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TESTIMONY.

HUDSON COUNTY CIRCUIT COURT.

Filed May 27, 1921.

FRANK KVEDAR, Plaintiff, *vs.* ISRAEL SHAPIRO, Defendant.	ACTION AT LAW AMENDED COMPLAINT

The plaintiff who resides at No. 26 East 16th Street, Bayonne, in the County of Hudson, says that:

1. The plaintiff, on the 18th day of September, 1920, at Bayonne, in the County of Hudson, entered into a written agreement with the defendant for the purchase of a 1½ Ton "Apex" automobile truck, fully equipped and complete, model "D", manufacturers' No. 75477.

2. Plaintiff agreed to pay to defendant as the purchase price of said automobile, the sum of $2543.00, and plaintiff paid on account of said purchase price the sum of $1225.00, pursuant to the terms of said agreement, and plaintiff has carried out all of the terms and conditions on his part to be performed.

3. That the defendant connived and conspired to defraud this plaintiff by selling him a 1 ton truck of a different model and number contrary to the said agreement, which the defendant falsely and fraudulently represented to plaintiff to be the truck specified in said agreement.

4. That all of the aforesaid representations of the defendant were false and fraudulent, and were known to the said defendant to be false and fraudulent, that such representations were made for the purpose of deceiving and actually did de-

ceive this plaintiff, and were made with such intent.

5. That defendant had or should have had actual knowledge concerning facts as stated and represented by him, knowing that the plaintiff had no knowledge and further had no knowledge of the facts sufficient enough to charge him with notice of the falsity of the representations of the defendant.

6. (1) By reason of the breach of said agreement (2) and by reason of the misrepresentations aforsaid by the said defendant, plaintiff has suffered the loss of business, has been deprived of the use of said automobile and has otherwise been put to great expense, to his damage in the sum of $5000.00.

Plaintiff demands $5000.00.

ALEX. SIMPSON,
Attorney for Plaintiff.

HUDSON COUNTY CIRCUIT COURT.

Filed June 11, 1921.

FRANK KVEDAR, Plaintiff, *vs.* ISRAEL SHAPIRO, Defendant.	ACTION AT LAW ANSWER AND COUNTER-CLAIM

The defendant, residing at No. 553 Broadway, Bayonne, N. J., says:

1. He denies each and every allegation of the complaint except that he admits that the plaintiff bought an "Apex" truck from the defendant, for which the plaintiff agreed to pay two thousand five hundred and forty-three ($2543.00) dollars, and that the plaintiff has paid on account the sum of one thousand two hundred and twenty-five ($1225.00) dollars.

BY WAY OF COUNTER-CLAIM, defendant says:

1. Defendant sold to the plaintiff and plaintiff bought an Apex truck for which he agreed to pay two thousand five hundred and forty-three ($2543.00) dollars.

2. Said truck was delivered to the plaintiff.

3. Plaintiff paid on account the sum of one thousand two hundred and twenty-five ($1225.00) dollars, leaving a balance due of one thousand three hundred and eighteen ($1318.00) dollars, for which the defendant demands judgment, with interest and costs.

AARON A. MELNIKER,
Attorney for Defendant.

HUDSON COUNTY CIRCUIT COURT.

FRANK KVEDAR,
Plaintiff,

vs.

ISRAEL SHAPIRO,
Defendant.

ACTION AT LAW
REPLY TO COUNTER-CLAIM

The plaintiff denies each and every allegation of the counterclaim, except he admits that the defendant agreed to sell plaintiff a 1½ton "Apex" automobile truck, as described in plaintiff's complaint, for $2543 and that the sum of $1225 was paid thereon, on account, by the plantiff.

ALEX. SIMPSON,
Attorney for Plaintiff.

HUDSON COUNTY CIRCUIT COURT.

Filed April 29, 1921.

FRANK KVĖDAR,
Plaintiff,
vs.
ISRAEL SHAPIRO,
Defendant.

RULE FOR JUDGMENT

The above case having been tried before Hon. Luther A. Campbell and a jury on the 27th and 28th days of September, 1921, and the jury having returned its verdict in favor of the plaintiff and against the defendant in the sum of eleven hundred ($1100.00) dollars damages with costs to be taxed.

Now on motion of Alexander Simpson it is hereby ORDERED that the plaintiff, Frank Kvedar, have and receive from the defendant, Israel Shapiro, the sum of Eleven Hundred ($1100.00) Dollars damages as awarded, together with costs to be taxed.

Let judgment be entered this 29th day of September, 1921, accordingly.

LUTHER A. CAMPBELL,
Judge Circuit Court.

HUDSON COUNTY CIRCUIT COURT.

Filed Dec. 22, 1921.

FRANK KVEDAR,
Plaintiff-Respondent,

vs.

ISRAEL SHAPIRO,
Defendant-Appellant.

ACTION AT LAW
NOTICE OF APPEAL

To ALEX SIMPSON, ESQ.,
Attorney of Respondent.

TAKE NOTICE that the defendant-appellant, Israel Shapiro, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in this cause on the 29th day of September, 1921.

AARON A. MELNIKER,
Attorney of Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Filed Feb. 7, 1922.

FRANK KVEDAR,
Plaintiff-Respondent,

vs.

ISRAEL SHAPIRO,
Defendant-Appellant.

On Appeal from Circuit Court

GROUNDS FOR APPEAL

The above named defendant-appellant, Israel Shapiro, assigns the following grounds of appeal from the judgment of the Hudson County Circuit Court in the above case:

1. Because the trial judge refused to non-suit the plaintiff on its opening to the jury, there being a variance between the cause of action as opened to the jury and the cause of action stated in the complaint.

2. Because the trial judge refused to require and direct plaintiff to elect between his remedy in tort for fraud and deceit and his remedy on contract for breach of warranty.

3. Because the trial judge refused to grant defendant's motion for non-suit.

4. Because the trial judge refused to direct a verdict for the defendant at the close of the case.

5. Because the trial judge erred in charging the jury as follows:

> "In order for the plaintiff to have a verdict and get the benefit of an action such as this, and one which has been tried as this one has,—I mean upon the theory that this one has it is necessary for him to establish that he did rescind his contract, and that he did make

return of the machine, and in doing so, or in respect thereto, rather, the law is this:

> " 'It is a well settled principle that to entitle one to rescind a contract for fraud, he must exercise his option within a reasonable time after the discovery of the fraud. If he delays rescission for an unreasonable time he will be held to have affirmed the contract and cannot afterwards rescind.'

"There might be many reasons for that rule, gentlemen, many of which I cannot recall now; but there is one which is perhaps most common, and that is this: Rescission or intent to rescind would be most clearly portrayed and most clearly shown, if we as humans had the ability to ascertain what the working of others' minds were. We have not that ability, we cannot see the working of each other's mind, directly, I mean. The only way in which that can be determined is by what that other human being says and does. Any person may say, 'I made up my mind to do this or that, or, 'I made up my mind to do it at such a time, or such a time.' Whether he did or not cannot be ascertained by us, by you as jurors, except from evidence which goes to show his acts, what he did or what he said, and, therefore, the law presumes that it is not to be said that one has concluded to rescind the contract unless that mental determination is followed by some physical act which demonstrates or proves that mental determinaton, and that it is unreasonable to expect that one would act toward a contract of that sort, determining to rescind, unless he acted with promptness after coming to that mental conclusion.

"Now, of course, as to what is a reasonable time sometimes is to be determined by the court, many times, not; because what is reasonable often in point of time depends

upon the circumstances and the conditions of the particular case, and that is why I am submitting that matter to you.

"The question there will be, have you been satisfied—and the burden is upon the plaintiff—have you been satisfied by the greater weight of the evidence that the plaintiff did determine to rescind his contract and give up the benefit of it, any that he might have? And was it done within a reasonable time after he obtained the knowledge of the alleged fraud and deceit? If not, gentlemen, if that has not been made out to your satisfaction in that manner, then again the plaintiff is not entitled to your verdict, but your verdict must go to the defendant. If it has been made out then it would seem, if all these other matters which I have spoken to you of have been made out, and been made out by the greater weight of the evidence, that the plaintiff would be entitled to have your verdict."

6. Because the verdict is contrary to the evidence.

7. Because the verdict is contrary to the Judge's charge.

8. Because the damages are excessive.

9. Because the verdict is contrary to law.

AARON A. MELNIKER,
Attorney of Defendant-Appellant.

HUDSON COUNTY CIRCUIT COURT.

FRANK KVEDAR,
Plaintiff,
vs.
ISRAEL SHAPIRO,
Defendant.

ALEXANDER SIMPSON, ESQ., for plaintiff.

AARON A. MELNIKER, ESQ., (WILLIAM MELNIKER) for defendant.

The above entitled case was tried September 27, 1921, before Hon. Luther A. Campbell, Judge, and a jury.

Mr. Simpson opened the plaintiff's case to the jury.

Mr. Melniker opened the defendant's case to the jury.

(Plaintiff's opening.)

Mr. Simpson: May it please the court and gentlemen of the jury; on the 19th day of September, 1920, the plaintiff made a contract with the defendant to sell him a one and a half ton truck. That is what the contract calls for. My client, the plaintiff, did not know a one and a half ton truck from a white elephant, and he took the truck the men delivered to him supposing it was a one and a half ton truck. It was not. It was a ton truck. It was unsuitable for his business. This sale was a conditional sale. My man paid $1250 down and gave a note which was to pay the balance. Afterwards the defendant re-took possession of this truck and sold it to another man as a one ton truck.

Now, what we are suing for is the money we paid under this conditional bill of sale, because

we say he did not deliver to us a one and a half ton truck. He delivered to us a ton truck and then took it back again and sold it.

Mr. Melniker: Your Honor, I move for a nonsuit against the plaintiff on the grounds of a variance between the complaint and the opening statement of counsel.

The Court: What is the variance?

Mr. Melniker: The complaint sets out a tort action founded on deceit. The opening statement of counsel is based upon a dissaffirmance, setting out that the defendant re-took this truck.

The Court: I understood his opening to be that he bargained for and made a contract for a one and a half ton truck and that in fact he did not get a one and a half ton truck but only a one ton truck. That is what I understand the opening to be.

Mr. Melniker: The opening statement of counsel was that we re-took this truck.

The Court: Oh, yes; he said that. I took it to mean that he proposed to offset or show that after taking it the defendant sold it as a one ton truck, I suppose confirmatory of his former statement that it had been sold to the plaintiff as a one and a half ton truck.

Mr. Melniker: But the complaint sets up nothing as to the return of the truck. The complaint sounds as though it were based upon an affirmance of a contract.

The Court: Why didn't you raise objections to this thing before this time, Mr. Melniker? You have answered and counter-claimed.

Mr. Melniker: I could not tell in advance.

The Court: I take it from the complaint that it is an action for deceit.

Mr. Melniker: Sounding in tort.

The Court: Well, that is in tort.

Mr. Melniker: It is based upon the affirmance—

The Court: I will deny the nonsuit. You may take your exception.

Mr. Melniker: I take it. I ask that the plaintiff elect his remedy.

The Court: Now, Mr. Melniker, I have said all I am going to say. I will not require it because it seems to me that the pleadings are perfectly plain. As I read the pleadings I can not make out anything else than that it is an action for deceit, which you have answered denying, and you have also counterclaimed. I do not think you come in here in any way surprised; and I also have in mind the partial trial of the same cause many months ago. I think then the pleadings were in improper form, as I remember them. I think all that was charged was fraud in the contract.

Mr. Melniker: I understood that the plaintiff was proceeding upon a tort action, sounding in tort for deceit.

The Court: Now, Mr. Melniker, are you going to proceed or are you going to continue to argue? Are you going to proceed or are you going to continue to argue the question. I am telling you what I take the pleadings to be. If you are not content with my ruling take your exception and go on.

HUDSON COUNTY CIRCUIT COURT.

FRANK KVEDAR,

vs.

ISRAEL SHAPIRO,

AT LAW

FRANK KVEDAR, *sworn.*

Direct Examination by Mr. Simpson:

Q. Mr. Kvedar, is that your signature? A. That is my signature.

Q. Is that Mr. Shapiro's signature? A. That is Mr. Shapiro's signature.

Q. And it was signed where, Bayonne, or where? A. Bayonne.

Q. On the date that is mentioned there? A. Yes, sir.

MR. SIMPSON: I offer that in evidence.

(Paper marked P-1 in evidence.)

Q. Did you get a truck from Shapiro under that contract? A. Yes, sir.

Q. When did you get the truck? When did you get the truck? A. In Bayonne.

Q. When? A. On the same date what the contract said.

Q. And that contract called for a ton and a half truck? A. Yes.

MR. MELNIKER: I object to that. The contract speaks for itself. I ask to have that stricken out.

MR. SIMPSON: I am asking him a question. The contract is in evidence, and I say as a fact that the contract calls for a ton and a half truck. If he wants the whole contract read he can read it to the jury if he wants to.

MR. MELNIKER: I did not know it was in evidence, that is all.

MR. SIMPSON: Certainly it is in evidence.

MR. MELNIKER: May I inquire when the contract got in evidence?

MR. SIMPSON: Just now.

Q. Now, that contract calls for a ton and a half truck? Did you get a truck under that contract? Did you get a truck? A. I get a truck.

MR. MELNIKER: May I look at this? This went in while I was finding out where the case stood, and I didn't have an opportunity to look at it. I think I ought to be allowed just a minute.

Q. What date did you get the truck? What date did you get the truck? A. The same date what the contract mentions.

Q. Who delivered the truck to you? Who gave it to you? A. Shapiro; Israel Shapiro.

Q. Where? A. In Bayonne, in his own garage.

Q. When you took this truck what kind of a truck was it? Was it an Apex truck? A. Apex.

Q. And what business was Shapiro in then? A. Shapiro was in the automobile business.

Q. And did you take this from his place of business? A. Yes, sir.

Q. Was he the agent for the Apex truck? A. Yes, sir.

Q. Now, when you took the truck out did you think it was a ton and a half truck? A. I was thinking.

Q. When did you find out what kind of a truck it was? How long after you had it? A. First I can't put my foot—

THE COURT: That is not what you were asked.

Q. (Repeated by the stenographer.) When

did you find out what kind of a truck it was? How long after you had it? A. When I have it November 3rd I have accident.

MR. SIMPSON: Oh, I ask that that be stricken out as not responsive.

Q. I didn't ask you anything about your accident. I asked you when you first found out what kind of a truck it was. When did you first find out whether it was a ton truck or a ton and a half? When did you find that out?

MR. MELNIKER: I object to that question. Counsel assumes that he found out that was the fact. There is no evidence in this case that this was a one ton truck. Certainly no competent evidence.

MR. SIMPSON: I will withdraw it.

Q. Did you ever find out whether it was a ton and a half or not? Did you ever find that out? A. Yes.

Q. When did you find it out? A. In November, after November 3rd and 10th—between that.

Q. Where did you find it out? Where did you find out what it was; that it was a ton or a ton and a half where did you find that out? Were you in Chicago or New York, or Paris, or London? Where were you when you found out what kind of a truck it was? A. Because when I have the accident I find out.

THE COURT: Where was it? Where was it that you found it out?

THE WITNESS: In Bayonne.

Q. In Bayonne? How did you find out what kind of truck it was? A. I have accident—

Q. I didn't ask you anything about the accident. Did you go anywhere to buy anything? A. Yes, I go.

Q. Where did you go? A. In Newark.

Q. The Apex people? A. The Apex people.

Q. To get parts? A. A part.

Q. What part were you looking for? A. Spindles and bearings.

Q. Did you get a part? A. Yes.

Q. A part for what truck did you get? A. For ton and a half.

Q. What did you do with that part? A. I was putting it on.

Q. What did you do with that? Did you eat it or did you bring it to Bayonne? A. Bring it to Bayonne.

Q. All right. When you got to Bayonne what did you do with it? A. Gave it to mechanic.

Q. What mechanic? A. Harry Bach.

Q. And what part was it you got for it? A. Bearings, spindle.

Q. What did he do with them? A.. He was putting on.

Q. What? A. Mechanic put it on.

Q. Put it on? A. Put it on.

Q. What did you find out when he put it on? A. It was too big.

Q. For the truck? A. For the truck.

Q. Did you ever try to load the truck with a ton and a half? Did you try to put a ton and a half on? A. Yes.

Q. Could you get a ton and a half on? A. No; I get a ton and a half on, there was rear end way down; springs was too weak, bent.

Q. For a ton and a half? A. Yes, bended.

Q. What did you do with the truck finally? What did you do with it? What did you do with the truck? Did you take it back to Shapiro? A. No.

Q. How did he get it? He got it, didn't he? How did Shapiro get the truck? A. I returned it myself.

Q. When? A. On December 3rd.

Q. And did he take it? A. Yes.

Q. And where was it when you returned it? A. It was in the garage.

Q. How much cash did you pay him for the truck? How much money did you pay him? A. $1343. In two monthly installments.

Q. That makes four—

THE COURT: Is there any use spending time on that, Senator? Isn't that admitted?

MR. SIMPSON: That I do not know.

THE COURT: I think you are together on that.

MR. MELNIKER: $1225. is what he paid.

THE COURT: Now, let me see. In your reply to the counter-claim you say that the price was to be $2543., and that the sum of $1225. was paid on it. So you see you are together on that.

Q. And have you ever seen the truck since? Have you seen the truck since? A. Since I returned it?

Q. Yes. A. Yes, I see it.

Q. Where? A. In Bayonne.

Q. Who has got it? A. Some other party.

Q. Is he in court here, the man that has it? A. Yes.

Q. What is his name? A. Joseph Solomon.

Q. Joseph Solomon? A. Solomon.

Q. While you were using this truck what business were you using it in? A. Wholesale produce.

Q. And you bought under this contract a ton and a half truck? A. Yes.

Q. Now, did it make any difference to you in your business that you did not have a ton and a half truck?

A. I can't bring ton and a half—

Q. Well, did you lose any money because of that? A. I going twice to market.

Q. Twice to the market instead of once? A. Instead of once.

Q. Well, how much did that cost you, if you know? To go twice instead of once?

MR. MELNIKER: Now, if the court please, I object to that queston on the ground of statement made by counsel that he was consigned to charge off the amount of it.

MR. SIMPSON: Well, that may be. I was looking at the action for deceit. I did not look at the addendum in this—

THE COURT: I think you will find the rule of admeasurement to be what I think it is.

MR. SIMPSON: In deceit, yes.

THE COURT: I think you have it correctly. I do not think Mr. Melniker is raising any question about that. You laid it down quite correctly in your opening.

MR. MELNIKER: I understand, then, that this action is proceeding on the theory that it is founded in fraud and deceit.

THE COURT: Yes; that is the way the complaint sounds.

MR. SIMPSON: He misrepresented to us a fact which he knew or should have known, which was not the fact.

Cross Examination by Mr. Melniker:

Q. Now, Mr. Kvedar, you bought this chassis from Mr. Shapiro, and you had a body built on it to your own order, did you not? A. (No answer.)

THE COURT: I take it he does not understand the question.

Q. You know what a chassis is, don't you? A. Yes, sir.

Q. (Repeated by the stenographer.) Now, Mr. Kvedar, you bought this chassis from Mr.

Shapiro and you had a body built on it to your own order, did you not? A. Yes.

Q. The chassis was delivered to Mr. Shapiro's garage in Bayonne by the gentleman in Newark, wasn't it? A. I don't know who delivered to Shapiro.

Q. Well, you know where he got the chassis, don't you? A. Yes.

Q. You went with him? A. I didn't see the chassis in the place.

Q. You went with Mr. Shapiro to Newark? A. To Newark.

Q. When you bought the car? A. Yes.

Q. And you saw the car that you bought, did you not? A. I didn't see the car when I bought it.

Q. When did you first see the car? A. First I see in the Bayonne, in body maker's place.

Q. Where? A. In body maker's place.

Q. Well, you went with Mr. Shapiro to Newark to the Apex agent in Newark, and you picked out a car—the car—didn't you? A. I didn't pick it out because I didn't see no Apex.

Q. Well, you put in an order for a car?

MR. SIMPSON: I object to that, because that is a subject of a written contract. The contract speaks for itself, and whether he put in an order at another place cannot change the terms of this written contract.

THE COURT: As I remember, there are three elements that the plaintiff is called upon to establish. First, that there were false representations; second, that the representations when made by the party alleged to have made them were known to him to be false; and, third, that the party toward whom they were made believed them to be true, and, acting upon them, did so to his damage. Now, the only thing I can see coming out of these questions, unless Mr. Melniker can tell me

or direct me to something further, is probably on the question as to whether or not they were put and this particular plaintiff at the time of the purchase can be said to have believed the representations so made to have been true. Is that what you are reaching for?

MR. MELNIKER: Yes, absolutely. This case depends absolutely on guilty knowledge of this defendant. If there is no knowledge on his part of fraud this action cannot lie in fraud for tort.

THE COURT: Those are the three elements that must be shown. Of course, you have a right to assume anything proper in any proper way, either on direct or cross examination.

What is the question, Mr. Victory?

Q. (Repeated by the stenographer.) Well, you put in an order for a car?

MR. MELNIKER: I will withdraw that question for a minute.

Q. When you wanted to buy a truck you went down to Mr. Shapiro in Bayonne, in his garage, did you not? A. No; Shapiro comes in my house.

Q. He came over to sell you an Apex truck? A. He came after me and leave me catalog for some other kind of truck. Then he said, "Some day I am going to take you in a place and show you trucks," and after that he comes himself and his son and took me to Newark, and in Newark he show me truck available, two ton. I said, "I no want available two ton; I want a ton and a half." "Well," he sad, "All right; I got a truck ton and a half for you which I can show you now," he said. "Well, I was trusting him. I said, "Send me a ton and a half truck," and he said he

was going to send me a good ton and a half truck; and I placed fifty dollars deposit right away, and in about seven days he called me in Bayonne, in body maker's shop and he showed me the ton and a half chassis.

Q. All right. Now, before we get— A. And I was looking in the front and there was Apex name, and that was the first time I was seeing it.

Q. Now, before we get to that point let us go back to Newark for a minute. He took you to Newark, did he? A. Yes.

Q. And he brought you to a garage over there where they sell Apex trucks? A. Yes.

Q. And you told those people in that place that you wanted to buy a ton and a half Apex truck—you didn't mention any name, did you? A. No.

Q. You just told him you wanted a ton and a half truck? A. Yes.

Q. And you gave them a deposit of fifty dollars, is that right? A. Fifty dollars.

Q. Now, were you there when the fifty dollars was paid to the Newark man for the truck? A. No; Shapiro took that fifty dollars.

Q. Where did you give Shapiro the fifty dollars? A. Right in Newark.

Q. In the Newark office? A. Yes, sir.

Q. And he paid the fifty dollars to the Newark man, did he? A. I don't know whether he paid to the Newark man or put it in his own pocket; I don't know; I didn't see.

Q. Well, you were right there when he paid the fifty dollars to the Newark man and he got that receipt; you remember that, don't you? A. I don't remember that, because I didn't see what they made; maybe I was standing outside the door when that was made.

Q. Maybe you were? A. Yes.

Q. Well, where were you? A. Well, I was in the office they made that.

Q. You were there? A. Yes.

Q. You were there when he took the fifty dollars and gave it to the Newark man as a deposit on the truck? A. I didn't see if he gave it to him or not.

Q. Well, did you sign the order at that time or not? A. Yes; I signed it for ton and a half.

Q. For a ton and a half truck. Do you know whether this is the order that you signed? A. What is the date?

Q. September 7th? A. No, that was August 26th.

Q. August 26th. Well, in any event, when you gave Shapiro the order for a ton and a half truck at Newark, Shapiro ordered a truck right there from the man in Newark, didn't he, right there in the office? A. I don't know; because there was about three or four or five men in the place; they spoke one to the other one. I didn't exactly hear everything what they talking one to the other.

Q. Well, then you went back to Bayonne? A. Yes.

Q. And you say about a week later Shapiro told you the truck was in the body maker's? A. Body maker's.

Q. And you went down to the body maker's, and that was the first time that you saw this truck? A. This truck.

Q. Now then, you had a body put on; you told the body maker what kind of a body you wanted? A. Yes.

Q. And he built that kind of a body for you, did he? A. Yes.

Q. And then the truck was delivered to you? A. No.

Q. What was done to it? A. When the body was made Shapiro coming and took that truck in his garage and then he called me up.

Q. Yes. A. Then call me down and show me that truck was complete and said, "Now, what we going to do is going to a lawyer to finish up:

Give the rest of the money, and give it to you." Then was the same date that the contract or bill of sale made, and we go by the lawyer and I pay him the rest of the money and I take the truck.

Q. Then you took the truck? A. Yes.

Q. Took it home? A. No; I leave it for a couple of days until I find a garage in the other place.

Q. Then you took it away? A. A few days later I took off him.

Q. What date was that? A. I don't remember the date exactly.

Q. The 7th of September, wasn't it? A. 7th of September the chassis was sold.

Q. Well, what date was it you got the truck delivered to you? A. Two weeks after the 7th.

Q. About the 20th of September? A. About that, because the body maker took about ten or twelve days.

Q. You started to use the truck, didn't you? A. Started to use the truck.

Q. And on the 3rd day of November you had an accident? A. Yes.

Q. And what did you do to the truck in the accident? A. Well, I call the mechanic, Harry Beck, and he took my truck in his shop and he is looking it over; he is finding out if it had bearings or spindles broke.

Q. You had a collision, did you? A. Yes.

Q. With another truck? A. With another truck.

Q. And the spindle was broke? A. The spindle was bended, and the bearings broke.

Q. And the bearings were broke, and what else? A. The axle was bended and the radiator was like a pin hole, leaking.

Q. The radiator was damaged? A. The radiator was a little hole.

Q. Leaking? A. Leaks.

Q. What else happened to it? A. And the

front bumper—front bumper was broke, one end broke.

Q. How long was it laid up? A. Then the mechanic look him over and took the number of the dash.

Q. How long was it laid up? A. It was laid up for four days.

Q. Now, did you take it down to the mechanic the same day that you had the collision? A. Same day.

Q. And did you go for the parts the same day? A. Same day.

Q. You went to Newark to the same place where you ordered the car? A. Yes.

Q. And you got the spindle? A. Spindle and bearings.

Q. And the bearings? A. And the bearings.

Q. And you brought them back the same day? A. Back the same day.

Q. And the mechanic tried to put them on? A. Tried to put them on and they were too big.

Q. They didn't fit? A. Didn't fit.

Q. Then you took them back again? A. Then the next morning—it was too late that night; the next morning.

Q. The next morning, on November 4th— A. November 4th.

Q. —you took them back? A. Took them back.

Q. And you got a smaller spindle and smaller bearings? A. Smaller bearings.

Q. And were those for the front wheels? A. Front wheels.

Q. Then you brought those back on the same day? A. Yes.

Q. And the mechanic fixed the car? A. The mechanic was put on; they were good when I brought the small ones.

Q. Were you able to use the car after that? Were you able to use it? Was the car all right

when you put the spindles on? A. Yes; I used it.

Q. Used it until when? A. Till November 18th.

Q. November 18th or December 3rd? A. November 18th.

Q. What date did you bring it back to Shapiro? A. December 3rd.

Q. Well, what happened on November 18th? A. November 18th—before November 18th—about November 16th there comes around in my house a salesman from the Republic Sales Corporation, and then ask me was I interest in any other Republic cars, and I ask, "Yes," because I want to get some information about my car. Then he look at my car; we have car stand right in front of the house when they come—take a look at my car, and ask me what kind of car it is. I say it is Apex ton and a half, and he said it don't look like tone and a half, and they look on the motor; they look at my different motor number, and look on the dash, and what number of the motor, too, and said that there must be something the matter with that car. "Well," I said, "if anything is the matter I ought to find out."

"Well," they said, "let it to us, we will find out." Well, then the manager of the Republic write a letter to Hamilton Motor Company, Michigan, and in about three or four days after I went to Newark to see that manager, and the manager showed me the letter answering from Hamilton Motor Company. The company said it is a one ton chassis. Then I took that letter and in two days I saw Shapiro and told Shapiro that truck is not a ton and a half. Well, Shapiro and his man, he says, "It is a ton and a half, what more do you want?" Then I see he don't want to talk to me, I stopped work right away, and a few days later, about December 3rd, I went to lawyer. I showed to lawyer the letter and I told him what I heard from a few peoples about that truck, and

the lawyer told me to return it, and the same day I am returning it to Shapiro.

Q. Why do you say you stopped using it on the 18th and didn't use it after that? How do you know it was the 18th? You didn't deliver it back to Shapiro until the 3rd of December? A. Yes, but I kept it in the garage; I know the date I stopped work. When I finished up my job; it was after all the stock produce; hired horse and wagon.

