfinkel, purchased said car under a conditional sales agreement (see Exhibit C6, page 429). The defendant, Harry Garfinkel, admitted his purchase of the car under that contract (p. 337). The importance of the warranty is established by the testimony of witness, Kreps, who was in charge of underwriting for the complainant. He testified as follows (S. C., pp. 99-100):

> "A. Well, we have found where people operated cars which they did not own outright as a rule they were poorer moral risks than people who owned their cars outright. We also have found on many occasions other people had interests in the car and in the operation of the car who probably because of their own standing couldn't get insurance themselves and if those facts were known, facts which they do endeavor to find out when they know that a man is not the unconditional owner of a car in this case they will not insure anybody who operates that car. A lot of cases we have where people have had insurance policies cancelled on them by companies and then in an endeavor to secure insurance, thereby avoiding the necessity of stating that they have had previous insurance cancelled and so on, they have the cars insured in the name of somebody else."

It has been repeatedly held that a breach of such a warranty voids a policy.

Franklin Fire Insurance Company v. Martin, 40 Law 568;
Smith v. Fidelity & Deposit Co., 98 Law 534, 120 Atl. 322;
Sica v. Home Insurance Co., 8 Misc. 35, 148 Atl. 17;
Heliotos v. Great American Insurance Co., 103 Law 529, 138 Atl. 97;
Berkowitz v. West Chester Fire Insurance Co., 106 Eq. 238, 150 Atl. 404;
Weatherby v. Scottish Union National Insurance Co., 9 Misc. 1256 (N. J. Advance Reports, Vol. 9, No. 51, page 1256);
Kramer v. Western Assurance Co., 9 Misc. 1261 (N. J. Advance Reports, Vol. 9, No. 51, page 1261).

The case of *Heliotos v. Great American Insurance Co.,* above cited, is very close to the present case on the point of breach of warranty. In that case the plaintiff held a fire insurance policy issued by the defendant company in which it was agreed that the policy should be void "if the subject of the insurance be personal property and *be or* become encumbered by a chattel mortgage." It appeared that the insured property was encumbered by a chattel mortgage and it was held that the policy was thereby avoided. The reasoning of the Court employed in that case is applicable to the present case in which an outstanding interest by way of conditional sales agreement existed in violation of the insured's covenant that he was the unconditional and sole owner. In the cited case the Court said:

"One who is the sole and unconditional owner of property is likely to be more concerned about its preservation than one who merely has a fractional interest therein. Similarly one who holds property free from encumbrances is likely to take greater pains to protect than one who has a mere equity in it. This declining interest should affect, not only the property covered by the mortgage, but all other insured property covered by the policy, where, as here, it was in all the same building and the risk substantially the same on all. For these reasons it is provided that the encumbrance shall void the entire policy. A chattel mortgage in the eyes of an insurer is an indication of the possibility of an undesirable risk. If the mortgage is brought to its attention and the insurer, after investigation, is satisfied to continue its policy, the clause in question is supplanted by an endorsement attached to the policy in accordance with the terms of the standard policy. But, if the assured does not disclose the chattel mortgage, he deprives the insurer of the right and opportunity to cancel its policy, if it should determine that the risk is an undesirable one."

"The great weight of authority is to the effect that the vendee under such conditional sales contracts is not the sole and unconditional owner within the meaning of the condition of an insurance policy." *Virginia F. & M. v. Lennon* (Va.) 125 S. E. 801, 38 A. L. R. 186, and note, which collects numerous cases: 14 R. C. L. 1059; 26 C. J. 176; 3 Joyce No. 2034, 2 Cooley 1382.

Upon ascertainment of the fact that Harry Garfinkel was not the sole and unconditional owner, the complainant notified him of its election to rescind (Exhibit C5, p. 428); also see Exhibit D2 (p. 442), and returned unto the said Harry Garfinkel the premium paid by him.

Upon those facts, clearly the complainant was entitled to a decree setting the policy aside and restraining any action upon it by these defendants, each of whom might institute an action at law thereon. *New York Life Ins. Co. v. Hernman,* 103 N. J. Eq. 403; *Shotwell v. Shotwell,* 24 N. J. Eq. 378, 380.

III.

THE COURT WAS JUSTIFIED IN SETTING ASIDE THE POLICY UPON A FINDING THAT MILTON GARFINKEL WAS, IN FACT, THE OWNER OF THE AUTOMOBILE IN QUESTION.

The testimony with respect to Milton Garfinkel's ownership of the car in question turns rather upon inferences to be drawn from the facts and the circumstances of the transaction, than upon direct proof. However, the Court would have been entirely justified in reaching the conclusion that Milton Garfinkel was, in fact, the owner of the automobile, from the reasonable inferences permissible from the testimony adduced. Under the circumstances of this case, it must be assumed that the Vice-Chancellor found all the reasonable conclusions permissible from the testimony.

In the first place, Harry Garfinkel, who is the uncle of Milton Garfinkel, had never owned a car before, and did not know how to drive. Milton Garfinkel had previously owned a car which, shortly before the purchase of the car in question, had been repossessed by the finance company, which was financing it. Shortly prior to that, the complainant had cancelled a policy of insurance which it had issued to the said Milton Garfinkel (see Testimony, p. 105; p. 126, l. 26). While it is true that the defendant, Milton Garfinkel, undertook to deny the receipt by him of the notice of cancellation, on cross-examination all that he would say was that he did not remember having received it, and would not deny that he had received it (p. 208). His friend, John Soloff, who happened to be the insurance manager in the office of Taylor & Soloff, the Atlantic City agents for the complainant, and who had handled the negotiations relating both to the policy issued to Milton Garfinkel and the policy issued to Harry Garfinkel, admitted that he knew that the complainant had cancelled the first policy that Milton Garfinkel had gotten.

