

INDEX

	Page
District Court Summons	1
State of Demand	2
Judgment Record	3
Notice of Appeal to Supreme Court	5
Testimony	6
Stenographer's Certificate	45
Judge's Certificate	45
Decision and Findings	46
Refusal to Find	47
CERTIFICATION OF FACT Reasons	48 58
Order Permitting Additional Reasons	61
Notice and Grounds of Appeal to Court of Errors	62
Opinion of Supreme Court	64
ORDER OF AFFIRMANCE	68

TESTIMONY

Plaintiff's:

David Rabinowitz,	
Direct	6
Cross	8
Re-direct	18
J. Chauncey VanHorne,	
Direct	20
Cross	24

Defendant's:

Isidor Kahn,	
Direct	36
Cross	40

Rebuttal:

David Rabinowitz, Direct	42
J. Chauncey Van Horne, Direct	44

EXHIBITS

Plaintiff's:

	Offered Page	Printed Page
Exhibit P-1—Insurance policy on auto- mobile	8	48

Defendant's:

Exhibit D-1—Official circular in which theft was advertised	39	49
Exhibit D-2—Proof of loss	16	50
Exhibit D-3—Application for insur- ance which describes the car as new	38	51
Exhibit D-4—Letter dated September 15, 1915 to the Vulcan Insurance Co. signed The Van Horn Co.	37	53
Exhibit D-5—Tally slip for repair ...	31	54
Exhibit D-6—Description of car; Affi- davit of Applicant and Certificate of motor vehicle number	42	57
Exhibit D-7—Letter dated September 25, 1915, Vulcan Insurance Com- pany	39	

Supreme Court

OF THE

State of New Jersey

District Court Summons

Mercer County, ss:

The State of New Jersey, to any Constable of said County: or the Sergeant-at-Arms of the District Court of the City of Trenton. 20

SUMMON: Valcan Insurance Company to appear before the District Court of the City of Trenton, to be held at the City Hall in said city, on the 20th day of December, Nineteen Hundred and Fifteen at ten o'clock in the forenoon, to answer David Rabinowitz in an action at law, for Four Hundred Dollars, with interest and costs of suit. 30

Hereof fail not.

Witness, John A. Montgomery, Esquire, Judge of said Court, at Trenton aforesaid, the Eighth day of December, in the year Nineteen Hundred and Fifteen.

HENRY M. STRATTON,

Clerk. 40

State of Demand

DISTRICT COURT OF THE CITY OF
TRENTON

10	DAVID RABINOWITZ, <div style="text-align: center;">vs.</div> VULCAN INSURANCE COMPANY, Defendant.	}	Plaintiff, State of De- mand.
----	---	---	---

1. Plaintiff was the owner of an automobile known as a Ford touring type, factory No. 602-436, in Trenton at the time of its insurance and of a theft herein stated.

20 2. On June 25, 1915, defendant was and still is a corporation of the State of New York with power of insuring risks by theft or loss.

3. On that date in consideration of \$7.50 to wit, paid, the defendant executed the plaintiff a policy of Insurance on said automobile.

4. On September 7, 1915, said automobile was lost or stolen.

5. Plaintiff's loss thereby was \$400.

30 6. On October 8, 1915, plaintiff furnished defendant with proof of loss and interest in said property and otherwise duly performed all the covenants of the said policy on his part.

Defendant has not paid his loss.

Plaintiff demands Four Hundred Dollars damages.

40

WILLIAM E. BLACKMAN,
Attorney for Plaintiff.

Judgment Record

IN THE DISTRICT COURT OF THE CITY OF TRENTON

State of New Jersey, } ss:
Mercer County. } 10

DAVID RABINOWITZ, <div style="text-align: center;">vs.</div> VULCAN INSURANCE COMPANY, 	Plaintiff, Defendant.	}	In an action at Law. De- mand \$400.00 Atty for plttf.
---	------------------------------	---	---

A summons was issued in the above-stated cause December 8, 1915, returnable December 20, 1915, at 10 o'clock a. m., and was returned by the constable as follows:

“I served the within summons December 15, 1915, on the defendant corporation by reading it to J. C. Van Horn, agent of said corporation and giving him a copy.

“WALTER D. POWNALL,
“Constable.”

State of Demand filed December 8, 1915. 30

January 26, 1916, the plaintiff appeared by W. E. Blackman, the defendant by Hershenstein & Finnerty. Upon request of the defendant Theresa Bergen was sworn as stenographer.

David Rabinowitz sworn. Insurance policy offered. Plaintiff rested.

Motion for non-suit refused. 40

Judgment Record

David Rabinowitz recalled. J. Chauncey Van Horn sworn, application, proof of loss, license application and letters offered.

Isidor Kahn sworn. Defendant rested.

Decision reserved. Briefs to be submitted.

10 February 1, 1916, the evidence being closed and submitted to the Court, judgment was given by the Court in favor of the plaintiff and against the defendant for the sum of four hundred dollars damages and twenty-three dollars and sixty-eight cents costs.

Judge's finding filed as of February 11, 1916.

Bond and notice of appeal filed February 11, 1916.

20 I, Henry M. Stratton, Clerk of the District Court of the City of Trenton do hereby certify the foregoing to be a true copy of the Judgment Record in the above entitled cause. That the names of the parties to said suit, the date of the issue of the summons, the return date and the return thereon endorsed by the officer, the date and the filing of all papers in said cause, the date and the nature of the judgment together with the finding of the Judge in said cause, and all other proceedings had in said cause are correctly set forth
30 as the same appear upon the records of said Court.

Witness, my hand and the seal of said Court at Trenton aforesaid this eighteenth day of May, A. D. 1916.

HENRY M. STRATTON,

40 (Seal)

Clerk.

Notice of Appeal

(Filed, February 11, 1916)

DISTRICT COURT OF TRENTON

DAVID RABINOWITZ, vs. VULCAN INSURANCE COMPANY, Defendant.	}	Plaintiff, Action at Law on Contract	10
---	---	--	----

To William E. Blackman, Esq., Atty for Pltff:

Sir:

PLEASE TAKE NOTICE that the defendant, the 20
Vulcan Fire Insurance Co. hereby appeal from
the judgment of the District Court of the City
of Trenton, rendered in the above stated action
on the first day of February, 1916.

HERSHENSTEIN & FINNERTY,
Attorneys for Defendant.

Testimony

TRENTON DISTRICT COURT

10	DAVID RABINOWITZ, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div> <div style="text-align: center; padding: 5px 0;">vs.</div> VULCAN INSURANCE COMPANY, <div style="text-align: right; padding-right: 20px;">Defendant.</div>
----	--

Appearances:

Mr. W. E. Blackman, appearing for the plaintiff.

20 Messrs. Hershenstein & Finnerty (Mr. Hershenstein) appearing for the defendant.

Testimony taken upon a trial of the above entitled matter, on Wednesday, January 26, 1916, before Hon. John A. Montgomery, Judge.

Therese Cross Bergen duly sworn as stenographer.

30 It is admitted that the Vulcan Insurance Company issued the insurance policy in connection with loss under which suit is brought.

DAVID RABINOWITZ, called and sworn on behalf of the plaintiff testified as follows:

Direct-examination by Mr. Blackman:

Q. Mr. Rabinowitz, were you an owner of a Ford automobile prior to September the 7, 1915?

A. Yes.

40 Q. From whom did you purchase that automobile? A. The Van Horne Company.

David Rabinowitz—Direct

Q. How much did you pay for the automobile?
A. \$495.

Q. Is that the automobile that you are speaking of now—the same automobile that was insured under this policy? A. Yes.

Q. What happened to that automobile? A. It was stolen September the 7th; I left it on the street. 10

Q. Where did you have it? A. Out in Hanover Street, 242 E. Hanover Street.

Q. What time did you lose it if you know? A. About 11 o'clock at night.

Q. Where did you go when you left the automobile? A. I went into the house.

Q. 242 E. Hanover Street? A. 242 East Hanover Street. 20

Q. How long did you stay there? A. I stayed there all night till 7 o'clock in the next morning.

Q. When did you miss the automobile? A. About 7 o'clock the next morning.

Q. Did you file the proof of loss with the company? A. Yes.

Q. Did you receive any money from them on account of the insurance policy? A. No.

Q. How much is due on the insurance policy? A. \$400. 30

Q. You received no portion of that? A. No.

Q. Have you fulfilled, so far as you know, and can, all of the conditions of said insurance policy?

Objected to as a conclusion of law. Objection sustained.

Q. What did you do in regard to the loss of this automobile, Mr. Rabinowitz? A. I don't know what you mean.

The Court: What did you do concern- 40

David Rabinowitz—Cross

ing the loss of the automobile. What did you do with the company?

A. I went in and I reported to the insurance, to Mr. Van Horne, that I made a loss of it; I didn't do nothing.

10 Q. Who is Mr. Van Horne? A. He is the agent for them.

Q. Is he the one with whom you took out the policy? A. Yes, he is the one I took the policy.

Q. Did you conceal or misstate anything in writing, any material fact in your application for the insurance?

Objected to.

A. I didn't make the application.

The Court: Didn't make the application.

20 The Witness: No, the girl made out the application in the office and I just signed it.

Q. So far as you know, did you make any false statements in that application? A. I don't know it.

The Court: I think that would be a matter of defense anyway, Mr. Blackman.

Mr. Blackman: Well, if it is I won't bother going further with it.

30 Insurance policy offered in evidence, received and marked Exhibit P-1.

CROSS-EXAMINATION by Mr. Hershenstein:

Q. Mr. Rabinowitz, to whom did you apply for this policy of insurance? A. To the Van Horne Company.

Q. Local insurance agents? A. Yes.

40 Q. Were you an employee of the Van Horne

David Rabinowitz—Cross

Company during the month of June, 1915? A. Yes.

Q. In what capacity? A. As a salesman.

Q. And for what period of time were you em-

Q. You, had been with them prior to June 1915? A. I didn't have no contract with them; I have been with them. 10

Q. Talk up please. A. I didn't have no contract with them. I have been with them for three years.

Q. You have been with them prior to June, 1915? A. Yes.

Q. You say you purchased your automobile from the Van Horne people? A. Yes.

Q. How did you pay them?

Objected to as immaterial. 20

Mr. Hershenstein: If your Honor please, we desire to show that the automobile was not purchased for the amount that the witness states it was; that the automobile was not a new machine; the policy of insurance is for a new automobile; the application is for a new automobile; the proof of loss describes the automobile as a new automobile and we will endeavor to show this automobile was not a new ma- 30
chine when this policy was issued.