Q. How do you know that was the 18th of November? A. Well, I know, same as I know my name.

Q. How do you know it was not the 19th? A. No.

Q. How do you know that? A. Because when I stop work I marked it down that way.

Q. What's that? A. (Repeated by the stenographer.) Because when I stop work I marked it down that way.

Q. Where did you mark it down? A. I marked it down in my book, in my pocket.

Q. What book? A. Pocket book.

Q. Where is your book? A. I got it here.

Q. Let us see it? A. On the same date it was; I got it and marked it down; that is in my language—"Truck November 18th"; November 18th, that means my language.

Q. Yes. What does it say? A. "Stopped with the truck work."

Q. Stopped working with the truck? And you wrote it in your book. Had you spoken to a lawyer before you put that in the book or after? A. After.

Q. At the time you put that in the book you had not talked to any lawyer? A. No.

Q. But when you stopped using this truck you went and wrote it in your book? A. Yes.

Q. Why did you put it in your book? A. Because before I put it in the book I saw Shapiro and Shapiro said this was not one ton truck, and

I thought he no want to speak to me; that I am going to see the lawyer about that. So I heard from a few places and the company if he is not sure it is a ton and a half. Then I stopped work.

Q. How long before that did you see Shapiro? A. I guess about one day before.

Q. On the 17th? A. On the 17th or 16th, something like that.

Q. 16th or 17th? A. 16th or 17th; something like that.

Q. And you told Shapiro it was a one ton truck and Shapiro said it was a one and a half ton truck? A. Yes, sir.

Q. Well, why did you write this down in your little book after you stopped using this truck? You would remember that without writing it in your book, wouldn't you? A. Well, if I didn't write it I would forget to remember.

Q. Why did you put it in your book? A. Same date.

Q. You put everything that happens in your book? A. Everything that happens.

Q. Everything that happens in your business you put in that little book? A. Everything that happens.

Q. What were you doing with this car between the 18th of November and the 3rd of December? A. It was laying in the garage.

Q. What was it doing there? A. It was laying in my garage.

Q. Didn't use it? A. No.

Q. What garage was that, yours? A. No—my garage, yes. I paying rent for that garage.

Q. But whose garage is it? A. Some other owner.

Q. Any other cars in there besides your own? A. No.

Q. Just this one car? A. Just that one.

Q. Now, when you went over there—over to Newark to get these parts on the 3rd of November, what did you ask for? A. I asked for ton

and a half parts, and I show that order from the mechanic, because the mechanic took the order from the plate.

Q. Well, did you bring the old parts over there? A. No.

Q. Did you brng the old spindle over to Newark? A. No.

Q. Did you bring the old bearing over there to show him what you wanted? A. No.

Q. Didn't the mechanic tell you that the parts were— A. The mechanic wrote me on a piece of paper number of the axles and number of the motor and number of the truck and sent me to Newark. Then I said it was a ton and a half Apex, is number what the mechanic wrote. I want to get them two parts.

Q. You asked for one and a half ton parts? A. Yes.

Q. And the man gave you parts for one and a half ton truck? A. For one and a half ton truck he gave me parts.

Q. Then you said they were too big when you brought them back? A. The mechanic says it is funny looks for one and a half ton parts; they are too big; they must be one ton parts.

Q. Then you told the man in Newark that those parts were too big? A. Yes.

Q. So he gave you parts for a one ton truck? A. Then the stock clerk said, "That is funny, too, if I gave you ton and a half parts it is too big; that truck must be one ton truck."

Q. Then he gave you parts for one ton truck? A. Then he gave me parts for one ton truck.

Q. And the one ton parts fitted your car? A. Fitted, and the same parts are being used to-day, yet.

Q. You had other accidents wth this truck when you were using it, didn't you?

Mr. Simpson: I object to that as not cross examination. I am suing for a fraudulent

breach of this agreement, as I read this complaint, and for deceit. If he ran into a tree it seems to me to make no difference, and it is not cross examination. I have asked him simply as to the agreement. Now, whether he ran it into a start while he had the truck, it would not affect his direct examination.

THE COURT: But you have also asked him what the amount was that he had paid on the account of the contract, which undoubtedly must have been done for the purpose of establishing to some extent he seeks to have a recovery for.

MR. SIMPSON: Yes; that is the amount he paid.

THE COURT: It would seem to me to be just this situation—I am travelling on what I think would be the thing; I have nothing to guide me thus far—but at best the situation would be this; that if fraud and deceit are established in a given case, and the return of the article is made, or the thing which is the subject of that contract, and during the time that it has been in the possession of the party seeking to have the benefit of that, or his redress under that fraudulent contract, that article or thing has become damaged through his act or through an act for which he is responsbile, he might not have and should not have the full amount, as in this case he claims; but that amount reduced to what the proportionate value was,—at least the proportionate value was after the demolition had taken place.

MR. SIMPSON: I withdraw the objecton. That is so.

Q. (Repeated by the stenographer.) You had other accidents with this truck, when you were using it, didn't you? A. Never have accident any more.

Q. You only had one accident? A. One accident.

Q. Did you damage this truck at any other time while you were using it besides this time of November 3rd? A. Before November 3rd?

Q. Before November 3rd? A. Yes.

Q. When? A. The first day, and the same day what the bill of sale said, and the same day when I paid money and the bill of sale was made; it was afternoon, or before noon—I cannot remember that exactly—I don't know how to drive because first time I was took the truck, and first time I was sitting at the driver in an automobile in my life. Shapiro's son took me; he want to show me how to drive, and we went in Bayonne on a clear road and he said, "Well, take that here now and go ahead," he said. "Well, I just took that wheel and turned a little on the curb. When I turned in the curb it stopped the car, but it gets front axle a little bit bended, too.

Q. You ran up on the sdewalk, didn't you? You ran up on the curb? A. On the curb; that means—I don't call that if I ran up, because the first time I took the wheel in my life. He was responsible for that.

Q. Well, you had the accident, anyhow, didn't you? A. That is not accident.

Q. You bent the axle, anyhow, didn't you? A. No axle.

Q. The spindle was broken? A. The spindle was a little bended, but the spindle was good to work.

Q. Well, you had to have it fixed, didn't you? A. Well, Shapiro said, "I put new spindle," and he put new spindle.

Q. You never drove a car before this day, did you? A. No.

Q. You didn't know anything about automobiles? A. Nothing at all.

Q. Nothing about how to take care of it? A. No.

Q. Didn't know what was inside of it at all? A. Didn't know at all. I took Shapiro's word.

Q. Don't know yet, do you? A. I know little bit, a little more than before.

Q. You know that there are wheels going around inside? A. Yes, I know now.

Q. Did you have any other damage or trouble with the car? A. No more troubles.

Q. Didn't you have some trouble in New York? A. Well, I called Shapiro for service, not for accident. When I got to market that was trouble, and I want to come back again; I wanted crank the car and I cannot crank it, and don't know what the Hell is the matter, whether was a frost, or what; and I call Shapiro and at the same time I want to call Shapiro the other man come in and want the job, and clean some kind of a thing. She started right away. And his mechanic come and the car is home all right. That ain't an accident.

Q. There was nothing the matter with the car? A. Nothing the matter, only if I know that myself I could have done it myself.

Q. You couldn't make it go, could you? A. I couldn't make it go.

Q. And another fellow came along and lifted up the hood and pushed a little thing, and it went? A. I don't know. If I knew I would not have asked anybody. I don't know that time.

Mr. Melniker: I think that is all.

Mr. Simpson: That is all.

(Witness excused.)

Joseph Solomon, sworn.

Direct examination by Mr. Simpson:

Q. Where do you live, Mr. Solomon? A. 24 East 29th Street, Bayonne.

Q. Do you know Mr. Israel Shapiro, the defendant here? A. Yes, sir.

Q. You know Mr. Shapiro. Did you buy this truck Kvedar owned from Shapiro? A. Yes.

Q. What did Shapiro tell you that was when he sold it to you? A. He told me it was a one—

Mr. Melniker: I object, if your Honor please. This is something that happened months afterward. It has no bearing at all on any representations that were made by the plaintiff in this case.

Mr. Simpson: Certainly it has. If Shapiro said, "This is a one ton truck," it fixes the knowledge of Shapiro to the fact that it was a one ton truck. If they claim that he learned that after the date it was sold to this plaintiff, that is a matter for them to bring out on cross-examination. In addition to this, I have proven that Mr. Shapiro was the Apex agent; therefore, he either knew or should have known what kind of a truck it was. Now, then, if at any time with reference to this truck he says something else, it seems to me it is an admission, and material.

Mr. Melniker: Why, the important thing, if your Honor please, in this case, is what Shapiro's knowledge was at the time he sold this truck to this plaintiff, not what he discovered afterward. He is in the same boat with the plaintiff, as far as that is concerned.

The Court: There is another angle to it, Mr. Melniker, and that is as to what this truck was in fact; whether it was a one ton truck or whether it was a ton and a half truck, and it seems to me that this testimony would go to an admission against interest, if, dealing with the same truck he subsequently represented it to be and stated it to be a one ton truck. Wouldn't it thus go to the point of

showing what the make of the truck was and what its capacity was, whether it was a ton and a half or one ton truck?

Mr. Melniker: Perhaps it might.

The Court: The contract beyond question fixes it as a ton and a half Apex model.

Q. (Repeated by the stenographer.) What did Shapiro tell you it was when he sold it to you? A. He told me one and a half ton truck.

Mr. Melniker: Allow me an exception.

The Witness: And I showed it to my friend; I don't know anything at all about the truck, he says to me, "That looks like one ton truck."

Q. When was it you had this conversation with Shapiro, when he also told it was a one and a half ton truck? A. It was the same day I made the deal with him.

Q. The first time you went to talk to him he showed you this truck which was Kvedar's, and said it was a one and a half ton truck?

Mr. Melniker: I ask that that be stricken out.

Mr. Simpson: It seems to me any admission by the defendant, if it is relevant, is competent; any admission by him to show what kind of truck it was.

Q. (Repeated by the stenographer.) The first time you went to talk to him he showed you this truck which was Kvedar's, and said it was a one and a half ton truck?

The Court: I will sustain it.

Q. (Repeated by the stenographer.) The first time you went to talk to him he showed you this truck which was Kvedar's, and said it was a one

and a half ton truck? A. He told me it was a one and a half ton truck.

Q. Now, what time of the day was that? A. It was in the night, about five o'clock; I don't know the date, though.

Q. Then you made some investigation yourself, no matter what it was, and then you went back then? A. Yes; I showed my friend, and I told him, "How is this truck? It looks like a ton and a half or ton truck?" He said to me, "It is only one ton truck."

Q. Then did you go back to Shapiro? A. Then I went back to Shapiro and I told him about it. "Well," he said, "I can't give you a bill of sale for one ton and a half truck, because we have trouble on this truck. I could sell you the truck for one ton."

Q. "I will sell it to you for a ton?" A. "Well," I said, "I couldn't make a deal for one ton." He say, "I have no trade for it." I say, "How is that?" He said, the plate is call for different numbers and the motor different numbers.

Q. Well, he sold it to you? A. Yes.

Q. And you have it now? A. Yes.

Q. How much did you pay for it? A. I paid $1285—$1185.

Q. And you had it licensed as a one ton truck?

Mr. Melniker: I object to that as immaterial, how it had it licensed. He might have had it licensed as a five ton truck.

The Court: Yes; that may be so.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Melniker:

Q. Did you get a bill of sale for this truck? A. Yes, sir.

Q. Where is it? A. I got it.

Q. Let us see it? A. (Witness produces paper.)

Mr. Melniker: I want to have this marked for identification.

Mr. Simpson: Paper marked D-1 for identification.

Mr. Melniker: That is all.

(Witness excused.)

Israel Shapiro, sworn.

Direct Examination by Mr. Simpson:

Q. Where do you live, Mr. Shapiro? A. Bayonne.

Q. On the 18th day of September, 1920, what was your business? A. Garage.

Q. What, automobile business? A. Automobile business.

Q. Were you the agent for the Apex truck? A. Yes.

Q. How long had you been agent for the Apex truck on the 18th of September, 1920? A. How long I held the agency?

Q. Yes. A. I bought the truck from—

Q. How long were you the agent for the Apex on the 18th of September, ten years or ten minutes? A. Well, I haven't any—

Q. How long? A. I haven't that contract at that time—

Q. How long had you been the agent for the Apex truck—the third time I ask you—on the 18th of September, 1920? A. When I sold this man the Apex truck—

Q. I didn't ask you that. I asked you on the 18th of September, 1920, how long had you had the agency for the Apex truck in Bayonne? A. The time what I sold him, that was all; it was about a week.

Q. About a week. What do you mean, a couple of weeks or a week? A. One week.

Q. How did you get the agency? A. I got the

agency from them; the man come over, and he had an available truck for sale, an Apex, and he wanted to induce me to take the Phillip (?) and the Apex truck agency.

Q. The what? A. The Phillip and the Apex agency.

Q. Phillip and Apex? A. Yes.

Q. And he wanted you to take the agency for both trucks? A. Yes sir.

Q. And did you take it for both trucks or only the Apex? A. I didn't take both of them; it only was, not an agreement, but only a word.

Q. Just a verbal agreement? A. Just a verbal agreement.

Q. And how many kinds of Apex truck did you have the agency for? A. One.

Q. Only one? A. One truck, what I sold to this gentleman.

Q. I know you only made one sale, but how many kinds of trucks did you get the agency for? How many tons did they make? A. They make a ton, and ton and a half and two and a half.''

Q. Only three kinds they make? A. Yes.

Q. They don't make a five ton truck, do they? A. I don't remember.

Q. And where was your place of business in Bayonne? A. 555 Broadway.

Q. And did you have catalogs there to show this man pictures of the trucks before you took him to Newark? A. No.

Q. You didn't show him any pictures before you took him to Newark? A. No.

Mr. Simpson: Cross examine.

Cross Examination by Mr. Melniker:

Q. Now, Mr. Shapiro, who was the Apex agent in this state, do you know? A. In this State?

Q. Yes. A. It was in Newark.

Q. What was the name of the company? A. The company was—I forget the name of the company. Now I know the name is Brown.

Q. The B. & B. Motor Company? A. Yes, B. & B. Motor Company.

Q. Did you ever have an agreement or contract, an agent's agreement or contract? A. With these people?

Q. Yes. A. No.

Q. Did you ever sell any other Apex truck outside of this one? A. No sir.

Q. This is the only truck you ever sold? A. Yes.

Q. Is this the only truck you ever saw—Apex truck? A. Apex, this is the only one.

Q. The only one you ever saw and the only one you ever sold? A. Yes.

Q. Were you an agent or were you just a dealer? A. I am an agent for them trucks, an agent.

Q. You have no agency contract, have you? A. No.

Q. You didn't have any agency for the truck, did you? A. No.

Q. You were a sub-dealer, were you? A. Sub-dealer.

Q. And you sold this one truck? A. One truck.

Q. That—you went over to Newark with Mr. Kvedar? A. Yes.

Q. And he told you he wanted to buy a one and a half ton truck? A. Yes.

Q. Did you tell the people in Newark that this man wanted to buy a ton and a half truck? A. Yes.

Q. Did you put in an order for a one and a half ton truck? A. Yes sir.

Q. He said he gave you fifty dollars for a deposit. Did he give you fifty dollars? A. The fifty dollars he gave to me I gave to the man in the Apex truck in his hand. He gave a receipt to me, and after he make up, this man, from the Apex truck in Jesey City—in Newark, he make an agreement with the man, between me and him, but I don't draw the agreement; only the man over there was drawing it.

Q. Oh, an agreement was drawn in the Newark office in the presence of you and Mr. Kvedar? A. An agreement was drawn in the Newark office in the presence of me and Mr. Kvedar.

Q. And Mr. Kvedar paid fifty dollars deposit? A. And then I got fifty dollars receipt from the Apex truck man.

Q. Now I want to show you this card and ask you who wrote that? A. This is the salesman for the Apex truck.

Q. Did he write that in the Newark office? A. He wrote that in the Newark office?

Q. In the presence of Kvedar and you? A. Kvedar and me.

Q. When he got the fifty dollars? A. And the same agreement he made between Kvedar and me, too. The man make the agreement.

Q. Was it the same fifty dollars? A. Same fifty dollars.

Q. Kvedar's fifty dollars that was paid to this man who wrote this paper? A. Yes.

Mr. Melniker: I ask to have that marked for identification.

(Paper marked D-2 for identification.)

Q. Now, did you afterwards pay for this truck? A. Yes.

Q. This B. & B. Motor Sales Corporation billed you for this truck, did they? A. Yes.

Q. I show you this paper and ask you if this is the bill they billed you? A. Yes.

Mr. Melniker: I ask to have that marked for identification.

(Paper marked D-3 for identification.)

Q. You afterwards paid for this truck? A. I paid for this truck.

Q. With your check? A. Yes.

Q. I show you this check dated September 9, and ask you whether that is the check? A. Yes, that is the check.

Mr. Melniker: Mark that for identification.

(Paper marked D-4 for identification.)

Q. Was there any Apex over in Newark at the time you bought this truck? A. Yes sir; standing on the floor.

Q. Was that the first time you ever saw an Apex truck? A. Yes.

Q. Did you know the difference between an Apex and any other kind of truck?—

Mr. Melniker: I withdraw that.

Q. Between an Apex one ton and an Apex one and a half ton truck? A. No, not very quite; I am not acquainted.

Q. Was that the truck that you sold over there in the garage; was that the truck that you bought for Kvedar? A. Ton and a half.

Q. This man in Newark told you it was a ton and a half truck? A. One and a half ton truck.

Q. And was that the truck you bought? A. This was the truck but the other truck was a little abused. You see, it was a used truck a little, and he didn't want to take this used truck, and he trade the same truck for another one.

Q. How many Apex ton and a half trucks were on the floor at the time this order was put in? A. I don't remember; there was a couple of trucks.

Q. There was more than one? A. Yes sir.

Q. But this was the first time you ever saw an Apex truck? A. This was the first time.

Q. What I am trying to find out is, if the truck that Mr. Kvedar got physically, the one that was delivered to him,—was that one of the trucks that were in the garage, on the floor over there at the time you and he were over there? A. It was.

Q. You talked about the truck that he was going to take? A. Yes sir.

Q. And was that the truck that was delivered? A. This is the same truck that was delivered.

The Court: When you went to Newark

with this man there were some trucks on the floor; is that right?

The Witness: Yes.

The Court: Was it any of those trucks that were on the floor that day that you finally delivered to Mr. Kvedar? Do you understand the question?

The Witness: Not the same truck, but the same model.

By Mr. Melniker:

Q. That is what I am trying to find out. Was it the same truck?

Mr. Simpson: He says the same kind of model.

Q. Same model. Did you have a catalog of those trucks at that time? A. No; I did not.

Q. Did you ever give Kvedar a catalog? A. Yes; we got two catalogs. He took catalog from there.

Q. He took a catalog from there? A. Yes.

Q. Of the Apex truck? A. Apex truck.

Q. Well, the truck that you looked at and which you selected as the kind of a truck he wanted, do you know whether that was a one ton or a one and a half ton truck? A. One and a half.

Q. And was that the same kind of truck that was delivered to him? A. Some model was standing on the floor yet delivered to him.

Q. Was that a one and a half ton truck delivered to him? A. It was one and a half.

Q. He got a one and a half ton truck? A. He got a one and a half ton.

Q. When he brought this truck back in December what condition was it in? A. It was in very bad condition.

The Court: That does not tell us anything, Mr. Witness. That is not what Mr. Melniker wanted you to say. He wanted you tell us

just what its condition was; if it was in bad condition, what the bad condition was; if there was anything broken, what it was that was broken.

The Witness: It was broke on the truck—when he brought the truck it was the chassis bended.

Q. Go ahead. A. The battery was not in the truck.

Q. The battery was gone? A. Yes.

Q. What else? A. The bumper was not on the truck.

Q. The bumper was gone? A. Yes; was not on the truck.

Q. What else? A. It was the mudguard bended; the radiator was leaking, and I never started truck, but I saw it standing over there. As to the condition inside I know you can't turn over the motor.

Q. Couldn't turn over the motor? A. No.

Q. What was the matter with the cylinders, with the motor? A. Maybe it is because of the cylinders he can't turn over the motor.

Q. What was the trouble? A. He can't start it, even with the crank case he can't start it.

Q. What was it? Were the pistons frozen? A. Froze in.

Q. Frozen in? A. Yes sir.

Q. By the way, did you ever sell this truck to this man with the mustache, Solomon? Did you sell him that truck? He said you sold him the truck? A. No; I didn't sell him the truck.

Q. Did you ever make any representations to him that this was a one ton truck, or a one and a half ton truck, or any other kind of truck? A. I never talk about one ton.

Q. Did you ever make any representations to this man as to whether it was a one ton or one and a half ton, or any other kind of a ton? A. I never have a talk with him about ton or a half ton.

Re-direct Examination by Mr. Simpson:

Q. Now, when you went to Newark you say that this man's fifty dollars—you took that and you paid it in to the Apex Company; did you? A. I even not take it in my hand, the fifty dollars.

Q. You didn't take it in your hand? A. No.

Q. Well, what happened to it? A. He turned it over to the others near there.

Q. Do not tell us a book about it. What happened to the fifty dollars? A. He make the deal over there. Even me not was stay in the place.

Q. When he took the fifty dollars out he didn't give it to you, you say? A. No sir.

Q. You never had it in your hand? A. No.

Q. You never gave him a receipt of any kind? A. I signed the receipt, yes.

Q. You never had this money in your hand? A. No.

Q. And gave it to some one else? A. He gave it to the Apex people.

Q. All right. Just look at this paper and see whether you didn't give him a receipt? A. Oh, yes; I give him a receipt.

Q. Just tell, isn't that your signature? A. Yes.

Mr. Simpson: I offer that in evidence.

Have you any objection to this?

(Paper marked P-2 in evidence.)

Q. That is a receipt signed by you for money you never had in your hand. "Central garage, August 24-26, 1920. Received fifty dollars from Frank Kvedar, on deposit one and a half ton truck, 254,30. I. Shapiro. You signed that? A. Yes.

Q. And you signed it for money you never had in your hand? A. But the money he give; he admits it himself. He give it the deposit in the Newark.

Q. For the money you never had in your hand;

that was the money you never had in your hand? A. But I give the deposit—

Q. That was the money you never had in your hand; is that right? A. No; the money he give it over there, and I give it the receipt for the money.

Q. You have already sworn that you never had the money in your hand. Will you tell me whether you did or not?

The Court: Answer that question. This fifty dollars they are talking about, which was paid in Newark. You have said that you never had the fifty dollars in your hand. Now, you are asked by Mr. Simpson if that is so, that you never had that fifty dollars in your hand?

The Witness: He handed the fifty dollars in the Apex people, on the deposit for the fifty dollars, and I have a receipt for the fifty dollars, and I give him the receipt.

Q. You never had it in your hands, did you? (No answer.)

Q. Now, this check which is marked for identification, made by you to the B. & B. Motor Sales Corporation, $1575., that is a check you made for this truck; didn't you? A. Yes sir.

Q. Did you know how many kinds of trucks they had when you made this check at that time to them? A. How many trucks?

Q. How many kinds, whether they had one ton, one and a half ton, two and a half ton, or ten and a half ton? Did you know the different kinds of trucks they had? A. When I handled him this check he bring over only the—

Q. I didn't ask you anything about that. You don't sign checks without knowing anything about it, do you? Do you sign them in your sleep?

Mr. Melniker: I have no objection to counsel using that check in his examination, but I think it ought to be offered in evidence.

(D-4 for identification received in evidence and marked Plaintiff's exhibit 2—in evidence.)

Q. When you made this check out you knew there were three kinds of trucks,—a ton, ton and a half, and two and a half? A. I can't quite understand.

Q. You can't understand what you knew about trucks? You were the sub-dealer in the Apex truck when you signed this truck; weren't you? A. Yes.

Q. And as such sub-dealer you have already sworn you knew that they have three kinds of trucks, ton, and ton and a half, and two and a half; is that right? A. Yes.

Q. Did you know what the prices were of the different trucks,—the ton, the ton and a half and the two and a half? A. No.

Q. You did not know that? A. No.

Q. You thought they were all the same prices, did you? A. No sir.

Q. Well, what did you think the difference was in the prices? You had seen this catalog, hadn't you, before you made this sale, the Apex, when you were sub-dealer? Had you seen the catalog? You have them in your place of business, haven't you? A. No.

Q. Where had you seen them before you made this sale? A. I seen them in Newark.

Q. Well, when the man came and gave you the sub-dealership, did he give you the catalog? A. No.

Q. You were selling trucks without catalogs, then? Painting word pictures, were you? A. I bring him over in Newark.

Q. You were selling without catalogs? A. I sold the truck not even in my place.

Q. You were selling them without catalogs; that is all I want to know?

Mr. Melniker: He has not sold any, he said, according to his testimony.

Mr. Simpson: He said he had the agency a week or two weeks before he made this sale.

Q. Did you ever see these prices in effect May 15th, one ton truck, $1595. One and a half ton truck, $1795., Two and a half ton truck, $2250.? Did you ever know that when you were sub-dealer? Did you know that? Did you know that, or were you a baby selling trucks without knowing what the prices were? A. I have my catalog in my place.

Q. Well, were you a baby automobile dealer selling trucks to people without knowing what the prices were? A. I sold the truck in Newark. I didn't—

Q. I am not talking about Newark, I am talking about when you were a sub-dealer for the Apex and the other one? Were you selling trucks like a baby without knowing what the prices were? A. (No answer.)

Q. Do you mean to tell these men that you had an agency and a man would come into your place and you would not know the price to tell him? Do you mean that? A. (No answer.)

Q. Do you mean that? A. (No answer.)

The Court: Do you understand the questions, Mr. Shapiro?

The Witness: Yes.

Q. You did or you did not know the price? Do not let us waste any time about it? A. I got agency now, for a truck. When a man come in I look over the price list and I show him what is the price.

The Court: Let us get back to this particular Apex. If I understood you, you said that you were a sub-dealer and had been be-

fore this truck was sold, for a week or two weeks; that is right, is it?

The Witness: Yes.

The Court: You had your arrangements at that time for a week or two weeks. Now then, at the time that you went over to Newark, did you know that there were three kinds of trucks they were handling—a ton truck, a ton and a half, and two and a half? You knew that, didn't you?

The Witness: Yes.

The Court: Did you know the prices you were getting for the ton truck and the ton and a half and the two and a half ton truck when you went over there?

The Witness: I was—

The Court: Just answer the question. Did you know what the prices were for those different trucks when you went over to Newark?

The Witness: When I was over to Newark they show me different kinds of trucks, but I don't remember exactly how much was the price. If this was the price of the new one the price list was changed.

The Court: What we are all trying to get at, Mr. Shapiro, is that you knew that the Apex was putting out and offering for sale three sizes of trucks: a one ton truck, a ton and a half, and a two and a half ton truck; and you knew, did you, that there must be some difference in the prices of the different trucks?

The Witness: Yes.

The Court: Well, when you went to Newark with Mr. Kvedar, did you or didn't you know what the price of the one ton truck

was, what the price of the ton and a half ton truck was, and what the price of the two and a half ton truck was, or didn't you know?

The Witness: I was—

The Court: Did you or didn't you know it?

The Witness: I know it only on the ton and a half that he bought it; the rest I didn't know.

The Court: What was the price of the one and a half ton truck?

The Witness: I think, $1,750. That was only the chassis with solid tires.

The Court: Well, that is what you sold him, wasn't it, the chassis?

The Witness: The chassis, but other equipment.

The Court: And other equipment?

The Witness: Yes.

The Court: $1795. for the chassis, with solid tires?

The Witness: Solid tires.

The Court: Did you know what the price of the one ton truck was at that time?

The Witness; No sir; I don't remember exactly.

The Court: And what was the amount of this check that is now in evidence?

Mr. Simpson: $1575. was exactly the price, as I remember it, of the one ton truck.

The Witness: Yes, but you are forgetting—

Mr. Simpson: I am not forgetting any-

thing. If you will talk to the jury we will see who has forgotten the most.

Mr. Melniker: Now, if your Honor please—

Q. As I understand the result of his Honor's interrogation of you, you didn't know anything about prices until you went over on the 9th of September, the date of this check; that is the first you knew about prices, isn't it?

Mr. Melniker: He didn't say that.

Q. Well, is that the fact?

The Court: My questions were directed at the latest to the time that he went over to Newark with the plaintiff to look.

Mr. Simpson: Well, what date is that?

The Court: I do not remember.

Q. What date did you go over with the plaintiff to look at the truck? A. I think it was about two weeks before I paid for that.

Q. Two weeks before you paid? A. Yes.

Q. That you went over. Well, when did you first know anything about the prices of these trucks, about the different prices of these trucks? When did you first find that out? A. The prices I didn't know exactly from the Apex truck at all.