It was claimed that the car in question was bought for Harry's business purposes.

It was admitted that Milton Garfinkel was the only one who drove it (pp. 375-376). It was testified that Harry Garfinkel was in the business of buying and selling precious metals, and that his nephew, Milton Garfinkel, worked for him (p. 198), and had not been in business for some months prior to working for Harry Garfinkel. Milton Garfinkel claimed that he received a commission for whatever business he did for his uncle, and also testified that for what-

ever business he did, the uncle had always gone along (p. 199, l. 20). He testified that outside of one or two trips out of Atlantic City, such as a trip referred to as being made to Maryland and to Ocean City, all the rest of the business was conducted in Atlantic City. Although Milton Garfinkel had been in the real estate business for a number of years prior, in Atlantic City, and knew all the streets and the names of many people in Atlantic City, he could not recall but one person upon whom he and his uncle ever called to transact business. Their business relations started in the forepart of April and continued until May 14th, and that was the only business visit that he could remember having made, although he was supposed to be driving his uncle around in the car for business purposes, from which he was to make his living (p. 202); nor could he remember how much he had ever received as commissions while in business with his uncle (see Testimony of Milton Garfinkel, pp. 198-204).

After May 14th, the date of the accident and the destruction of the car, he discontinued his business relationship with his uncle, and Milton Garfinkel's mother bought an automobile which Milton Garfinkel then operated (p. 201), and which he used in his business.

Coupled with that, when the car in question was bought, Milton Garfinkel was the one who went down to select and inspect it, bringing his uncle, Harry Garfinkel, along at the time the transaction was closed. The indifference of Harry Garfinkel, and his ignorance with regard to the present suit, are not insignificant factors.

He did not appear to testify at the time of the

trial, but his testimony was taken *de bene esse,* prior to the trial. On his examination he testified that he did not know that the complainant herein had started a suit against him, nor did he remember hiring a lawyer to represent him in the suit (p. 363, ll. 10-25). He denied that he had ever authorized anyone to file an answer in the pending suit (p. 365, ll. 25-35), although one was in fact filed. On page 366, Mr. Gaskill, of counsel with the defense, in the form of an objection, told Mr. Garfinkel all about the case, and yet he insisted that he was not a party to the suit. Later on in his testimony, under the prompting of Mr. Gaskill, who showed him a letter to refresh his recollection, he recalled that he had engaged a lawyer (p. 381, l. 33; p. 382), and stated that Mr. Gaskill was his counsel (p. 383, l. 20). Later, he remembered that Mr. Halpern was his counsel. Mr. Halpern's name appears as solicitor upon Garfinkel's answer and counterclaim.

From all of the testimony just referred to, the inference is that Harry Garfinkel did not own a car, and had no use for one, and that Milton Garfinkel, since the insurance had been cancelled upon his car, and the car had been repossessed, had Harry Garfinkel take title to the car in question for Milton Garfinkel. Milton Garfinkel's inability to remember on whom he called while driving his uncle around on business, and the fact that upon the destruction of the car in question, his mother acquired a car which he used, and that he terminated his business relationship with his uncle, all would tend to show that the car in question was Milton Garfinkel's.

That Harry Garfinkel never had a car before, or

since, would seem to indicate that he is not very serious in claiming the one in question. That Harry Garfinkel was so utterly ignorant as to the pending litigation would surely indicate that he had no interest in it, and that, no doubt, for the reason that that, like the car, was in Milton's hands. The Vice-Chancellor was justified in believing Milton Garfinkel was the real owner of the automobile.

IV.

THE COURT BELOW PROPERLY DISMISSED DEFENDANTS' COUNTER-CLAIM FOR REFORMATION.

Defendants counter-claimed for the reformation of the policy to show Harry Garfinkel as conditional vendee instead of as owner. This prayer was based on the allegation that John Soloff, Milton Garfinkel's friend, and manager of Taylor and Soloff, knew the nature of Harry Garfinkel's interest. With extraordinary similitude of detail, Milton and Harry Garfinkel and John Soloff testified that Milton ordered the policy over the telephone, and that when Milton gave him the motor number, serial number, etc., he told John Soloff that he was reading the information from the conditional bill of sale.

Assuming defendants' story to be true, defendants are not entitled to reformation.

John Soloff testified (S. C., pp. 255-256):

> "Q. When did it occur to you that it was important for you to remember that this car was being bought under a conditional sale contract?

A. A few months ago.

Q. You just then realized that it was important for you to remember it?

A. Yes, sir.

Q. What brought it to your attention then that it was important for you to remember that fact?

A. Certain affidavit that I have signed in Merritt Lane's office in Newark.

Q. You told the truth when you signed that affidavit, didn't you?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Was there any reason why you didn't?

A. I told the truth as far as the affidavit is concerned, but there was a clause put in pertaining to the sole and absolute ownership of the car that I didn't understand at the time.

Q. Didn't you know what sole and unconditional ownership of the car meant at the time you swore to this affidavit?

A. I haven't paid much attention to that clause at that time.

Q. Do you know now what that clause means?

A. Yes, sir.

Q. What does it mean?

A. When the car is bought outright.

Q. When the interest is not sole and unconditional, what kind of an interest does the man get in it then, do you know?

A. He holds title to the car I presume until it is paid for.

Q. What is that?

A. He holds title to the car until it is paid for.

Q. Who does?

A. Purchaser has an interest in the car until it is paid for, but the title is reverted to the purchaser when it is paid for in full.

Q. Now, the first time you found out what that sole and unconditional ownership meant was some time after you swore to this affidavit?

A. Correct.

Q. Up until that time, whether a man was buying a car under a conditional sales contract or whether or was not, did not mean anything to you, is that it?