The Court: I will allow the question on that ground.

A. I paid them in cash.

Q. All in one sum? A. No; money has been coming to me on my commission and he took that out; out of it.

Q. Well, when was the last payment for that machine made? A. I couldn't tell you exactly. 40

David Rabinowitz—Cross

Q. Was it made prior to June 25, 1915?

Objected to as immaterial.

Question withdrawn.

Q. Mr. Rabinowitz, had you seen this car before you purchased it? A. Yes.

10 Q. And for what period of time prior to your purchasing this car have you seen this particular car? A. I couldn't tell you what time it was, but as soon as I seen the car, Mr. Van Horne had it and then I bought it off him.

Q Well, tell us the first time you saw this car at the Van Horne people's place of business?

A. Well, I should say about a week or two weeks. I seen the car before I bought it.

20 Q. You are sure that was the first occasion that you saw this particular car, a week or two weeks before you purchased it? A. I am positively.

Q. You are quite sure of that, sir? A. I think I am, yes.

Q. Did you see this car in January, 1915? A. January, 1915.

Q. I don't hear you.

The Court: I don't think he has answered yet; answer the question.

30 A. I seen that car, yes.

Q. Yes; you saw that car in January, 1915 and where? A. At Mr. Van Horne's office.

Q. Now, you know this particular car was injured in an accident before you bought it, don't you?

Mr. Blackman: I object to that; don't see that that makes any difference.

The Court: Oh, I will allow it.

40 A. Yes.

David Rabinowitz—Cross

Q. And how long before the time when you purchased it, was this accident? A. I couldn't tell you that; I don't know.

Q. Was it a month before? A. I don't know.

Q. Weren't you in the car at the time? A. When the accident was? 10

Q. Yes; well now, can't you tell us when that accident was? A. Yes.

Q. Well now, tell us? A. Now, when I bought that car, I went out that day, see, and I had an accident with it, and then I brought back the car to Brock's— that is, I left it near Mount Holly. I had the accident myself.

Q. Where was that, Mr. Rabinowitz? A. That was in June, I think.

Q. In June? A. Yes. 20

Q. What day of the month in June? A. I couldn't tell you that.

Q. Are you quite sure this accident occurred in June, 1915? A. No, I couldn't say—I think it was in June.

Q. Don't you know as a matter of fact, this accident happened in April, 1915? A. April.

Q. Yes. A. (Witness mumbles and takes memorandum out of pocket). I could tell you when I bought that car—that accident happened 30 in June.

Q. In June? A. Yes.

Q. You are positive of that, sir? A. Yes.

Q. Now, tell us exactly how the car was injured; what was the nature of the injuries? A. I broke the front wheels, I broke the radiator.

Q. Yes. A. And I broke the wind shield; that's about all.

Q. It was a smash-up wasn't it? A. Yes. 40

David Rabinowitz—Cross

Q. Now, did you go to the Van Horne people for the purpose of applying for this insurance; you made the application for insurance, didn't you? A. I made the application?

10 Q. Yes; you understand my question; did you make the application for this insurance? A. No, I didn't.

Q. You did? A. I did not.

Q. Who did? A. The girl in the office.

Q. Well, how did she know you wanted insurance upon this car? A. Well, she knowed my machine was stolen.

20 Q. No, no; you don't understand me. Before the insurance policy was issued, this insurance policy upon which suit is brought, you made an application for insurance with the Van Horne people? A. Yes.

Q. And did you state to the Van Horne people the facts upon which the policy was to be issued? A. Yes.

Q. Yes; did you state to them that this was a Ford car? A. Yes.

Q. Did you state to them that the factory number was 602,486? A. Yes.

30 Q. Did you state to them that it was a touring type of car? A. Yes.

Q. Did you state to them that it was of gas motive power? A. Yes.

Q. That it was four cylinders? A. Yes.

Q. That it was a 1915 model? A. Yes.

Q. Did you state to them that this was a new car? A. Yes.

40 Q. Did you state to them that you bought it as a new car? A. Yes.

David Rabinowitz—Cross

Q. Now, as a matter of fact, don't you know at the time you took this insurance out, this was a second hand car which was at least purchased by the Van Horne people as far back as January, 1915? A. No, because when I had the accident I took it down to Brock's and paid \$160 and had it repaired that car. 10

Q. You knew that this car was in the possession of the Van Horne people since January, 1915, didn't you? A. Yes.

Q. Now, just tell us where you were on the night this car was stolen? A. I was at 242 East Hanover Street.

Q. Who were you with? A. Mr. Richmond.

Q. And who else? A. Nobody else.

Q. You are sure he was the only person? A. 20
Positively.

Q. Well, what did you do with the car at night time? A. I left it in the street in the front of his house.

Q. And when was the car stolen? A. When I come out the next morning.

Q. And you left it in the street all night? A. Yes.

Q. Are you accustomed to leaving your car in the street all night? A. What't that? 30

(Question repeated.) A. Well, I didn't know that—I don't know it.

Q. Didn't know what?

The Court: Answer the question, are you accustomed to leave your car in the street all night?

The Witness: I don't know what that means.

The Court: Well, do you generally do it then?

The Witness: No. 40

David Rabinowitz—Cross

Q. Was this the first time you did it? A. This was the first time.

Q. Well, why did you leave the car in the street all night on this occasion, Mr. Rabinowitz? A. I didn't want to go home; he asked me to stop with him and he says "It is all right; it is safe to leave it there," and I thought, I will leave it and I will stop with him.

Q. Where was this place? A. 242 East Hanover Street.

Q. Are there any garages around that place? A. No.

Q. Where is the nearest garage from that place? A. Brock's Garage at Canal Street.

Q. Now, did you report your loss to the police? A. Yes; in the morning about half-past 7.

Q. Do you know that the police advertised this loss; do you know that? A. Yes; I seen them.

Q. I show you this circular that is attached to the report—I show you this circular, and ask you whether this was the circular which was printed after you notified the police department about your loss?

Mr. Blackman: I object to that; how does he know that it was printed or anything about it?

Mr. Hershenstein: I only want to introduce this in evidence for the purpose of showing that the police department officials got the information from this plaintiff that the car was not owned at the time by him and they advertised in their official circular, this car as the car of the Van Horne Company.

David Rabinowitz—Cross

The Court: I will admit it for what it is worth.

Exception noted for the plaintiff.

Q. Is this the circular which was issued by the police department after you reported the loss?

A. I don't know when they issued this circular. 10

Circular marked for identification, Exhibit D-1 for identification.

Q. Now, after this so-called theft occurred, you made a claim under your policy of insurance? A. Yes.

Q. I show you this paper and ask you whether that's your signature? A. Yes.

Q. Affidavit taken by J. W. Van Horne, Notary Public? A. Yes.

Q. I will read to you from this proof of loss: 20

Descriptive trade name:	Ford	
Factory number:	602486	
Type	Touring Car	
Motive power	Gas	
Number of cylinders	4	
Horse power	22	
Year built	1915	
Year model	1915	
New or second-hand when purchased by present owner	New.	30

Didn't you know, as a matter of fact that the car was not new when you purchased this from the Van Horne people? A. I bought it as a new one as far as I know.

Q. Didn't you testify a few minutes ago that you had ridden in that car prior to your purchasing the car, didn't you so testify, yes or no?

A. Yes, I ridden in that car. 40

David Rabinowitz—Cross

Q. Yes; you testified you had an accident to that car before you insured it, yes or no?

Mr. Blackman: No, he didn't testify to that; he testified the accident occurred—

10 Q. All right; there was an accident to that car before you purchased it? A. No, after I purchased.

Q. Will you now swear this accident occurred before or after you purchased this car? A. After; I say I had the accident when I had the car; when I bought the car I was out with her and I had the accident.

Q. Didn't you take this car back to the Van Horne people after this accident? A. No, I took it back to Brock's and had it repaired, \$160.

20 Q. Didn't you know this car was in the possession of the Van Horne people in January, 1915? A. January, yes.

Proof of loss marked Exhibit D-2 for identification.

Q. Now, tell me exactly, Mr. Rabinowitz, what date you purchased this car? A. I couldn't tell you the date.

30 Q. Well, you are so sure about some of the other facts in this case, can't you tell us as nearly as possible the date? A. No, I couldn't tell you.

Q. Well, fix it as nearly as possible. A. I think in March.

Q. In March, 1915? A. Yes.

Q. Did you drive the car between March, 1915 and June, 1915, you were driving the car between those periods? A. No, I wasn't driving it in March; I was driving it in April, I got my license.

40 Q. When was your accident? A. My accident was in June.

David Rabinowitz—Cross

Q. What part of June? A. I couldn't tell you that. I don't know the date.

Q. Don't you know whether it was the first part of June, the middle part of June or the end of June? A. About the middle part, I think.

Q. About the middle part of June. That's as nearly as possibly that you can fix it at this time? 10

A. I think (refers to memorandum).

Q. Now, you refer to a memorandum; refer to that memorandum and see if you can fix the time more definitely. A. No, I couldn't say; I haven't got the date here.

Q. Is it possible it was before June 15, 1915, sir? A. No.

Q. That's impossible? A. Yes.

Q. What makes you say that is impossible? 20
A. Because I know it was in June.

Q. Well, will you say it was later than June, 1915? A. It was what?

Q. Will you say this accident occurred later than June 15? A. No.

Q. That it occurred on June 15? A. No, I don't know the date, but some time in June.

Q. Do you mean it occurred some time before the middle of June, is that the best answer you can make, sir? A. I couldn't say it was in the middle or the first part, some time in June. 30

Q. That's your best answer? A. Yes.

Q. Well, now, you are positive that you bought this car in March, 1915? A. Yes.

Q. Have you your repair bills here from the Brock's Garage for repairing your car? A. I haven't got it with me, but I could get that.

Q. You can get that? A. Yes.

David Rabinowitz—Re-direct

Q. All right; will you produce them? A. Yes.

Mr. Hershenstein: I ask that they be produced, if you have time.