Q. You now know the prices or you don't know them now? A. The prices is only when I look over on this catalog, and I show them.

Q. Well, when was that? Was that on the 9th? When did you first see the catalog, on the 9th? A. When I was in Newark.

Q. When was that? A. That was about two weeks before I paid this check. I don't remember exactly the date.

Q. Well, you didn't know anything about the difference between a ton, a ton and a half and two and a half ton truck, did you? A. Not exactly; I am not acquainted so much.

Q. You did not know the difference. So that

you told the man this was a ton and a half truck, although you didn't know whether or not it was; did you? You didn't know the difference you tell us now, between a ton, a ton and a half and two and a half? A. Yes; I don't know exactly the prices—

Q. Do you know what the difference is between a ton and a ton and a half truck? Did you know the difference between a ton and a ton and a half truck when you made this agreement? A. When I make the agreement with the Apex?

Q. Yes. Did you know the difference?

The Court: Not when you made the agreement with the Apex.

Q. No, when you made it with this man. Did you know the difference? A. Yes, I know the difference.

Q. Then when you made the agreement with him you knew what a ton and a half truck was, didn't you? A. Yes.

Q. And yet you deliver him a one ton truck although you knew the difference? A. I know the difference from ton and a half.

Q. And you delivered him a one ton truck; didn't you? A. I delivered him a ton and a half.

Q. You say it is a one and a half ton you delivered him? A. Yes.

Q. You are sure of that? A. Yes.

Mr. Simpson: That is all.

By Mr. Melniker:

Q. You say you knew all about or knew something about these trucks. Did you know anything about these trucks except what the agency in Newark told you about them? A. That is all.

Q. All you knew was what he told you? A. What he told me.

Q. Now, you have made several statements, that once you were agent, another time you were sub-dealer, another time you did not know whe-

ther you were agent or sub-dealer. Isn't it a fact that at the time you sold this truck to Kvedar you were only considering the Apex sub-dealer's proposition? A. Sub-dealer's proposition, yes.

Q. You never did take it, did you? A. No; I have not.

Q. You never were the agent of this company, were you? A. Never.

Q. Never were the sub-dealer of this company, were you? A. Never.

Q. Now, you said something about changes in price. Do you know whether this catalog that the lawyer showed you were the prices at the time that you sold this truck, or whether it was the price before or after? This catalog that we showed you, with the pictures on it, do you know whether those were the prices at the time this sale was made, or whether they were the prices six months after or six months before? A. I don't know.

Q. You don't know anything about that, do you? A. No.

Q. There were changes in the prices after that time, were there? A. Yes sir.

Mr. Melniker: That is all.

By Mr. Simpson:

Q. Just look at that. Is that in your handwriting, that paper? A. No.

Q. Did you ever see it before? A. No.

Q. You didn't do this figuring on the paper of Central Garage—that is your garage, isn't it, the Central garage? Is that your garage? A. Yes.

Q. But you didn't do this writing? A. No.

Q. "Chassis, $1915., cab $90., body $200."? A. No.

Q. War tax, etc. $145., insurance $193., $2543., deposit $50." You didn't give him that, did you? A. No, that is not my writing.

Q. Well, do you know whose writing it is? Did you ever see it before? A. No.

Q. You never even saw it before, did you? A. No.

Q. You never saw it? Take a good look at it. You never saw it before, did you? A. This is not my writing.

Q. Did you ever see it before? A. No.

Q. Never saw it before, did you, before to-day? A. No.

Q. What? A. It is not my writing.

Q. Did you ever see it before to-day? A. No.

Mr. Simpson: I ask to have it marked for identification.

(Paper marked P-3 for identification.)

By Mr. Melniker:

Q. You said something before, that at the time you were over there with this man, and the fifty dollars deposit was paid on the car, and the receipt of the fifty dollars given, there was some agreement made out? A. Yes.

Q. By the B. & B. agency? A. Yes.

Q. Is this the paper? A. I cannot remember that.

Q. You don't remember it? That is all.

Mr. Simpson: That is all.

(Witness excused.)

John Loew, sworn.

Direct Examination by Mr. Simpson:

Q. Did you get from Shapiro what his commission was on this sale? A. No; I did not.

Mr. Simpson: What was your commission on this sale? How much was your commission?

Mr. Shapiro: Twenty per cent.

Q. What is your business? A. I am vice-president and general manager of the W. J. B. Motor Truck Company of Newark.

Q. Did you have any conversation with Mr. Shapiro about this truck that he sold to Kvedar? A. Yes sir.

Q. Did you see the truck before you had a conversation with him? A. Yes sir.

Q. Where did you see it? A. In front of Mr. Kvedar's place.

Q. It was an Apex truck? A. Yes sir.

Q. Was it a ton or ton and a half truck? A. One ton truck.

Q. You made some investigation as to the details of this sale, as to whether or not this truck was sold to Mr. Shapiro as a ton or a ton and a half truck, didn't you?

A. Yes sir.

Q. And after that investigation did you have a conversation with Mr. Kvedar, and call to his attention— A. With Mr. Shapiro.

Q. With Mr. Shapiro, and call this letter to his attention, letter bearing date November 29, 1920? A. Yes sir.

Q. And did you particularly call his attention to this paragraph: "Mr. Shapiro called upon us in regard to a truck. He was then about to accept a sub-dealer's proposition. We had showed Mr. Shapiro a truck which was on our floor and which he purchased. At that time he advised us that he had a purchaser in Bayonne who would be interested in this truck, and a day or two later Mr. Shapiro called with the prospect, entered into an agreement to purchase the truck, which was the only truck on the floor of this capacity," etc. "Mr. Shapiro accepted this truck and his regular com-

mission allowed as per agreement entered between Mr. Shapiro and ourself." Did you call his attention to that paragraph? A. Yes sir.

Q. What did he say as to its being a one ton or ton and a half truck? A. He said he didn't know.

Q. He said, "I don't know?" A. Yes, meaning that he didn't know the difference between the two sizes of trucks.

Q. Did you further call attention to this paragraph: "We further wish to advise you that Mr. Shapiro sold this truck as a one and a half ton truck? . . . . We personally believe that this truck was misrepresented by Mr. Shapiro to his prospect." Did you call his attention to that? A. Yes sir.

Q. And what did he say about that? A. Well, he said, "You can tell your man to sue me and I will sue Louis Brown."

Q. Who is Louis Brown? A. He was the Newark representative of the Apex truck.

Q. Now, I understand your interest in this was —you were doing business with this Kvedar? A. No, I called there at the request of one of our salesmen, who had been there the day previous to my visit, and he attempted to sell Mr. Kvedar a Republic truck.

Q. And Mr. Shapiro then tried to tell you he did not know the difference between a one ton and a one and a half ton truck? A. Yes sir.

Cross Examination by Mr. Melniker:

Q. Well, did you know the difference between the one ton and the one and a half ton truck? A. Yes sir.

Q. What is the difference? A. There are several points of difference, difference in weight, difference in size of springs, number of spokes in the rear wheel, and size of the rear tire, and in the clutch.

Q. Now, let us take one of those things at a

time—difference in the weight. What is the difference in the weight? A. Well, at that time it was two hundred pounds. Since they have changed the model there is a difference.

Q. We are talking about this particular time and this particular model? A. Well, the difference was two hundred pounds in weight.

Q. Did you weigh this truck? A. No sir.

Q. Then how do you know this one weighed two hundred pounds less than a one and a half ton? A. I obtained my information from a study of the Apex catalog, and the Commercial Car Journal.

Q. You never weighed the two trucks? A. No sir.

Q. You don't know that this truck does not weigh the same as the one and a half ton truck, did you? A. No; because, you see, this truck has been—has pneumatic tires on, and a body and cab on.

Q. I am simply asking you whether you weighed these or not? A. No sir.

Q. So you don't know the difference in weight? A. Not the exact difference in the weight between this truck and a ton and a half truck; because, as I say, this truck has a body and a cab on it.

Q. What is the next point? A. Difference in size of springs.

Q. Which springs, the front? A. No, the rear springs.

Q. Front springs the same? A. Yes sir.

Q. What is the difference in the size of the rear springs? A. A different number of leaves in the ton and a half truck.

Q. Anything else? A. As to the springs. There are other points of difference.

Q. As to the springs. You said difference in the size of the springs. Now, you say there is a difference in the number of leaves. Is there anything else in the springs that is different? A.

Those are the only two points of difference in the springs.

Q. Otherwise the springs are exactly alike? A. Yes sir.

Q. Now, what is the difference in the number of leaves? A. There are more. I believe there are thirteen in the ton and a half, and eleven, as I recall it, in the one ton.

Q. Did you count the leaves in Mr. Kvedar's truck? A. Yes.

Q. How many different kinds—how many leaves did you count? A. I think I counted thirteen, and he explained to me that he had a blacksmith put in an extra leaf or two after he bought the truck.

Q. What is the other point of difference? A. The clutch.

Q. What is the difference in the clutch? A. The clutch and transmission on the ton and a half, you have four speeds, and on the one ton you only have three.

Q. Did you examine the truck to see if it had three or four ? A. I can not recall going into the—

Q. Well, you don't know whether there was any difference in this truck? A. On the clutch I am not positive.

Q. Well, you don't know anything about the clutch of this truck, at all, do you? A. No; I do not.

Q. What other points of difference were there? A. Number of spokes in the rear wheel.

Q. How many spokes in the rear wheel of a one ton truck? A. There are two more in the ton and a half than there are in the one ton.

Q. Well, how many were there in the one ton? A. I do not recall that.

Q. How many in the ton and a half? A. Two more than there are in the one ton.

Q. Do you know how many? A. No sir; it is either eleven and thirteen or—

Q. Do you know how many there are in this Kvedar truck? A. Yes sir.

Q. How many? A. The number that corresponds with the catalog there as being in a one ton truck.

Q. How many? A. Well, I am not positive; I do not recall.

Q. You don't know that? A. I don't recall it; I did at the time, because that is one of the things that made me go right up to Mr. Kvedar and tell him that was a one ton truck.

Q. What are the points of difference? A. General appearance, lightness of the truck.

Q. Well, what is the difference? A. Well, to an expert eye there is a big difference between a ton and a ton and a half truck.

Q. What is the difference? A. I believe I gave all the points of difference that I can recall.

Q. What? A. I believe I have enumerated all the points of difference.

Q. Now, your points are, difference in weight, as to which you said you did not weigh them, therefore don't know the weight of the truck A. Yes sir.

Q. You say there is a difference in the clutch, and you did not examine the clutch, therefore you don't know what kind of a clutch was in this one; you say there is a difference in the spokes, and you don't know how many spokes there are either in this truck or the ton truck or the ton and a half truck? A. That is not what I said.

Q. What did you say about that? A. I said I counted the number of spokes in the rear wheels of Mr. Kvedar's truck, and they correspond with the number of spokes set forth in that catalog as being in a one ton truck.

Q. Which catalog did you use, this one? A. No sir.

Q. Which one did you use? A. I believe I used that three-sheet folder.

Q. Have you any knowledge as to whether this

was the catalog which was being used at the time this truck was being sold? A. As to what?

Q. Whether this was the catalog that was issued, and was in use at the time this truck was sold? A. I couldnt' tell you. I can tell you in a minute.

Q. That is what we want to know. A. (After examining folder.) Yes, that is the one that was in use; because they both used Buda motors at that time.

Q. Did you ever see that catalog? A. Yes sir; I believe I have.

Q. Was that one in use, too, at that time? A. That must have been in use; I am not sure of it.

Q. Well, then, they ought to be the same/ the specifications in these two catalogs? A. They certainly ought to be.

Q. Now, I want you to look at the one you used and tell us how many spokes there were in the rear wheel of the one ton truck? A. Twelve.

Q. And how many spokes in the rear wheel of the one and a half ton truck? A. Thirteen.

Q. Thirteen? A. Yes sir.

Q. How many spokes did you say this truck had? A. Twelve.

Q. You counted them? A. Yes.

Q. What kind of tires were on this truck? A. Pneumatic, I believe.

Q. All around? A. Yes sir.

Q. What does the catalog say about tire equipment on a one and a half ton truck? A. It is optional, I believe. I will tell you in a minute. Yes, pneumatic, optional. That is one other point of difference that I mentioned, and you forgot to mention in your summary. There is a difference in the solid tire sizes between the ton and the ton and a half.

Q. What tires were there on this truck? A. Pneumatic.

Q. What size? A. I think 35 by 5.

Q. What is the equipment on the one ton ac-

cording to the catalog? A. 32 by 3½.—just a minute—

Q. Pneumatic or solid? A. 32 by 3½ solid, pneumatics optional.

Q. The regular equipment on a one ton truck is what? A. Solid.

Q. Solid. And these were pneumatics, 35's by 5? A. Yes sir; that is light equipment for a one and a half ton truck. Knowing that you were going to put them on a ton and a half the tire people won't sell you them, knowing that you are going to put them on a ton and a half.

Q. Mr. Loew, you testified in this case once before, didn't you? A. Yes sir.

Q. You testified to your conversation with Mr. Shapiro at the last trial, did you not? A. If you say so.

Q. Dont' you remember your testimony at the last trial? A. Not entirely, by any means.

Q. You remember testifying? A. Oh, yes.

Q. You remember being asked about your visit to Mr. Shapiro? A. No, I do not.

Q. Do you remember testifying in answer to counsel's question about your conversation with him? A. I don't remember the testimony.

Mr. Simpson: I object to that. This is an entirely improper way to examine on testimony. As I understand the rule, he must read the testimony and ask him—

The Court: He must be confronted with the question and answer.

Mr. Melniker: But I have not got to that point yet. Suppose he says, "I did not testify?" Suppose he says, "I don't remember anything about my testimony?"

Q. You testified to-day about a conversation with Mr. Shapiro in which you called attention to some letter that counsel read from. A. I called his attention to two letters.

Q. Did you read them to him? A. Showed them to him, both to Mr. Shapiro and to his daughter.

Q. Did you read them to him or did he read them himself? A. I read them to him, and then turned them over to his daugher.

Q. You read the letters out to him out loud? A. Yes sir.

Q. And did he tell you that he misrepresented this truck? A. No.

Q. Did he say anything about him trying to sell this man a one ton truck for a one and a half ton truck? Did he say anything about it? There is a statement in this letter that he sold this one ton as a ton and a half and misrepresented it. Did you read that to him? A. Yes.

Q. He denied it, didn't he? A. Yes; then I said to him, as I remember—

Mr. Simpson: Go ahead.

Q. Go ahead. I am listening to you? A. Then I said to him, "Anyway, you got yourself in Dutch by selling this man a truck without the numbers on it, don't correspond with the actual numbers on the truck."

Q. What did he say about that? A. Well, he said, "You let him sue me and I will sue Louis Brown."

Q. He said he did not know anything about changed numbers, didn't he? A. No.

Q. Do you mean to testify that he told you he knew all about this change in the numbers? A. No; I called his attention, or at least, spoke of the difference in the numbers. He didn't say anything about it one way or the other.

Q. He didn't indicate that he knew anything about it, did he?

Mr. Simpson: I object to that as calling for a conclusion.

A. He didn't indicate that he knew all about it or nothing. So I said to him, "My only interest

in this is trying to get the thing cleared up so that I can get the Apex back out of Kvedar's hands and sell him a Republic."

Q. Now, I want to call attention to your testimony at the last trial. Do you remember being asked this question? "Did you go to see Shapiro and talk to him about it?" And you answered, "Yes." "Q. And what did you say to Shapiro about it?" "A. I said that Mr. Kvedar asked me to come around and talk about the truck that he had sold him. I told Mr. Shapiro that it was a one ton truck. Mr. Shapiro said he didn't know anything about it, but he had bought it as a one ton and a half truck from Louis Brown, of Newark. He asked me to come back in three or four days and see his daughter, and I did that, and his daughter showed me he had paid for it, his fifty dollar deposit on a one and a half ton Apex." "Q. Did you ask him to take it back?" "A. I did." "What did he say, that he would or would not?" "A. He said he would not."

Do you remember so testifying? A. Yes sir.

Q. Now at that time you didn't say a word about having had these letters and having read these letters? A. I think I did further on.

Q. Well, will you examine this and find? A. No; I will take your word.

Mr. Simpson: I object to his examining any copy of the testimony. It has not been proven.

Q. Well, will you look at this paper?

Mr. Simpson: I object to the witness looking at any printed document handed to him.

The Court: What was the question?

Q. (Reapeated by the stenographer.) Well, will you examine this and find—well, will you look at this paper.

Q. Now, I ask you to examine this paper. It is a transcript of your testimony at the last trial.

Mr. Simpson: I object to that statement. That is not proven. It may be the Egyptian Bible, for all we know. He says it is a transcript of the testimony.

The Court: If he is exacting that, let the reporter who transcribed the case take the stand and testify.

Mr. Simpson: That is not the point of my objection. My objection is that it is incorrect to hand the witness a typewritten copy and say, "Please examine through this and see if you can find something of this kind." That is not the way to contradict. It is to ask him point blank what his testimony was, and then he can put in the record. I do not object to his putting this in afterward, but I object to his handing this to the witness and saying to the witness, "Run through this and see what you can find."

The Court: I think that is the situation. You should read the questions and answers, and if he says, "No, I did not so testify," then your way would be to show the testimony.

Q. You say then, that you did so testify? A. I have a recollection of testifying to my conversation with Shapiro.

Q. And showing him the letters? A. And showing him the letters.

Q. Well, you were asked to tell the conversation, and you say now that you testified to the conversation? A. No; I don't say that I did. I say I will take your word for it, but I say I have a recollection of having testified.

Q. Your recollection is when you were asked that question you did tell what the conversation was? A. Not when I was asked that question, but at some point in my testimony the last time I was here, my recollection now is that I did

testify about showing those two letters to Shapiro.

Mr. Melniker: I think that is all.

Mr. Simpson: That is all.

(Witness excused.)

Frank Kvedar, recalled.

Direct Examination by Mr. Simpson:

Q. Showing you P-3 for identification, where did you get that paper? A. I got that paper in Shapiro's garage.

Q. From whom? A. From Shapiro himself.

Q. Who gave you this paper? A. He gave me this.

Mr. Simpson: I offer that in evidence. This is the paper that Shapiro denied ever having seen before.

(Paper marked 3 for identification received in evidence.)

Q. That was given to you on the day it bears date, the 3rd of September, 1920? A. Yes sir.

Cross Examination by Mr. Melniker:

Q. Who gave you the paper? A. Mr. Shapiro.

By Mr. Simpson:

Q. It says, September 3rd, 1920, this printed letterhead, Mr. Frank Kvedar, chassis, $1915.; cab, $90. Body $320. Tax $145. Insurance $193. $2543; deposit $50. $2493. Note, $1200.

This is a little bit out of order, but on the counter-claim I want to put it in.

(Paper marked P-4 in evidence.)

John H. Craig—Direct.

By Mr. Melniker:

Q. Who handed you this paper P-3? A. Shapiro.

Q. Which one? A. Israel.

Q. The old man? A. The old man.

Q. Who was there? Who was there besides the old man? A. There was a son, was his daughter.

Q. They were all there when he gave you this paper? A. All three of them.

Q. Who handed you the paper? A. The old man.

Q. Where did he get it? A. In his garage, in his little office.

Q. Where did he have it? Did he have it in his pocket, in his hand, on a desk? A. No, on a desk.

Q. Had it on a desk? A. Had it on a desk.

Q. And he took and picked that off the desk and gave it to you? A. Yes, and he told me that is what you—what cost by the pieces, he told me that time, it is going to cost you by the pieces.

By Mr. Simpson:

Q. What do you mean by the pieces? A. That is chassis, and so forth.

Mr. Melniker: An itemized bill?

The Witness: Yes; what everything costs.

(Witness excused.)

John H. Craig, sworn.

Direct Examination by Mr. Simpson:

Mr. Craig, what is your business? A. Automobile mechanic, and foreman of a truck shop.

Q. And have you experience with motor trucks, different kinds of motor trucks? A. Yes sir.

Q. Over what period of time? A. Well, for the

period of seven or eight years.

Q. Do you know this truck that Kvedar had, the Apex truck, that Shapiro sold him? A. I don't know this particular truck, but I know Apex trucks.

Q. Well, do you know this truck? A. Yes sir.

Q. What is the difference between a ton and a half and a ton truck? A. Why, a ton and a half truck is built a little heavier in proportion to a ton truck.

Q. It is built to carry a ton and a half instead of a ton? A. Yes sir.

Q. And have you seen this truck—this particular truck? You have seen this particular truck? A. Saw this particular truck, no.

Q. But the one and a half ton truck is substantially different from a one ton truck; it is more expensive, isn't it? A. Yes sir.

Mr. Simpson: That is all.

Cross Examination by Mr. Melniker:

Q. Well, now, Mr. Craig, how is it different?

The Court: How is the one and a half ton truck different from the one ton truck?

The Witness: Why, it is built heavier, in construction.

Q. Where? A. Well, the springs, the rear axle, the gear is different.

Q. That would not make it any different? A. Well, the gearage won't make it any heavier, but it is a difference in the truck.

Q. Well, now, you mentioned the spring and the rear axle. Is there anything else? A. Yes; I think in the Apex there is—the frame is reinforced to a certain extent, about midship of the car.

Q. You think there is a difference in the frame, do you? A. Yes, some.

Q. What difference is there in the frame? A.

There is a sort of an oval frame that helps reinforce the original frame.

Q. What other differences do you know about? A. Well, the springs, and the weight of it.

Q. What? A. The weight of it.

Q. What is the difference in the springs? You say they are heavier springs? A. No, there is some leaves; they would not necessarily be heavier, there is more leaves; they would not necessarily be heavier.

Q. Any other difference in the springs? A. Not that I know of.

Q. Same size springs? A. About the same size.

Q. Same size leaves? A. And the same size leaves.

Q. Only difference in the number of leaves? A. Only different in the number of leaves.

Q. What is the difference? How many? A. The one ton has eleven leaves, and the ton and a half has twelve or thirteen, I think it is; twelve, though.

Q. You know how many leaves this particular car had? A. No; I do not.

Q. Never examined that, did you? A. No sir.

Q. Did you ever weigh the rear axle of the car to see whether it weighed as much as the one and a half? A. I never weighed it.

Q. Did you ever examine the frame to see whether it was the frame of a one ton or one and a half ton? A. Not this particular car.

Q. This particular car, I mean. You don't know anything about this particular car, whether it is a one or a one and a half? A. No.

Q. Now, as I understand your testimony, the difference between the one and one and a half ton is the difference in weight? A. Different weight.

Q. And there is a difference of one leaf in the springs, or possibly two; one or two? A. Yes sir.

Q. And a difference in the frame, difference in

the frame construction, is that right? A. Frame construction.

Q. I want to call your attention to the specification in this catalog.

Mr. Simpson: Is that in evidence? If it is not I will admit it.

The Court: The previous witness testified to it.

Mr. Simpson: I will offer it in evidence if it is not in.

(Paper marked P-5 in evidence.)

Q. You don't know of any other differences, do you? A. No; I do not, not in detail.

Q. Well, now, will you just look at this catalog, specifications of the one ton and the one and a half ton, and read the part relating to the frame in each case? First read the one ton specifications out loud, and then read the one and a half ton, and then tell us if there is any difference? Read it out loud so we can get it on the record.

A. "Frame—Apex celebrated twin-frame construction made of 4 inch 5¼ pound rolled channel, rigid , being doubly reinforced throughout load carrying space by the twin-frame construction and by strongly gussited cross members.

"Weight of working parts taken by twin-frame leaving frame proper to carry payload. Frame castings of size and design to give extreme strength with no surplus weight. Frame and frame castings assembled by hot riveting while clamped in form which insures perfect alignment of all parts."

Q. It is exactly the same, isn't it, weight for weight? Isn't it? A. Practically the same.

Q. Practically the same thing, isn't it? A. Yes.

Q. Well, isn't it a fact that the wheel base of the two cars is exactly alike? A. The wheel base is about the same.

Q. Well, just look at the specifications and we

will be sure? A. Wheel base, one and a half ton, 130 inches.

Q. Wheel base 130 inches in the one ton; same thing, isn't it? A. Yes.

Q. Front tread, 56 inches in each case, isn't it? A. Yes.

Q. Rear tread fifty-six inches, in each case; isn't it? A. Yes.

Q. Front axle exactly the same, isn't it? A. Yes.

Q. Front springs 2 x 36, 8 leaves in one and in the other? A. Yes.

Q. Wheels, best grade selected wood, built to S. A. E. specifications, 12 spokes front and rear; that is a one ton. There is a difference here, isn't there? A. Yes.

Q. Twelve in the one ton and fourteen in the ton and a half; isn't that right? A. Yes.

Q. Rear axle, design internal gear type. Separate load carrying member. Main reduction obtained in internal gears making high speed light torque construction possible in differential and jack shafts. All material in axle is of the best quality and heat treated. Timpken taper roller bearings throughout. Minimum road clearance 11¼ inches with 32 inch tires. Final gear ration 6½-1. Isn't that the only difference? A. On the axle,—one is carried lower than the other; one is carried lower than the other.

Q. And the rear springs, 2¼ by 52½ inches, 12 leaves. Graded construction, Silico Manganese alloy. Bolts ¾ inch round hardened and ground. ¾ inch round 3½% nickel steel U bolts attach spring to axle. Exactly the same? A. Eleven leaves.

Q. Graded construction; otherwise it is exactly the same, isn't it? A. Yes.

Q. Tire, 32 by 3½ inches solid front; 2 by 4 inches rear; pneumatic optional at additional price. In the one ton, tire, 33 by 4 pneumatic front, 32 by 3½ inches solid, rear; pneumatic op-

tional at additional price. The frame you have already read. Now, the motor is exactly the same in all parts, isn't it? A. Yes.

Q. Cylinders exactly the same? A. Yes.

Q. Valves, connecting rods, crank shaft, cam shaft, the same? A. Is the price the same?

Q. Lubrication is the same, isn't it? A. Lubrication.

Q. Cooling is the same; carburetor the same; generator the same; the transmission—self-starter, transmission and clutch—by the way, is there any difference in the clutch between these two cars? A. I don't exactly remember.

Q. Exactly alike, aren't they? A. Yes sir.

Q. Drive shaft same thing, isn't it? Radiator, steering gear, brakes, gas equipment, drive, fenders, hood, equipment, special equipment, painting, body data—let us see if there is any difference there: Frame, 35½ inches wide. Length back of driver's seat, 102 inches. Over all width of axles 72 inches, in the one and a half; the one ton, 35½ wide, length back of driver's seat 102 inches; overall width over axles 72 inches—exactly the same, isn't it? A. Same thing.

Mr. Simpson: That is all.

(Witness excused)

Harry Bach, sworn.

Direct Examination by Mr. Simpson:

Q. What is your business? A. Garage business.

Q. How long have you been in the garage business? A. Well, in the garage business for the past two years now; that is, in Bayonne.

Q. Have you become familiar with trucks and auto trucks? A. Yes sir.

Q. Do you know this particular truck under discussion here, sold by Shapiro to Kvedar? A. I do.

Q. You have seen it and examined it? A. I have.

Q. In this garage business you find that the chassis are numbered and the dashboard is numbered? A. Corresponding.

Q. Did you find that the chassis is numbered and the dashboards also are numbered? A. The dashboards also are numbered.

Q. I did not ask you anything about corresponding. Did you find that the chassis is numbered and the dashboards also are numbered? A. The dashboards also are numbered.

Q. Well, in the ordinary course of business does that indicate anything to the garage people? A. Well, yes, in ordering parts.

Q. Should the numbers correspond? A. They should.

Q. Now, in this truck that you examined were the numbers the same on the dashboard and on the chassis? A. No, they were not.

Q. What would that indicate to you? A. Well, we usually take the number from the dashboard, save ourselves time to get to the motor where it is dirty, see? In ordering parts. Now, when I took the motor number of the plate, on the dashboard, and sent it to Kvedar, there was no reason why the parts should not fit; and when he came back with the parts, why,—

Q. You are trying now to give it to us all in a minute. If you will only confine yourself to the subject of my question—you took the number from the dashboard of this truck, did you? A. Yes.

Q. And you sent Kvedar away with that number to get a part? A. Yes.

Q. And he brought you back a part from that dashboard number? A. Yes.

Q. What part did he bring back? A. Spindle and the bearing.

Q. Did it fit the truck? A. No sir.

Q. Why didn't it fit? A. Because it was a trifle too large.

Q. Was it for the same kind of a truck or a heavier truck, the part that he brought you? A. Well, it was a heavier truck.

Q. Well, how much heavier? A. Well, it was possibly one sixteenth of an inch difference.

Q. How much heavier truck, a ton heavier or half ton heavier? A. There must have been an extra capacity of a ton and a half.