A. Correct.

Q. Now, where did you suddenly acquire this new information about sole and unconditional ownership?

A. When I discussed this matter with several people.

Q. Who were those people?

A. Mr. Halpern, Mr. Gaskill, Mr. Soloff, my brother, Mr. Taylor, several other people and Mr. Kreps."

In other words, the attention of John Soloff was not drawn to the meaning of sole and unconditional ownership until after the litigation began. Under these facts the case is on all fours with the case of *Sardo v. Fidelity & Deposit Co. of Maryland,* 100 N. J. Eq. 332, and *Berkowitz v. Westchester Fire Insurance Co.,* 106 N. J. Eq. 238.

In the Sardo case this Court reversed a decree for reformation advised by Vice-Chancellor Lewis on the following facts, which are taken from the opinion of Judge Kays for the Court:

Sardo desired insurance against theft on his stock of jewelry. His broker took him to a company agent called Newman, who called in the district manager of the company, Brush, to visit complainant's place of business and investigate the risk. Newman, the company agent, thereafter received from Brush a policy covering "money and securities," and after examining it concluded that these words also covered jewelry, although he knew there were no securities in the store. Sardo, assuming that it covered jewelry, did not read the policy.

Here we have a situation where two agents of the company examined Sardo's place of business and saw a jewelry risk was involved. They knew Sardo desired insurance on his jewelry. The Vice-Chancellor decreed reformation by the substitution of the word "jewelry" for the word "securities," largely because the company agent knew that there were no securities in the store. This Court, in reversing the decree, said (p. 334):

> "The rule laid down in this State is, that in order to reform a contract of insurance or other written contract in the absence of fraud on the part of the defendant, it must appear that the minds of the parties to said contract have met and that a mutual mistake of the contracting parties has been made in writing out the contract, so that the parties appear to have entered into a contract which they have not entered into.

> The reformation, therefore, of such a contract must be to make the written contract to conform to that upon which the minds of the parties have met. It cannot be said in this case that because the complainant assumed that the word 'securities' included jewelry, or because he did not read the policy, that the defendant intended that the word 'securities' was to include the word 'jewelry.' Mr. Justice Depue, in speaking for this court, in the case of Green v. Stone, 54 N. J. Eq. 307, says: 'The doctrine that a contract or deed will not be reformed for mistake, in the absence of fraud or imposition, unless the mistake was mutual, that is, reciprocal and common to both parties, where each alike was under the same misconception as to the terms of the written instrument, is the settled doctrine of courts of equity.' There is nothing in this case which shows that the defendant ratified the acts or intended acts of the agent, Newman, so that it was thereafter estopped from disaffirming them. Such acts must be shown unequivocally and that they were done with the full knowledge of the principal."

The applicability of this language to the facts of the case at bar is clear. Defendants gave no thought whatsoever to the warranty of sole and unconditional ownership and John Soloff gave it no thought, or if he did give it thought, believed that the policy covered. There was obviously no meeting of the minds upon this question. After the policy was issued, Harry Garfinkel did not read it and simply

put it away with his papers, where it remained until the time of the accident.

The Sardo case was followed and approved in the case of *Berkowitz v. Westchester Fire Insurance Co.*, 106 N. J. Eq. 238. In that case Berkowitz had a lien on certain fixtures, together with an option to purchase. He procured a policy of insurance through one, Newman, an agent of the insurance company, and both Newman and Berkowitz testified that Berkowitz had shown him the instrument from which Berkowitz derived his rights in the property. The policy of insurance was prepared in the usual form, insuring Berkowitz as owner. Under these circumstances the Vice-Chancellor granted reformation, but this Court reversed this decree, saying:

> "We are of the opinion that the conclusion of the Vice-Chancellor was erroneous. The complainant did not contend that fraud was practiced by the defendant company upon the complainant, nor did the complaint allege fraud. This case is similar to the case of Sardo v. Fidelity and Deposit Company of Maryland, 100 N. J. Eq. 332, in which this Court stated the rule, as laid down in this State in reference to reformation of contracts, to be as follows:
>
> 'That in order to reform a contract of insurance or other written contract in the absence of fraud on the part of the defendant it must appear that the minds of the parties to said contract have met and that a mutual mistake of the contracting parties has been made in writing out the contract, so that the parties appear to have entered into a contract,

which they have not entered into. The reformation, therefore, of such a contract must be to make the written contract to conform to that upon which the minds of the parties have met.'

This same rule was also laid down by this Court speaking through Chancellor Walker in the case of the Crescent Ring Co., Inc. v. Travelers' Indemnity Co., 102 N. J. Law 85.

The complainant in this case had the policy of insurance, as written, in his possession for six or seven months and it was his duty when the policy was received to promptly examine it and if it did not contain the proper conditions or provisions to at once notify the company of such fact and of his refusal to accept the policy. This the complainant did not do. This rule was also laid down in the case of the Crescent Ring Co., Inc., Inc. v. Travelers' Indemnity Co., and in the case of Sardo v. Fidelity and Deposit Company, &c., above cited."

Again in *Gross v. Yeskel,* 100 N. J. Eq. 293, the Court held:

"It is manifest that the parties to this agreement have not agreed to the same thing in the same sense, so that there was lacking in the situation the meeting of the minds of the contracting parties, which forms the essential element to the valid consummation of a contract.

Reformation, as an equitable doctrine, proceeds upon the theory that a valid contract was created by the negotiations of the parties, but

by mutual mistake is wanting in formal expression or execution, so as to evince the actual intent of the parties. Birch v. Baker, 81 N. J. Eq. 264, 86 A. 932; Cochran v. Burns, 91 N. J. Eq. 7, 107 Atl. 476; 23 R. C. L. 327, and cases cited."

Since it is obvious here that there was no meeting of the minds upon this term in the contract, there can be no reformation. Further, it should be noted that the policy provides that the statements in the policy are warranted to be true by the acceptance of the policy (Ex. C2, p. 415, l. 25).