Q. Well, now, Mr. Rabinowitz, was there an accident to this car prior to the accident in which you yourself were? A. No.

10 Q. You are sure of that? A. Sure.

Q. Don't you know there was an accident to this car in April, 1915? A. No, I don't know.

Q. Well, how often do you go in the Van Horne people's place of business here in Trenton? A. How often?

Q. Yes. A. I am all the time there.

Q. Pardon me? A. I am most of the time there.

Q. Yes; you are there most of the day? A. Yes.

20 Q. You see them come in with a car and leave with a car, don't you? A. Yes.

Q. And you have seen this particular car in front of Van Horne's place of business on many occasions? A. Yes.

Q. Prior to the time you purchased this car? A. Yes.

Q. Yes; that's all.

RE-DIRECT-EXAMINATION by Mr. Blackman:

30 Q. Mr. Rabinowitz, are you sure that the accident which has been spoken about occurred after you owned the car, after you bought the car? A. After I bought the car?

Q. Yes. A. No; I am not sure of that.

Q. What was the trip and where were you going? A. I was going down to Cape May.

Q. Who was with you? A. My wife and my
40 wife's sister.

David Rabinowitz—Re-direct

Q. Well, does that refresh your memory as to whether it was after or before you purchased the car? A. I couldn't remember that.

Q. Well, if you purchased it in March and the accident happened in June, it must have been after it?

10

Objected to. Objection sustained.

Q. Do you know anything about the circumstances connected with the purchase of the machine by Van Horne? A. Yes.

Q. Do you know why it was purchased?

Mr. Hershenstein: Now, I object to that question as not material to this issue, the circumstances under which Van Horne bought it. The question here is the circumstances under which the plaintiff purchased this car. 20

The Court: I don't know what the object is at present. I will admit it.

(Question repeated.) A. Yes.

Q. Why? A. For the line of work I was doing.

Q. For a line of work what? A. My use in the business.

Q. Was it purchased by Van Horne for your use in the business when he bought it? A. Yes.

Q. When was your particular line most active, when did you get busy in your line? A. Around June, May and June. June. 30

Q. What do you do? A. Selling lots, land.

Q. Whereabouts? A. In Trenton; we were selling in Bristol.

Q. Was it the development of the Van Horne Company? A. Yes.

Q. Did you subpoena Mr. Richmond? A. Yes.

Q. Is he here? A. No.

40

J. Chauncey Van Horne—Direct

Q. Do you know why he isn't here? A. I don't know why.

The Court: Who is Mr. Richmond?

10 Mr. Blackman: Mr. Richmond is the gentleman where he stayed that night and I have simply asked this question so no advantage will be taken of his absence. We subpoenaed him; he refused to accept the subpoena, evidently; he isn't here. His testimony isn't important except in that respect.

Q. At the time you made this application did you consider that the car was a new car?

Objected to as immaterial.

20 Mr. Blackman: Under the application, the question is as to whether he thought so or not.

The Court: I think that is for the Court to determine.

J. CHAUNCEY VAN HORNE, called and sworn on behalf of the plaintiff, testified as follows:

30 Direct-examination by Mr. Blackman:

Q. What's your business, Mr. Van Horne? A. Real Estate and Insurance.

Q. Were you the local agent for the Vulcan Insurance Company? A. The Van Horne Company was of which I am President.

40 Q. Did you have in your employ Mr. Rabinowitz during the year 1915? A. At the time the policy was written, and his season is over in October.

J. Chauncey Van Horne—Direct

You see he is what we call a land salesman; they work in the open summer season on our land developments in and around Trenton and during this season he was with us, yes.

Q. Did you purchase the machine from Brock?

A. The machine was purchased from Brock to be used in the line of the development work by Mr. Rabinowitz. 10

Q. Did Mr. Rabinowitz know the reason for the purchase of that car? A. Yes; he knew that the car was to be used by him that season and he was to pay for it from the bonuses and commissions coming to him.

Q. Then from the time of its purchase to the present time or the time of loss, it belonged to Mr. Rabinowitz? 20

Objected to as a conclusion. Withdrawn.

Q. For whom was this car purchased? A. This car was purchased for Mr. Rabinowitz and it was—his work doesn't start until the spring opens up, just like now, the lot business is dead.

Q. Who used it previous to the opening of his season? A. Well, until Mr. Rabinowitz moved up to our Pennington Development, he had no place to keep the car so the car was kept at our garage. As soon as he was out at that end of town—and then until he learned how to drive the car and what few calls he did have he would use our colored fellow, chauffeur; he had no license. 30

Q. But he used it some from the time you bought it, Mr. Van Horne, from Brock? A. Oh, yes, that was his work taking prospective purchasers out to see lots.

Q. And you chauffeur drove the car for him?

A. Yes; in fact, taught him how to drive the car 40

J. Chauncey Van Horne—Direct

until he got his license. I might add he was some time learning how to drive the car.

Q. From the beginning who owned the car? A. From the beginning who owned the car? It was bought for Mr. Rabinowitz but it was bought by us from Brock.

10 Q. Why did you buy it? A. Why, we have an account with Brock's in interchange or exchange of business. Brock needs insurance; we need automobiles and supplies; it is the same way with tires from the rubber factory here; they need insurance; we need tires. If one of the salesmen need a tire, the tire was taken from the factory and charged to our account; we in turn charge it to the salesman's account.

20 Q. Then do you get usually a discount, or get your discount by way of getting business?

Objected to.

The Court: It is leading in the first place.

Q. Was there any profit to the Van Horne Company or to Mr. Rabinowitz in the purchase of the automobile under this method?

Objected to as leading. Objection sustained.

30 Q. Why did you purchase it in your name? A. Through our exchange of business; this way we get a profit on the business that we write for Brock's or for any of the large concerns with whom we deal and in turn gives us the opportunity of furnishing our salesmen with autos or supplies whatever the case may be at the lowest market price. The same time it gives us an opportunity of giving an exchange or handling an exchange of business.

40 Q. Did you give Mr. Rabinowitz credit for that

J. Chauncey Van Horne—Direct

advantage to your company? A. Yes, sir, I think he was given credit for that.

Q. When was this charged off, if you know, to Mr. Rabinowitz? A. I think it was charged in June; I think the entry was made on the books in June—charged against him when his credits were just starting to come through. 10

Q. Prior to that had he or had he not received any commissions? A. Yes; he had had his bonus from 1914; that would come to him right after the first of the year; then he starts to accumulate and then in April and May—in June he starts his work; his sales commissions are coming in and that was what was used to pay for the car.

The Court: What's the date of the insurance policy? 20

Mr. Hershenstein: June 25th, sir.

Q. Do you know when the accident happened that was spoken about? A. Yes, sir, I was called on the telephone shortly after Mr. Rabinowitz secured his driver's license. Mr. Rabinowitz asked me some time—

Q. Well, I will ask the question this way, Mr. Van Horne. Was it after he had taken possession of the car or before, that's all I want to know? A. It was after he was up on the Pennington Road and had his driver's license and he asked me if he could have two or three days off; he was quite proud that he had his driver's license, of course, he wanted to take his wife and sister-in-law, I think, down home. He lived down near Cape May, I think it was; his wife's people; he wanted to go down there; I believe this accident happened on the way back; it was a foggy or rainy night and they ran into a ditch. 30

Q. That's all. 40

J. Chauncey Van Horne—Cross

CROSS-EXAMINATION by Mr. Hershenstein:

Q. Mr. Van Horne, what officer of the Van Horne Company are you, sir? A. President.

Q. You are President and are therefore familiar with all of the transactions of that company?

10 A. Not all, no.

Q. Most of the transactions of your company?

A. Most important ones.

Q. Well, now, do you know when your company actually purchased this car? A. Yes.

Q. When? A. January, I think it was January the 2d.

Q. Yes; did you hear Mr. Rabinowitz testify he purchased this car from you in March, sir, is that correct, 1915? A. In March?

20 Q. Yes. A. I don't know just what date it was, but I know— (interrupted).

Q. Just a minute; don't argue with me. When did Mr. Rabinowitz purchase this car from the Van Horne Company? A. Mr. Rabinowitz understood the purchase of that car was when we bought the car and it was going to be turned over to him and when he got a place and got going with his work.

30 Q. Do you mean to say you at no time considered yourselves owner of that car? A. Yes, we were owner of the car in the fact that it hadn't been turned over to Mr. Rabinowitz, yes.

Q. That's your explanation? A. Yes; but it was bought with the idea just as I tell you.

Q. Now, the Van Horne people considered themselves owners of that car when they purchased it, didn't they? A. Owners when they purchased it?

Q. Yes. A. Yes, certainly.

40 Q. And then you or your company sold that car to Mr. Rabinowitz? A. Sold it to him, yes.

J. Chauncey Van Horne—Cross

Q. Now, when did that sale take place? A. When did that sale take place?

Q. Yes. A. It was understood—

Q. No; just answer the question; when; when did you sell it to him, name a time. A. Why, the car was bought for Mr. Rabinowitz' work.

Q. Will you now testify that in January 1915 this car was sold and was owned by Mr. Rabinowitz? A. No, I won't testify to that; but it was bought with the intention of turning it over to Mr. Rabinowitz. 10

Q. Didn't you consider yourselves owners of that car in January, 1915?

Mr. Blackman: I object; he has answered that; no use repeating it.

The Court: I will allow the question; he has answered it already, but go ahead. 20

A. Yes.

Q. Now, when did you transfer title to that car to Mr. Rabinowitz? A. The car was billed to him in June, I think that's when it was entered on our books.

Q. Now, in June, 1915, then you transferred possession and title to that car to Mr. Rabinowitz, didn't you?

Objected to as a conclusion. 30

The Court: I don't think so.

Mr. Blackman: He has testified when the bill of sale was made, testified under what circumstances it was turned over to him.

The Court: I haven't heard of any bill of sale for the car.

Mr. Blackman: He said it was billed to him in June; he has testified to the whole circumstance. 40

J. Chauncey Van Horne—Cross

The Court: All right; he has testified that it was billed to him in June.

Q. Now, as a matter of fact, Mr. Van Horne, the Van Horne Company made application to the Department of Motor Vehicles for the purpose of obtaining a license on that car in January and described themselves as owner, didn't you? A. We did.

Q. I now show you this application, the Department of Motor Vehicles, and ask if that's not the application filed by your company? A. That's a copy of it.