Q. When you sent him for that part what was the date that you sent him? A. On November third.

Q. And you took the number off the dash and sent him with that and he brought you back a part that would not fit? A. Yes sir.

Q. Did that cause you to compare the numbers on the chassis and the dash? A. Yes sir.

Q. And you found them different, didn't you? A. Yes sir.

Q. Well, what was the part that he brought back to you which corresponded with the dash number? Was that a ton and a half truck part? A. A ton and a half truck part.

Q. What did you do with this truck, if anything? A. Why, Mr. Kvedar spoke to me about the rear spring. When he loaded it to its full capacity he stated that the rear part—

Mr. Melniker: I object to what Kvedar told him.

Q. What did you do with the truck? A. So we looked the truck over and we finally put in extra leaves in the rear springs, see? One extra leaf in each rear spring. We also looked over the truck, and we received a catalog, and we compared the gear ratio to find the capacity of this here truck, whether it was a ton or ton and a half; and I marked it on the spoke on the rear wheel, and I put the gear lever in high speed, which is practically the only way to tell the gear

ratio of a truck, unless you take the rear construction all apart, and I marked the high on the rear spoke of the wheel. I had one mechanic on the motor, turning it over, and he turned it over six and a half times to one full turn of the wheel; that means that the gear inside of the differential turns six and a half times to one of the wheel, and the gear ratio on the ton and a half is eight to one.

Q. That indicated to you it was a one ton truck? A. One ton truck.

Q. Did you examine the bill of sale in this case? A. No sir.

Q. You did not know what number the bill of sale had on it? A. Well, I saw the bill of sale when he was about to—give it to the lawyer.

Q. What number did it have? A. 75477.

Q. That was the dash number, was it? A. The dash number.

Q. And not the chassis number? A. Not the chassis number.

Q. And the dash number was the number for a one and a half ton truck, wasn't it? A. One and a half ton truck.

Mr. Simpson: That is all.

Cross Examination by Mr. Melniker:

Q. You have been in the garage business two years, you say? A. Yes sir.

Q. What business were you in before that? A. Why, I have been practically in the automobile business all my life.

Q. Where? A. I have been in Jersey City, New York, and have business for private people, chauffeur.

Q. Did you ever have anything to do with this truck before November 3rd? A. No sir.

Q. Did you ever see it? A. Never saw it, nor Mr. Kvedar.

Q. Did you do any work on it before November

3rd? A. That was the first time that I saw it, November 3rd.

Q. And you sent Kvedar over for these parts? A. Yes sir.

Q. And he brought them back the same day? A. Yes sir.

Q. You found that they were too big for this car? A. They were.

Q. And you came to the conclusion that it was a one ton and not a one and a half ton truck? A. Well, I was kind of skeptical afterward to see when he brought the parts back in accordance with the number on the dash and that they didn't correspond; and then we looked at the motor. We saw that it was a different number on the motor than there was on the dash. So I sent him back with the parts, giving him the motor number, and the clerk told him in the stock room it was a one ton truck he has got. So he said, "Wait; I will give you smaller parts." So when he brought the parts back—

Q. How do you know the clerk in Newark told him, Kvedar, that it was a one ton truck? A. Oh, when he brought the parts back he told me.

Q. Kvedar told you that? A. Yes sir.

Q. How long was the truck laid up in your garage at that time? A. How long? Why, I believe about three or four days.

Q. Three or four days? A. Yes.

Q. And you made the necessary repairs and Kvedar took it away? A. Yes; we put extra leaves in the rear springs.

Q. By the way, did you see the truck after that, after you returned it to him repaired? A. After I returned it to him repaired? Why, yes.

Q. Where did you see it? A. Mr. Kvedar came over to my place and he says, "I was over to the lawyer and the lawyer told me to return the truck." So I went with him and returned the

truck. The truck was in perfectly good running condition when it arrived there.

Q. You left it there? A. Yes sir.

(Witness Excused.)

John Hikolo, sworn.

Direct Examination by Mr. Simpson:

Q. Do you know this truck? A. Yes.

Q. Well, you don't know anything about the numbers of it, do you? A. I don't know; I fixed that truck.

Mr. Simpson: I withdraw it.

(Witness Excused.)

Joseph Solomon, recalled.

By Mr. Simpson:

Q. Is this the bill of sale that Shapiro gave you when he sold you this truck? A. Not the first time when he sold it.

Q. I didn't ask you that. Is it the bill of sale that you got when you got the truck and paid your money? A. Yes.

Mr. Simpson: I offer that in evidence.

(Paper marked P-6 in evidence.)

(Witness Excused.)

John Loew, recalled.

By Mr. Simpson:

Q. I show you the original bill of sale to the plaintiff and the bill of sale just offered to the same man for the same truck. Do they bear the same number? A. No sir; they do not.

Q. What number does the first bill of sale bear? A. Chassis number of Mr. Kvedar's truck is 75477; and the one to Mr. Soloman is serial number 88238.

Q. Do you know the dash number when Kvedar had it agreed with the chassis number? A. It did not.

Q. Well, should they agree? A. They certainly should.

Q. Well, what would it indicate, the chassis number, as to whether it was a ton or ton and a half truck? A. No; those are only serial numbers; they are distinctive manufacturers' numbers. You can not tell—

Q. Does either of them agree with the other? What I want to find out is, how is it when this man took the number of the chassis, which you say it did not agree with the dash number— A. Well, that caused the confusion—

Q. Oh, wait a minute. You are no mind reader. A. Yes, I am. That caused the confusion.

Q. No, you are not. If you are, tell me what I was going to ask you? A. It caused the confusion up in the—

The Court: Wait till you hear the whole question.

Q. What I want to know is, how is it if you say the numbers do not indicate the capacity of the truck, when this man went over to Newark with the number of his dash in his hand they gave him the parts for a ton and a half truck? A. Well, I am a mind reader. It is simply because they keep a record there of the chassis number that they sell; they can tell from that whether the truck is a ton, ton and a half or two and a half ton truck.

Q. Why would the number on the dash tell anything about that? A. Because somebody had "Fineagled," or mixed up the numbers on this truck.

Q. You say the number on that dash was the number of a one and a half ton truck; is that so? A. It must have been, if they sent back a ton and a half truck part.

Q. And the numbers in those two bills of sale are different for the same truck? A. Yes sir.

Mr. Simpson: That is all.

Cross Examination by Mr. Melniker:

Q. Mr. Loew, you don't mean to testify that those two bills of sale are not for the same truck, do you? A. No.

Q. The testimony here has been that they are for the same truck? A. I am simply testifying what anybody can see, that the numbers are different.

Q. One number was taken off the dash and the other number was taken off the motor; is that the idea? A. No; dash numbers and motor numbers are entirely different things.

Q. Now, in those two bill of sales they both refer to chassis numbers?

The Court: As distinguished from motor numbers.

A. As distinguished from motor numbers. Trucks are known by two numbers, chassis numbers and motor numbers; but Mr. Shapiro in selling this same truck only gave chassis numbers. In neither case does he give the motor number.

Q. And where does the chassis number appear, on the plate? A. Each manufacturer stamps it into the frame one place or another, somewheres on the frame.

Q. In this case where was it, on the plate? A. There was a number on the plate.

Q. And your testimony, as I understand it, is that one of these numbers—that the number in one of these bills of sale was taken from the plate, and the number in the other bill of sale was taken

from the car itself; is that the idea? A. No; I didn't testify to that at all.

Q. Well, does your explanation—what is your explanation of the difference between those two numbers, assuming, as you have testified, that they represent the same car? A. Ask your client to explain the difference.

Q. Well, you don't deny that they are for the same automobile? A. On the contrary, the contention here is that they are for the same truck.

Q. So you admit that? A. Yes sir.

Mr. Melniker: That is all.

(Witness excused.)

Israel Shapiro, recalled.

By Mr. Simpson:

Q. This chassis you got from the Apex, didn't you? A. Yes.

Q. Where did you get the body? Where did you get the body you put on this truck? A. Bayonne.

Q. Where abouts in Bayonne? A. 16th Street from a body maker.

Q. What is the name of the body maker? A. Gold.

By Mr. Melniker:

Q. This body was built, wasn't it, according to the testifications of Mr. Kvedar? A. Yes.

The Court: I do not know just what you are reaching for, but I think it is something that should be straightened out. I would like to ask the previous witness one question.

(Witness Excused.)

John Loew—Re-Cross.
Defendant's Motion for Nonsuit

John Loew, recalled.

By the Court:

Q. This dash that has been spoken of here is always a part of the chassis equipment? Do you sell the chassis with the dash as a part of it, or is that a construction that is put on afterwards? In trucks I mean now.

The Witness: It is always a part of the original equipment.

The Court: It is a part of the chassis and is sold a part of the chassis, and is on the chassis when you sell the chassis?

The Witness: Yes; and a dash plate, what is called the dash plate, is a little metal sheet that size tacked on by four rivets, one in each corner.

(Witness Excused.)

(Plaintiff rests.)

Mr. Simpson: I want to offer those things that are marked for identification.

DEFENDANT'S MOTION FOR NONSUIT

Mr. Melniker: I want to move for a nonsuit on the ground that there is absolutely no evidence in this case of—in the language of this complaint—no evidence that this defendant connived and conspired to defraud the plaintiff, and that he falsely and fraudulently represented to the plaintiff that the truck was other than just what it was; no evidence that he made any false representations or that he knew they were false when he made them; or that he had any knowledge

or any reason to believe that what he said was not true; and, on the further ground, that according to the evidence of the plaintiff himself, he had actual knowledge on the 4th of November that this truck was not what he had purchased. That knowledge came to him initially from the mechanic whom he employed, Bach, who tried it out and was satisfied it was a one ton truck; but it was also told him by the clerk in the Newark agency, and after that, after he knew what it was, knew that it was not what he bought or claimed to have bought, he continued to use that truck until the 18th of November, for pretty near two weeks, in his business, and then he kept it two weeks after that and did not return it until the 3rd day of December. Now, it seems to me clear that the law that governs this case is this: that when a person discovers he has not received what he contracted for, if he expects to hold the seller, he has immediately to restore the seller to statu quo; he has to act promptly or with reasonable promptness, and return the property and then seek his remedy; and this man did not do that.

The Court: Well, I am not willing to say that that is so.

Mr. Simpson: Can't we save a lot of time on that?

The Court: As a matter of fact, it is always dependent on the circumstances of the particular case. Of course the principle you invoke is undoubtedly the principle that where one finds that he has been deceived with respect to a purchase, when he does get the knowledge of that deceit it is his duty to act with reasonable dispatch, disavowing the contract under which he purchased, and to restore, or attempt to restore

the thing to the other party to the contract; but I think all of the matters which you called my attention are matters of fact, and none of them is a matter of which I can deal as an abstract question of law. Deceit, fraud, as we all know, are matters that are not open matters; they are matters which must be established, of course, but they have to be established often and almost always by implication and by reasoning that on the events as well as some things spoken; and ordinarily it is from events and circumstances that fraud is to be discovered if there is fraud; because it is very seldom that one who is perpetrating a fraud will go forward and do so by word of mouth.

Mr. Melniker: I want to also ask a nonsuit on the ground that it appears from plaintiff's own case that when he brought his car back it was not in the same condition in which he received it. The most he was entitled to was to bring the car back subject to the ordinary wear and tear that he would be entitled to give it. When he brought it back it was not in that condition.

The Court: I do not think there is anything that definitely shows that it was not in that condition. Perhaps that may be so.

Mr. Melniker: Well, the plaintiff called Mr. Shapiro, and he testified as their witness that when that car was brought back on the 3rd of December it would not turn over; that the pistons were frozen in.

The Court: That was drawn up by your cross examination.

Mr. Melniker: Well, I do not know but what they are bound by it.

Mr. Simpson: The plaintiff says it was in good condition; so it is for the jury to say whether it was.

Mr. Melniker: We enumerated several other things: the battery was missing; the radiator was leaking; the bumper was missing. Those are matters of facts that are established in this case. There is no dispute about those facts. There can not be. There has not been any—

The Court: The most that could happen would be a diminution of the amount of damage the plaintiff is entitled to have.

Mr. Melniker: The defendant is entitled to have his property in the condition in which he delivered it subject only to ordinary wear and tear.

The Court: As I said, if one had acted in otherwise perfectly reasonable way, but were unfortunate to the extent even of five cents in that direction, then he never could have his redress. I do not think that that would be the law. My impression is that the law would be quite to the contrary; that if he were the object of deceit and fraud he may have his redress, but subject, of course, to diminution in the way of damage, of whatever that damage might be. Of course, if the damage to the article were so great as to equal or exceed the amount of the damage to which he otherwise would be entitled, he would not be entitled to anything.

Mr. Melniker: I also want to ask for a nonsuit on the further ground that both from the pleadings and the proofs there was no repudiation of this contract; there was no recision.

Mr. Simpson: We are suing in deceit, I understand.

The Court: Yes, but there must be a recision either in fact or in law, or technically so. I take it from the testimony, and that seems to be uncontroverted, that plaintiff returned the car to the defendant; defendant says, yes, it came there. It seems, too, that

the defendant has acted toward the car — whether it was for the purpose of taking it back because a recision had been urged upon the part of the plaintiff or whether it was because of the unpaid amounts due upon his conditional contract is an open question—all one is obliged to do, as I understand it, where a recision is intended, is to return the thing which is the subject of the particular contract. Of course, Mr. Shapiro might have put himself in the position that he would not take redelivery of it at all, and all the plaintiff would have to do, I take it, would be to do those acts or those things which would amount to a delivery or tender of a redelivery of an article. It seems to me Mr. Shapiro might have put himself in that position. He might have locked his doors against the entry of this car in its place; he might have refused to have it stand in front of its place, and it could not be said, of course, that that had not been a tender of redelivery, or attempt at redelivery. I think all those things Mr. Melniker, are matters of fact which the jury will have to pass upon.

Mr. Melniker: Also on the further ground that there is a variance between the cause of action laid in the complaint and the proof. The complaint bases this action upon an affirmance of the contract and the attempt now is made to bring this action or sound this action on the theory of disaffirmance or recision. This complaint sounds absolutely or is based absolutely on the theory that the plaintiff never disaffirmed the contract. Under those circumstances the rule of damage is very much different.

The Court: I do not follow you; I do not follow you, and I will deny it.

Mr. Melniker: Exception.

The Court: You may have it.

DEFENDANT'S CASE.

Clarence B. Rice, sworn.

Direct Examination by Mr. Melniker:

Q. What is your occupation, Mr. Rice? A. I am vice president of the Hamilton Motor Co.

Q. That is the company that builds the Apex Trucks? A. Yes.

Q. Did you ever see the truck that Mr. Shapiro sold Mr. Kvedar, the plaintiff in this case? A. Did I ever see it?

Q. Yes. A. No.

Q. Who was your New Jersey agent in August and September last year? A. The B. & B. Motor Sales Company, River Street.

Q. Of Newark? A. River Street, Newark.

Q. Is that company in business? A. No.

Q. When did that company go out of business? A. They are in the hands of a receiver, I believe.

Q. You are familiar with the construction of these trucks? A. Yes.

Q. In the regular one and a half ton trucks how many spokes are there in the rear wheels? A. Fourteen.

Q. And how many in the one ton? A. Twelve.

Q. What is the regular tire equipment on the one ton truck? A. Thirty three by four pneumatic front, thirty two by three and a half solid rear.

Q. If there were no other information given to you, no other specifications, you were told that an Apex Truck had thirty five by five pneumatic tires all around, what rating of truck would that be, one ton or one and a half ton? A. One and a half.

Q. And if it had fourteen spokes in the rear wheel would that be a one ton or ton and a half? A. Ton and a half.

Q. Is there any difference in the frame of those two cars? A. No.

Q. Any difference in the motor? A. No.

Q. Is there any difference in the front springs? A. No.

Q. Any difference in the rear springs? A. One extra leaf in the ton and a half.

Q. The leaves otherwise are exactly the same? A. Yes.

Q. The size of each leaf? A. Yes sir.

Q. Do you know how many leaves there are in the one and half ton? A. Twelve.

Q. How many in the one? A. Eleven.

Q. Is there some difference in the rear axle? A. Yes sir.

Q. Is the difference anything else except the difference of weight? Same kind of axle, isn't it? A. Same kind of an axle, yes.

Q. One is a little heavier than the other? A. The "O" axle is used in the one ton; the "A" axle is used in the ton and a helf. The gear ratios in the ton are six and a half to one, and eight to one in the ton and a half.

Q. Same kind of axle? A. Yes.

Q. Now, could the ordinary garage man tell the difference between these two axles by looking at them?

Mr. Simpson: I object to that. He has not shown any qualifications to testify on what the ordinary garage man might know. Some garage men might know something and some might know nothing, and some might only know enough to send in a bill. You can not tell anything about it. He is asking him to create an artificial character, to wit, the ordinary garage man.

The Court: I think the objection is well taken. I think you can get from this witness what the characteristics of the two axles may have been—

Mr. Melniker: I withdraw the question.

The Court: —and it is a matter for the jury to say whether or not the ordinary person in the garage business would know the difference.

Q. Would they have the same general appearance? A. Yes sir.

Q. Look the same on the outside? A. One is a little larger.

The Court: Well, what is the difference in size? Do you mean diameter or what?

The Witness: Why, yes, in diameter, in the axle housing, center housing.

The Court: Now, will you tell us what the difference is in size, if you have not done so, between the axle in the one ton truck and in the one and a half ton truck? The length of the axle, I presume, is the same; because the length of your body and the width of the body is the same?

The Witness: Yes.

The Court: The trackage is the same; so that it must be in some other direction that the change is. Now, tell us what the difference is in the size of the axle between the one ton and the one and a half ton truck, and the housing. I suppose the axle is in the housing?

The Witness: Yes. It is in the diameter of the differential housing; it is a little heavier, little larger; has two inches—

Q. That is the only difference? A. Yes.

Q. When you say diameter do you mean the diameter across the differential in the direction of the axle or do you mean horizontally or perpendicularly? A. Perpendicularly; up and down.

Q. Up and down? A. Yes.

Q. It is the same horizontally, the diameter? A. Practically the same.

Q. In other words, looking at the car from the rear the width of the differential would be about the same? A. Yes.

Q. Would there be a difference in the perpendicular diameter? A. About two inches.

Q. What is the perpendicular diameter of the differential in the one and what is it in the other in inches? A. In the one fourteen inches; about sixteen inches in the ton and a half; very small.

Q. It is exactly that or do you say about that? A. About that.

Q. You would not say it was exactly true? A. No.

Q. Now, outside of the difference in the number of spokes could you tell by looking at the car without examining it, without going behind it to measure the diameter of the differential, whether a car was a one ton or one and a half? A. No.

(Recess Till Two O'clock.)

(After Recess.)

Q. Mr. Rice, in the case of a truck such as we have discussed here, equipped with thirty five by five pneumatic tires, how would your company sell and guarantee this truck, as a one or one and a half ton truck? A. One and a half ton.

Q. Now, was Mr. Shapiro ever the agent or sub-dealer of that company? A. Not to my knowledge, no.

Q. And would you know? A. The sub-dealer's contracts—all sub-dealers' contracts have to be approved by me.

Q. And did you ever approve a contract by him? A. No sir.

Q. Then he never was an agent or sub-dealer of the Apex Company or the Hamilton Motor Company? A. No.

Q. I asked you some question this morning about whether you could tell on casual examination or by looking at the one and a half or one ton truck whether it was or the other. Could anyone tell—could you tell, even as experienced as you are in this business, as vice president of this company that manufactures this truck,—could you tell by looking at the truck whether it was a one and a half or one ton truck? A. Not without a little inspection.

Q. Have to make a close examination of it? A. Yes.

Q. How long have you been in the automobile business? A. Twenty five years.

Q. In what capacity? A. Practically all.

Q. Everything there is about automobiles? A. From making them to selling them, yes.

Q. And you are familiar with the manufacture of them? A. What did you say?

Q. Are you familiar with the manufacture of them? A. Yes.

Q. Are you familiar with the market prices of trucks, of this kind of truck? A. Yes.

Q. Both new and used? A. Yes.

Q. Now assuming that Mr. Kvedar had this truck in about the month of September and ran it in his business as he has described, and on the 3rd of November had a collision in which it suffered the damage which has been described here by the other witnesses, and then he continued to use it after that for several weeks or until about the 18th of November, and then finally brought it back, returned it to Mr. Shapiro on the 3rd of December, what would you say was the market value of that truck at that time? A. A depreciation of about 50%.

Q. What part of that would be due to ordinary wear and tear, what part of it would be due to the

fact that the car had been in a collision and had been repaired? A. 25%.

Q. So that if the truck had not been in any collision, had not been damaged, and been repaired, if it would have only received the ordinary wear and tear and reasonably careful use—if it had been used from the month of September until the 18th of November it would have a normal depreciation of 25%? A. Yes.

Q. Having been damaged in the way which has been testified you say there would be an additional depreciation of 25%?

Mr. Simpson: I object on the ground no answer can be founded upon this witnesses' assumption of what has been testified. I object to the form of that question. He would have to put in the question, it seems to me, what was the damage of the accident.

The Court: I thought of that, Senator, when the first question was put. He is basing his whole hypothesis on what somebody else had testified to, which, of course, is a highly improper form of hypothetical question.

Q. Do you remember the testimony of the other witnesses about the condition of this truck?

The Court: Even that would not be sufficient over objection, Mr. Melniker.

Mr. Melniker: It is only a question of saving time.

The Court: Because of the fact that he may not have heard, or perhaps there may be contrary evidence. We will cover the situation, then; the first day that this truck was taken out it was run up on the curb or sidewalk and the right spindle in the front was so damaged, and the bearings, that they had to be repaired; then on the 3rd of November there was a collision with another truck in which

the right spindle, front wheel, and the bearings were damaged; the radiator was damaged so that it leaked, and the front axle was bent, had to be straightened out, new bearings put in the front axle, new spindles put on the right side; the frame was bent; the pistons were frozen, and the motor would not turn over; the battery was gone; the bumper was gone. Now, in that condition what would the depreciation be due to those things outside of ordinary wear and tear?

A. 25 per cent greater, making 50 per cent in all.

Cross Examination by Mr. Simpson:

Q. What is your business? A. Vice president of the Hamilton Motors Co.

Q. You are the selling agent of this Apex Truck? A. Yes, in the east.

Q. Where is your office? A. 25 Vesey Street, New York City.

Q. Did you come here under subpoena today? A. What did you say?

Q. Did you come under subpoena today? A. No.

Q. Came voluntarily? A. Yes.

Q. Have you any interest in this litigation? A. No sir.

Q. This Apex Truck which you are selling agent for is one ton, one and a half and two and a half? A. Yes.

Q. Is there any difference between the one and a half and the one ton truck. A. Yes.

Q. You charge more for the one and a half ton truck than you do for the one ton truck? A. Yes.

Q. Why is that? A. Well, there is a difference.

Q. Well, why do you charge more for the one and a half than for the one? A. There is a difference in the tire equipment; there is a difference in the axle equipment.

Q. Any other difference? A. Practically nothing; no.

Q. No spring difference? A. Well, that is only a leaf.

Q. Well, it carries a ton and a half, doesn't it? A. Yes.

Q. Without difficulty? A. Yes.

Q. You consider it good business to sell a man a one ton truck as a one and a half ton truck? A. We do not.

Q. You do not do that, do you? A. No.

Q. Do you instruct your selling agent to sell a man a one ton truck and tell the man it is a one and a half ton truck? A. No.

Q. This one and a half ton truck, do you know what the retail price of it was on the 18th day of September, 1920, what the retail price of this truck was, equipped with body, and so on? A. We don't as manufacturers build the bodies. We only sell the chassis.

Q. What was the retail price of the chassis? A. $1915.

Q. What was the retail price of the chassis—that was the retail price of the chassis at that time? A. F. O. B. Grand Haven, Michigan; yes.

Q. How much was the freight on it? A. Well, the rate is $1.08 on a hundred; a minimum of 5000 pounds.

Q. How much difference would that make in cost when the man got the truck then? How much would that make it cost, a one ton chassis? A. Why, it might be about sixty five dollars; something like that.

Q. You say that Mr. Shapiro's contract as a sub-agent was submitted to you? A. He has no contract.

Q. Well, what was it? You said something about refusing to approve of his contract as a sub-dealer or something of that kind. A. The attorney asked me if there was on record any sub-dealer's contract with Mr. Shapiro. I said no.

Q. Well, you know he was selling these trucks, on the date? A. No; I don't.

Q. How could he sell it unless he had a sub-dealer's contract? A. Well, he could make without a contract.

Q. Could he make an arrangement with this concern in Newark? A. That is what I mean.

Q. You had a concern in Newark, then, the W. & B. Motor Sales Corporation; didn't you? A. No; the B. & C. Sales Corporation.

Q. They were your agents there? A. Yes.

Q. Did you have any correspondence with them about this particular truck that was sold by Shapiro? A. With them?

Q. Yes. A. No; I don't think so.

Q. You never have seen this truck, have you? A. No.

Q. Well, how much would a new spindle cost? A. Either $7.50 or $9.50.

Q. How much would a battery cost? A. About twenty-six dollars.

Q. How much do you figure it 25% depreciation if the only damage was a broken spindle and a battery missing? A. There is a depreciation on any truck that has that.

Mr. Melniker: I object to that because that was not the only damage and that is not the testimony.

(Question repeated by the stenographer.)

How do you figure it a 25% depreciation if the only damage was a broken spindle and a battery missing?

Q. Well, a broken spindle, if it was replaced with a new spindle,—there was no damage, was there? If a broken spindle is replaced there is no damage, is there? A. Practically not, no.

Q. And if a battery was put in to take the place of the missing battery there would be no damage to the battery? A. No.

Q. What other elements of damage have you in mind as figuring this 25%? A. There is a depreciation of 25% in my mind as soon as any truck is used in operation for a period of, say, two months.

The Court: But I do not understand that the interrogator is going to that question. That is eliminated by both the senator and Mr. Melniker. They are not talking about depreciation from ordinary use of the vehicle. The question put to you is on the question of the damage that would come to such a vehicle as this by some happening which would break or put out of repair the vehicle itself; for instance, the broken spindle. You said, of course, if that were replaced the damage then because of the spindle having been broken would be practically nil; then you were asked regarding the battery, if the battery had been lost out of the car and had been replaced by another one what the depreciation in the car would be because of the battery having been out of it, and you said practically nothing because the one replaced the other. That is very evident.

Q. (Repeated by the stenographer.) What other elements of damage have you in mind figuring this 25%

The Court: You have said, as I understand you, after a certain question was put to you, in which the subject of a broken spindle was incorporated, a missing battery and some other element, that if that were the condition when returned you considered that the car had depreciated 25% because of those defects and missing things. Now, you have been asked by the Senator, the present interrogator, as to two items, the spindle and the missing battery. You are now asked what

other element you take into consideration, than those two, when you say that loss was 25%. That is the way I understand the question.

The Witness: Well, on that same ground it would be impossible to have any depreciation.

Q. Now, you say, as I understand you, there was no contract or file showing Shapiro to be a sub-dealer? A. Yes.

Q. Well, do you know anything about a Commercial Investment Trust Company which buys notes given to your sub-dealers, of purchasers of cars? A. I don't know anything about that company.

Q. Commercial Investment Trust? A. No; I don't know them.

Q. You have no arrangement whereby your sub-dealers could sell notes to them, which notes were given to them by purchasers of cars? A. Not with that concern.

Q. Now, this tire question—you say it is common to equip a one and a half ton truck with thirty five five by four pneumatic tires? A. Thirty five by five pneumatic tires.

Q. You equip them with those, do you? A. Yes.

Q. Do you equip them with other tires also? A. Yes.

Q. What other tires do you equip them with? A. On a ton and a half.

Q. Yes. A. In some cases thirty five by five front, and thirty six by six rear; some cases thirty six by six all four wheels.

Q. And what do you equip the one ton trucks with? A. Thirty three by five and thirty five by five sometimes.

Q. And your sub dealers, do you supply them with catalogs, and so on? A. Yes sir.

Q. You have never seen this particular truck, have you? A. No.

Q. Isn't it a fact that the tire company recommend a six inch tire for a one and a half ton truck? A. It would depend on—what is the date of that recommendation?

Q. March 8th, 1920.

Mr. Melniker: I will object unless it is proven to have something to do—

Mr. Simpson: He is an expert.

The Court: I think he can answer yes or no; he either does know or does not know.

Q. Do you know whether or not the tire— A. Naturally a tire company would recommend a larger size tire in every case. They guarantee thirty five by five to carry one and a half tons capacity.

Q. Then what advantage do you claim for your one and a half ton truck over the ton truck that you charge more for it? A. Well, there is only a small difference.