The mere knowledge of the agent does not affect the situation. The policy expressly provides:

> "Condition O. No change in the Agreements, Conditions, or Statements contained in the Schedule of this policy, either printed or written, shall be valid unless made by endorsement signed by the President and Vice-President and countersigned by a duly authorized agent, nor shall notice to, or knowledge possessed by any agent or any other person be held to waive, alter or extend any of such Agreements, Conditions, or Statements contained in Schedule, nor to preclude the Company from asserting any defense under said Agreements, Conditions or Statements contained in the Schedule, unless set forth in a duly executed endorsement attached hereto."

Construing such a clause, this Court in *Shyowitz v. Union Indemnity Co.*, 104 N. J. L. 339, held:

> "There are, of course, cases where in the ab-

sence of an express provision in the contract, such as is here contained, the acts of an agent in lulling the insured into a status of quiescence have operated as an estoppel against the company. Such an instance is presented in the case of Millville Ins. Co. v. Mechanics, etc., B. & L. Ass'n, 43 N. J. Law 652. But where the contract expressly contains the restrictions and limitations of authority presented by the policy in suit, it is difficult to perceive upon what legal theory of constructions its provisions may be ignored and overridden by the unauthorized acts of a subordinate agent, without in effect denying to the insurer the right to contract upon terms of its own selection. Manifestly, unless the *modus operandi* provided in the policy, relating to transfers of ownership, be complied with, there is no privity of contract existing between the parties upon which liability can be legally predicated, and obviously the parties to the suit must be assumed to be cognizant of the express provisions of the contract upon which they predicate a contractual status of liability. Catoir v. Insurance Co., 33 N. J. Law 487; McClave v. Mutual Reserve Assn., 55 N. J. Law 187, 26 A. 78; Kupferschmidt v. Agricultural Ins. Co., 80 N. J. Law 441, 78 A. 225, 34 L. R. A. (N. S.) 503."

See also *Robbins v. Farmers Mutual Fire Insurance Co.*, 133 Atl. 513; *Wheeler v. U. S. Casualty Co.*, 71 N. J. L. 396; *Pearson v. General Casualty Insurance Co.*, 107 N. J. L. 509; *Weatherby v. Scot-*

tish Union, 9 Misc. 1256; *Kramer v. Western Assurance Co.,* 9 Misc. 1261.

In *Sun Insurance Co. v. Scott,* decided Nov. 23, 1931, Supreme Ct. of the U. S.; U. S. Sup. Ct. Ad. Opinion 1931-1932, 76 L. S. p. 55, the Supreme Court said at p. 57:

> "The respondent insists that laying the loss payable endorsement out of view, the uncontradicted evidence that Bracken, the insurers' local agent, knew of the chattel mortgage, constitutes a consent on the part of the insurers that the policies should remain in force notwithstanding the encumbrance. He claims that for this purpose the knowledge of the agent is that of his principals. Reliance is placed upon Sec. 9586 of the Ohio General Code, which makes a person who solicits or takes an application for insurance the agent of the company, 'anything in the application or the policy to the contrary notwitstanding.' He asserts that the decisions of the Ohio courts interpreting this statute are to the effect that the agency thus imputed to the solicitor extends to all matters of contract with respect to the policy, including consent to the alteration of its terms.
>
> On its face the statute does not go so far. We have examined the authorities cited and fail to find that they give it any such force or effect. They do not, as respondent claims, define the scope of the agency created by the statute, but leave it to be defined by applicable principles of common law. *In the present cases the policy limits its scope, and we think the written contract must control.*"

The policy in the case at bar provided (p. 491):

> "1. NO CHANGE OR WAIVER of any of the terms, conditions or statements of this policy shall be valid unless set forth in an endorsement attached hereto and signed by an executive officer of the Company, or the Superintendent of the Automobile Department.
>
> 2. NOTICE GIVEN TO OR THE KNOWLEDGE of any agent or any other person, whether received or acquired before or after the date of the policy, shall not be held to waive any of its terms, conditions or statements; nor to preclude the Company from asserting any defense under said terms, conditions or statements unless set forth in a duly executed endorsement attached hereto."

It follows, therefore, that defendants were not entitled to reformation in this case and their counterclaim was therefore properly dismissed.

The decree below is right and should be affirmed.

Respectfully submitted,

THOMPSON & HANSTEIN,
Solicitors for and of Counsel with Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

HUDSON CASUALTY INSURANCE COMPANY,
Complainant-Respondent,

and

HARRY GARFINKEL, *et al.*,
Defendants-Appellants.

ON APPEAL FROM CHANCERY DECREE FOR COMPLAINANT.

APPEAL OF DEFENDANTS, HARRY GARFINKEL, MILTON J. GARFINKEL and LIDA A. ENDICOTT, Executrix, etc.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS FILED BY PERMISSION GRANTED BY THE COURT AT THE ORAL ARGUMENT.

(Italics, etc., ours, except where otherwise noted.)

Defendants, in replying to complainant's brief, will not attempt to specially answer the inductory part headed "Facts," but will answer what defendants believe to be a specious argument under the guise of facts in the four different parts of complainant's brief.

I.

Defendants have examined all the cases cited by complainant, on pages 4 and 5 of its brief, with the exception of the two United States Circuit Court of Appeals, which volumes we have been unable to locate. In each and every other case cited, the insurance company had given direct notice to its assured that it would not be liable under the terms of its policy. Therefore, the cases are not in point on the matter now under discussion because we argue that no notice was given to Milton Garfinkel, an assured under the policy.