Q. And that's the very car, sir, upon which suit is now being brought under this policy? A. I suppose so.

Q. That's car No. 602,486? A. Yes.

Q. That application is dated January 2, 1915? A. It was.

Q. Now, were you acting as insurance agents also for the Vulcan Fire Insurance Company? A. Yes, sir.

Q. You were their resident agents here in Trenton? A. The Van Horne Company, yes.

Q. And you insured this particular car in the Vulcan Insurance Company of which you were the agent? A. The Van Horne Company did, yes.

Q. You insured this car at the request and upon the application of Mr. Rabinowitz, I assume? A. Yes.

Q. Is that correct? A. I think that is so.

Q. And your company filed this application with the Vulcan Fire Insurance Company.

Objected to as not proper cross-examination.

A. I cannot recognize—

J. Chauncey Van Horne—Cross

Mr. Blackman: I want it understood he is not my witness.

A. I cannot recognize the application because I don't handle the applications; we have an insurance collector that receives applications of insurance.

Q. That's your form of application? A. It is our form, yes. 10

Q. It is your form, yes, that you furnish us. This is your rubber stamp that you use? A. Yes.

Q. This is the usual application you made to the Vulcan Insurance Company for insurance? A. This is the usual one.

The Court: What's the date?

Mr. Herchenstein: June 25, 1915.

Q. And you issued the policy on the very day 20 this application was made to you? A. That I don't know; that was the next day or two, I suppose.

Q. You are familiar with all the transactions relative to this particular car, aren't you, about this car and the theft and the report to the company and claim for loss? A. I cannot say I know all about it; ask me any particular thing; I will try and tell you, sir.

Q. Were you notified that this car was stolen? 30 A. Yes, the office was notified.

Q. The office was notified by whom? A. By Mr. Rabinowitz that the car was stolen and in turn we instructed him to tell the police.

Q. And did you report it to the Vulcan? A. Reported it to the Vulcan.

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

Q. How did you report it? A. By mail; I don't 40

J. Chauncey Van Horne—Cross

know; I did not; guess the insurance collector did.

Q. And do you know whether there was correspondence with the Vulcan Fire Insurance Company relative to this loss? A. Yes, considerable
10 correspondence.

Mr. Blackman: My objection goes to all this line of examination.

Q. I now show you letter dated September 15, 1915, from the Van Horne Company and ask you if this is your letter, without reading it, sir. A. Without reading it?

Q. Yes. Is that your stationery? A. Yes, that's our stationery.

Q. That's your letter sent to the Vulcan? A. It is our letter head.
20

Q. Is this your letter? A. I don't know; you don't want me to read it?

Q. You can't identify it? A. No, I can't identify it.

Q. All right; read it. A. This is undoubtedly in reply to letter of yours and undoubtedly written by one of the clerks of the office, not dictated—

Offered for identification.

Objected to.

The Court: It will be marked for identification.
30

Letter marked Exhibit D-4 for identification.

Q. Now, this letter from Van Horne Company, to refresh your recollection reads as follows: (Reads) A. I have never seen that letter and never seen the contents of it before; that letter
40 was never dictated or read by me.

J. Chauncey Van Horne—Cross

Q. You now admit, sir, this is the letter of your company in response to letter—

Mr. Blackman: He said it was their letter head, that's all he said.

Q. Well, will you deny this letter was sent by your company? A. I won't deny it, won't admit it; I have never seen it before. 10

Q. All right, sir. A. Any letters I dictate you will find my initials down in the corner.

Q. Now, if I should say to you, sir, that your company wrote to us under date of September 15 as follows that this car, the car in question, was purchased in June, 1915, from Brock's Garage, agents for the Ford Company; "We are personally acquainted with the assured as he is one of our salesman and the line was direct—" 20

Mr. Blackman: I object.

Q. —which I assume means the policy—

Mr. Blackman: I object to the question being asked.

Mr. Hershenstein: I haven't finished the question.

Q. Would you say that your company was wrong in giving us this information? A. I would say—

Mr. Blackman: Don't answer. 30

A. I don't mind answering that.

Mr. Blackman: I object that this isn't a proper question, first on cross-examination; if it is direct-examination it certainly isn't proper.

The Court: It isn't direct-examination.

Mr. Blackman: It must be direct.

The Court: It isn't direct-examination.

Mr. Blackman: This isn't proper cross- 40

J. Chauncey Van Horne—Cross

examination; these people have got to accept Mr. Van Horne as their own witness and if he is their own witness it is direct-examination.

The Court: I will allow the question.

Exception noted for plaintiff.

10 A. I think I can recall it, yes, I say the company is wrong and that you know through your investigators that that question is wrong, because you have seen the bill of sale from Brock; you know what day it was bought and everything else about it.

Q. You say this information in this letter if such letter was sent to us, is incorrect? A. That that little statement in there is incorrect, yes.

20 Q. Do you know of any other accident which occurred to this car besides the accident which Mr. Rabinowitz testified to in June, 1915? A. Do I know of any other?

Q. Yes. A. I don't know. I don't know that that accident happened in June.

Q. Well, when did you say this accident happened? A. I am not saying when but you ought to know; you have been furnished with all that information.

30 Q. You are testifying.

The Court: Then you do not know?

The Witness: I do not know.

Q. Will you tell us whether or not you know the date of any accident which occurred upon this car? A. Definite dates I do not know.

Q. All right; approximate dates, sir. A. No, I won't say approximate dates because I don't know.

40 Q. Will you tell us whether you know whether

J. Chauncey Van Horne—Cross

one or more accidents occurred to that car? A. I do not know.

Q. You do not know? A. I do not recall; I do not know, that's right.

Q. Can you tell us the month in which any accident took place upon this car? A. No. 10

Q. I now show you this tally slip and ask you if this is upon your stationery? A. It is.

Q. Will you look that through carefully; is this a tally for repairs which your company sent to us? A. That's I don't know; I suppose it has been sent to you unless one of your men got it from the office, bookkeeper or something else, I don't know.

Slip offered for identification.

Mr. Blackman: Objected to on the same 20
ground as the other; has nothing to do
with this case.

Received and marked for identification,
Exhibit D-5.

Q. Now, these papers purport to be bills dated May 8, 1915 sent by your company to the Vulcan Fire Insurance Company and the repairs—

Q. For what purpose? A. For repairs charged against the Van Horne Company and I ask you by looking at this paper, whether it will refresh 30
your recollection as to when the date of this accident occurred. A. I don't know the date of the accident; we get a bill that long almost every month in the summer from Brocks, wash and polish and all that kind of stuff.

Q. Referring to these papers, sir, and the date upon this statement could you tell us whether your memory is refreshed as to the date of this particular accident? A. I can tell you this if you 40

Argument

will find out the date of Mr. Rabinowitz's license it was shortly after that he made his trip.

Q. All right; when was Mr. Rabinowitz' license obtained? A. I don't know that.

10 Q. You don't know that? A. If you want me to fix it I can tell you it was shortly after that he went down him.

Q. What is your name, sir? A. J. Chauncey Van Horne.

Q. And where is the proof of loss? (Paper produced) Are you a notary public of New Jersey? A. I am a notary public of New Jersey.

Q. And you took this affidavit for Mr. Rabinowitz upon this proof of loss? A. Yes.

20 Q. That's all.
By the Court: Q. You say you were the resident agent of the Vulcan Insurance Company? A. Yes, sir.

Plaintiff rests.

30 Mr. Hershenstein: Now, if your Honor please, I move for a non suit upon these grounds: first, it has been proven that this car was purchased by the Van Horne Company some time in January, 1915; they purchased the car as owners and made application from their own testimony to the Motor Vehicle Department that this car in question was owned by them and upon their application which is marked in evidence, and upon their own testimony, this license was procured and granted to the Van Horne Company as owners of this car. The
40 testimony further shows that Mr. Rabin-

Argument

owitz says that an accident happened upon this car prior, he says, to June, 1915. This policy of insurance was obtained June 25th so by no stretch of the imagination—

The Court: My recollection is Rabinowitz said it was in June and he wouldn't say anything further. 10

Mr. Hershenstein: That's my recollection, if your Honor please. I tried to get him down to dates but he was very indefinite. He said this car was in an accident some time before the middle of June, 1915.

Now, Mr. Van Horne, who knows about these transactions, knows about the purchasing of the car and its sale, identifies the statement blanks of the Van Horne Company, which show that repairs were made upon that car in May, 1915, and Mr. Van Horne further testifies that title to that car did not pass to Mr. Rabinowitz until June, 1915. Now, if your Honor please, it shows that Mr. Rabinowitz never owned this car until June, 1915; that the very testimony shows that the Van Horne Company purchased and owned this car in January and yet knowing these facts, and Mr. Rabinowitz testified that he rode in the car often, was in the car before he purchased it, in his application and proof of loss, he swears that this car is a new car. 20 30

Now, if your Honor please, the decisions both in our state and other jurisdictions, are quite unanimous upon this point, that a representation made by an applicant for 40

Argument

10 insurance, if it be material, is such a representation which if untrue, whether the applicant knew it to be untrue or not, vitiates the policy and we have a very case in point if your Honor please, where the New York Courts have decided that where an applicant says that he insures a 1907 model and it turns out that the car was a 1906 model that the policy is void, because the risk of an old machine is not the same as a new car.

20 Now, in this case if you Honor please, the testimony shows the plaintiff in this case was not the owner of this car, the original owner of a new car that he purchased, but a second hand car; that he purchased a car which has been used which he himself has used repeatedly and which the Van Horne people from whom he did purchase it made the application for a license in January as owners and obtained the license upon their application and the Van Horne people themselves testified that title to this car never passed until June, 1915. It is therefore a representation which is material, if your Honor please, a representation which goes to the making of this policy of insurance and a representation upon which we had a right to rely and upon discovery that this car was not a new car, the policy cannot be effective.

30
40 Now, as a matter of fact, if your Honor please, insurance companies will not take a theft risk on an old car and without go-

Argument

ing to the motive of these people at all— I don't want to impute any dishonesty at all, upon the facts produced before your Honor, we are entitled to a nonsuit.

The Court: You don't claim there was any misrepresentation which was not known to your agent here do you? 10

Mr. Hershenstein: We claim, if your Honor please, that this agent was acting for Mr. Rabinowitz; the application was made to him; Mr. Van Horne so testifies, was made to him at the instance of Mr. Rabinowitz and at his request this policy was issued; it just happens your Honor, that these people were also agents of our company. 20

The Court: He was your resident agent here though.