Q. What advantage do you claim which justifies your increased charge? That is all I want to know. If it is the same thing why charge more, and if it is not the same thing what is the difference that makes you charge more for it? A. Different tire equipment, different axle equipment.

Q. Different axles, different tires? A. Yes.

Q. And it is more capable of carrying a ton and a half than a one ton truck is, isn't it? A. Well, the ton is capable of carrying a ton and a half.

Q. Is the ton and a half truck for which you charge more—is it better equipped to carry a ton and a half than a ton truck? A. Yes.

Mr. Simpson: That is all.

Clarence B. Rice—Re-Direct—Re-Cross
Israel Shapiro—Direct.

Re-direct Examination by Mr. Melniker:

Q. Just one question about this approval of contracts. There has been some confusion about that. If Mr. Shapiro had a contract would you have to approve it? A. Yes.

Q. Did ever such a contract come before you? A. No.

Mr. Melniker: That is all.

Re-Cross Examination by Mr. Simpson:

Q. Then he was selling them without any authority from you? A. Yes.

Mr. Simpson: That is all.

Mr. Melniker: What is all.

(Witness Excused.)

Israel Shapiro, recalled.

Direct Examination by Mr. Melniker:

Q. Did you ever handle any other Apex Truck besides the one you sold to Kvedar? A. No sir.

Q. Did you ever change the plates on this truck of Kvedar's? A. No sir.

Q. Did you ever have any other plates of any other Apex truck in your possession? A. No sir.

Q. Or in your hand? A. No sir.

Q. Did Mr. Loew ever read any letters to you that he says he got from this firm in Newark? He testified that he came down to your office to talk to you about this case and that he read two letters to you. Did that ever happen? A. Not in my possession; maybe he read it but I was not with him.

Q. You mean in your presence. A. Not in my presence.

Mr. Melniker: That is all. Cross examine.

Cross Examination by Mr. Simpson:

Q. Did the B. & B. Motor Sales Company subsequent to November 29, 1920 ever take up with you this contraction to try and find out what was the cause of the selling of this truck as a one and a half ton truck; did they ever correspond with you, write to you, or talk to you about it? A. To me?

Q. No—who else but to you? I said to you. Did they ever do that? A. No.

Q. Did this gentleman when he called on you read you this paragraph: "We further wish to advise you that Mr. Shapiro has sold this truck as a one and a half ton truck? He no doubt got his information from the caution plate which was on this truck. We personally believe that this truck was misrepresented by Mr. Shapiro to his contract. We can not understand how the caution plate on the one and a half ton got on this particular car unless Mr. Shapiro or one of his helpers who called at our office to take delivery of this truck had one of our men change the plates on the trucks." Did he call your attention to that paragraph in the letter when he called on you? A. I never saw the letter.

Q. He never talked to you, this man, about this letter? A. Yes; he talked about the truck, but not about the letter.

Q. Did he talk to you about this letter that he got from the man that you got the truck from this man, when he came and tried to straighten this out, did he talk to you about this letter? A. He talked, but he never read to me a letter.

Q. No, but did he talk about this letter that he got from this man in Newark? A. Yes; he talked about the letter.

Q. That he got from the man in Newark? A. But he never did read to me a letter.

Q. What did he say to you about this letter that he got from the man in Newark? A. That I changed the plate.

Q. What did you tell him about that? A. I told him I did not change plates.

Q. Well, did you ever go out to Newark and ask the man what he meant by saying that you changed the plates? A. I didn't see the man.

Q. You did not go out. When this man told you that the man in Newark said you changed the plate you didn't go out to Newark did you? A. No; I did not.

Q. I notice here some kind of a notice. When you sold this truck to this Polish man how much did you get in cash?

Mr. Melniker: Kvedar, you mean?

Mr. Simpson: Kvedar.

A. When he sold it in the beginning?

Q. Well, you only sold it once, didn't you, to the Polish man? A. One time he made that contract and give a deposit.

Q. No, no. How much did he pay you in cash and how much in notes? Perhaps I can make it simpler to you. He had paid you a thousand dollars in cash? A. Yes.

Q. And twelve hundred dollars in twelve notes, didn't he; and a note for $343; is that right? A. Yes.

Q. Now you sold those notes, didn't you, to the Commercial Investment Trust? A. Yes.

Q. How much did you get for the notes that you sold?

Mr. Melniker: I object to it as immaterial.

Mr. Simpson: We are to be held on these notes, your Honor, you see. We are not only damaged in cash, but if a man comes and sues us for twelve hundred dollars of notes which

he sold and got the cash for, isn't that part of our damage?

The Court: Perhaps that may be so; but I do not think it makes any difference how much this defendant got for those notes. You would be held for the full amount, anyway, if those notes were in the hands of an adult party. I suppose it is in the same position as if they had not been paid.

Mr. Melniker: He would have to set them off before he could claim the amount of these notes in this action. He would have to show you he paid it. He could not certainly recover it when he did not pay it.

Mr. Simpson: But it is an obligation against that.

Q. Now, do you still say that you never saw this paper? You said this morning that you never saw this paper, which is marked P-3. You never saw that paper before I showed it to you this morning? It is not in your hand writing? You swore this morning that you never saw that paper until this morning. Do you still stick to that? A. Yes; I never saw the paper.

Mr. Simpson: That is all.

Mr. Melniker: That is all.

(Witness Excused.)

Morris Shapiro, sworn.

Direct Examination by Mr. Melniker:

Q. You are Morris Shapiro? A. Yes sir.

Q. You are the son of the defendant in this case? A. Yes sir.

Q. You work for your father? A. Yes sir.

Q. How long have you been in the automobile

business? A. Five years.

Q. Do you buy and sell cars? A. Buy and sell cars and repair them.

Q. Have a garage? A. A garage.

Q. Handle second hand cars? A. Handle second hand cars and new cars.

Q. Do you know about this truck that was sold to Kvedar? A. Yes sir.

Q. Were you over there in Newark when this sale was made? A. Yes sir.

Q. Were you there when the fifty dollar deposit was paid? A. Yes sir.

Q. When did Kvedar give that fifty dollars—whom did Kvedar give that fifty dollars to? A. To Mr. Hahn.

Q. At that time that this fifty dollars was paid to Mr. Hahn did he give a receipt for it? A. He gave me a receipt.

Q. Is this it? A. Yes sir.

The Court: What materiality has the testimony on this line, Mr. Melniker? I only see one purpose and that is answer the question of the veracity of the witnesses; but the contract is with the defendant in this action.

Mr. Melniker: Surely, but—

The Court: As to whom the money was paid, what difference does it make?

Mr. Melniker: Well, it is one of the incidentals of the transaction. We want to get the whole transaction. Now, here is a receipt that was given at the time. These people knew no more about this truck than Kvedar, and they give a fifty dollar deposit and get a receipt from the man who is selling the truck that it is a deposit upon a one and a half ton truck.

The Court: Well, aside from the question of affecting the veracity of the witness who

had testified to it I can not see where it makes any difference whether the fifty dollars was paid directly to the concern in Newark or whether it passed through Mr. Shapiro's hands. I do not think that makes a particle of difference.

Mr. Melniker: I do not think it does make any difference.

The Court: As far as the receipt is concerned, I think that is beyond dispute. It is in the case that the receipt was given. It has its purpose and place; I haven't any doubt about that.

Mr. Melniker: That is right; I remember having it for identification. I offer this D-2 for identification in evidence.

(Paper marked D-2 for identification received in evidence.)

Q. This card reads, "Received fifty dollars for I. Shapiro on deposit, one, one and a half ton truck $2543. Signed Leo F. Hahn." Is this the receipt that you got at the time Kvedar paid this fifty dollar deposit? A. Yes sir.

Q. And when you were talking to this B. & B. Automobile Company salesman was there any discussion about a one ton truck? A. No sir.

Q. Did you have any understanding, private understanding, with the B. & B. people that you were to get a one ton truck and deliver it as a ton and a half? A. No sir.

Q. Did you ever buy a one ton truck from the B. & B. people? A. No sir.

Q. Did you ever buy any Apex Truck other than this one from the B. & B. people or the Hamilton people or anyone else? A. No sir.

Q. Did you ever handle any other Apex truck beside the one that was delivered to Kvedar? A. Just that one.

Q. Did you ever have an Apex truck from

which you could take off a plate and put it on this one that was delivered to Kvedar? A. No sir.

Q. Did you remove the plate and substitute plates on this truck? A. No sir.

Q. Did you ever know anybody else having done it? A. No sir.

Q. When did you first hear that there was a question about some confusion in the numbers between the plate and the motor? A. Mr| Loew come down to our place of business and just gave us a rough sketch of it, telling us it is a one ton truck instead of a one and a half.

Q. Now, did you also get a receipt—

Mr. Melniker: I withdraw that.

Q. Do you know anything about this check or was that out of your department? A. That was out of my department.

Q. You do not know anything about the delivery of this check, do you? A. No.

Q. Now, do you remember when that truck was brought back—

Mr. Melniker: I withdraw that for a moment.

Q. you recall when the truck was delivered to Kvedar? A. Yes sir.

Q. And that day that he went out with it first did you go with him? A. I went with him to teach him how to drive.

Q. Did anything happen? A. Why, yes.

Q. What? A. He had on the left side of the street, ran up the curb and he broke up the whole front; that is, the spindle and the axle. The spring had to come off and the front spindles, and we straightened it out and put it in shape again.

Q. And had to repaint the front part of it? A. Repaired the front part of it.

Q. And repainted it? A. No, repaired.

Q. And what about the axle? A. It was bent.

Q. Had to be straightened? A. Yes sir.

Q. How do you do that, a fire or cold? A. In fire.

Q. And you fixed it up again for him? A. Yes sir.

Q. Now, when he brought the truck back on December 3rd did you examine the truck? A. No sir.

Q. When did you look at it? A. We let it stay there. We looked at it about—

Q. Well, did you look at it to see what condition it was in, to see whether it was in good condition or bad condition? A. Yes; the outside—the bumper was off, the fenders were bent; there was no battery; he took the battery out of the car when he brought the car in; the chassis looked to be out of line, and the front springs were out of line. That is about all.

Q. How about the axle? Was there anything the matter with it or not? If there was not, say so. A. Why, no.

Q. At that time did you find anything else the matter with this car? What else did you find was the trouble with this car? Anything? Was the motor all right?

A. Afterwards we took the motor down; we gave it a regular overhauling job. She was leaking slightly; she was loose; bearings loose in her; and we tightened her up all around. We put in new pistons, new rings in her, put in new wrist pins; there was a score on the cylinder; we straightened the chassis; we lined up the front wheels, and we fixed up the car to have her in running condition.

Q. This condition that you found of loose bearings, and the scored cylinder, and the defective pistons, what would that be due to? A. Why to careless handling of the truck, running without water, water particularly, and overheating it; not taking proper care of it.

Q. Now you say you bought and sold new and

second hand cars. Are you familiar with the market prices new and second hand? A. Yes sir.

Q. Take a car like this. How much depreciation would there be in that car if it had ordinarily received care, after it had been used for two months, or from September 20, to November 18? What would be the ordinary depreciation in the market value? A. About twenty per cent; twenty to twenty-five per cent.

Q. Now, what would be the rate of depreciation in the market value of a car which was in the condition you have just described this one to be, assuming that there had been a collision and that it had to have the front axle straightened, and new spindle and bearings put on the front axle, and the frame was out of line and the battery was missing, radiator had been repaired, bumper was missing, and the cylinder was scored, and some of the bearings or other parts of the motor were loose,—what would be the depreciation in the market value of that car? A. About fifty per cent.

Q. Fifty per cent? A. Yes sir.

Q. Now, there was a bill of sale produced here by a witness who testified that he bought this car. I want to show you this paper, it has been marked for identification P-6. I ask you whether that is your signature? A. Yes sir.

Q. You sold him that car? A. Yes sir.

Q. How much did you get for it? A. Eleven hundred dollars.

Q. That was after you had repaired it? A. Yes sir.

Q. And put it in good condition? A. Yes sir.

Q. How much worth of work did you do on it? A. About three hundred dollars.

Q. How did you get this car? How did you get it so as to sell it to this man? A. I bought it at a public auction.

Q. Now, you are, of course, familiar with the specifications of this car, this truck? A. Yes sir.

Morris Shapiro—Cross.

Q. Now, the specifications which have been testified about here in this case, state that the one and a half ton truck has fourteen spokes in the rear, twelve in the front, and the one ton has twelve spokes in the front and rear. How many spokes are there in the wheels of this car that was delivered to Kvedar? A. Fourteen spokes.

Q. Fourteen spokes in the rear? A. Yes sir.

Q. And twelve in the front? A. Twelve in the front.

Q. And that is the specification of a one and a half ton truck, is it? A. Yes sir.

Q. Is there any way that you can tell by looking at this truck outside of counting the spokes in the rear wheel, whether it was a one ton or a one and a half ton truck? A. No sir.

Mr. Melniker: Cross examine.

Cross Examination by Mr. Simpson:

Q. So I see your father did not sell this car. You sold this car, eh, that you bought at public auction? A. Yes sir.

Q. It is a fact, isn't it, that your father took the first deposit and signed for it, of three hundred dollars in cash; is that a fact? A. Yes sir.

Q. Although you were selling the car. It is a fact that your father took the check and endorsed it, isn't it, although you were selling the car? That is a fact, isn't it? A. I don't know about that.

Q. Well, don't you know? Why, you were selling the car that you bought at public auction. Don't you know who got the first three hundred dollars for the car? For your car that you bought at public auction, that you were selling? A. My father signed personally.

Q. Do you know who got the first three hundred dollars? A. It was made out to Mr. Shapiro.

Q. Do you know who got the first three hundred dollars? A. I cannot recall it.

Q. You don't remember it. Do you remember

whether it was paid by cash or check? A. It was paid by check.

Q. Did you get the check? A. It went through my hands.

Q. Was it made to your order? A. I don't remember.

Q. Don't remember that, although you were selling the car? A. Yes sir.

Q. Now, was the second check made to your order? A. I don't remember.

Q. You don't remember anything about that although it was your car and you were selling it? A. Yes.

Q. Where was this public auction held, where you bought this car? A. Central garage.

Q. Who was the auctioneer? A. Melniker, I guess it was.

Q. The lawyer? A. It was some man down there.

Q. Was that the first time you ever put your eyes on this car that your father had sold to Kvedar, when you saw it at public auction? A. No; I seen it every day.

Q. Where did you see it every day? A. In Bayonne, and I have seen it in other places.

Q. Where? Where did you first see it after this man gave it up? A. In our garage.

Q. What? A. It was in our garage.

Q. In your garage, eh? A. Yes sir.

Q. And how long was it in your garage before it was sold at public auction? A. About five or six months.

Q. How much did you pay for it at public auction? A. Six hundred dollars.

Q. Who got the money? A. Who got the money?

Q. Who got the six hundred dollars? A. Paid it to a man by the name of Askkins.

Q. Who? A. Mr. Askkins.

Q. He didn't own the car, did he? A. I don't know who owned it.

Q. You paid six hundred dollars for a car in

your own garage to whom? Mr. who— A. Mr. Askkins.

Q. August? A. Askkins.

Q. Is he here? A. No sir.

Q. What is he, a circus clown or what is he? A. I don't know what he is.

Q. A fireman? A. He is in some kind of business.

Q. Did you ever see him before? A. Yes.

Q. How much did you pay him in cash—how did you pay him, in cash? A. Yes sir.

Q. This was not his car, was it? A. I don't know whose car it was.

Q. It was a car that your father sold to the plaintiff and the plaintiff brought back and put in your garage; is that right? A. He put it there and didn't say a word about it.

Q. And then you paid six hundred dollars to a strange man for it; is that right? A. Yes sir.

Q. Did you pay him cash or check? A. Cash.

Q. Have you got a receipt for it? A. Have I got a receipt for it, why no. It was given all through—

Q. Have you got a receipt for the six hundred dollars that you paid to a strange man for a car in your own garage; have you got a receipt for it? A. No.

Q. Did you deliver that car yourself? A. (No answer.)

Mr. Simpson: I think that is all.

The Court: What was this public auction? What was it an auction of and for, Mr. Shapiro?

The Witness: I cannot say; all I seen—I just bought the car and I bought it up.

The Court: How did you know there was to be such an auction?

The Witness: I seen it advertised in the paper.

The Court: Do you recall now what it was for? What the reason was for holding the auction from the advertisement you saw in the paper?

The Witness: I think it was for nonpayment of notes.

The Court: Nonpayment of notes. Do you know who it was that was causing the sale to take place? Was there any name attached to the notice of sale?

The Witness: Phillip Askkins name was attached to the sale.

The Court: Is that all?

The Witness: That is all, and Shapiro and Kvedar were in there, something like that.

The Court: The reason I ask these questions is that I want to know what the public sale was, and if it was of this finance corporation it might have some bearing upon these outstanding notes that have been spoken of.

Mr. Simpson: Well, it is not any concern of mine. I just want to show what the circumstances were about this. That is all.

The Court: I am not perfectly sure, but it may be a matter of some concern to both parties as to what the present position of this twelve hundred dollars worth of notes is. If they were extinguished in any way, why, we need not in anywise consider them; but if they have not been extinguished I am not so certain but we are concerned about them.

(Paper marked P-6 for identification received in evidence.)

Q. You showed a receipt here marked D-2 in evidence. Was D-2 in evidence given before P-6? Was this given before this? A. We got this first —Mr. Kvedar in the other case.

Q. You got your own receipt, this card marked D-3—you got this receipt before you got this receipt, P-6; is that right? A. Yes sir.

Q. In other words, you had this man's fifty dollars in your pocket, and gave him no receipt, and took his fifty dollars and got this receipt, and then afterwards gave him this receipt? A. No sir.

Q. That is the plaintiff's receipt? A. No sir.

Q. Well, which was first? A. B. & B. Motors got the fifty dollars and they gave me a receipt for it, and when we got back to Bayonne we made out a receipt on our literature for Mr. Kvedar.

Q. Then he didn't get his receipt until after you got yours? A. Yes sir.

Q. Did you take delivery of this truck from Newark? Did you ever take this truck in from Newark? A. No sir; they brought it in themselves.

Q. And delivered it to you? A. Yes sir.

Q. Now, at the time of this accident you were driving this truck, weren't you? A. No sir.

Q. Well, was it the same day that you got the truck the accident was? A. When we got the truck, why, it went right up to the body builders.

Q. Who was the body builder? A. Mr. Gold.

Q. And when it came back from the body builder's it was then delivered to the plaintiff? A. When it came back from the body builder's, why, we took it right down to the garage.

Q. When did he get it? That is what I want to know? A. He got it when he signed his papers.

A. And the first day you went out to try to teach him to run it? A. Yes sir.

Q. And you taught him so well he ran into a lamp post; is that right? A. (No answer.)

Q. Well, you were still on the truck, weren't you? A. Yes, I was. I stopped it.

Q. And you went down and off the truck and let him take it at the time of the accident, did you? A. No sir.

Q. You were still on the truck at the time of the accident? A. Yes sir.

Q. What was he doing at the time of the accident? A. He was at the wheel.

Q. You were sitting beside him? A. I was sitting beside him,

Q. How long after that did you get off the truck and let him have it alone? A. How long after that?

Q. Was it a week, a month; how long? A. As soon as we repaired the truck, why he took a chauffeur for it. He was not capable of driving himself.

Q. Well, how long were you on the truck teaching him to drive it before the accident? A. How long? About twenty minutes.

Q. Why didn't you stop it, grab hold of the steering wheel? You were an expert chauffeur, weren't you? A. I grabbed a hold of my emergency brake, and I did stop it.

Q. You didn't stop it in time to prevent it being injured, did you? A. No.

Q. Well, if you had a greenhorn on this truck, if you were teaching him to run it, why didn't you keep such control of it that you could keep it off the sidewalk? A. Why, he had it in his own hands so fast that I couldn't steal the wheel from him.

Q. He had it in his own hands so fast. What do you mean? He had the steering wheel tight in his hand, and I tried to turn him to the right, but I couldn't steer. He had more strength than I had.

Q. Well, you had taught people before? A. Yes sir.

Q. Did you insruct him to so use the steering

wheel that you had some control of it as well as he? A. Yes sir: I explained the car generally before I gave him the wheel.

Q. And yet you didn't prevent this accident, did you? I guess that is self-evident. That is all.

Re-direct Examination by Mr. Melniker:

Q. Now, you referred to having seen an advertisement in the paper. I want to show you this news paper— A. Yes.

Q. I want to show you this newspaper, and ask you whether this is the ad. you saw? A. Yes sir.

Q. Wasn't there also notice posted up around the city that this car was to be sold at public auction? A. I have seen notices around the city, too.

Q. Were they similar to this one? A. Yes sir.

Mr. Melniker: I want to offer this.

Mr. Simpson: No objection.

(Paper marked D-5 in evidence.)

Q. Now, at that time and place was the truck sold at public auction? A. Yes sir.

Q. To the highest bidder? A. Yes sir.

Q. And you were the highest bidder? A. Yes sir.

Q. You were the man that executed the bill of sale? A. Yes sir.

Q. When the truck was resold to this witness, that testified? A. Yes sir.

Ida Shapiro, sworn.

Direct Examination by Mr. Melniker:

Q. You are the daughter of this defendant? A. Yes sir.

Q. What do you do there? A. Bookkeeper.

Q. Do you run the business? A. Yes sir.

Q. Did your father have anything to do with running the business? A. Yes sir.

Q. Does he know anything about it? A. No sir.

Q. What is your first knowledge of this sale to Mr. Kvedar? A. My first knowledge of the sale was when I received—when they come back and they told me that—

Mr. Simpson: I object to what they told her.

Q. When you say "them" do you mean Mr. Kvedar, too? A. Yes sir, Mr. Kvedar came back with Mr. Shapiro, to the garage, and Mr. Shapiro informed me that Mr. Kvedar had bought a truck.

Q. Your father told you that Mr. Kvedar had bought a truck in Newark? A. In Newark; and then we received—then I received a statement from Newark, that they bought—

Mr. Simpson: I object to any testimony about the statement.

The Court: Well, she is testifying to a statement that is already in evidence.

Mr. Simpson: All right.

Mr. Melniker: I will either read the—

The Witness: We received a statement from them that there was a truck bought.

Q. How soon after your father came back from Newark? A. About two weeks after.

Q. You got the statement, and it was receipted afterwards? A. Yes.

Q. Receipted when you paid the bill? A. Yes, sir.

Q. Had you got this bill first? A. Yes sir.

Q. Before you sent the check? A. Yes sir, the check was given—it was given them at the time of the delivery of the truck.

Q. The bill came first? A. Yes sir.

Q. The bill came in August? A. Yes sir.

Q. That was the time when the truck was bought? A. Yes sir.

Q. I want to show you this paper and ask you whether this is the bill that you got from the B. & B. Motors Company? A. Yes; that was the bill I got from the B. & B. Company.

(Paper marked D-3 for identification received in evidence.)

Mr. Simpson: I do not see how that is material. That is a bill received from somebody else, and cannot be an agreement. There is no proof, as I understand it, as to when that bill was made; it may have been gotten after this transaction.

Mr. Melniker: Well, she has testified she got the bill shortly after these people were in Newark and made this purchase.

Mr. Simpson: What date is the bill?

Mr. Melniker: The bill is not dated, except it was August.

Mr. Simpson: This is the bill for the Apex?

Mr. Melniker: Yes.

Q. This is the bill to the Central Garage; that is your father's business? A. Yes sir.

Q. One and a half ton capacity, pneumatic equipped, new Apex truck chassis, $1915. less twenty per cent, $383., making a total of $1532., which makes a grand total of $1532. This is the bill and receipt that you got in connection with the sale? A. Yes sir.

Q. Check dated September 9, to B. & B. Motor sales Corporation, for, $1575. I ask you if that is the check that you gave in payment? A. That is the check I made out and gave to Mr. Shapiro to sign.

Q. For the final payment? A. For the final payment.

Q. That is your father's signature? A. Yes sir.

Mr. Melniker: I offer this.

(Paper marked D-2, received in evidence and marked D-6.)

Q. I notice on the back of this check is the writing "in payment of bill of one and a half Apex truck." Who wrote that, you or he? A. I did.

Q. That is, before you sent the check? A. Before I sent the check.

(Recess to ten o'clock to-morrow morning.)

September 28, 1921, trial resumed pursuant to adjournment.

Ida Shapiro, recalled.

Direct Examination by Mr. Melniker, resumed:

Q. Did you see this truck when it was delivered to your garage? A. Yes sir.

Q. By the way, where is your garage located? A. 555 Broadway, Bayonne, New Jersey.

Q. That is, on Broadway near what street? A. Between 25th and 26th Street.

Q. And did you see it there at that time, the time of this sale? A. Yes sir.

Q. Did you ever count the spokes in the wheels of this truck? A. Yes sir.

Q. How many spokes are there? A. Twelve in front and fourteen in the rear.

Q. When was the last time you saw this truck? A. The last time I saw this truck was about May or June; around the latter part of June.

Q. When this man brought this truck back on December 3rd, and left it at your garage was that truck handled or used or taken apart by anybody at that time,—from that time, December 3rd,

until after this sale, this auction sale in June? A. No.

Q. Anybody ever touch it? A. No sir.

Q. Or move it? A. No sir.

Q. Did your firm or your father in connection with this business ever handle any other Apex truck besides this one? A. No sir.

Q. Did you ever have any other Apex truck in your place? A. No sir.

Q. Before or since? A. No sir.

Mr. Melniker: Cross examine.

Cross Examination by Mr. Simpson:

Q. I understand that neither your father nor any one else did anything with this truck except let it stay there from the time it was delivered on the 3rd of December until the time of the auction sale; that is right, isn't it? A. Yes sir.

Q. He had nothing to do with it at all? A. No sir.

Q. He never sold it to anybody or tried to in any way? A. Not until the auction sale.

Q. Not until the auction sale; you were there every day, weren't you? A. Not after—not during the first—not after the first of the year.

Q. Well, then, you don't know anything about what happened to this truck after the first of the year 1920, do you, if you were not there? A. The first of 1921.

Q. What? A. After the first of 1921.

Q. That is—when was this truck delivered, in December, 1920? A. In December, 1920.

Q. All right. Then you don't know anything about this truck after January, 1921, do you? A. I used to see it when I went down to the garage; but during the day I wasn't there.

Q. Well, were you working there at all in the garage, keeping books in 1921? A. I had been informed of what was doing there.

Q. Well, but do you swear that up till the time of the sale, June 20, 1921, your father had nothing

to do with this truck? Exercised no dominion over it, didn't agree to sell it or show it to anybody to take it; you are sure of that? A. Surely.

Q. You are sure that the date of sale was June 20, 1921? A. Yes sir.

Q. Now, you are as sure of that as you are of anything you testified, are you? A. Absolutely.

Q. Do you know this bill? When did you first see this bill? When did you first see this bill? A. A couple of weeks—days—after they made the sale.

Q. Well, what date? A. Well, I just don't remember.

Q. June 20, 1921? A. No.

Q. Well, when? A. This bill was receipted to us after they gave the order.

Q. Is there a date on the bill? A. They dated it August.

Q. What date in August was it? A. I don't know; I havn't the least idea.

Q. Is there any date on there? A. There is no date, just August.

Q. August without any date? A. Yes.

Q. Are you in the habit of receiving bills without the date of the month on them? A. It isn't anything due to me.

Q. You accepted this bill; you don't assume to put the date of the month on it; nobody in your place? A. I didn't at the time take notice.

Q. And nobody in your place, assumes, as far as you know, to put the date on it? A. No sir.

Q. Now, you are quite sure that up till the 20th of June your father had nothing to do with this truck in the garage; he simply let it lie there; he didn't try to sell it or do anything at all with it, did he? A. Not that I know.

Q. You are positive of that? A. Not that I know of.

Mr. Simpson: That is all.

Frank Kvedar—Recalled.
Harry Bach—Recalled.

Frank Kvedar, recalled.

By Mr. Melniker:

Q. Mr. Kvedar, where is this garage where you kept this car after you got it? A. On Broadway, in Bayonne.

Q. On what street? A. Between 25th and 26th Street.

Q. Is that where you kept the car? A. That is where I kept the car, that place.

Q. And where did you keep it? A. Where I kept it?

Q. Yes. A. In 26th Street and Prospect Avenue.

Q. 26th Street and Prospect Avenue? A. East.

Q. That is about two blocks from Shapiro's garage? A. Two blocks from Shapiro's garage.

Q. Did you have it in this same place all the time? A. All the time.

Q. Do you know how many spokes there are in the wheels of this truck? A. I don't know.

Q. Yon don't know? A. No sir.

Q. Never counted them? A. No.

Mr. Melniker: That is all.