Complainant attempts in the brief, by argument of counsel, to prove that Milton Garfinkel was fully informed concerning the agreement between Harry Garfinkel and complainant (Ex. D8, p. 501), respecting the defense of Harry Garfinkel in the Endicott case and acquiesced therein. Pages 4 to 23 of the brief are used in an attempt to establish this fact, and it is interesting to note from the State of the Case that at the trial in the court below, the same counsel who seek to establish this fact objected, and was sustained by the learned Vice-Chancellor to the admission of direct testimony from the witness it

now argues acted for Milton Garfinkel. We quote from Robert Garfinkel's testimony, p. 301:

> "Q. But you did not communicate the facts concerning this contract to Milton Garfinkel?
>
> Mr. Hanstein: I object to that; leading the witness.
>
> The Court: Yes.
>
> Q. Did you ever communicate the facts concerning the contents of this agreement (referring to D8), to Milton Garfinkel?
>
> Mr. Hanstein: *I object what further occurred, irrelevant and immaterial.*
>
> *The Court: Sustain the objection.*"

From this it seems that at the trial complainant prevented, by its objection, direct testimony as to whether or not Milton Garfinkel had been advised by Robert Garfinkel of the contents of the agreement (D8), and seeks by means of suspicion, innuendo, and skillfulness of counsel to now assert that which at the trial it deemed *irrelevant and immaterial.* We urge complainant cannot, in equity, blow hot and cold and, in effect, exclude, by objection, direct testimony on an important subject and then endeavor to establish the same point by argument on appeal.

At page 5 of the brief, an attempt is made to confuse the true facts relative to the service of the summons and complaint on Milton Garfinkel and his action thereon. By an inspection of Exhibit D9, p. 504, it will be found that he took the summons and complaint to the proper agents of the complainant,

who, in turn, forwarded the papers to complainant. Harry Garfinkel was served personally on November 21, 1928 (p. 449), and complainant returned the summons and complaint to Harry Garfinkel, *not Milton,* and notified Harry, *not Milton,* of its non-liability position. Complainant's agents testify (pp. 395, 396, 397), that they had no record of ever receiving from complainant C11 or C12, and further that they were without knowledge that complainant had refused to defend the suit. The foregoing seems to indicate that the complainant intended to recognize Harry as the assured and ignore Milton.

At page 6 of the complainant's brief, first paragraph, it is argued that Robert Garfinkel communicated with complainant respecting the defense of the suit and the inference intended is that Robert was pursuing the complainant. No testimony justifies this inference, but just exactly the contrary. Mr. F. Hobart Higgins, secretary of the complainant corporation, testified as follows (pp. 283, 284):

> "Q. Using those letters to refresh your recollection, if necessary, will you tell me who it was, who delivered to you this executed contract, D8?
>
> A. My recollection is that that contract was originally drawn by my father, I think, and that it was then changed by——
>
> Mr. Gaskill: Unless he knows of his own knowledge, I object to it.
>
> Q. Was it drawn by the Hudson Casualty side of the picture or the other side?
>
> A. Hudson Casualty."

The above testimony indicates that the contract was drawn and submitted by the complainant and some changes were made by Robert Garfinkel (Exhibit C9, p. 436), and then signed by Harry Garfinkel. Complainant's brief sets out only a portion of the contract and for convenience we print the entire contract (Exhibit D8):

"EXHIBIT D8.
11/21/30 L.

THIS AGREEMENT made this day of December, Nineteen Hundred and Twenty-Eight, by and between HARRY GARFINKEL, of Atlantic City, New Jersey, party of the first part, and HUDSON CASUALTY INSURANCE COMPANY, a New Jersey corporation with its principal place of business in Jersey City, New Jersey, party of the second part.

WITNESSETH:

1. WHEREAS, a certain automobile owned by said party of the first part and driven by one Milton J. Garfinkel was involved in an accident on May 14th, 1928, with a certain automobile owned and driven by one Timothy Cordery, and

2. WHEREAS, as a result of said accident said *party of the first part claims the benefits accruing to him* under the terms of policy No. AP 15803 issued to him by said party of the second part, and,

3. WHEREAS, said party of the second part

denies all liability under the terms of said policy, and

4. WHEREAS, as a result of said accident an action for damages has been instituted in the Supreme Court of New Jersey against said Harry Garfinkel, Milton J. Garfinkel and Timothy Cordery, jointly and individually, by Lida A. Endicott, executrix of Thomas D. Endicott, deceased, and,

5. WHEREAS, said Harry Garfinkel and Milton J. Garfinkel are desirous of filing a counter-claim against said Timothy Cordery for the recovery of damages resulting to each of them because of the negligence of the said Timothy Cordery in causing the accident aforesaid, and,

6. *WHEREAS, said party of the second part regardless of its denial of liability as set out in paragraph 3 hereof deems it advisable for its better protection to defend the action mentioned in paragraph 4 hereof, therefore*:

In *consideration of the facts set out in paragraph 6 hereof it is mutually agreed* and understood by and between the parties hereto that the said party of the second part shall defend the above-mentioned action on behalf of the said Harry Garfinkel and Milton J. Garfinkel and shall also file a counter-claim for each of them in said action against the said Timothy Cordery, all without charge or cost to said Harry Garfinkel and Milton J. Garfinkel, and it is further agreed and understood that nothing in these premises shall be construed either as

an admission of liability to pay damages on the part of the party of the second part under its policy as aforesaid, *or as a waiver on the part of the party of the first part to any of his rights under the terms of said policy,* in the event of a recovery by the plaintiff in the above-entitled action.

This agreement shall take effect only when it shall have been signed and sealed by both parties hereto.

IN WITNESS WHEREOF the party of the first part has hereunto set his hand and seal and the party of the second part has caused these presents to be signed by its President, attested by its Secretary and its corporate seal hereunto affixed, all the day and year first above written.