Mr. Hershenstein: Yes, sir, but the policy of insurance itself says, referring to line 6, "The entire policy shall be void if the insured or his agent—OR HIS AGENT—has concealed or mis-stated in writing or otherwise any material fact. The proof is that Mr. Van Horne was his agent for this particular policy and if he has mis-stated the facts to Mr. Van Horne and he mis-states the fact to us, the policy is void and the insured is bound by representations he made through the agent who was his agent for the writing of this policy. 30

The Court: He was your resident agent though.

Mr. Hershenstein: Yes, sir. 40

Isidor Kahn—Direct

The Court: I will hear the defense in this case and grant you an exception.

Exception noted for defendant, to refusal of the Court to grant a nonsuit.

10

ISIDOR KAHN, called and sworn on behalf of the defendant, testified as follows:

Direct-examination by Mr. Hershenstein:

Q. Mr. Kahn, you are the president of the Vulcan Fire Insurance Company? A. Yes, sir.

Q. And are familiar with the insurance business, I take it? A. Yes, sir.

20 Q. Does your company insure theft risks on second hand cars? A. No, sir.

Q. In this particular instance, if the application was handed to your company for a risk upon a second hand car, Mr. Rabinowitz being the applicant, would your company accept the risk? A. No.

30 Q. Will you state to the Court why your insurance company does not accept the theft risk on second hand cars? A. In consequence of the values—the depreciation of the same and the desire on the part of an assured to foist upon an insurance company a possible loss of the car.

Q. So in no event do you insure second hand cars against theft? A. No, sir, for that reason, no. We only insure new cars and inform all our agents to that effect.

40 Q. I show you a letter dated September 15, and ask whether your company ever received this letter from the Van Horne Company?

Isidor Kahn—Direct

Mr. Blackman: I object to the form of the question where it came from; you can ask whether he received the letter.

The Court: Yes, I think so.

A. Yes, sir.

The Court: From whom did he get the letter? 10

Mr. Blackman: I object, he cannot tell.

A. From the Van Horne Company.

Q. And what's the date of that letter? A. September 15.

Letter offered in evidence.

Objected to.

The Court: Why do you object?

Mr. Blackman: Why, how is it to bind us, Mr. Rabinowitz, even if it did come from the Van Horne Company which is not proven here; that cannot bind Mr. Rabinowitz. 20

Letter admitted.

Received and marked Exhibit D-4.

Exception noted for plaintiff.

Q. Now, Mr. Kahn, to make it a little more emphatic, is this the stamp of your company? A. Yes, September 17.

Letter read by counsel. 30

Mr. Blackman: I object to that letter on another ground that Mr. Van Horne who was on the stand, testified he had nothing to do with it.

The Court: He has already testified to that.

Q. Is this the application, Mr. Kahn, that your company received from the Van Horne Company for this insurance? A. Yes, sir. 40

Isidor Kahn—Direct

Q. This application described the car as new?

A. Yes, sir.

10 Q. It was upon this application that the insurance was issued? A. Passed—accepted; it had been issued when this application was received; the policy had been issued; otherwise this report would presumably not have come in.

By the Court: Q. I think that application was written out in the Van Horne office wasn't it; I think Mr. Rabinowitz testified to that? A. Yes.

Q. Filled out in the Van Horne office? A. That's correct.

Application offered in evidence and marked Exhibit D-3.

20 Q. Now pursuant to a notice of loss in this case, was this proof of loss served upon your company? A. We received it yes, sir, by mail.

Q. And in this proof of loss is the car described as new or old? A. The car is described as a new car.

Mr. Hershenstein: I now offer in evidence if your Honor please, circular identified by Mr. Rabinowitz as being a circular of the police department which reads as follows (Reads)

30 Objected to.

Mr. Hershenstein: The purpose if your Honor please, is to show the circular states the ownership of this car as the Van Horne Company.

40 Mr. Blackman: If your Honor please, you cannot connect Mr. Rabinowitz with a circular sent around by the police department; what's he got to do with the police

Isidor Kahn—Direct

department; he didn't tell them to send it that way.

The Court: Who made the report to the police?

Mr. Hershenstein: Mr. Rabinowitz; it is so testified.

The Court: I will admit it for what it is worth. 10

Exception noted for plaintiff.

Received and given same number as marked for identification.

Q. Was this circular attached to this letter I show you, which your company received? A. Yes.

Q. And was this letter received by your company? A. Yes.

Q. This letter dated September 25, 1915, Vulcan Insurance Company reads as follows: 20
(Reads)

The Court: Mentions no name in the letter as ownership?

The Witness: No, sir.

Offered in evidence, received and marked Exhibit D-7.

Q. I now show you this carbon copy and ask you whether this carbon copy was attached to letter of September 25th? A. I couldn't remember now whether that was attached to the letter. 30

Q. I show you this letter, September 23, and ask you whether this copy was attached to letter of September 23, 1915? A. Yes, sir, I remember it very distinctly. I attend to loss matters more particularly in the office.

Mr. Hershenstein: I offer, if your Honor please, this letter in evidence and copy attached. 40

Isidor Kahn—Cross

Mr. Blackman: I want to object to all these letters.

The Court: Is it a letter from the Van Horne Company?

The Witness: Yes, sir.

10

The Court: All right, I will admit it.

Mr. Blackman: Purports to come from there in that their name appears; no proof that it came from them.

Counsel reads letter.

Mr. Hershenstein: This is carbon copy of letter sent to the Chief of Police.

The Court: It mentions Rabinowitz loss.

20

Mr. Hershenstein: Yes; it says *Re* Rabinowitz loss, if your Honor please, all these letters have the same caption, *Re* Rabinowitz loss.

The Court: Does the last letter you read purport to come from the Van Horne Company?

Mr. Hershenstein: Yes addressed to the Police Department.

30

The Court: This is a copy of letter sent to the police department of this city, which copy was received by the Vulcan Insurance Company?

Mr. Hershenstein: Exactly right, sir.

CROSS-EXAMINATION by Mr. Blackman:

Q. Mr. Kahn, what connection have you with the Vulcan Insurance Company? A. I am president of it.

Q. Do you take an active part in investigating the losses of your company? A. I direct the matter of investigating losses.

40

Isidor Kahn—Cross

Q. You did in this particular case? A. Yes, sir.

Q. Did you authorize the Van Horne Company to advertise the loss in the Trenton Times? A. Yes.

Q. Did you— A. I also paid the bill.

Q. And did you also authorize Mr. Van Horne to have the circulars printed by the police department—to have the police department print the bills? A. Yes, sir. 10

Q. And did you pay for those? A. Well, no; Van Horne paid for them.

Q. Have you reimbursed Mr. Van Horne for that? A. That I couldn't tell you.

Q. It was your intention to pay for them, was it? A. Yes, sir.

Q. Did you tell the Van Horne Company that you would stand good for the reward of \$50 if the car was recovered? A. Yes, sir. 20

Q. And this correspondence, this that has been offered, has been in response to some correspondence by you to him, has it not? A. Either correspondence or a visit by one of our representatives to Mr. Van Horne.

Q. Well, these letters that have been offered were letters of the Van Horne Company, carrying out what you authorized him to do, was it? A. Yes, sir. 30

By the Court: Q. Mr. Van Horne was your resident agent here at the time wasn't he? A. Well, he was an agent of the company.

Q. That is, the Van Horne Company was your agent was it not? A. Yes, sir.

Q. Now, when these applications for insurance come in to the company, is there any inspection made by your company? A. Of the automobile, inspection of that, no. 40

David Rabinowitz—Direct

Q. None at all; you rely upon the agent, do you? A. Upon the representation of the agent.

10 Mr. Hershenstein: I now, offer in evidence, if your Honor please, certified copy of the records of the State Board of Motor Vehicle Department of an application by the Van Horne Company for a motor vehicle license upon car #602486 Ford Car.

MR. RABINOWITZ re-called:

Direct-examination by Mr. Hershenstein:

20 Q. Mr. Rabinowitz, when did you make application to the State Motor Vehicle Department for a license upon your car? A. I got my license April 14—I made the application about six weeks, about four weeks ahead of time.

Q. When was it, what date as nearly as possible? A. Well, I got my license April 14, I made my application three weeks ahead of time or four weeks.

30 Q. That was the first application you ever filed with the Motor Vehicle Department? A. Yes.

Q. As owner of this car? A. Yes.

Q. Just one more question. Now, in the correspondence relative to this loss, did you furnish Mr. Van Horne, or the Van Horne Company with information for the correspondence which they wrote? A. I didn't furnish anything to Mr. Van Horne; the girls have got to do that.

40 Q. What? A. I didn't furnish anything to Mr.

David Rabinowitz—Direct

Van Horne; the girl takes care of insurance has to do that.

Q. Yes; and you furnished it to the girl? A. No, I didn't furnish anything; she wrote it herself; I didn't tell her anything.

Q. Now, you don't mean to tell this Court that without anything said by you or done by you, or information about this car, the Van Horne Company had correspondence with the Vulcan Insurance Company? 10

The Court: Don't try to contradict your own witness.

Mr. Hershenstein: I want to see whether he understands my question.

A. I never have anything to do with this correspondence. 20

Q. Well, who did you notify about this loss?

A. I come in this morning in the office about seven o'clock and I notify—

Q. Who? A. In the office of Mr. Van Horne.

Q. You told the facts about the case? A. I told him my car was lost.

Q. What else did you tell him? A. He asked me if I been to the police station; I said no; "Well" he says, "Best thing for you to go down notify the Chief of Police." 30

Q. Then you notified the Chief of Police? A. Yes.

Q. Did you tell Mr. Van Horne afterwards you notified the Chief of Police? A. Yes.

By the Court: Q. When you made this application for insurance, did you give any information to this young lady or did she write out the thing herself? A. She wrote out the thing herself. 40

J. Chauncey Van Horne—Direct

Q. Did you give her no information whatever?
 A. No, I just told her I wanted to have fire and theft insurance on my machine; she takes care of that.

10 Q. Did she know this car; do you know whether she knew this car? A. I couldn't say that.

Defendant rests.

The Court: I want to ask Mr. Van Horne one question.