Mr. Simpson: That is all.

(Witness Excused.)

Harry Bach, recalled.

By Mr. Melniker:

Q. Mr. Bach, you are the man that did this work on this car? A. Yes sir.

Q. Do you know how many spokes there are in the wheels? A. There is fourteen in the rear one.

Q. Fourteen in the rear wheel? A. Yes sir.

Mr. Melniker: That is all.

Mr. Simpson: That is all.

(Witness excused.)

Defendant Rests.

Israel Shapiro, recalled in rebuttal.

Direct Examination by Mr. Simpson:

Q. Is that your signature on the bottom of that paper? A. Yes.

Q. It bears date June 11, 1921? A. Who is this—

Q. Did you sign that on that date, June 11, 1921? A. No sir, not on this date.

Q. You did not. All right. Let me have that. Here is a check to your order dated June 11, and endorsed by you and went through the bank. Is that your signature on that check dated June 11th for three hundred dollars? A. No sir.

Q. That is not your signature? A. No sir.

Q. You did not cash that check made to your order? A. Well, it is not my signature; you go by the signature.

Q. Well, did you get that money on that check from Solomon? Did you get that money on that check? A. That is not my signature.

Q. Did you get that money on that check of Solomon's? A. I don't remember he give.

Q. Didn't you get that check from Solomon on the 11th of June as a deposit? A. No; I didn't get it.

Q. You didn't get it? A. No.

Q. Did you sign that paper on the 11th of June, 1921?

The Court: Look at the signature.

The Witness: The signature is mine.

Q. All right. It was signed and given to this man, Solomon, wasn't it? A. What date?

Q. On the date it bears date. Do you put "phony" dates in your papers? A. (No answer.)

Mr. Simpson: I would ask for an opportunity to get Solomon. It is funny this man is denying his signature to his checks. I think

there is something very funny and I would like to get Solomon here.

Mr. Melniker: There is no reason for counsel to create an inference for Solomon not being here.

Mr. Simpson: I did not say that. I say it is very funny he is not here; that is all.

Mr. Melniker: That is an improper remark for counsel to make.

Mr. Simpson: I will offer in evidence this paper he has identified as bearing his signature.

(Paper marked P-7 in evidence.)

The Court: Do you want Mr. Solomon here?

Mr. Simpson: Yes sir.

Mr. Melniker: As a matter of fact I say Solomon went there last night to the garage where this truck was, and I asked him to count the spokes, and I asked him to be in court to-morrow and testify to the number of spokes in this wheel; and I am as much surprised as you are.

The Court: Was he under proper process?

Mr. Melniker: Yes sir; the subpoena was for to-day and he is not here. I asked him specially to be here, and I would like to get him here.

Mr. Simpson: I also offer this paper.

(Paper marked P-8 in evidence.)

Q. Now, here is the check. Can you read that check? A. (No answer.)

Q. You cannot read a check, can you? You cannot read a check? Did you ever see that check before? It is dated June 11, 1920. A. I do not remember this check.

Q. Did you ever see that check before, yes or no? A. No.

Mr. Simpson: I want to have that marked for identification.

(Paper marked P-9 for identification.)

Q. Was not this check given to you by Mr. Solomon who testified in this case, as a deposit of three hundred dollars on this car? A. This is—

Q. Was it or was it not? Was this check which I have shown you, marked P-9 for identification, given to you by Solomon as a deposit on this car? A. I explain to you how was he come over with the check. I not sold Mr. Solomon the car.

Q. Did he give you this check at any time? A. I don't see the check.

Q. You said he came over with the check. How do you know he came over with the check if you did not see the check? How do you know he came over with the check if you did not see the check? A. I explain it to you how he come over with that deposit on the car.

Q. No, you didn't explain anything. You said you never saw this check. Now, you say he came over with this check. How do you know he came over with this check if you never saw this check? A. I never saw this check, but—

Q. You never saw this check. Well, how did you get the three hundred dollars deposit on this car? A. Well, the car is sold by salesman.

Q. How did you get the three hundred dollars deposit on this car? A. I don't get three hundred dollars on this check, and I never saw this check.

Q. How did you get the three hundred dollars on this car? A. A salesman sold the car.

Q. How did you get the three hundred dollars on this car? A. (No answer.)

Q. How did you get it? A. Mine boy tell me a salesman sold the car and he got a deposit on it.

Q. Well, do you mean to say that somebody is endorsing your name on a check made to your

order, and you got the three hundred dollars and you don't know how you got the money? A. This is not my signature.

Q. Who put your name on that check? A. I think this is my boy's name.

Q. You think it is your boy's name, eh? A. Yes.

Q. You mean your boy wrote that? Your boy's name is not Israel, is it? What is your first name? A. Israel.

Q. Israel? A. Yes.

Q. Well now, that is Israel Shapiro. Do you say that is your boy's handwriting? A. I think it is my boy's handwriting.

Q. You think it is your boy's handwriting, but you never saw the check before? A. No.

Mr. Simpson: I think that is all.

Mr. Melniker: That is all.

(Witness excused.)

Morris Shapiro, recalled.

Direct Examination by Mr. Simpson:

Q. Did you ever see that check P-9 for identification before? A. Yes sir.

Q. Look at the back of it. Whose handwriting is that endorsement? A. Mine.

Q. It is your father's name, isn't it? A. Yes sir.

Q. Have you power to endorse your father's name? Have you the authority to endorse your father's name? A. Have I the authority?

Q. Yes. A. No sir.

Q. Well, what did you do with that three hundred dollars that you got there? A. I put it in the bank.

Q. In whose name? A. In mine.

Q. Here is a check—I offer that in evidence.

(P-9 for identification received in evidence.)

Q. You are sure you put that in your name in the bank? A. Yes.

Q. So if it had been to your order all that would have been necessary to do would be to put your name, "Morris Shapiro," on it and deposit it? A. Yes.

Q. But because it was in your father's name you had to endorse his name and get the cash and put it in your own name? A. Yes sir.

Q. All right. Now, here is one made to your order and your father's name on it, too. How do you explain that? A. Why, I got this money and my father was kind of short, and I lent him eight hundred and seventy-five dollars on this check.

Q. But you didn't need to have his name on the check; you say you put your father's name on the check and got the three hundred and put it in your bank. Now, here is a check made to your order, and you not only put your name on it but you put your father's name on it, too? A. All right. I didn't have enough money to give him eight hundred and seventy-five dollars on my bank book; I went to work and endorsed his name.

Q. Well, why endorse his? Why not cash it and get the seven hundred dollars cash and hand it to him? A. Instead of doing that, why I just gave him this check and he deposited it in his bank.

Q. What was his bank? What is his bank? A. Union Trust.

Q. Is there on the bank book of the Union Trust any indication that he has deposited that check in the Union Trust—on the back there?

Mr. Melniker: Doesn't the check speak for itself? A. I don't know.

Q. Well, read it. Show us anything on the back there which says it was deposited in the Union Trust?

Mr. Melniker: I object to that. This man is not a bank expert. How can he tell.

The Court: I presume, gentlemen, the check shows for itself.

Q. Well, you say this check was deposited by your father in what company? A. The Union Trust.

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

Q. How do you know anything about it? Were you there when he deposited it?

Mr. Melniker: I object to this line of examination. This witness was offered by the plaintiff himself, and he is cross examining him.

Mr. Simpson: I am not cross examining him. I am calling him to prove certain papers.

Mr. Melniker: Not only that, but trying to impeach him.

Mr. Simpson: Impeach him? He has impeached himself.

The Court: I do not know what the purpose of all the testimony is, except it be for one purpose, and that is to impeach and tear down and break down the veracity of these witnesses.

Mr. Melniker: Yes, but it is a purely collateral matter. This is a distinct sale to some one else after seven months.

Mr. Simpson: They say they did not sell it until the 20th of June. I have the contract to sell it on the 11th of June, and the checks.

Mr. Melniker: The date does not make any difference. It is a collateral matter. It is seven months after the plaintiff claims to have rescinded this contract. I did not ob-

ject to it because I did not want to waste time in argument, but it is purely collateral.

Mr. Simpson: He proved as part of his case that they sold the car on the 20th of June, and I want to show that was untrue; that they sold it as of June 7th, and that the father exercised no dominion over it. I want to put in this contract to show that on the 7th of June he had a contract to sell it, and defend the title, to this man Solomon.

Mr. Melniker: Why, that does not contradict anything that we proved. We proved that the auction sale took place on the 20th of June. There was nothing to prevent this man or that man from making an agreement to sell this stuff at the 7th or 11th of June if he thought he was going to be able to purchase it on the 11th of June at the auction sale.

The Court: But might it not go to a question that is perhaps an important question in this case, as to whether or not there was a recision of this contract?

Mr. Melniker: Well, that is part of the plaintiff's case as to whether or not there was a recision of the contract. This evidence can only tend to prove that there was no recission, which is contrary to the theory upon which they are trying this case.

The Court: I do not know that. It may go to that, and if so, of course, it is going to come back to the plaintiff then; but it may also go to the point—whatever credence the jury may place in it I do not know—it may also go to the point of adding to anything the plaintiff may have so far attempted to show regarding a recission, showing what the acts of the defendant were as toward the article which is the subject of the recission. It certainly would be relevant in a case of this sort.

Mr. Melniker: I ask your Honor for an exception.

The Court: It may have another purpose. It may be more or less collateral, but still there is some pertinent connection between it and the subject of this particular action, in that it has to do with the article, the same truck as is the subject, we will say, of this particular action; and another relevance I see it would have would be that it would go to the testing of the probity of some of these witnesses, as to whether they are telling the truth upon this question and as to the likelihood of their having told the truth upon other questions. Of course it may cut both ways, or either way. It may cut in a different direction than plaintiff is attempting to have it cut. If so, why, of course, that is at his peril.

Q. (Repeated by the stenographer.) How do you know anything about it? Were you there when he deposited it?

Mr. Simpson: I will withdraw that question.

I will offer that second check in evidence.

(Paper marked P-10 in evidence.)

Mr. Simpson: That is all.

Witness excused.)

Mr. Simpson: I won't ask for Solomon because he is not here. I have proved these two papers and these two checks by these other witnesses. That is all I wanted Solomon for, so I won't ask you to wait for him.

The Court: Well, Mr. Melniker may want him.

Mr. Simpson: Oh, yes. If he wants him I have no objection. The only thing is I do not want to hold the case up because of that.

The Court: Perhaps a couple of minutes of wait may not be ill spent, in attempting to settle one question that will have to be dealt with by me, and that is the question of admeasurement of damages. Mr. Solomon is now here.

Joseph Solomon, recalled.

Direct Examination by Mr. Simpson:

Q. You are the man that bought this truck from Shapiro, aren't you? A. Yes sir.

Q. Is that your signature? A. Yes sir.

Q. Did he sign it on the 11th of June, 1920? A. Yes sir.

Q. Referring to P-8, did he also sign this, that is marked, the blue paper— A. That is the deposit.

Q. Did he also sign P-7 the same day? A. Yes sir.

Mr. Melniker: I object. That is not so.

Q. It does not appear to be on the same day. There is no date on that paper.

Mr. Simpson: There is a date on that paper, June 11th. There is the date: "I further agree to abide by the terms of a certain printed agreement and warranty, dated June 11, 1921, covering the truck sold by me."

Q. Is that the same date you got the other paper that he gave you, this paper? A. He gave it to me when he made the bill of sale.

Q. Mr. Melniker? A. Yes.

Q. Here is a check for three hundred dollars made to the order of Israel Shapiro. Whom did you give that to? A. To Israel Shapiro.

Q. To him or to his son? A. No, his son; I didn't see him; he was not in the place.

Q. To the old man himself? A. To the old man himself.

Q. And you gave it to him on the day the check bears date? A. Yes sir.

Q. June 11, 1921? A. Yes sir.

Cross Examination by Mr. Melniker:

Q. Where were you just now, Mr. Solomon, when this man brought you here? A. I was home.

Q. Home? A. Yes.

Q. Where? A. I was in the—

Q. Where were you? A. In Bayonne.

Q. In Bayonne? A. Yes sir.

Q. What street? A. Just now?

Q. Yes. A. 24 East 29th Street.

Q. You were where? A. I come with a jitney.

Q. Where were you when this man found you? A. 24 East 29th Street.

Q. Where this man found you? A. Yes.

Q. Where? A. Over here, just as I got off from the jitney.

Q. Where? A. I don't know what you call it; last stop where the jitney come on the Boulevard.

Q. Right here at the tube station? A. Yes.

Q. Down here at Summit Avenue? A. Yes sir.

Q. Is that where you were? A. Just I come in this way.

Q. Where were you going? A. In here.

Q. You were walking on the street? A. No, just as I come over here.

Q. Oh, you were coming here? A. Yes.

Q. Where was it that he saw you? A. Saw me in the street; I come in and he saw me.

Q. Where did he see you? Where were you when he saw you? A. I don't know the name of the street.

Q. Was it right here? A. No, a little further.

Q. You were just coming here, were you? A. Yes.

Q. Where is the truck now? A. In Bayonne.

Q. Where did you have it last night? A. In the garage.

Q. Down at Leeds' garage? A. Yes.

Q. I saw you down there last night, didn't I? A. Yes.

Mr. Simpson: I object to this as not proper cross examination.

The Court: Perhaps Mr. Melniker wants to make him his own witness.

Mr. Simpson: If he saw him last night I would still object to it as irrelevant.

Q. I asked you to count the spokes in that car last night? A. Yes sir.

Q. Did you count them? A. Yes.

Q. How many were there in the back wheel? A. Fourteen.

Mr. Melniker: That is all.

Mr. Simpson: That is all.

(Witness excused.)

PLAINTIFF RESTS.

The Court: The question I want to ask you, gentlemen, is this, on the admeasurement of damages: As I understand the situation in transactions of this alleged character, the purchaser may take the benefit of his contract and if he has been put to actual loss he may sue for a recovery of that loss. But where he has taken the benefit of his contract and where he has retained the article which is the subject of the contract, and, retaining, has disposed of it for his own benefit, he would be entitled to have an admeasurement of what the difference was between the value of the article purchased, and what would have been its value had it been the article as represented. That would be his exact measure of damage. If there were no material difference, of course, he would not then

have been damaged by it. Or, he may take the other string of it and rescind the contract, or tender the return of the subject of the contract. If that is the situation then he may recover what his actual loss has been as the proximate result of the alleged fraud and deceit, and ordinarily that seems to be what he may have paid upon and for and toward the contract which he has sought to rescind.

Now, do the attorneys engaged in this case understand that there is any other rule or principle applicable to cases of this character?

Mr. Simpson: I do not.

The Court: What say you, Mr. Melniker?

Mr. Melniker: I think that is the rule, except, of course, I want to call attention to the fact that the right to rescind depends upon a reasonable exercise of that privilege.

The Court: Yes, but I am getting away from that for the moment. I am only talking now, Mr. Melniker, about the admeasurement of damages. This case is rested, as I understand the pleadings and the way it has been tried, upon the theory or the assertion that the contract was rescinded, and that the subject of the contract, being this truck, was re-delivered, or at least, that a tender of redelivery was made of it by the purchaser to the seller.

Now, there is one other thing: The amount actually paid in cash, I believe was $1225., the balance of it by two notes, one a $1200. monthly note, and another of three hundred and some odd dollars. There is no evidence in the case that any of those notes have been paid by the plaintiff, as I recall the evidence, and I doubt if there can be a recovery for that because there has not been a payment. A

note is not a payment until it is paid. As to whether or not there will ever be a recovery on those notes against the plaintiff is too problematical, it seems to me to be the subject of any admeasurement in a cause of this sort.

I am not bringing this forward as a settled rule, or settled right, because I do not know whether this is so or not, and that is, if the plaintiff should be called upon in the future, or be required to pay these notes or any of them, he might have another action because of any damage arising to him after the cause just being tried. I say I am not putting that forward as a proposition of law at all. I do not know what the situation would be, but damages that are speculative are prohibited in a case of this sort just as much as in any other case. My thought is that we must direct ourselves, if at all, as to the question of damage, to the amount actually paid, subject to diminution, of course, if there is any diminution, because of the damage to the car by the act of the plaintiff, for which he was responsible over and above the damage or lessened value from ordinary wear and tear, from ordinary use.

I would like to hear what you have to say about that, Senator?

Mr. Simpson: I think you are right about that. I want to simplify this as much as I can. The only thing that seems to me was that Shapiro got twelve hundred dollars from us, and he got eleven hundred dollars, I think, from Solomon, and six hundred dollars from the selling of the car. Now, whether that would enter into the admeasurement of damage or not is for your Honor to say; that is all. He seems to have gotten twelve hundred dollars from us, six hundred dollars from the sale of the car; that would

be eighteen hundred—he got about three thousand dollars on this car.

Mr. Melniker: There is no such evidence in this case. He paid six hundred dollars for the car and put three hundred dollars worth of work on it.

The Court: I do not see how it would have any effect on the admeasurement of damage. It is more a question, in my mind, of certainty in instructing the jury, as I shall have to do.

Mr. Simpson: Oh, yes. I think the only measure of damage is what we paid, our money loss. I do not say that we can hold this man for notes. It may be we have a defense. I have not thought of that. It may be we have not.

The Court: He may never be called upon to pay them, and in that way, of course, it is problematical as to any damage that might come to him. I think that would be the admeasurement, gentlemen.

DEFENDANT'S MOTION FOR DIRECTION OF VERDICT.

Mr. Melniker: I move for a direction of verdict if the Court please, on the following grounds. There is no evidence of deceit or wilful misrepresentation. This case is predicated upon the defendant having wilfully deceived, having made false statements knowing they were false at the time he made them. There is absolutely no evidence in this case that he knew. Assuming that this was a one ton truck and not a one and a half ton truck, there is no evidence in this

case that he knew it, or had any reason to believe it, or that he himself was not imposed upon.

On the second ground—

The Court: Upon that point let me say this to you—perhaps you have it in your mind. Perhaps your language has conveyed it to me. It is not only that one who is charged with false representation did not know at the time he made it that it was false, but it goes somewhat further, to the extent, as I will read to you, as to whether or not under all of the circumstances of the case he should not have known, or, rather, that he should have known that the representations were not true, and this is what I wish to read to you, and it seems to be the law:

"By the overwhelming weight of authority in order to render a person liable for false representations in an action for deceit it must be shown that he made the representations; that is, either with actual knowledge of their falsity, or under such circumstances that the law will imply or impute knowledge, as in the case of reckless statements, without knowledge whether they are true or false, representations made for a fraudulent purpose though without actual knowledge of their falsity, and representations accompanied by a false assumption of knowledge, express or implied."

So I say it does not mean if I make a representation to you with reference to a subject matter of a contract,—it does not satisfy the conscience of the law that I did not actually know, but it goes a trifle further,—whether I, consciously dealing with you with respect to the matter, should not have known the representations I made to you were

false. Of course, the other elements must be there also, Mr. Melniker, that I intended to defraud you and intended to make you believe that the representations were true when in fact they were not. They seem to be all tied up one with another. You cannot separate them.

Mr. Melniker: But there is a great distinction in those two situations and the consequences that flow from the two situations. If a man assumes to know and he really believes that he knows, and he is honest in his belief, and he makes representations which he believes are true, all that that entitles the other party to do is to rescind the contract and recover back his money; not on the theory of fraud and deceit, but on the theory that he did not get what he bought; not that he was defrauded or had misrepresentations made to him.

The Court: No, that is not so, Mr. Melniker. I think you are wrong there. That is the point I tried to make before. The party might rescind, yes, perhaps; but what would usually happen would be that he would recover from the party the difference between the value of the thing he actually got and what its value would have been had it been as represented. That seems to be what the law says will satisfy a person where the situation is as you say. There would be no fraud then, no intended or intentional fraud.

Mr. Melniker: Exactly. The plaintiff may have the same right to rescind it, but his action is entirely different. His action is not for fraud and deceit then; his action is to recover back his money on the theory of money had and received; that he did not get what he paid for. They are entirely dis-

tinct actions. Now, this case is based on fraud and deceit.

The Court: Yes.

Mr. Melniker: And wilful misrepresentation.

The Court: Yes.

Mr. Melniker: The action sounds in tort rather than contract. It is another action. Now, there is no evidence in this case—and, in fact, all the evidence is to the contrary that this defendant in this case wilfully deceived this man. He knew no more about that truck than the man who bought it.

The Court: I cannot say that.

Mr. Melniker: And the evidence of the witness, the vice president of the company that manufactured the truck, is that nobody can tell the difference between a one ton and a one and a half ton truck without a very careful examination of the truck; and the only difference in the outward appearance between the one and the other, he said, was a difference in the spokes, twelve instead of fourteen, and this truck has fourteen spokes; so that would not have been a notice to him. The other difference was the difference between the dimensions of the rear axles, which could not be told except by a careful measurement of the axle; because it only had two inches difference in the vertical diameter of the differential gear case.

Mr. Simpson: Why, his own client says he knew the difference.

The Court: I will have to tell you, Mr. Melniker, that it would be entirely improper for me to say that the defendant did or did not know these things, or that he did or did not make the representations; and the rea-

son for my saying that is that from all of the testimony in the case to my mind it is very clearly a question for the jury to pass upon.

Mr. Melniker: On the second ground, I urge that this property was not in the same condition in which the buyer got it at the time when he returned it, less depreciation due to reasonable use.

His obligation as set down in all the cases and also in our statute's governing sales, is that the property must be returned in the same condition in which it is bought. Of course, that rule is qualified by the fact that a man has a right to use it at the time he has it, but he has to use it, not abuse it. Now, the evidence in this case is that when this property was returned, it had deteriorated, not due to the ordinary wear and tear of reasonable use, but deteriorated due to the negligent use which this plaintiff had given it. That testimony is undisputed, and on that testimony this man has failed to comply with our statute and has failed to comply with the general principle which applies to these cases,—that he must return the property in the same condition in which he got it, ordinary wear excepted.

The Court: I do not know that I can quite follow you. I agree with you in the main that the duty of this person, the plaintiff, was to return it in the condition in which he received it, less what the usual depreciation would be from the usual use of that vehicle or that article; but I say, as I have said before, because a person may have been negligent, perhaps abusively negligent, in the use of an article of this sort, does not, it seems to me, put him in a position where he may not if he thinks that his conduct was

the result of deceit worked on himself, rescind,; but it seems to me that the quality of the law is measured and applied to the parties in interest when in the admeasurement of damages, if the plaintiff is entitled to have a recovery, there is offset against what he otherwise would be entitled to have the damage to the article which has been caused by his own act; because how otherwise would it be right or just? Perhaps the damage might be only fractional; perhaps the depreciation because of the neglect of the purchaser might only amount to one per cent of the value of the thing, and, again, it might amount to fifty per cent. But where would we stop? We could not step aside from the inflexible rule that you advance, Mr. Melniker; because then even if there were a fraction of one per cent of damage because of a happening—which perhaps might not be of his own fault; perhaps it might be the negligence of another; it might be in a case of this sort the result of a collision with another car where the absolute negligence was that of another person, a stranger,—yet he could not return it if that were the inflexible rule. I think it is to the contrary. I think the rule is generally as you put it, but I think the rule that must be applied is the one I was just speaking to: that any damage that the plaintiff may have shown himself entitled to, should have to be reduced by the amount of depreciation in the article chargeable to his own shortcoming. Of course, if that should be more than his right of recovery ordinarily would be, why, he gets nothing from it.

Mr. Melniker: I submit, if the Court please, if any part of that damage, regardless of how much it is, is due to his negligence, that then the question of the degree of damage does not enter into it. In this case the

fact is uncontradicted that the condition of that car when he returned it was due to his negligence, either his or that of his servant, for which he is responsible; that it was due to improper care, not giving it enough oil or water, running it under those conditions, allowing it to be overheated, and that that was the condition in which it was brought back. Now, he is responsible for those conditions.

The Court: He is answering for that responsibility when I apply the rule that I am suggesting here that I should apply.

Mr. Melniker: He is not deprived of all his remedy because that condition existed. His remedy is merely a different remedy. His remedy is then, having put himself in that position through his own negligence,—his remedy then is not rescission; his remedy then is for the difference between what he bought and for what he got. That is his remedy. In other words, the law simply says to him, "You cannot come in by this door." He has to put himself in the position where he may have the one remedy, as others have to. He cannot have this remedy and the other one.

On the third ground that according to the plaintiff's own testimony he did not act with the promptitude that the law exacts of him. He himself has testified that he knew on the 4th of November, that this car was not what he bought; that it was a one ton and not a one and a half ton. In the face of that knowledge as given to him by the representative of this company in Newark, and which he verified from other sources, he continued to use that car until the 18th day of November. In that way he has absolutely deprived himself of the remedy of rescission; and not only that, he kept the car from the 18th of Novem-

ber until the 3rd of December. His testimony is uncontradicted that he had this car in a garage two blocks away from where he finally delivered the car to the defendant in the Central garage. Now, he does not offer any explanation of why he did not deliver that car sooner. There is no question about the principle involved, which is that upon discovery of a fraud it is the duty of the buyer to return the goods. There might be circumstances in which perhaps a return would be excusable if not immediate; but there are not any such circumstances here. There is no disputed question of fact. This is not a situation where we have facts from which different inferences might be drawn; there is only fact and there is only one inference—he himself, according to his own testimony, uncontradicted, used that car after he had knowledge of fact, and even then he continued to keep the car when he stopped using it from the 18th of November to the 3rd of December. It was his duty to return it promptly. That is the law. There is no question about that. What is the explanation? He offers none, and thereby, I say, he has deprived himself of the remedy of recission in that respect. He may still have another remedy. I do not say that he is deprived of all remedy, but this is not his remedy, not by recission; because the law has laid down a certain condition which must be met before a buyer can have the remedy of recission. The doing of any act by a buyer after knowledge of the facts, which indicates the exercise of the right of ownership, deprives him of the right of recission. This man did the very act which above all acts indicates the exercise of the power or the right of ownership—he used the car for his business, continued to use it until the 18th of November. What do we know

about what caused this condition of the car that we found it in when we finally got it? How do we know but what it was due to that very use from the third of November until the eighteenth—or the 4th of November until the 18th? I might add to that, that the burden to show that is on the plaintiff. He has absolutely not only failed to meet that burden, but he has not even attempted to meet it.

The Court: I will decline to direct a verdict.

Mr. Melniker: I ask for an exception.

The Court: You may have it.

Mr. Melniker summed up to the jury for the defendant.

Mr. Simpson summed up to the jury for the plaintiff.

The Court: We seem to have lost sight of the counterclaim. It seems to me it is out of the case.

Mr. Melniker: It seems to me the evidence in that situation is this: that this plaintiff proceeded on the theory of no rescission—

The Court: Well, he is not proceeding on that theory at all, I take it. We have tried this case upon the theory of rescission.

Mr. Melniker: We could not tell that at the time we filed this counterclaim, because according to the complaint—

The Court: We have tried the cause, as I understand it, upon the theory of rescission. Now, if that has failed, all right; the case ends.

Mr. Melniker: Well, if that is the understanding that would dispose of the counterclaim.

The Court: I cannot imagine the Senator states anything else; do you, Senator?

Mr. Simpson: No sir; neither did Mr. Melniker, because he did not say anything about it in his summnig up.

The Court: I take it that as far as the counterclaim is concerned the evidence is such that there could not be a recovery upon it.

Mr. Melniker: Well, I could not afford to take any chances.

The Court: No, I am not questioning that, but I say that from the way the thing has turned out it appears to me as if the whole issue is to be decided upon the complaint and the answer outside of the counterclaim.

Now, there is another question: the money that was paid,—twelve hundred dollars, is it?

Mr. Simpson: I think it is $1343.

The Court: $1225. it is. That was paid when?

Mr. Melniker: September 7th.

Mr. Simpson: How much do you say?

Mr. Melniker: $1225.

Mr. Simpson: My client says, $1343.

Mr. Melniker: The complaint has it $1225.

Mr. Simpson: He is not stating that he paid $1343., which includes two monthly payments on these notes.

Mr. Melniker: That is included in the $1225.

The Court: That payment was when?

Mr. Melniker: September 7th.

Mr. Simpson: You say two of those twelve hundred dollar notes are in the $1225.?

The Court: That is my recollection.

COURT'S CHARGE TO THE JURY.

Gentlemen of the Jury:

This is an action by Frank Kvedar against Israel Shapiro.

The contention of the plaintiff is that in the negotiations for and in the purchase of a certain motor truck which occurred some time I think about the 7th of September, 1920, representations as to the truck were fraudulent and that that fraud was not discovered until some time later, I think some time in the month of November, 1920; and the plaintiff says and alleges that upon finding out that situation he elected to rescind the contract under which the purchase had been made and return or tendered the return of the truck to the person from whom he had purchased it, who was the defendant in this case. Now he is asking to have his alleged damages because of the alleged fraud and deceit with which it is further alleged that that contract of purchase was made.