Harry Garfinkel (Seal)
HUDSON CASUALTY INSURANCE COMPANY,
By Frank J. Higgins
President.
Attest Frank H. Higgins
Secretary.

Witness
Anna Gruber."

The complainant was not under any disability and was represented by counsel, and if they chose to have only Harry Garfinkel execute the non-liability agreement, founded upon the consideration that it was for complainant's *better protection,* it seems specious now to argue it was meant to include Milton, the other assured under the policy.

At page 7 of the brief, complainant insinuates in paragraph 2, that Robert Garfinkel again took the initiative concerning the filing of the counter-claims, etc., and again the undisputed record (p. 305, complainant's secretary), contradicts the argument:

> "Q. Who gave you the information that Milton had a counter-claim at all in this?
>
> A. *Why, Mr.—as I recall it, Mr. Higgins' secretary called me on the telephone and said they were filing a counter-claim for Milton and wanted to know the extent of his injuries.*
>
> Q. *You were practicing law in Atlantic City at that time?*
>
> A. *I was practicing law in Atlantic City at the time of the accident. I was practicing law in Newark at that time.*
>
> Q. *Had you had any conversation with Milton with regard to the defense to this suit?*
>
> A. *At that time?*
>
> Q. *Yes.*
>
> A. *No, sir.*"

From this testimony it would appear that the complainant was the party eager to prosecute the counter-claims, and that Robert Garfinkel was not in touch with Milton at the time the contract and counter-claim was under discussion, because we find in the evidence, uncontradicted, as follows (p. 307):

> "Q. Didn't talk to him about this accident at all?
>
> A. *No, Milton at that time resided in Philadelphia and was on the road a great deal of the*

time, while I resided and practiced law in Newark.''

Complainant seems to have changed its idea of the rights of Milton under the policy and the necessity of notice to him, as well as the estoppel feature of this cause, between the trial in the Court below and the argument before this Court. Complainant's counsel repeatedly objected, and was sustained by the learned Vice-Chancellor, whenever defendants undertook to develop the question of whether or not complainant denied liability under its policy to Milton Garfinkel, as assured thereunder.

We quote from the testimony of F. Hobart Higgins, secretary of complainant, at pp. 287, 288, 289 and 290:

''By Mr. Gaskill:

Q. One question I overlooked. Did you ever communicate for the company a denial of liability under the policy now in question to Milton Garfinkel?

Mr. Hanstein: I object to that.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, under the policy, Milton Garfinkel, on the happening of an accident, became an assured, and for that reason a third party beneficiary has some rights that have accrued to him on the happening of an accident, and it seems to me that *he was entitled to notice of denial of liability if they meant to deny liability.*

The Court: Sustain the objection unless you

show that they had some notice of that to show that after they had notice of such fact, did or did they not.

Q. Now, Mr. Higgins, on July 5th, 1928, did your company know that Milton Garfinkel was the operator of Harry Garfinkel's automobile on May 14th that was involved in the case in which Mr. Endicott was killed?

A. Investigation showed that Milton Garfinkel——

Q. That Milton Garfinkel was the operator of the car?

A. Yes.

Q. And you had that information before that time, didn't you?

A. Yes, I believe so, shortly after the accident.

Q. Now, did you, after July 5, 1928, communicate to Milton Garfinkel a denial of the company's liability to him under the policy?

A. To his attorney——

Mr. Hanstein: I object to that. It does not seem to me that they predicated on our case on our failure to do it. *There is certainly no liability on our part to do it.* Our policy, of course, is with Harry Garfinkel, and we had no obligation to Milton that rose higher than our obligation to Harry.

The Court: Sustain the objection.

Mr. Gaskill: Your Honor, may I direct the Court's attention to Condition A on the first page of the policy?

The Court: I have read it.

Mr. Gaskill: Where it says, 'The term, "Named assured," shall apply to the assured named, and the term "assured" shall apply to any person or persons while riding in or legally operating the automobile described in Schedule 5, with the permission of the named assured,' then agreement Number 1, on the first page, 'The company agrees to pay any loss by reason of the liability imposed by law upon the assured for damages on account of bodily injuries or death resulting therefrom, including instantaneous death accidentally suffered or alleged to have suffered while this policy is in force by any person,' and so forth and so on. Now, Milton Garfinkel, under this policy, at the happening of that accident became an assured under the terms of the policy. The company agreed to pay any judgment against him. It also agreed to pay counsel expenses. It also provided, the contract provides, that Milton Garfinkel could have nothing to do with the settlement of the case, that he must dance attendance to the company in the defense of the suit, in other words, he stood in every respect as an assured under this policy, and there has been a recent case in New Jersey, I think it is 105 Law, on the question of an assured under a policy exactly like this, the company defended on the theory that they had no obligation to this man because they had issued the policy to A, and it was a suit and judgment against B, and they said under the policy, 'We don't know B,' but the Court of Errors and Appeals said, 'Yes, you did, because

under the policy you said anybody that is operating this automobile becomes an assured, and you must pay a judgment against that person.' That is an opinion in, I think, 105 New Jersey Law, by Justice Bodine, in the Court of Errors and Appeals, case of Horn against Commonwealth Casualty Insurance Company.

The Court: Objection sustained.

Q. Did the company ever send notice or in any wise communicate to Milton Garfinkel after the happening of the accident to Mr. Endicott, on May 14, 1928, that you would not be liable to Milton Garfinkel under the terms of your policy?

Mr. Hanstein: Same objection.

The Court: Sustain the objection.

Q. Who, in your company, Mr. Higgins, would send notice of denial of liability?

Mr. Hanstein: I object to that, *if it is immaterial, whether the notice was sent, it is certainly immaterial who would send it.*

The Court: That is the purpose, I am overruling it. It is immaterial whether the notice went to Milton or not. If it is for that purpose I will sustain the objection.