MR. VAN HORNE, re-called:

20 By the Court: Q. Mr. Van Horne, did you know of this application for insurance being made on this car? A. I knew of it afterwards, Judge.

Q. How soon afterwards, that is before the theft? A. Before the theft, oh yes, yes, two or three months before the theft.

Mr. Blackman: We have nothing further.

30 Argument of Counsel.

The Court: It is out of order, Mr. Kahn, but I would like to ask you just one question; is Mr. Van Horne still your agent?

Mr. Kahn: Yes.

Judgment was entered for \$400 damages, and
 40 \$23.68 costs.

Judge's Certificate

Defendant's counsel asks an exception to the finding of the judge as to the law and the facts and objects to his rendering judgment in favor of the plaintiff for the above amount.

10

Stenographer's Certificate

State of New Jersey, }
County of Hudson. } ss.:

Therese Cross Bergen, being duly sworn according to law on her oath says that the foregoing is a true and correct record of the proceedings had and testimony taken upon the trial of the matter hereinbefore mentioned, to the best of her skill and ability. 20

THERESE CROSS BERGEN,

Sworn and subscribed to before
me at Jersey City this 10th day
of February, 1916.
Harry Lane.

Master in Chancery of New Jersey. 30

Judge's Certificate

I HEREBY CERTIFY the foregoing to be a true record of the proceedings had before me, in the District Court of the City of Trénton, upon the 40

Decision and Findings

J
trial of the case of David Rabinowitz, plaintiff,
against the Vulcan Insurance Company, defend-
ant, on Wednesday, January 26, 1916.

Dated February 11, 1916.

JOHN A. MONTGOMERY,

Judge.

10

Decision and Findings

(Filed as of Feb. 11, 1916)

DISTRICT COURT OF THE CITY OF
TRENTON

20	DAVID RABINOWITZ, vs. VULCAN INSURANCE Co., Defendant.	}	Plaintiff, Findings of Fact and Law.
----	---	---	---

From the evidence in the above cause, I hereby
find:

30 (1) That the Ford car was insured by the de-
fendant company, and it was a fact whether the
car should be considered a new one or not. It
had been purchased by J. Chauncey Van Horn
for the plaintiff in this cause, the car to become
the property of the plaintiff as soon as paid for.
Van Horn was also the agent of the defendant
company. Some two or three months after the
purchase of the car, an insurance policy was
40 taken out by the plaintiff upon the car, then his

Refusal to Find

property, and in his application for such policy, said application being also filled out by the Van Horn Company, the plaintiff stated that the car was a new one.

(2) That the said J. Chauncey Van Horn, when the policy of insurance was applied for, had as much knowledge of the facts as the plaintiff himself. 10

(3) Whether the car was a new one or not was one of fact.

(4) That there was no misrepresentation of the plaintiff which was not known to the agent of the defendant company.

(5) Plaintiff is, therefore, entitled to judgment upon the policy of insurance.

JOHN A. MONTGOMERY, 20
Judge of the District Court.

Refusal to Find

(Filed as of Feb. 11, 1916)

DISTRICT COURT OF THE CITY OF
TRENTON

John A. Montgomery, Judge

May 16th, 1916. 30

Messrs. Hershenstein & Finnerty,
#15 Exchange Place,
Jersey City, N. J.

Gentlemen:

In re. Rabinowitz vs. Vulcan Ins. Co.

Your favor of May 11th, received and in reply I beg to say that in my decision I found it to be 40

Refusal to Find

a question of fact whether the car was an old one or not.

10 You will probably agree with me when I say that it is often a difficult matter to determine this point and it so occurred to me in this case. As to the knowledge of the company's agent, that was simply a suggestion upon my part at the close of the case.

I cannot change my findings so as to state, in my opinion, the car was an old one. I think that was a question for a jury to decide.

Yours very truly,

JOHN A. MONTGOMERY.

20 Counsel objects to Court's refusal to find whether or not the car was old.

Rule to Certify Fact

NEW JERSEY SUPREME COURT

DAVID RABINOWITZ, Plaintiff-Appellee, vs. VULCAN INSURANCE COMPANY, Defendant-Appellant.	}	10a
--	---	-----

This matter coming on to be heard before Part III of The Supreme Court, upon the appeal taken from the judgment of the District Court of the City of Trenton, entered in favor of the Plaintiff.

AND WHEREAS it is deemed necessary for the proper consideration of the above appeal that the trial court should find as a fact whether or not the automobile purchased by the plaintiff was new or old at the time he purchased the same. 20a

IT IS on this 7th day of June, 1916, ORDERED, that John A. Montgomery, Esq., the said trial judge do find as a fact whether or not the automobile in question was old or new when purchased by the plaintiff and submit his finding to the Supreme Court. 30a

C. G. GARRISON,

Presiding Justice Part III of the Supreme Court.
 Rule allowed in open Court.

Certification of Fact*(Filed, June 7, 1916)*

DISTRICT COURT OF THE CITY OF TRENTON

10b	DAVID RABINOWITZ, <div style="text-align: right; padding-right: 20px;">Plaintiff,</div>
	vs.
	VULCAN INSURANCE COMPANY, <div style="text-align: right; padding-right: 20px;">Defendant.</div>

20b In compliance with an Order of the Supreme Court of the State of New Jersey, in reference to my findings in the above stated cause, as to whether the automobile insured by the defendant company and belonging to the plaintiff, was an old or new car, I beg to say that the testimony produced before me discloses the fact that the automobile was purchased in the month of January, one thousand nine hundred and fifteen, not by the plaintiff, but by his employer, J. Chauncey Van Horn; Van Horn testifying that the automobile was purchased by him with the intention of his turning it over to the plaintiff, his employee, as soon as the latter should earn sufficient funds to

30b pay the same. In the month of March following, Rabinowitz, the plaintiff, earned such amount, and the automobile was then turned over to him according to his own testimony. Of course, from the testimony produced before me, the car was an old one, it having been purchased from the manufacturers by Van Horn, a license being issued in his name, and subsequently the title passed from him to the plaintiff, at least two months after the purchase by Van Horn.

40b

JOHN A. MONTGOMERY,
 Judge District Court, Trenton.

No. 503238

\$ 400.00



Insurance Company

(NEW YORK.)

In Consideration of the stipulations herein named and of Seven and 50/100 Dollars Premium

DOES INSURE David Rabinowitz

For the term of one year

from the 25th day of June 1915, at noon, standard time,

to the 25th day of June 1916, at noon, standard time,

against actual loss or damage by fire, explosion (except explosion damage to tires), self-ignition or lightning; also while being transported in any conveyance by land or water, against loss or damage caused by stranding, sinking, collision, burning or derailment of such conveyance; also against general average and salvage charges for which the insured is legally liable; and also against loss or damage, if amounting to Twenty-five Dollars (\$25.00) or more on any single occasion, by theft, robbery or pilferage by any person or persons other than those in the employ, service or household of the insured,

to an amount not exceeding Four Hundred and no/100 Dollars

UPON THE AUTOMOBILE HEREINAFTER DESCRIBED consisting of BODY, MACHINERY and EQUIPMENT (no extra bodies, robes, wearing apparel or personal effects are covered by this policy unless by special endorsement hereon), while within the limits of the United States (exclusive of Alaska, the Hawaiian Islands and Porto Rico) and Canada, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or on coastwise steamer between ports within said limits.

Descriptive Trade Name	Factory No.	Type	Motive Power	No. of Cylinders	Horse Power	Year Built	New or Second hand when purchased by present owner.
Ford	602486	Tour	Gas	4	22	1915	

This policy is made and accepted subject to the foregoing stipulations and conditions and to the following stipulations and conditions printed on back hereof, which are hereby specially referred to and made a part of this policy, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto, and no officer, agent or other representative of this company, shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

NOTE: "Automobile" wherever appearing herein; shall be read "Automobiles;" "Body" shall be read "Bodies," and singular verbs shall be read as plural where more than one automobile is covered by this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by a duly authorized Agent of the Company at Trenton, N.J.

I. Koenigsberger
SECRETARY.

Isadore Kahn
PRESIDENT.

Countersigned at Trenton, N.J.

The Van Horn Co.

this 25th day of June 1915

Per R. Levenson, Ass't Sec'y
Agent.

1 The property hereby insured is valued at the sum insured.

2 The interest of the insured in this policy, or any part thereof, or in the property insured, or any part thereof, is not assignable,
3 unless by consent of this Company manifested in writing, and in case of transfer or termination of any such interest of the insured,
4 or any change of the nature of the insurable interest of the insured in the property aforesaid, either by sale or otherwise, without such
5 consent, this policy shall from thenceforth be void and of no effect.

6 This entire policy shall be void if the insured or his agent has concealed or misstated, in writing or otherwise, any material fact
7 or circumstance, concerning this insurance or the subject thereof; or if the interest of the insured be other than unconditional and sole
8 ownership, or if the subject of this insurance be or become encumbered by any lien or mortgage, or in case of any fraud or false
9 swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss or
10 damage.

11 In the event of loss under this policy, this company shall be liable only for the actual cost of repairing or, if necessary, replacing
12 the parts damaged or destroyed. It shall be optional, however, with this company to take all, or any part, of the articles at the as-
13 certained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality
14 within a reasonable time, on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do;
15 but there can be no abandonment to this company of the property described.

16 In the event of loss or damage to said automobile, whether covered by this policy or not, the further liability of this company
17 under this policy shall be reduced by the amount of such loss or damage until repairs have been completed, but shall then attach for
18 the full amount as originally written, without additional premium.

19 The acts of the insured or this company, or their agents, in recovering, saving and preserving the property described herein, in
20 case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under
21 this policy; but such acts shall be considered as done for the benefit of all concerned and without prejudice to the rights of either
22 party, and all reasonable expenses thus incurred shall constitute a claim under this policy.

23 In the event of loss or damage the insured shall forthwith give notice thereof in writing to this company or its authorized agent
24 nearest to the place of loss, and protect the property from further damage; and within sixty days thereafter, unless such time is ex-
25 tended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge
26 and belief of the insured as to the time and origin of the loss or damage; the interest of the insured and of all others in the prop-
27 erty, all incumbrances thereon; the cash value thereof; the amount of loss or damage; all other insurance, whether valid or not, direct
28 or indirect, covering the property described herein which would attach if this insurance had not been effected, and a copy of all the de-
29 scriptions and schedules in all policies; any changes in the title or possession of said property since the issuing of this policy; and the in-
30 sured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and
31 submit to examinations under oath by any person named by this company, and subscribe the same; and as often as required, shall pro-
32 duce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such rea-
33 sonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made.