Always in these cases, gentlemen, there are serious questions to be passed upon and determined. Keep in mind this: that fraud is never presumed. On the contrary, the law assumes that men are honest and truthful. The law assumes that in business transac-

tions men are honest and truthful, and that their acts are free from fraud and deceit, and that if fraud is to be the basis of the reason or right to rescind a contract or business agreement, and a recovery because thereof is to be had, that fraud so alleged must be proved and established by evidence, facts, circumstances and conditions. True, it is, that people do not, if they are intending to work deceit, if they are intending to work a fraud as toward another, do so openly, but commonly and usually the effort naturally is to conceal the fraud. If that were not so it would be quite impossible for one to perpetrate a fraud or be successful in carrying it out.

The burden of satisfying you of several things that must be established in this case rests upon the plaintiff. There may be some, of which I will speak to you later on, where the burden may be upon the defendant; but before you need to approach the question of what damages, if any, in a case of this sort should be admeasured, there are other things which you must pass upon, and which must have been made out to you and satisfied to you by the greater weight of the evidence; and the burden rests upon the plaintiff have brought that evidence to you, not only the evidence of them, but the greater weight of the evidence in each case.

I shall try to take them up in some order, gentlemen. It may not be the order in which you will care to consider them. I cannot know what order your minds will say they logically should be placed in. I can only do what to my mind would seem to be the order in which they should come.

It would seem to me that this question would first come to your minds, and that you

would require it to be settled,—whether it has been established by the greater weight of the evidence, or fair preponderance of the evidence, as it is sometimes stated, that this truck which is the subject of this controversy was a one ton truck. The reason I place that first, gentlemen, (I think you can see without explanation) is that if this was a one and a half ton truck, why, assuredly all of the claims of the plaintiff must fall.

If it was a one ton truck still his right to recover may not exist. If this was a one and a half ton truck all of his claims fall instanter and you need not consider anything more. But the question is not quite that. It is not quite the way from a legal standpoint in which the thing before you is to be expressed, but it must be expressed in this wise as to the question I have just placed before you: Have you been satisfied by the greater weight of the evidence that this truck was not a one and a half ton truck?

Now, upon that point, if your answer is, if your settlement of that controversy is that you have not been satisfied that it was other than a one and a half ton truck, then you need not go any further with any other matter in the case, and for this reason—I want to make it plain and emphasize it, gentlemen—that that is one of the burdens resting upon the plaintiff before he may have your consideration any further. He must establish that this was not a one and a half ton truck which he had delivered to him; because you see, he comes forward and says: "I bargained for, and the contract I made by its very terms in fact state that it was, a one and a half ton truck." He more specifically says it was not a one and a half ton truck, but that it was a one ton truck. The burden first attaches to

him there. Has he met that burden? Has he satisfied you by and through his own testimony and that of the other witnesses in the case, by the greater weight of it, that this was not a one and a half ton truck but was only a one ton truck?

If he has failed to do that, he has so failed that he is not entitled to have any further thing considered by you, and immediately you will be in a position where you must return your verdict and return it in favor of the defendant.

If he has met that burden, if he has established that thing, still he may not be entitled to have a recovery; because there are other burdens as to other matters resting upon him, and just as heavily. In all actions of this sort and of this character there are three other things which the plaintiff must satisfy you of and by the greater weight of the evidence, and it is not a question of satisfying you as to one of the three or two of the three, but he must satisfy you as to all three of them; because, you will see, I am sure, when I have stated them to you, that they are so correllated; that they are so tied the one to the other that it is absolutely that all three must be made out in order to have made out a case in that direction.

Those three things are these:

First, that the representation alleged to have been made was false. I will stop there for just a minute to show you why I so emphasize the first question I placed before you, because if it has not been made out that this was a one ton truck then it cannot be said that the representation, even if it was a representation, as is said, was false. But,

to go back, the first of these three things to be made out is, was the representation false?

Second, was the representation known to be false to the party making it, who was the defendant in this case? And did he make it knowing it to be false for the purpose of misrepresenting to the plaintiff?

Third, did the plaintiff at the time that the representation was made, if it was false, believe it to be true? And if, believing it to be true, did he act upon it to his damage?

Now, those are the three elements, gentlemen, which I have said are to be so co-related, that are so tied one to the other, that all three must be established. The first is, were the representations false? Second, were they known to be false, and were they made for the purpose of defrauding and deceiving the plaintiff?

Third, did the plaintiff at the time they were made believe them to be true and did he act upon them in that way and with that belief to his disadvantage or damage?

As to the question of whether they were false or not I will have to repeat, that whether they were or not will probably be settled by the first question I put before you, as to whether this truck was a one ton truck or a one and a half ton truck.

As to the second question, whether they were known to be false to the defendant at the time he made them, here is the rule which I stated before—perhaps you paid no attention to it, but this is the rule which will assist and guide you in passing upon that question:

"It is said by the overwhelming weight of authority in order to render a person liable

for false representations in an action for deceit it must be shown that he made the representations; that is, either with actual knowledge of their falsity or under such circumstances that the law will imply or impute knowledge, as in the case of reckless statements, without knowledge whether they are true or false, representations made for a fraudulent purpose, though without actual knowledge of their falsity, and recommendations accompanied by a false assumption of knowledge, express or implied."

Now, as to all three of those matters, gentlemen, I can only say by way of repetition that the burden of establishing them rests upon the plaintiff, and he must do so to your satisfaction and by the greater weight of the evidence in the case. If he has failed to establish any of them then he is not entitled to your verdict.

If he has established them all then you will have to go further in your consideration of the case; and because I place one ahead of the other, gentlemen, does not mean that you are to slack as to any one of them. They are all important, one as important as the other. That is always so. If he has established these things that I have spoken to you of already, and in the manner which I have said he must, he then contends that some time in November, the date of which you will remember, some time early in November of the year 1920, in which he made the purchase, he discovered this alleged fraud and deceit; that he as he alleges, then elected or exercised his option in law to rescind the contract which he had made with the defendant, and to return the car to the defendant. It seems that the actual effort in that direction—I mean as to the return of the machine—was not made

until some time in December. That date likewise I shall have to leave to your recollection of what the testimony was.

In order for the plaintiff to have a verdict and get the benefit of an action such as this, and one which has been tried as this one has, —I mean upon the theory that this one has —it is necessary for him to establish that he did rescind his contract, and that he did make return of the machine, and in doing so, or in respect thereto, rather, the law is this:

"It is a well settled principle that to entitle one to rescind a contract for fraud, he must exercise his option within a reasonable time after the discovery of the fraud. If he delays rescission for an unreasonable time he will be held to have affirmed the contract and cannot afterwards rescind."

There might be many reasons for that rule, gentlemen, many which I cannot recall now; but there is one which is perhaps most common, and that is this: rescission or intent to rescind would be most clearly portrayed and most clearly shown, if we as humans had the ability to ascertain what the working of others' minds were. We have not that ability, we cannot see the working of each other's mind, directly, I mean. The only way in which that can be determined is by what that other human being says and does. Any person may say, "I made up my mind to do this or that," or, "I made up my mind to do it at such a time, or such a time." Whether he did or not cannot be ascertained by us, by you as jurors, except from evidence which goes to show his acts, what he did or what he said, and, therefore, the law presumes that it is not to be said that one has concluded to

rescind the contract unless that mental determination is followed by some physical act which demonstrates or proves that mental determination, and that it is unreasonable to expect that one would act toward a contract of that sort, determining to rescind, unless he acted with promptness after coming to that mental conclusion.

Now, of course, as to what is a reasonable time sometimes is to be determined by the court, many times not; because what is reasonable often in point of time depends upon the circumstances and the conditions of the particular case, and that is why I am submitting that matter to you.

The question there will be, have you been satisfied—and the burden is upon the plaintiff—have you been satisfied by the greater weight of the evidence that the plaintiff did determine to rescind his contract and give up the benefit of it, any that he might have? And was it done within a reasonable time after he obtained the knowledge of the alleged fraud and deceit? If not, gentlemen, if that has not been made out to your satisfaction in that manner then again the plaintiff is not entitled to your verdict, but your verdict must go to the defendant. If it has been made out then it would seem, if all these other matters which I have spoken to you of have been made out, and been made out by the greater weight of the evidence, that the plaintiff would be entitled to have your verdict.

If he is entitled to your verdict then you will need to know how that damage of his, if any, is to be measured. It would be measured fairly simply. The undisputed testimony apparently is, that what the plaintiff had paid, actually paid up to the time of the

alleged discovery of the fraud, or alleged fraud, or up to the time of the alleged rescission of his contract and the return of the property as is alleged, was in cash $1225., and that sum, I think, was paid on September 7, 1920. If there were nothing else in the case and he was entitled to have a verdict, he would be entitled to a verdict for $1225. together with interest thereon from September, 1920, to the present date at six per cent. But the defendant says that aside from all other questions of his not having a right to have a verdict, that if he is entitled to have a verdict he is not entitled to have it for that sum of money—that is the best, or that is the least that can be said of the defendant's contention—for the reason, as it is asserted and alleged and urged, that his duty was (and I am not attempting to contradict it or to gainsay it) to return, if he returned the truck as the result of his determination to rescind his contract, in such condition as it was when he received it, less that the depreciation which would naturally come to it by the proper use of it for the purposes for which the article was intended to be used,—ordinarily depreciation in value because of normal, reasonable use. But the defendant says it was not in that condition; that it was in a lessened value condition, and that the reason for that further lessened condition was that it had been in some accident or accidents,—I do not know whether one or more,—and that damage had been done to it. If that is so, if that has been made out, and if it has likewise been made out what that damage was, what the depreciation in the value of the machine was, or in the truck, because of that or those circumstances, and yet the plaintiff is entitled to have your verdict, he would then not be entitled to have a verdict

for $1225. plus interest, as I have said, but he would be entitled to have a verdict which would be determined by the sum of $1225. plus the interest, diminished or reduced to the extent of the damage to the car aside from the depreciation due to its normal, usual use for the purposes for which it was designed and intended. So that if that thing has been made out, gentlemen, then your verdict would be determined in accordance with the rule that I have just given you.

Now, the return of your verdict, gentlemen, will be a very simple matter. If you find for the plaintiff you will say that you find for the plaintiff and against the defendant, and that you assess the plaintiff's damages at so much money. I think I am going to leave it to you, gentlemen, to figure and include the amount of accrued interest.

That, you will remember, if there is a verdict for the plaintiff, would be from September 7th, 1920, to the present date at six per cent.

On the other hand, if you find under the evidence and the rules which I have laid down for your guidance should be for the defendant, you will announce that by saying that you find for the defendant and against the plaintiff.

With that you may take the case.

(The jury retired.)

Mr. Melniker: I except to that part of the charge with reference to knowledge of the falsity of the representations. Your Honor I think, failed to say that they must have

been known to be false at the time they were made; but if the defendant found them to be false afterward I do not think it would have any bearing on this case.

Your Honor kept saying, "If the defendant knew they were false—"

The Court: Are you making a request that I should charge now in that direction?

Mr. Melniker: Yes, I think your Honor ought to correct that.

I also object to your Honor's charge in laying down the law in regard to the rescission. Your Honor seemed to base it solely on the ground of acting within a reasonable time. The law is that he must also return the goods in fair condition or restore the seller to *statu quo.*

The Court: I certainly said all that possibly could convey.

Mr. Melniker: In laying down the rule as to rescission the only thing your Honor referred to was the fact that he must act within a reasonable time. There was nothing said of the duty of the duty of the buyer to restore the goods.

The Court: If you mean that I should have said to the jury that he must return the goods as the result of his intention to rescind, in exactly the condition that they were at the time they got them, excepting only for wear and tear because of normal use, I would not have charged that if you had made the request; because I have said all the way through that I did not think that was the rule.

Mr. Melniker: Your Honor did not say anything at all about returning the goods

when you spoke about rescission. You simply said he must exercise his right to rescind within a reasonable time.

The Court: And return the goods; because I spoke upon the mental determination and the physical evidence of that determination; didn't I?

Mr. Melniker: I do not recall your saying anything about returning the goods; and even so, if that were so it would be misleading; because the goods must be returned, from the statute, in such a way as to put the seller back in *statu quo.*

The Court: You may have your exception. I will not charge that under all conditions and under all circumstances they must be returned in exactly the condition in which they were delivered to the purchaser, because I do not think that that can be the rule.

(The jury recalled.)

The Court: Gentlemen, I have called you back for just one moment to correct an oversight of mine, if one exists. I am not perfectly sure that it does, but to make assurance doubly sure I have called you back. I am having reference now to the question of the alleged false representations. You will remember the three items I spoke to you of, the first of which was that representations which were false, and known to be false must have been shown to have been made by the defendant. Perhaps I did not speak to you of that with reference to point of time of that knowledge on the part of the defendant, and that is what I am trying to correct. It must be shown that false representations were made by the defendant, and that it was

known to him that they were false, and known to him at the time that he made them. That is what I mean by the point of time—at the time that he made them time that he made them, that they were false. That is what I brought you back to correct. Whether I said that to you before I do not remember. If I did not, it was an oversight on my part because I should have said it.

(The jury retired.)

Mr. Melniker: I will take a nonsuit as to the counterclaim.

Exhibit P-1.

MEMORANDUM OF AGREEMENT,

made this eighteenth day of September, 1920, between Israil Shapiro, Trading as Central Garage, of the City of Bayonne, in the County of Hudson and State of New Jersey, party of the first part, for and in consideration of the sum of twenty-five hundred and forty-three dollars, lawful money of the United States of America, to me in hand to be paid by Frank Kvedar, of the same place, in the manner and form hereinafter stated, conditionally sell unto the said party of the second part,

One new, 1½ ton "Apex" automobile truck, fully equipped, and complete, model "D" manufacturers No. 75477,

And the said party of the second part, for himself, his heirs, executors, administrators and assigns, agrees to pay for the said truck the said sum of twenty-five hundred and forty-three dollars in the following manner:

Upon the execution of this agreement, the receipt whereof is hereby acknowledged, cash

$1000.00

Exhibit P-1.

By executing and delivering 12 notes of one hundred dollars each, including the interest. First note due and payable October 7th, 1920, and then every month thereafter.	1200.00
By executing and delivering note for the balance of $343., due and payable November 1st, 1920, but subject to renewal upon payment of $25 and interest on due date and subject to renewal every month thereafter on payment of $25 and interest on the first of every month, until paid.	343.00
	$2543.00

It is agreed between the parties to this agreement as follows:

First. The title to the said automobile truck shall remain in the said party of the first part until the full amount of $2543 is fully paid.

Second. The said party of the second part shall keep the said automobile truck sufficiently insured against loss or damage.

Third. The said party of the second part shall not permanently remove the said automobile truck from Hudson County, New Jersey, without first notifying in writing the said party of the first part of new address and location and shall not remove the said automobile truck from the State of New Jersey without first obtaining the consent in writing of the said party of the first part.

Four. Upon default in any one of the payments as hereinbefore stated, or if levy or other process is made against said truck, the whole of the amount of the consideration price shall immediately become due and payable and upon failure to pay same, the said party of the first part,

Exhibit P-1.

his heirs, executors, administrators, assigns or agents shall have the right to seize and recover the said automobile truck, wherever found, and then to dispose of same as the law requires and to apply the proceeds obtained from a sale of the same as required by law.

The said party of the second part shall have the right to the immediate use and possession of said automobile truck and on fully and completely complying with the terms and conditions and payments as aforesaid shall then become the absolute owner of said automobile truck.

In witness whereof the said parties have hereunto set their hands and seals this 18th day of Sept., 1920.

Signed, sealed and
delivered in the presence of
ISAAC COHEN
MARGARET REIDY
(Signed) ISRAIL SHAPIRO (L.S.)
(Signed) FRANK KVEDAR (L.S.)

STATE OF NEW JERSEY }
COUNTY OF HUDSON } *ss*:

Israil Shapiro, of full age, being duly sworn, on his oath says: that he is the owner of the automobile truck set forth in the within agreement; that he has fully paid for the same; that the same is free and clear of all encumbrances whatsoever.

(Signed) ISRAIL SHAPIRO.

Sworn and subscribed to
before me this 18th day
of Sept., 1920.
(Signed) ISAAC COHEN,
Attorney at Law of N. J.

Bayonne, N. J., Sept. 18, 1920.

Received of Frank Kvedar one thousand dollars deposit as set forth in within agreement.

(Signed) ISRAIL SHAPIRO.

Witness:
(Signed) ISAAC COHEN.

Exhibit P-3.

CENTRAL GARAGE.
Storing, Repairing, Rental and Supplies.
Carbon Removing Oxy-Acetylene Welding
549-555 Broadway
Bayonne, N. J., Sept. 3, 1920.
Mr. Frank Kvedar

	Chassis	$1915.00
	Cab	90.00
	Body	200.00
	Freight and war tax	145.00
	Insurance T. R. C.	193.00
		$2543.00
	Deposit	50.00
		$2493.00
	Note	1200.00
		$1293.00

Exhibit P-6.

KNOW ALL MEN BY THESE PRESENTS:

That Morris Shapiro, of the City of Bayonne, in the County of Hudson, and State of New Jersey, party of the first part, in consideration of the sum of Eleven Hundred Seventy-five Dollars, paid by Joseph Solomon of the City of Bayonne, in the County of Hudson and State of New Jersey, party of the second part, has bargained, sold, granted and conveyed and by these presents does bargain, sell, grant, and convey unto the said party of the second part, his heirs, executors, administrators and assigns, One Motor Truck, Apex, W. U. Serial No. 88238, B. M. 1956, to have and to hold the same unto the said party of the second part, his heirs, executors, administrators and assigns, forever, and Morris Shapiro, does for himself, his heirs, executors, administrators or assigns, covenant and agree to and with the

Exhibit P-6.

said party of the second part to warrant and defend the said described motor vehicle hereby sold unto the said party of the second part, his executors, administrators and assigns against all and every person or persons whomsoever.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 22nd day of June, one thousand nine hundred and twenty-one.

(Signed) MORRIS SHAPIRO (L.S.)

Signed, sealed and delivered
in the presence of
AARON A. MELNIKER,
PETER STILLWELL.

CENTRAL GARAGE
Storing, Repairing, Rental and Supplies.
Carbon Removing Oxy-Acetylene Welding
549-555 Broadway
Bayonne, N. J., Aug. 26, 1920.

Received $50.00 from Frank Kvedar on Deposit 1½ Ton Truck. $2543.

(Signed) I. SHAPIRO.

Exhibit P-7.

AARON MELNIKER
Counselor at Law
Bergoff Building
Bayonne, N. J.

In consideration of the purchase of one Apex Auto Truck from Morris Shapiro and payment to him of Eleven Hundred and Seventy-five Dollars, I hereby covenant and agree with Joseph Solomon the purchaser, to warrant and defend the title of said Morris Shapiro and Joseph Solomon against all claims whatsoever and against all persons whomsoever.

I further agree to abide by all the terms of a certain printed agreement and warranty dated June 11—1921, covering said truck signed by me.

Witness: (Signed) ISRAIL SHAPIRO.
(Signed) PETER STILLWELL.

Exhibit P-8.

CENTRAL GARAGE, BAYONNE, N. J.

Date 6—11—21

I hereby purchase from you under the terms, conditions and prices herein

Cash

as per standard specifications except as noted below.

This purchase is scheduled for shipment from the factory of

on or about

and is F. O. B. Factory.

Model at	Price
Truck Apex	$1175.00
	300.00
Bal. to be paid in cash.	$ 875.00
Total amount of purchase.....	
DEPOSIT—10% on each Truck or car..	

Salesman (Signed) E. BAYAK.

CENTRAL GARAGE.

Sig. (Signed) I. SHAPIRO.

Exhibit P-9.

Bayonne, N. J., 6—11—1921.

No. 1379.

City Branch

UNION TRUST COMPANY OF NEW JERSEY

22nd Street & Broadway, Bayonne, N. J.

Pay to the order of....Iseral Shapiro....$300.00

Three hundred 00/100.....Dollars

(Signed) JOSEPH SOLOMON

(Endorsed: Israil Shapiro.)

Exhibit P-10.

Bayonne, N. J., June 22, 1921.
Number 1381.

City Branch
UNION TRUST COMPANY OF NEW JERSEY
22nd Street & Broadway, Bayonne, N. J.
Pay to the order of...Morris Shapiro...$875.00
Eight hundred and seventy-five 00/100...Dollars
(Signed) JOE SOLOMON.
Endorsed: Morris Shapiro
Israil Shapiro

Exhibit P-11.

Number 5179-K
COMMERCIAL INVESTMENT TRUST
347 Madison Ave., at Forty-Fifth St.
New York, N. Y.
Date..9—9—20..

Frank Kvedar,
26 E. 16th St.,
Bayonne,
New Jersey.

Dealer
Israil Shapiro,
549 Broadway,
Bayonne, New Jersey.

Please take notice that we have purchased your note from the above named dealer, dated 9-7-20 payable in instalments as listed below, covering new Apex 1½ Ton, Serial No. 5395, Motor No. 88238, sold for $2375.13, with contract dated 9-7-20 for $1200.00 covering same.

Due Date	Amount of each instalment.
10-7-20	100.00
11-7-20	100.00
12-7-20	100.00
1-7-21	100.00
2-7-21	100.00
3-7-21	100.00
4-7-21	100.00
5-7-21	100.00
6-7-21	100.00
7-7-21	100.00
8-7-21	100.00
9-7-21	100.00

Exhibit D-2.

Received $50.00 from I. Shapiro on Deposite 1½ truck.

$2543.00

(Signed) LEO L. HAHN.

Exhibit D-3.

Newark, N. J., August, 1920.

Central Garage,

B. & B. MOTOR SALES CORP.
Distributors of
Available
Motor Trucks.
61 & 63 River Street

1	1½ Ton Capacity Pneumatic Equipped New Apex Truck Chassis	$1915.00	
	Less 20 %	383.00	
			$1532.00
	Cab	90.00	
			90.00
	Total		$1622.00

Received Payment,

B. & B. MOTOR SALES CORP.
(Signed) L. W. Brown,
Pres.

Exhibits D-4, P-2, D-6.

Central Garage No. 282.
I. Shapiro, Prop.
549-555 Broadway

Bayonne, N. J., Sept. 9, 1920.

Pay to the order of B. & B. Motor Sales Corp. .....$1575.00.....Fifteen hundred seventy-five 00/100....Dollars.

To the City Branch
UNION TRUST COMPANY OF NEW JERSEY
22nd Street & Broadway
Bayonne, N. J.

(Signed) ISRAEL SHAPIRO.

(Endorsement)

In Payment in full of 1½ Apex Truck.
(Signed) B. & B. MOTOR SALES CORP.

New Jersey Court of Errors & Appeals

FRANK KVEDAR, Plaintiff-Respondent. *vs.* ISRAEL SCHAPIRO, Defendant-Appellant.	ACTION AT LAW

BRIEF FOR RESPONDENT.

FACTS.

This is an action for fraud in the selling of a motor truck by the appellant to respondent under the following circumstances:

Respondent agreed in writing to purchase on Sept. 18, 1920, a certain 1½ ton Apex Truck (Ex. P-1—S. C. p. 151) for $2,543. He paid on account $1,225.00 when on Nov. 3, 1920 (S. C. p. 15) he found out that instead of having a 1½ ton Apex truck he had only received a 1 ton truck. Respondent returned said truck to appellant on Dec. 3, 1920, and refused to make any further payments. He then brought this suit to recover damages for the loss he has sustained by reason of the fraudulent representations of the defendant-appellant.

ARGUMENT OF LAW.

I.

THE TRIAL COURT CORRECTLY REFUSED TO NON-SUIT RESPONDENT ON HIS OPENING TO THE JURY.

Appellant makes much in his brief of the fact that there is nothing about rescission mentioned in the complaint and that counsel for respondent

in his opening mentioned that the motor truck had been returned. There can be no doubt that this action was an action for deceit. The complaint was so drawn and the case tried on that theory. The mere fact that the truck had been returned was immaterial.

> "The plaintiff may disaffirm the contract and still maintain an action for deceit for damages sustained by him."

Prest vs. Farmington.
117 Maine. 348.
104 Atl. 521.
2 A. L. R. 1390.

Warren vs. Cole.
15 Michigan. 265.

Fields vs. Brown.
76 S. E. 8—160 N. C. 265.

In the case of Prest *vs.* Farmington (*supra*) it was held:—

> "A party agreeing to do work at a specified sum under fraudulent representations on discovery of the fraud may repudiate the contract and sue for deceit."

II.

The Trial Court Was Correct in Refusing to Require and Direct the Plaintiff to Elect Between His Remedy in Tort for Fraud and Deceit and His Remedy on Contract for Breach of Warranty.

The plaintiff brought his action for deceit. The contract was an executory contract as far as he was concerned. When he discovered the fraud he gave back the car and refused to make further payments.

Under the law plaintiff, under all the circum

stances of the case, was not bound to elect a remedy. He had elected his method of procedure when he started suit.

He returned the car. If the mere return of the car did not place him in *statu quo* and he suffered other damages he can bring an action for deceit.

There was evidence to show that the mere returning of the car could not put plaintiff in *statu quo* as he proved other damages, which were the proximate result of the defendant's fraudulent acts (S. C. p. 17, lines 30—40).

Smith vs. Bolles.
132 W. S. 125.

McRae vs. Lonsby.
130 Federal 17.

Atlanta, etc., R. R. vs. Hudunt.
29 Georgia. 461.

Linderman Co. vs. Hildebrand.
127 N. E. 813.

Nash vs. Minnesota Title Co.
163 Mass. 574.

Although one rescinds his contract of purchase for fraudulent representations of the seller as to quality of the goods, this will not prevent him from recovering special damages for injury to his business in attempting to sell the goods before discovering the fraud.

American Pure Food Co. vs. Elliot.
151 N. C. 393—66 S. E. 451.
31 L. R. A. N. S. 910.

III.

THE TRIAL COURT CORRECTLY REFUSED TO GRANT DEFENDANT'S MOTION FOR A NON-SUIT OR A DIRECTION OF A VERDICT.

(*a*) There was evidence to show that the appellant was an agent or sub-dealer and authorized to sell Apex trucks (S. C. p. 35, lines 20—30).

Appellant solicited respondent's business (S. C. p. 20, lines 30—40) and sold him an Apex truck which he represented to be a 1½ ton truck (Ex. P-1, p. 151). There was evidence to show that the truck was in fact a 1 ton truck (p. 24, lines 10—40; p. 52, l. 19), and that the defendant knew or should have known by reason of his position as an automobile dealer that the truck was in fact not what he represented it to be.

(*b*) Appellant claims that respondent did not act with reasonable dispatch in returning the truck after he discovered the fraud. There was evidence to show that respondent discovered the fraud on November 18, 1920, and returned the truck on Dec. 3, 1920 (S. C. p. 25, l. 10).

It was certainly for the jury to say under all the circumstances of the case as to whether the respondent rescinded promptly.

Roberts vs. James.

83 N. J. L. 244.

(*c*) Appellant claims that the respondent did not return the car in good condition. There was evidence that the car when returned was in good condition ( ).

There being conflicting testimony on this point it was for the jury to decide as a fact.

IV.

The Court Charged the Jury Correctly.

That portion of the Judge's charge to which appellant excepts in Point (5) of his brief relates to the question of rescission only. Respondent submits that this portion of the charge is correct. The appellant made no request to charge on this point and cannot afterwards claim error because in his opinion the Court omitted something from the charge, which should have gone in.

Error cannot be predicated on the failure of the Court to give an instruction not asked for.

Westcott vs. Garrison.
6 N. J. L. 132.

An omission to charge on a particular point is not error where no special instruction was asked.

Camden R. R. Co. vs. Williams.
61 N. J. L. 646.

To entitle a party to insist on a proper instruction requested by him shall be given the request should be made at or before the beginning of the argument.

Dunn vs. Jersey City Galvanizing Co.
73 N. J. L. 586.

Appellant is not correct in his contention that respondent was obliged to put him in *statu quo.* Respondent did all he could to put appellant in *statu quo,* and that is all that he was bound to do.

A party seeking to rescind a contract must place the other party in statu quo *as far as he is able to do it.*

Byard vs. Holmes.
33 N. J. L. 119.

If the charge of the Trial Court be deemed not sufficiently comprehensive the burden is on the exceptant by submitting a distinct request to charge in order to make the objection a basis for review.

Lieberman vs. Drill.
94 N. J. L. 337.

V.

THERE WAS LEGAL EVIDENCE TO SUSTAIN THE VERDICT.

There was legal evidence upon which the jury

could base its verdict and there being such evidence this Court will not disturb the verdict.