Q. Now, Mr. Higgins, in the preparation of the pleadings in the case of Endicott against Garfinkel, and others, did you rely on any of the information that was furnished you by the investigators of the Hudson Casualty Company?

Mr. Hanstein: I object to that.

The Court: Sustain the objection."

It would seem from the above that it was complainant's theory at the trial that they were under no duty whatsoever to Milton, and only on the argument in this court have they tried, after causing the exclusion of direct testimony on the same same point in the court below, decided to argue that Milton knew all about the denial of liability, non-liability contract, etc. It would seem inequitable to allow complainant to now endeavor to establish by indirect testimony a fact which by its successful objections it caused direct testimony thereon to be excluded at the trial below.

That the complainant ignored Milton as a defendant in the Endicott case is very much evidenced by a letter sent to Milton four days before the trial at the Atlantic County Circuit by C. L. Cole, Esquire, of Cole & Cole, attorneys for complainant, in the trial of the Endicott case. In the letter (D4, pp. 481, 482), Milton is not referred to as a defendant and the communication refers only to a possible disclaimer of liability to Harry Garfinkel in the event of the non-appearance of certain witnesses. The letter reads as follows (pp. 481, 482):

"EXHIBIT D4.
11/13/30 L.

COLE AND COLE
Counsellors at Law
ATLANTIC CITY, N. J.

Guarantee Trust Building
C. L. Cole
C. L. Cole, Jr.
Maurice Y. Cole

June 13, 1929.

Mr. Milton Garfinkel,
4 S. Surrey Place,
Ventnor City, N. J.
Dear Sir:

The *case of Endicott against your uncle Harry Garfinkel* will be reached Monday morning next. This morning Judge Sooy announced that he would not call the case today, owing to the fact that there are two cases ahead of it for trial.

In reading the correspondence and the record before me, I am impressed that there is no disposition *on your part or that of your uncle, the defendant, or your father, who was with you in the automobile, to assist the insurance company.* Whether you are justified in taking this position, I will not undertake to say because I know nothing of your relations. But, *in order to pro-*

tect the insurance company against any future claim that may be made, I am advising you that unless you and your uncle appear at the trial to testify as to the occurrence, that the company may refuse to pay the verdict, in the event there is one against your uncle. The company feels that the testimony of your father is important and that you and your uncle will be able to produce him as a witness. From the talk had at the conference yesterday, at which you and your brother Robert and your uncle Harry, the defendant, were present, I concluded that no effort would be made by you to induce your father to appear as a witness.

Counsel for plaintiff will move the case when called and I shall, of course, make the best defense possible, *but it will be with the distinct understanding that the company will disclaim liability to your uncle, in the event of your father's failure to appear.*

A copy of this letter is being sent to your father, your uncle and your brother, the attorney.

Very truly yours,
(Signed) C. L. Cole."

Complainant has quoted testimony at great length to endeavor to prove Milton knew about the denial of liability, the non-liability defense agreement to defend, etc., but in doing so it has overlooked the important and uncontradicted record which we have set out herein, but summarize as follows:

1. By objections as *"irrelevant and immaterial"* it caused to be excluded direct testimony as to whether or not Robert communicated the contents of the non-liability defense agreement to Milton.

2. By objection, *"there is certainly no liability on our part to do it,"* caused to be excluded direct testimony as to whether or not the complainant had ever denied liability under its policy to Milton.

We argue that by reason of complainant's course of objections which were sustained, that it has precluded itself from now urging that Milton knew of the contents of the agreement or that he had notice of the denial of liability.

3. The record is entirely bare of any notice, written or oral, from the complainant to Milton, from the date of the accident on May 14, 1928, until the filing of the bill in this cause on December 24, 1929, that it denied liability under its policy to him, or would not defend him under the terms of the policy.

4. The only communication we find from any person representing the complainant is from C. L. Cole, Esquire, advising him that if he did not appear and also produce his father as a witness "to assist the insurance company" that the company would disclaim liability to the uncle (Harry Garfinkel). Not a word about Milton's status under the policy nor a suggestion of prior denial of liability to anyone. The complainant was then anxious to take advantage of chance No. 1.

5. The agreement formulated by complainant to defend was with Harry solely; Milton was apparently not considered to be an assured, or to have any rights under the policy.

6. At the time of agreement and counter-claim Milton lived in Philadelphia and was on the road, while Robert Garfinkel lived and practiced law in Newark, New Jersey.

7. The letters of Robert Garfinkel to the complainant (C8, C9, C10) do not indicate he was representing anyone but Harry Garfinkel.

8. When the summons and complaint was served on Milton and sent to the complainant, it did not advise Taylor & Soloff to inform Milton it would not defend him under the terms of the policy and we have no record of any information to Milton from any official of the company that it would not defend him.

II.

Under this heading, at page 23 of the brief, complainant argues that the Court was justified in setting aside the policy because of breach of warranties even though the bill prayed for rescission only on the ground of fraud, and that was the finding of the learned Vice-Chancellor. Only one alleged breach is argued and it is found under the ninth statement (p. 414), and reads as follows:

"9. The interest of the Named Assured in the automobiles herein described is that of unconditional and sole ownership, except as follows: No exceptions."

The answer admittedly was made by the complainant without any information on the subject. The Vice-President of the complainant, at pages 114 and 115, testified as follows:

"Q. *When you received the information from this agent in respect to the writing of this policy did he tell you whether or not Harry Garfinkel was the sole and unconditional owner of that car?*

A. *No, sir; he did not.*

Q. *And then, without more, your company answered that question, didn't it?*

A. *We typed the answer in, yes, if that is what you mean.*"

Then, complainant had printed in the form (p. 402):

"* * *, *which statements the Named Assured makes and warrants to be true by the acceptance of this Policy,* * * *"

It will be remembered that the order blank sent to write the policy (D1, pages 441 and 442) contained no reference to the ownership, but it does show (p. 442) that the risk was *bound* on April 6, 1928, and after that time complainant made a statement for the assured without information on the subject and without assured's knowledge, and seeks to call the undisclosed statement a warranty. Such practice

does not seem honest and it cannot, therefore, be equitable, in view of the undisputed fact that complainant told Harry Garfinkel (p. 188) at the conclusion of the order, that the car was insured, and followed this with a letter (D6, p. 499) that the policy covered the car for public liability and property damage.