34 In the event of disagreement as to the amount of loss or damage the same shall, as above provided, be ascertained by two competent
35 and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and
36 disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and,
37 failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such
38 loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and
39 umpire.

40 This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any require-
41 ment, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become
42 payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received
43 by this company, including an award by appraisers when appraisal has been required.

44 The right of the insured to recover under this policy shall not be prejudiced by any release from liability which may have been
45 given to any railroad or other carrier or bailee in any bill of lading or other contract of carriage or storage, and this company con-
46 cedes to the insured the right to give such release; any right of recovery the insured is entitled to against said carrier or others shall,
47 by subrogation, inure to the benefit of this company upon payment of the claim and this company shall be entitled, if it so desire, to
48 take over and conduct, in the name of the insured, the defense of any action or to prosecute any claim for indemnity, damages or
49 otherwise against any third party.

50 It is a condition of this policy that this insurance shall not inure to the benefit of any carrier whatsoever.

51 It is a condition of this policy that this company shall not be liable for loss or damage which may be caused directly or indirectly
52 by war, invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by neglect of the insured to use all
53 reasonable means to save and preserve the property at or after a disaster.

54 If at the time a loss occurs there be any other insurance, direct or indirect, covering the property described herein which would
55 attach if this insurance had not been effected, and if such other insurance has been effected without the special consent of this com-
56 pany endorsed hereon then, in that event, this insurance shall be null and void.

57 This policy shall be canceled at any time at the request of the insured, in which case the company shall be entitled to retain, or, if not
58 paid, to collect the customary short rate premium for the time expired. This policy may be canceled at any time by the company by
59 delivering or mailing to the insured at the last known Post Office address of the insured a written notice of such cancellation without
60 tender of premium and the insurance hereunder shall cease five days after the date of delivery or mailing of such notice, and the com-
61 pany shall thereupon on demand, after the surrender of this policy, refund to the insured the excess of paid premium above the pro
62 rata premium for the expired time, it being understood that if the premium shall not have been paid to this company the company
63 shall be entitled to the pro rata premium for the expired time.

64 No person shall be deemed an agent of this company unless such person is authorized in writing as such agent by this company.

65 It is a condition of this policy that the automobile hereby insured shall not be operated in any race or speed contest, and shall not
66 be commonly used for carrying passengers for compensation, or rented or leased during the term of this policy unless assented to by
67 this company in writing; in the event of violation of this condition this policy shall immediately cease and terminate.

68 If this company shall claim that the loss was caused by the act or neglect of any person or corporation, private or municipal, this
69 company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss
70 resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

71 No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full
72 compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the happening
73 of the loss, except when otherwise provided for by statute or other legal regulation.

Receipt for Return Premium.

No. of Policy, _____

No. of Renewal, _____

Amount Insured, \$ _____

Date of Cancellation

YEAR	MONTH	DAY

“ Policy . . .

Time in Force . . .

Premium Paid, \$ _____

“ Earned at _____ rate, \$ _____

“ Returned, \$ _____

IF PRO RATA, STATE REASON WHY.

NOTE.—A Receipt should be taken for Return Premiums in all Cancellations and signed by the Insured.

VULCAN INSURANCE COMPANY, NEW YORK

_____ 191____

In consideration of _____ Dollars, return premium, the receipt of which is hereby acknowledged, this Policy is hereby canceled and surrendered to the Company.

_____ Insured.

AUTOMOBILE POLICY

Expires June 25th., 1916

Assured David Rabinowitz

Amount, \$ 400 Premium, \$ 7.50

No. 503238

Vulcan
Insurance Company
(NEW YORK.)

89 FULTON STREET

Exhibit D-1

Received, Sp. 29, 1915.
Agency Dept.

BUREAU OF POLICE

10

AUTOMOBILE STOLEN

\$50.00 REWARD

\$50.00 REWARD

Trenton, N. J. Sept. 24, 1915.

The following described FORD TOURING CAR was
stolen from the streets in this city on the night of
Sept. 7th, 1915: 20

The car was owned by the Van Horn Insurance
Company who will pay \$50.00 as a reward for
the recovery of the same.

DESCRIPTION: FORD TOURING CAR, black
body, 1915 Model, 4 cylinder, factory num-
ber 602486, New Jersey License 3224, equipped
with Acme Red Letter Tires, size 30x31½ in.,
Presto-lite tank on running board, black bumper
iron in front, empty tire irons on back, isinglass
broken out of rear curtain. Under the front seat
were some black stickers used by The Van Horn
Company, Insurance Department. 30

I would respectfully ask that search for this
machine be made at all garages in your city, or 40

Exhibit D-1

other places where the said machine might be disposed of. Will sent officer immediately on notice of recovery of the arrest of the thief. This reward of \$50.00 is guaranteed by the Van Horn Company.

10

JOHN J. CLEARY,
Chief of Police.

Exhibit D-2

Proof of Loss

Proof of Loss

EXHIBIT B-2

TO THE

VULCAN INSURANCE COMPANY

HOME OFFICE: 89 FULTON STREET, NEW YORK CITY

1. By your policy of Insurance No. 503238 Dated June 25 1915, issued at your agency in Trenton, N. J. you insured David Rabinowitz against loss or damage by fire and other causes, as specifically stated in said policy to Automobile described below:

Table with 9 columns: Descriptive Trade Name, Factory No., Type, Motive Power, No. of Cylinders, Horse Power, Year Built, Year Model, New or Second-hand when purchased by present owner? Row 1: Ford, 602486, Tour., Gas, 4, 22, 1915, 1915, New

and the equipment thereof, in the sum of \$ 400 for the term of one year from the 25th day of June 1915, to the 25 day of June 1915, according to the conditions therein contained.

2. I purchased the said Automobile on the 14 day of April, 1915, for Four Hundred Ninety five Dollars as per bill of sale hereto attached.

3. I hereby state that in addition to the sum insured by you in said policy on said Automobile and equipment there was no other insurance thereon to the amount of \$ as particularly specified hereunder, besides which there was no other insurance thereon:

Name of Company Date of Expiration Amount, \$

4. Loss of or damage to the said Automobile and/or equipment to the extent of \$ 400 occurred on the 7th day of September 1915, said loss and/or damage having occurred under the following circumstances, to wit: Taken while standing in front of 2826 Howard St

5. The particulars of said loss and/or damage were as follows:

Car was stolen

6. I further state that the property so lost or damaged, as aforesaid, belonged exclusively to me and that no other person or persons had any interest therein, and that there were no encumbrances on the said property at the time of said loss, except as follows: no ex options

7. I further state that at the time of the said loss and/or damage the said Automobile was being operated by myself who resides at Caring Gardens, Hoboken and was at the time employed by The Van Horn Co. in the capacity of salesman; and that at said time the following persons were with me in the said car: at the time car was stolen

Table with 2 columns: NAMES, RESIDENCES. Row 1: Isreal Richmond, 113 S. Broad St Trenton, N. J.

8. In addition to the persons in the car, the following persons were, or may have been witnesses of the said loss and/or damage:

Table with 2 columns: NAMES, RESIDENCES

9. The actual cash value of the automobile so lost or damaged was, immediately prior to the said loss or damage, \$ 495

10. The total amount claimed of the VULCAN INSURANCE COMPANY under the above policy is Four Hundred + no/100 Dollars.

11. The said loss and/or damage did not originate or occur by any act, design or procurement on my part, nor on the part of anyone having any interest in the property insured, or in the said Policy of Insurance, nor in consequence of any fraud or evil practice done or suffered by me; that nothing has been done by or with my privity or consent to violate the conditions of the Policy or render it void; no articles are mentioned herein but such as were lost, damaged or destroyed, and belonged to, and were in the possession of the said insured at the time of the said loss and/or damage; no property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss and/or damage, or otherwise, has in any manner been made. Any other information that may be required will be furnished on call, and shall become part of the proofs of loss.

12. It is further expressly understood and agreed, that the furnishing of this form of proof of loss blank to me, or making up of proof of loss by an adjuster or agent of the company shall not be construed to be a waiver of any of the conditions of the policy.

Dated at Trenton, N. J. this 9th day of October 1915

Subscribed and sworn to before me this 9th day of October 1915, at Trenton, N. J. David Rabinowitz Claimant

Adjuster's Certificate:

I HEREBY CERTIFY that I have carefully examined the evidences of the above claim and investigated as to the origin of the loss, and believe that the claimant has suffered loss (without fraud) to the amount claimed.

The Van Horn Company Agent or Adjuster. Per R. L. Linsenoy - Asst Sec'y

AUTOMOBILE

Proof of Loss

**VULCAN
INSURANCE
COMPANY**

89 FULTON STREET, NEW YORK

No. Policy No. *503238*

City *Linton, N.J.*

Insured *Harold Rakowitz*

Amount of Policy, \$ *400*

Amount Adjusted, \$

*Received
Oct, 11, 1915
Vulcan Ins. Co.*

Exhibit D-3

Application for Insurance on Automobile

VULCAN INSURANCE COMPANY

#89 Fulton Street, 10

Policy No. A503238	List Price \$
Old No.	Endt. No. P. D.
Renewed,	Endt. No. D. S.
Cancelled.	Amount \$400.00
M. R.	Rate Min.
Inspection	Premium \$7.50

Applicant, David Rabinowitz,

\$400.00 from June 25th., 1915 to June 25th., 1916 at min % premium, \$7.50. 20

Conditions of this insurance to be as per form of policy now in use by the Vulcan Insurance Company (New York)

Upon the Automobile Hereinafter Described, consisting of Body, Machinery and Equipment, while within the limits of the United States, (exclusive of Alaska, the Hawaiian Islands and Porto Rico) and Canada, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or on coast-wise steamer between ports within said limits. 30

Descriptive	Trade Name	Factory No.	Year built
Type	Motor	No. of cylinders	602,486
	Power		1915
TOUR	GAS	4	40

Exhibit D-3

Number, types and values of extra bodies, if any,

Kind of work for which automobile is used, pleasure and business.