There was evidence that at the time appellant sold car to respondent that he must have known that the truck was not as he represented it to be. He was the agent for the truck, knew that there were different models of Apex trucks (p. 36, l. 25), had catalogs showing difference in various models (p. 20, l. 30). He afterward sold this truck as a one-ton truck (p. 34, lines 10—15). He surely was in a position to know the difference between the various types of trucks and from the testimony given as to the difference in weight (p. 65, l. 1--40), and appearance and equipment the jury could legally infer from the facts adduced before them that appellant knew that he was selling a one-ton Apex truck representing it to be a one and a half ton truck.

Such facts having been shown from which the jury might infer fraud this Court will not weigh the case submitted.

Koch vs. Costello.
93 N. J. L. 367.

Nelson vs. Bock.
84 N. J. L. 123.

Kelly vs. Lemebck & Betz.
86 N. J. L. 471.
87 N. J. L. 696.

(Affirmed.)

VI.

THE QUESTION OF THE AMOUNT OF DAMAGES WILL NOT BE REVIEWED ON APPEAL.

Appellant argues that the damages are excessive. This question is not reviewable on this appeal.

Kletch vs. Betts.
89 N. J. L. 348.

RESUMÉ.

Respondent contends that this case was properly submitted to the jury and that the Court correctly passed on the questions of law in the case, and that the verdict should stand.

ALEX SIMPSON,

Atty. for Respondent.

Swiney Publishing Co.
Bayonne, N. J.

New Jersey Court of Errors and Appeals.

FRANK KVEDAR, Plaintiff-Respondent, *vs.* ISRAEL SHAPIRO, Defendant-Appellant.	ACTION AT LAW On Appeal from Circuit Court. Hudson County.

BRIEF FOR APPELLANT

Statement of the Case

The plaintiff claims to have bought of the defendant a 1½ ton Apex motor truck on September 18th, 1920, for which he agreed to pay $2543.00. He paid $1225.00 on account and gave notes for the balance. After using the truck for several months, he claims to have discovered that the truck was a 1 ton truck and not a 1½ ton truck, and that he thereupon returned the truck. He then brought this suit for damages.

In the complaint (p. 1) the plaintiff charges the defendant with having "connived and conspired to defraud" the plaintiff and with "falsely and fraudulently representing" the truck to be a 1½ ton truck, and that the defendant knew such representations to be false and fraudulent, and made them "for the purpose of deceiving and actually did deceive" the plaintiff. All of these allegations are denied by the defendant.

At the trial, the plaintiff introduced testimony to prove that the truck was a 1 ton truck.

The defendant introduced testimony:

1. That the truck was a 1½ ton truck;
2. That the plaintiff did not act promptly after his alleged discovery that the truck was not a 1½ ton truck, but kept and used the truck for a considerable time thereafter; and
3. That the plaintiff had had several col-

lisions with the truck while it was in his possession and had otherwise misused it, so that when it was returned, it was in a very badly damaged condition.

It is defendant's contention that the plaintiff has misconceived the nature of his action and that, at most, the plaintiff was only entitled to recover the difference in value between what he contracted for and what was actually delivered to him.

There was a verdict for the plaintiff for $1100.00, from which the defendant appeals.

Grounds of Appeal

1. That the Trial Judge erred in refusing to non-suit the plaintiff on the opening to the jury, there being a variance between the cause of action as opened to the jury and the cause of action stated in the complaint.

2. That the Trial Judge erred in refusing to direct and require plaintiff to elect between his remedy in tort for fraud and deceit and his remedy on contract for breach of warranty.

3. That the Trial Judge erred in refusing to grant the defendant's motion for a non-suit at the close of plaintiff's case.

4. That the Trial Judge erred in refusing to direct a verdict for the defendant at the close of the whole case.

5. That the Trial Judge errred in charging the jury as follows:

> "In order for the plaintiff to have a verdict and get the benefit of an action such as this, and one which has been tried as this one has, —I mean upon the theory that this one has, it is necessary for him to establish that he did rescind his contract and that he did make return of the machine, and in doing so, or in respect thereto, rather, the law is this:
>
> > " 'It is a well settled principle that to entitle one to rescind a contract for fraud, he must exercise his option within a reasonable time after the discovery of the fraud.

If he delays rescission for an unreasonable time he will be held to have affirmed the contract and cannot afterwards rescind.'

"There might be many reasons for that rule, gentlemen, many of which I cannot recall now, but there is one which is perhaps most common, and that is this: Rescission or intent to rescind would be most clearly portrayed and most clearly shown, if we as humans had the ability to ascertain what the working of others' minds were. We have not that ability, we cannot see the working of each other's mind, directly, I mean. The only way in which that can be determined is by what that other human being says and does. Any person may say, 'I made up my mind to do this or that,' or, 'I made up my mind to do it at such a time, or such a time.' Whether he did or not cannot be ascertained by us, by you as jurors, except from evidence which goes to show his acts, what he did or what he said, and, therefore, the law presumes that it is not to be said that one has concluded to rescind the contract unless that mental determination is followed by some physical act which demonstrates or proves that mental determination, and that it is unreasonable to expect that one would act toward a contract of that sort, determining to rescind, unless he acted with promptness after coming to that mental conclusion.

"Now, of course, as to what is a reasonable time sometimes is to be determined by the court; many times, not; because what is reasonable often in point of time depends upon the circumstances and the conditions of the particular case, and that is why I am submitting that matter to you.

"The question there will be, have you been satisfied--and the burden is upon the plaintiff —have you been satisfied by the greater weight of the evidence that the plaintiff did

determine to rescind his contract and give up the benefit of it, any that he might have? And was it done within a reasonable time after he obtained the knowledge of the alleged fraud and deceit? If not, gentlemen, if that has not been made out to your satisfaction in that manner, then again the plaintiff is not entitled to your verdict, but your verdict must go to the defendant. If it has been made out then it would seem, if all these other matters which I have spoken to you of have been made out, and been made out by the greater weight of the evidence, that the plaintiff would be entitled to have your verdict."

6. That the verdict is contrary to the evidence.

7. That the verdict is contrary to the Judge's charge.

8. That the damages are excessive.

BRIEF OF THE ARGUMENT.

I.

The Trial Judge Erred in Refusing to Non-Suit the Plaintiff on the Opening to the Jury, there Being a Variance Between the Cause of Action as Opened to the Jury and the Cause of Action stated in the Complaint.

The plaintiff's opening is given on page 10 of the state of the case. It will be noted that the complaint (p. 1) makes no mention of any recission or return of the goods. The cause of action as laid in the complaint is in tort for fraud and deceit.

If fraud and deceit is practiced upon a purchaser of goods, it is not necessary that he return or offer to return the goods or rescind the sale. He may keep the goods, thereby affirming the sale, and sue for damages for the fraud perpetrated upon him and for the loss he sustained by reason thereof. He need not allege or prove a rescission of the sale or return of the goods. That

is precisely the kind of an action plaintiff makes out in his complaint, and in an action of this nature the measure of the plaintiff's damage is the difference between what he paid and the value of what he received.

On the other hand, the defrauded purchaser need not keep the goods, but may, if he so choose, return them and sue to recover back the purchase price. In such a case, it is necessary for the plaintiff to allege and prove a rescission and return or tender of the goods. In such a case, the measure of his damages is the amount he paid for the goods. That is not the kind of an action the plaintiff makes out in this case.

In his complaint, the plaintiff makes out a case in which he affairms the contract and sues to recover damages for the loss sustained by him by reason of the fraud practiced upon him. However, in his opening to the jury the plaintiff departs from the action made out in the complaint and states that the goods had been returned, and asks for the return of the money paid, an entirely different sort of an action, founded not in tort, which is predicted upon an affirmance of the contract, but rather upon a disaffirmance of the contract, and one in which the measure of damage is entirely different. 24 R. C. L. 353.

To add to the confusion, we find the plaintiff at various stages of the case changing his position, and the Court, too, appearing to be in doubt as to just what the plaintiff was claiming. On page 11, the Court says: "I take it from the complaint that it is an action for deceit." On page 18, both Court and counsel join in stating that the action is founded on fraud and deceit.

On page 19, the Court says that the plaintiff is required to prove three things:

(1) That there were false representations,

(2) That the defendant knew them to be false, and

(3) That the plaintiff believed them to be true.

This clearly indicates that the action was being tried on the theory of fraud and deceit, which is the case made out in the complaint and not the one made out in the opening.

Of course, the plaintiff would have the right to rescind and return the goods if he was a victim of fraud and deceit in the sale, but he must so state in his complaint—that he has elected to rescind and has returned the goods—because what he is entitled to recover depends upon the case he makes out in his complaint, and because further, his right to rescind and return the goods depends upon whether or not he is able to put the vendor in "statu quo," because if he is not able so to do, then that remedy is closed to the plaintiff and he must then retain the goods and his only recourse then is an action—not upon the theory of a rescission—but for damages he sustained by the fraud, the measure of which would be the difference between what he paid and the value of what he received.

Again on page 80, we find counsel again stating: "We are suing in deceit, I understand."

At page 127, the Court says: "This case is rested, as I understand the pleadings and the way it has been tried, upon the theory or the assertion that the contract was rescinded." This is manifestly not so, as the pleadings, instead of making out a case of rescission, on the contrary make out a case of affirmance of the contract.

At page 129, counsel for the plaintiff says: "I think the only measure of damage is what we paid." This is also manifestly untrue on the theory of the case made out in the pleadings. The plaintiff would only be entitled to what he paid if he had pleaded a rescission.

And finally, on page 137, the Court says: "We have tried this cause, as I understand it, upon the theory of rescission." That may be true, but that is not the case made out in the pleadings.

II.

The Trial Judge Erred in Refusing to Require and Direct the Plaintiff to Elect Between His Remedy in Tort For Fraud and Deceit and His Remedy on Contract For Breach of Warranty.

As indicated before, the plaintiff had his choice of bringing one action or the other. Instead of doing so, he lays his action in his complaint in tort for fraud and deceit, and in his opening to the jury, he presents the cause of action on contract for breach of warranty.

It is true the Court might have permitted the plaintiff to amend his complaint to conform with the opening to the jury, but the plaintiff should have been required to elect either to proceed on one theory or the other, for the obvious reason that the measure of damages in the two cases is different, the measure of damages in the one case being the amount paid, while in the other it is the difference between the price paid and the value of the article received. The Court should have compelled the plaintiff to elect to proceed on one theory or the other and to make his pleadings conform to his choice, if necessary.

Dillon vs. Kralik. 168 Mich. 216; 132 N. W. 1041.

Lynn vs. Atl. Coast Line. 165 N. C. 143; 81 S. E. 1.

Whitten vs. Griswold. 60 Ore. 318; 118 Pac. 1018.

Commercial City Bank vs. Mitchell. 105 S. E. 57.

Bruce vs. Eustis. 8 Oh. App. 341.

III.

The Trial Judge Erred in Refusing to Grant the Defendant's Motion for a Non-Suit at the Close of Plaintiff's Case.

The defendant moved for a non-suit (p. 77) on the grounds:—

> (A.) That there was no evidence that the defendant connived and conspired to defraud the plaintiff and that he falsely and fraudulently represented to the plaintiff that the truck was other than just what it was; there was no evidence that defendant made any false representations or that he knew they were false when he made them, or that he had any knowledge or reason to believe that what he said was untrue.

It appears from the testimony of the defendant, who was called by the plaintiff as a witness, that the truck sold to the plaintiff was the only Apex truck that this defendant ever saw and the only one he ever sold (p. 37); that he and the plaintiff went together to the Apex agent in Newark and told the agent in Newark that the plaintiff wanted to buy a one and a half ton truck and the defendant put in an order for a ton and a half truck and gave a deposit and received a receipt from the Newark agent for the deposit paid upon purchase of a one and a half ton truck (p. 38—Ex. D-2, p. 158); that the Newark agency afterwards billed the defendant for a 1½ ton truck (Ex. D-3, p. 158) and the defendant paid the Newark agency with a check (Ex. D-4, p. 159), upon which was endorsed the following:

> "In payment in full of 1½ Apex truck.
>
> B. & B. Motor Sales Corp."

The defendant insists (p. 49) that he delivered to the plaintiff a 1½ ton truck. He was testifying then as the plaintiff's witness. He testified

further, that he did not know anything about the truck except what the agent in Newark told him, and that (p. 50) he was neither an agent nor a sub-dealer, never having accepted the proposition to handle this truck. In other words, he and the plaintiff selected this truck from a catalogue and together went to the agency in Newark and placed an order with the agent for a 1½ ton truck. The $50.00 deposit paid by the plaintiff was paid directly to the Newark agent, who gave a receipt for the $50.00 as a deposit on a 1½ ton truck. The truck was afterwards delivered to the defendant by the Newark agent as a 1½ ton truck and the defendant, in turn, delivered it to the plaintiff. There is nothing in the plaintiff's case anywhere to show that the defendant knew that the truck delivered was other than a 1½ ton truck or had any reason to believe it to be anything but a 1½ ton truck, and the appellant challenges plaintiff's counsel to point to anything in the plaintiff's case to indicate that at the time the defendant delivered this truck he had any knowledge or reason to believe that the truck was anything else but a 1½ ton truck.

In view of the claim made by the plaintiff that the defendant knew that this truck was a 1 ton truck and of the ruling made by the Court (p. 19) that the plaintiff was required to establish that the defendant knew the representations he made were false, it is submitted that the plaintiff should have been non-suited because there was nothing in the plaintiff's case from which such guilty knowledge could be spelled out.

(B). That plaintiff did not act promptly after his alleged discovery to rescind his contract.

According to plaintiff's testimony (p. 23), he had an accident with the truck on November 3rd. On the same day (p. 24) he sent to Newark for new parts. He obtained parts for a 1½ ton truck but they did not fit, so he returned them the next day, November 4th, and got parts for a 1 ton

truck, which did fit. He was told by the clerk from whom he obtained the parts (p. 28) that the truck must be a 1 ton truck. He told Harry Bach, the mechanic who repaired the truck, (p. 72) that the truck was a 1 ton truck. Notwithstanding that, he used the truck from November 6th until November 18th (p. 25). This of itself would have been sufficient violation of his obligation and duty to return the truck promptly upon his discovery that the truck was not what he had purchased. He does not even return the truck then. He retains it until December 3rd (p. 25), almost a month after his discovery, and then attempts to return it. All this time, between November 18th and December 3rd, it was laying in plaintiff's garage (p. 27).

A buyer must act promptly after discovery of fraud. If he does any act after discovery of fraud indicating a treatment of the property as his own he waives his right to rescind.

24 R. C. L. 357.

(C). When the plaintiff brought the car back it was not in the same condition as when he received it.

If the plaintiff chose to exercise his right to rescind the sale and return the goods, in case he did not get what he bought, he could do so only if he could place the defendant in "statu quo." In other words, in order that the plaintiff might avail himself of the right to rescind his contract, it was necessary for him to return the goods in the condition in which he received them, ordinary wear and tear excepted.

We find, however, that on November 3rd, after having used the truck two months, he had a collision, in which a spindle was bent, bearings were broken, axle was bent, radiator was damaged and leaking, and the front bumper was broken (p. 23).

We find, also, from his own testimony that (p. 30) on the first day the plaintiff took the truck out he ran upon the curb and bent a spindle, which necessitated putting in a new one.

The defendant, testifying as a witness for the plaintiff, says further (p. 41) that the battery was missing, the bumper was missing, the mudguard was bent and the motor could not be turned over; that the pistons were frozen in; that the truck was in very bad condition (p. 40).

The plaintiff has no right to rescind unless he can put the defendant in "statu quo." If he is unable to do that, he must resort to another remedy—he is not bereft of all remedy—he must then sue for the difference between what he paid and the value of the article received. If property is seriously damaged while in the hands of the buyer this will ordinarily deprive him of the right to rescind.

24 R. C. L. P. 358.
7 L. R. A. (N. S.) 694.
4 Comp. Stat. 4664 Sec. 69.
Hirsch vs. Verschnur. 108 Atl. 181.
Elliott on Sales. P. 665.
Woodward vs. Emmons. 61 N. J. L. 281.
Ann. Cases, 1916. B. 96.
24 R. C. L. 294.
Burnley vs. Shinn. 80 Wash. 240.

(D). There was no rescission of this contract.

There is no allegation in plaintiff's complaint that he ever rescinded the contract.

(E). That there was a variance between the cause of action laid in the complaint and the proof.

The complaint bases the action upon an affirmance of the contract. Plaintiff's counsel states in the argument (p. 80) that plaintiff is suing in deceit, which, of course, is predicated upon an affirmance of the contract. The proof, however, makes out a case of a disaffirmance of the contract and a rescission. As has been pointed out, the measure of damages in the two actions is entirely different. It is manifestly improper that at the close of the plaintiff's case the defendant

should still be in the dark as to what the nature of the plaintiff's action was.

Case vs. C. R. R. 37 Atl. 65-59, N. J. L. 471.
Gilliard vs. P. S. R'way. 110 Atl. 688.
Murphy vs. No. J. St. R'way Co. 71 N. J. L. 5.
Folsom vs. Squire. 72 N. J. L. 430.
McCord vs. Martin. 191 Pac. 89.

IV.

The Trial Judge Erred in Refusing to Direct a Verdict For the Defendant at the Close of the Whole Case.

The defendant moved for a direction of a verdict (p. 129) on the grounds:

(A). That there was no evidence of deceit or wilful misrepresentation. Assuming that the truck was a 1 ton truck and not a 1½ ton truck, there was no evidence in the case that defendant knew it or had any reason to believe it. On the contrary, it was he himself, who was imposed upon (p. 129).

Rice, a witness for the defendant, testified (p. 82) that he was Vice-President of the Hamilton Motor Company, the manufacturer of the Apex truck; that the B. & B. Motor Sales Company in Newark was the New Jersey agent; that a 1½ ton truck has 14 spokes in the rear wheels and a 1 ton truck has 12. (The truck delivered to the plaintiff had 14 spokes in the rear wheels (pgs. 103, 112, 115). That the 1 ton truck has 33 by 4 pneumatic tires in front and 32 by 3½ solid tires in rear, whereas the 1½ has 35 by 5 pneumatic tires all around. (The truck delivered to the plaintiff had 35 by 5 pneumatic tires all around). The witness further testified that there was no difference in the frames of the two trucks and no difference in the motor and no difference in the front springs, but the rear springs of the ton and a half truck had one more leaf in it than the rear springs of the 1 ton truck, and there was a slight difference in the diameter of the rear

axle, and that (p. 85) outside of the difference in the number of spokes, one could not tell by looking at a truck without examining it and without going behind it to measure the diameter of the differential, whether a truck was a 1 ton or a 1½ ton truck. The following questions put to Mr. Rice and his answers are illuminating:

> Q. I asked you some question this morning about whether you could tell on casual examination or by looking at the one and a half or one ton truck whether it was one or the other. Could anyone tell—could you tell, even as experienced as you are in this business, as vice-president of this company that manufactures this truck,—could you tell by looking at the truck whether it was a one and a half or a one ton truck?
>
> A. Not without a little inspection.
>
> Q. Have to make a close examination of it?
>
> A. Yes.

Mr. Rice further testified (p. 85) that the Hamilton Motor Co. sold the truck such as was delivered to the plaintiff, as a 1½ ton truck. He further testified that defendant was never an agent or a sub-dealer for the Apex truck.

In view of this testimony and of the testimony of the defendant, and the absence of anything to the contrary, there was absolutely nothing in the case to justify a finding that the defendant was guilty of deceit or wilful misrepresentation, or that the defendant knew or had any reason to believe that the truck delivered was not the truck contracted for.

> (B). That at the time the car was returned, it was not in the same condition in which the buyer received it, less ordinary wear and tear due to reasonable use (p. 133).

Mr. Rice, the manufacturer of this truck, who has been in the automobile business for twenty-five years, testified (p. 86) that at the time of the alleged return of the truck by the plaintiff to the defendant, it had suffered a depreciation of 50

per cent., of which 25 per cent. would be due to ordinary wear and tear and 25 per cent. be charged up to the collision.

As the price of this truck was $2543.00, this means that in dollars and cents this truck had suffered a depreciation of about $600.00 due to ordinary wear and tear, and about $600.00 due to it having been in a collision.

Morris Shapiro testified that when the truck was first delivered to the plaintiff (p. 100) the plaintiff ran up on the curb and broke up the whole front, that is, the spindle and the axle. The spring had to come off and the front spindles and the axle was bent and had to be straightened, and that when he examined the truck on December 3rd, he found that the bumper was off (p. 101), the fenders were bent, the battery had been removed, the chassis and the front springs were out of line, the motor was leaking slightly, it was loose, bearings were loose, cylinder was scored. This condition was due to careless handling, running without water and overheating. He further testified (p. 102) that the depreciation due to this condition of the car would amount to about 50 per cent. of its market value, of which from 20 to 25 per cent. would be charged against ordinary depreciation.

It is quite clear from this testimony that this truck was not, at the time of its return, in the same condition in which the buyer got it, less depreciation due to reasonable use. The plaintiff, consequently, was unable to place the defendant in "statu quo," and that being the case, he could not avail himself of the right to rescind. With the right of rescission taken away from him, he was not then entitled to recover the purchase price. He was confined then to his remedy for damages, the measure of which would be the difference between what he paid and the value of the article delivered.

(C). That plaintiff did not act promptly

to return this truck after his discovery of the alleged fraud.

According to the plaintiff's own testimony, he discovered as he claims, that the truck was a 1 ton truck, on November 4th, notwithstanding which he used the truck until Nomeber 18th and then kept it until December 3rd (p. 25) in his garage, which was only two blocks away from the defendant's garage. There is no explanation of why the plaintiff used this truck from November 4th until November 18—in other words, used it for two weeks after he had discovered the alleged fraud—and why he kept it in his possession for two weeks after that within two blocks of the defendant's garage. Plaintiff does not offer any explanation of why he did not return the car sooner.

The law is unequivocal that upon discovery of a fraud, if the buyer intends to rescind, it is his duty to promptly return the goods. There might be circumstances in which a failure to make immediate return would be excusable, but there are no such circumstances here. There is no disputed question of fact. There are no facts here from which different inferences might be drawn which might make a question for a jury. There is no room for any difference of opinion as to the facts. The plaintiff himself, according to his own uncontradicted testimony, used the truck for two weeks after he had knowledge of the facts upon which he now relies for a rescission, and at the expiration of the two weeks he kept it for two weeks longer within two blocks of the defandant's garage. It was his duty to return it promptly. He offers no explanation of his failure to do so. It is well established that the doing of any act by a vendee after knowledge of the facts which would justify a rescission—the doing of any act which indicates the exercise of the right of ownership—deprives the vendee of the right of rescission. The plaintiff did the very act which above all things indicates the exercise of the right of ownership—used the truck in his business and con-

tinued to use it and retained possession of it for a month after discovery of the alleged fraud.

Byard vs. Holmes. 33 N. J. L. 119.

V.

That the Court Erred in Charging the Jury in the Manner Hereinabove Set Forth in the Fifth Ground of Appeal.

The objection to this portion of the charge is that it fails to instruct the jury that one of the conditions precedent to a rescission is a return of the goods in the same condition as when the goods were received, reasonable wear and tear excepted. The Court merely states that "it is necessary for him (the plaintiff) to establish that he did rescind his contract and that he did make return of the machine." The Court says further that the question is, did the plaintiff determine to rescind his contract and was it done within a reasonable time after he obtained the knowledge of the alleged fraud and deceit. That is laid down as the only test of plaintiff's right to recover. Nothing is said about the further requirement that the plaintiff, in order to be able to exercise his right to rescind, must restore the defendant to "statu quo," reasonable wear excepted. The appellant respectfully insists that this charge ignores the provisions of the Sales Act and of the common law which makes a restoration to "statu quo" a condition precedent to rescission of a sale of goods.

VI. & VII.

The Verdict is Contrary to the Evidence and to the Judge's Charge

The judge charged (p. 150) that it must be shown that "false representations were made by the defendant and that it was known to him that they were false and known to him at the time he made them." The jury, in the face of this in-

struction and in the face of all the evidence to the contrary, by its verdict found that defendant knew the representations he is alleged to have made were false at the time he made them. There is no evidence whatever to support such a finding. In the first place, there is no evidence whatever that the defendant ever made any representations of any kind to the plaintiff. The evidence looked at in the light most favorable to the plaintiff merely shows that the defendant ordered a 1½ ton truck for the plaintiff from the manufacturer's agent and that some time thereafter a 1 ton truck was delivered to him. There is no testimony whatever (p. 22, 23) that any representations of any kind were made at the time the truck was bought or at the time the truck was delivered or at any other time. As for any knowledge on the part of the defendant that the truck delivered to him by the manufacturer and which he in turn delivered to the plaintiff was a 1 ton truck and not a 1½ ton truck, the evidence is entirely to the contrary. The Vice-President of the manufacturing company says it would be difficult to tell without a close examination. The defendant never sold an Apex truck before and, in fact, never saw one until the plaintiff put in his order. There is no evidence to contradict this. In the face of all this evidence to the contrary, the jury finds by its verdict that the defendant made false representations and that at the time he made them he knew them to be false.

The Judge further charged the jury that if the plaintiff did not return the truck in good condition, reasonable wear and tear excepted, he was only entitled to recover $1225 (the amount he paid) plus interest, less depreciation due to the damage suffered by this truck. In the face of this direction and of the testimony of Rice (p. 86) and Morris Shapiro (p. 102) that the damage due to abnormal use amounted to about $600.00, the jury brought in a verdict for $1100.00. This verdict cannot be reconciled with the charge nor with the

evidence. There was no contradiction nor refutation of the testimony of Rice and Shapiro. If the jury found that there was no damage due to abnormal use, then the verdict should have been $1225.00, plus one year's interest, amounting to about $75.00, making a total of $1300.00. The verdict being for $1100.00, the clear and only possible inference was that there was an allowance of $200.00 for damage due to abnormal use, but the uncontradicted evidence in the case is that such damage amounted to about $600.00. This was the only evidence there was on this subject. The jury should either have accepted it or rejected it in toto. The jury had no right to say $200.00 when the only evidence in the case was that it was $600.00. The jury had no right to substitute its own judgment for the judgment of two expert witnesses where there was no conflicting testimony. Its finding, therefore, was contrary to the express direction of the court and contrary to the only testimony there was on the subject.

VIII.

The Damages Are Excessive.

For the reasons given under Point VII., the damages were excessive and unsupported by the testimony.

The undisputed testimony of Rice and Shapiro was that the depreciation on this truck due to damage, aside from normal wear and tear, was about $600.00.

Assuming that the jury found for the plaintiff on all the points necessary to make out the plaintiff's case, and assuming that the plaintiff was entitled under his pleadings to recover the purchase price, the plaintiff would only be entitled to recover $1300.00, less the amount of the damage to the truck, aside from normal wear and tear. The uncontradicted testimony of Rice and Shapiro was that such damage amounted to approximately $600.00, which should have been de-

ducted from $1300.00, making a difference of $700.00, which should have been the limit of plaintiff's verdict.

In Conclusion.

Assuming that this truck was a 1 ton truck and not a 1½ ton truck; assuming that Rice, the manufacturer of the truck, does not know whereof he speaks and that the truck in question was not in fact a 1½ ton truck; (disregarding the testimony that there appeared to be just four points of difference between a 1 ton and a 1½ ton truck, *i.e.*:

1. spokes,
2. springs,
3. rear axle, and
4. tires,

and that the truck delivered to the plaintiff had the spokes and tires (things which could be plainly seen) of a 1½ ton truck, and the rear springs and rear axle (things which required a minute examination) of a 1 ton truck)—right and justice would seem to dictate that after the plaintiff had used this truck from September 20th to November 3rd, during the course of which the truck suffered a depreciation of 25 per cent. due to ordinary wear and tear, and after it had been badly damaged while in his possession causing a further depreciation of 25 per cent. and continued to use it for two weeks thereafter and then kept it two weeks after that, he should not be permitted to return the truck and the defendant should not be compelled to take it back and return the purchase price.

It is true that assuming the defendant to have failed to deliver the article bought by the plaintiff, the plaintiff should have some remedy. If the plaintiff were himself free from any fault, he would be entitled to a choice of two remedies—he could either rescind and recover what he paid or he could keep the article purchased and sue for the damage he sustained. His right to rescind depended upon his ability to restore the defend-

ant to "statu quo." Being unable to restore the defendant to "statu quo," he loses the right to rescind and is then limited to his remedy of recovering the difference between the price paid and the value of the article received, which is the case made out in the complaint.

It is respectfully submitted, therefore, that the judgment should be reduced to $700.00 or a new trial ordered.

Respectfully submitted,

AARON A. MELNIKER,

Of Counsel for Appellant.