We argue that statement 9, in the policy, was the statement of the complainant and not Harry Garfinkel, and cannot, therefore, be made Harry Garfinkel's warranty until he was apprised of it. A Court, in disposing of a very like situation, says, in substance, in *Mazeika v. Automobile Underwriters,* 226 Ill. App. 239:

> "Recovery cannot be defeated *for breach of warranty* that the car was not mortgaged, by *provisions of the policy that facts therein are warranted to be true on acceptance of the policy,* where evidence shows that no application was ever signed by insured and the alleged warranty reads: 'The automobile described herein is owned by the subscriber and is not mortgaged or incumbered except as follows: No,' without qualification or explanation."

The vice-president of complainant, endeavoring to show importance of the alleged warranty, testified as follows (pp. 99 and 100):

"* * * * * * *

Q. In what way is that material?

A. *Well, we have found where people oper-*

ated cars which they did not own outright, as a rule they were poorer moral risks than people who owned their cars outright. * * *."*

The above seems to be such a broad statement that it defeats itself. It is public knowledge that exceeding 65% of all automobiles are conditionally owned, and the mere fact that a man does not have enough money to pay cash for an automobile would not make him a *poorer moral risk* than one who did pay cash.

The remainder of the answer was meant to apply to the facts complainant hoped to prove in this case but failed. Another fact that defeats this testimony is that of the same witness (p. 130), that the same premium rate applied regardless of the kind of ownership, as well as the policy provision in condition F (p. 407). Added to this, the policy contained the omnibus clause which insured "everybody," providing the driving was with the permission of the named assured.

The cases cited by complainant have to do with the usual printed conditions in policies in standard form, which have the approval, as the cases say, of governmental authority. The policy in this case is not the standard form and does not have the stamp of governmental authority, and the alleged breach of warranty is not in the usual printed form but in the schedule in the form of statements to be answered, in each individual case. When complainant answered this question itself, we argue that it waived the answer of defendant, Garfinkel, and cannot now assert a breach of warranty because of its

own wrong answer, or that it is estopped to assert the breach by its own conduct in making an answer to the statement that it was without information as to what the true answer should be.

It is also argued in our original brief (pp. 38 to 44) that the policy should be reformed.

III.

We reply to complainant's brief (pp. 27 to 31) by referring the Court to the argument at pages 13 to 25 in our original brief, to which we only desire to add this observation: It seems odd that two men would conspire to aid the public. The policy in this case was for damages to be paid to anyone whose person or property might be injured or damaged by the operation of the automobile. In no case would the insured, under the facts in this case, benefit personally.

Another point we wish to reiterate is that the very thing (the policy, C1) Harry and Milton were conspiring to obtain, according to complainant, Milton already had in the form of a policy in the United States Fidelity & Guaranty Co. (Ex. D5, pp. 484 to 498), uncancelled and untalked about by the insuring company (p. 235). The fraud charge seems to be ridiculous.

IV.

Replying to complainant's brief under the above heading, beginning at page 31 to page 41, defen-

dants rest their case on the original brief, pages 38 to 49.

We, however, desire to call the attention of the Court to the fact that in both the Sardo and Berkowitz cases, cited by complainant, that reformation was prayed for solely on the ground of mistake, while in the present case the charge is (p. 52), "A mistake in preparing said policy, or by fraud or other inequity on the part of the complainant or its agents, etc." Having the foregoing charge in mind and quoting from complainant's brief (pp. 35 and 36), as follows:

> "Defendants gave no thought whatsoever to the warranty of sole and unconditional ownership and John Soloff gave it no thought, or if he did give it thought, believed that the policy covered. There was obviously no meeting of the minds upon this question. After the policy was issued, Harry Garfinkel did not read it and simply put it away with his papers, where it remained until the time of the accident."

This statement of what complainant believes to be true brings the case squarely within the law in *Lloyd v. Hulick,* 69 N. J. Eq. 784, and by the authority of that case the so-called Statement 9 in the policy (p. 414), should be *expunged* from the policy because, as complainant argues, there had been no meeting of the minds on this subject of sole and unconditional ownership. With Statement 9 expunged, we would have a contract complete in every respect and in accordance with the order and infor-

mation furnished complainant by its agent (D1, pp. 441, 442), and admittedly upon which the minds of the parties met. No part of the policy other than Statement 9 refers to ownership of the automobile and no reference in the policy makes its provisions inapplicable by reason or lack of ownership of any kind.

CONCLUSION.

In conclusion, we respectfully refer the Court to the record at State of the Case, pages 478 and 479, which is an execution issued against both Milton and Harry Garfinkel and returned wholly unsatisfied. This is ample evidence of their insolvency according to the case of *Horn v. Commonwealth Casualty Company,* 105 N. J. Law, 616, and we respectfully urge that in view of this fact that further litigation would be unnecessary, and that the prayer in the original brief, at pages 48 and 49, should be granted defendant, Lida A. Endicott, executrix, etc.

Respectfully submitted,

MAURICE J. HALPERN,
Solicitor for Harry Garfinkel and Milton Garfinkel.

BURTON A. GASKILL,
Solicitor and of Counsel with Lida A. Endicott, Executrix, etc., and of Counsel with Harry Garfinkel and Milton Garfinkel.