Original cost, including equipment, \$495.00.

10 Usual place of storage of the automobile: Private Garage at Lot #8 Ewing Gardens, Hopewell Twp., N. J.

When was automobile purchased by present owner

Was the automobile new or second-hand when purchased by present owner? New.

If second-hand, state cost to present owner and date purchased; also state name and address of party from whom purchased

20 Is the automobile fully paid for? Yes. Is the automobile mortgaged or encumbered? No.

Is the automobile described above rented or leased for carrying passengers for compensation (if so, assent of the company must be obtained in writing on policy) No.

Address of Assured, Street Lot #8 Ewing Gardens, Township of Hopewell County of Mercer, State of New Jersey.

Business of Assured real estate salesman.

30 Remarks

Broker

Address Insurance Department,

The Van Horn Co.,
State and Warren Sts.
Trenton.

Exhibit D-4

Received Sep. 17, 1915
Agency Dept.

Real Estate
The Van Horn Co. 10
Insurance.

Trenton, N. J., Sept. 15, 1915.

Vuncan Insurance Co.,
#89 Fulton Street,
New York City.

Gentlemen:

RE: 503238. RABINOWITZ

In reply to yours of the 15th. inst., would advise that we are enclosing herewith copy of letter reporting the loss under the above policy to the police, and trust you will find same in order. 20

We would also advise that the car was stolen from the front of #242 E. Hanover St. when it was left there Tuesday night, September 7th. by Mr. Rabinowitz who went into the house with a Mr. Israel Richmond and that was the last he saw of it. Mr. Rabinowitz states that he went into the house with Mr. Richmond and when he came out some time later, the car was gone. He immediately reported the matter to the police, but to date, we have heard nothing from it. 30

The car was purchased in June 1915 from Brock's Garage, agents for the Ford Co. We are personally acquainted with the assured, as he is one of our salesmen and the line was direct.

As to advertising for the return, would say that the Trenton Evening Times, in our opinion, 40

Exhibit D-5

is the best and the rate is \$.70 per inch. The morning paper, State Gazette, charges \$.50 per inch.

Yours very truly,

THE VAN HORN COMPANY.

10

Exhibit D-5

Trenton, N. J. May 18, 1915.

The Van Horn Co.,
City.

Main Offices State and Warren Sts.

	1915			
20	May 17	2-curtain fasteners	\$.10	
		6' 3/16" wire cable	.18	
		1 Horn tubing	.75	
		Wash & polish	1.00	
		1 New Winshield	10.00	
		1 spindle conn. rod.	1.00	
		1 " bolt	.40	
		2 " bodies	4.00	
		1 " body arm	.75	
30		1 Top to windshield strap	.35	
		1 outlet hose	.10	
		1 Mach. bolt and nut	.03	
		36½ hrs. labor at 60¢	21.90	
		36½ " " at 40¢	14.60	
		1 T. connection	.10	
		2 spark plugs	1.00	
		1 priming rod	.15	
		2 rad. stud springs	.10	
		2 " " nuts	.10	
40		1 com. wire loom support	.05	\$56.66

Exhibit D-5

	Carried	\$56.66	
	2 3/8" Cap screws	.10	
	2 3/8 lock washers	.02	
	1 Radiator	20.00	
	1 New Bumper	5.00	
	1 T Gas connection	.10	10
	1 Cap screw	.05	
	2 5/16" lock wash	.02	
	1 5/16" Hex nut	.02	
	4' rubber tubing	.10	
	1 3/8" Mach. bolt and nut	.05	
	1 5/16# mach bolt and nut	.05	
	1 speed pinion	.75	
	1 license bracket	.50	
	2 spark plugs	1.00	
	3 #6 B. wood screws	.02	20
	1 Fan Belt	.30	
	1 C. C. Front B. Screw	.05	
	1 F. spring 1 pag	.10	84.89
		<hr/>	
	Carried	\$84.89	
	Screws, nuts, washers and bolts	.62	
	1 main leaf	1.00	
	4 spindle oilers	.40	
	2 radiator studs	.20	30
	towing car	10.00	
	screws, nuts, washers, bolts & riverts	1.26	
May 17	1 crank case front bear- ing frame	.60	
	2 front spring hangers	1.00	
	1 front radius rod	3.00	
	2 front brackets	.40	
	1 front cross bracket	1.00	40

Exhibit D-6

1 steering rod	.75	
2 ball caps	.30	
1 front wheel with hub and hub cap	5.15	\$110.57

10

Exhibit D-6

Owners

Name The Van Horn Company.

Registration No. 3224

Address

Hamilton Township, Mercer County, New Jersey.

DESCRIPTION OF VEHICLE

20	Maker's Name	Year & Model	Maker's no.
	Ford	1915	602486
		Cylinders	
	Kind of Body,	Color	No. bore Horsepower
	touring	black	4 3 $\frac{3}{4}$ 22 $\frac{1}{2}$

State whether commercial vehicle

If so give weight unloaded

Issued by Magnus Bredenbeck Date,
Amount \$.

30

Affidavit of Applicant

State of New Jersey, }
County of Mercer. } ss:

A. V. Bower, being duly sworn, says the facts
as set forth in the foregoing statement are true.

40

A. V. BOWER, Treas.
The Van Horn Company.

Exhibit D-6

Subscribed and sworn to before me
this 2d day of Jan., 1915.

J. Van Horn,
Notary Public for N. J.

10

Certificate of Motor Vehicle Number

STATE OF NEW JERSEY

DEPARTMENT OF STATE.

Division of Motor Vehicle Registration

I, William L. Dill, Commissioner of Motor Ve- 20
hicles of the State of New Jersey, do hereby cer-
tify that the annexed is a true copy of motor
vehicle registration certificate number 3224 is-
sued to the Van Horn Company, of Hamilton
Township, Mercer County, New Jersey, on the
2d day of January 1915, as the same is taken from
and compared with the original now remaining
on file and of record in this office.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed my Official 30
L. S. Seal at Trenton, this twenty-fourth
day of January, A. D. 1916.

W. L. DILL,
Commissioner of Motor Vehicles.

Reasons*(Filed Feb. 11, 1916)*

NEW JERSEY SUPREME COURT

10	DAVID RABINOWITZ, Plaintiff-Appellee, vs. VULCAN FIRE INSURANCE Co., Defendant-Appellant.	} Action at Law on Appeal from District Court.

20 The following is a specification of the determinations and directions of the District Court of the City of Trenton, New Jersey, in this cause in which the defendant is dissatisfied in point of law:

1. The Court erred in refusing a nonsuit upon motion of the defendant for the following reasons:

30 (a) Because it affirmatively appeared that the plaintiff had misstated a material fact in his application, to wit: that the automobile he insured was new when purchased by him, and thereby perpetrated a fraud upon the defendant company.

40 (b) Because it affirmatively appeared that the plaintiff had misstated a material fact in his proof of loss, to wit: that the automobile he insured was new when purchased by him, and thereby perpetrated a fraud upon the defendant company.

Reasons

(c) Because it affirmatively appeared that the plaintiff falsely swore touching the matter of the condition of the car at the time he purchased the same both before and after the loss of the car.

(d) Because the policy of insurance provides that the policy shall be void if the insured or his agent concealed or misstated in writing or otherwise any material fact or circumstance concerning the insurance or subject thereof, and the plaintiff's case disclosed such a misstatement of a material fact. 10

(e) Because the plaintiff did not prove all of the elements necessary to establish his case nor full compliance with the terms of the policy. 20

2. The Court erred in refusing to give judgment for the defendant upon the evidence submitted in the case.

3. The Court erred in erroneously inferring the relationship of principal and agent between the defendant and the Van Horn Co. when it was expressly provided in the contract of insurance that "no person shall be deemed an agent of this company unless such person is authorized in writing as such agent by this company." 30

4. The Court erred in holding that the individual knowledge of a servant of the Van Horn Co. was the knowledge of the Van Horn Co.

5. The Court erred in holding that the Van 40

Reasons

Horn Co. was the general agent of the defendant with relation to the issuance of the policy in question when it affirmatively appeared that the Van Horn Co. was the special agent of the defendant.

10. 6. The Court erred in holding that the fraud of a servant of the Van Horn Co. which company was the special agent of the defendant, was the fraud of said Van Horn Co. and not the fraud of the insured.

7. The Court erred in holding that the plaintiff although perpetrating a fraud upon the defendant company is still entitled to judgment against the defendant because the fraud of the plaintiff was known to the Van Horn Co., its special agent.

20 8. The Court erred in finding that the Van Horn Co. had knowledge of the fraud perpetrated upon the defendant.

9. The Court erred in finding that the knowledge of a servant of the Van Horn Co. was the knowledge of the defendant company.

30 10. The Court erred in refusing to find that the Van Horn Co. was acting without the scope of its authority in the issuance of this policy and that the knowledge of the Van Horn Co. as to the fraud perpetrated by the plaintiff was not the knowledge of the defendant.

11. Judgment for plaintiff was in divers other respects erroneous and illegal.

HERSHENSTEIN & FINNERTY,
Attorneys for Defendant-Appellant.

Order Permitting Additional Reasons

NEW JERSEY SUPREME COURT

DAVID RABINOWITZ,

Plaintiff,

10

vs.

VULCAN INSURANCE Co.,

Defendant.

Application having been made by Hershenstein & Finnerty, attorneys for the defendant for leave to file additional determinations for reversal with which defendant is dissatisfied, upon the appeal of the hereinabove entitled cause by reason of the findings filed by the Judge of the District Court before whom the case was tried, and the attorney for plaintiff consenting thereto

20

It is on this 20th day of May A. D. 1916, ORDERED that the attorneys for the defendant be and are hereby permitted to file the following additional determinations for reversal with which defendant is dissatisfied.

12. That the Court erred in finding as a fact that "whether the car was a new one or not was one of fact" instead of finding what the fact really was.

30

13. That the Court erred in refusing to find that the car was either new or old.

FRANCIS J. SWAYZE,

Judge.

I do hereby consent to the entry and filing of the above order.

WILLIAM E. BLACKMAN,

Atty. for Plaintiff. 40

Notice and Grounds of Appeal

NEW JERSEY SUPREME COURT

10	<p style="text-align: center;">DAVID RABINOWITZ, Plaintiff-Appellee,</p> <p style="text-align: center;">vs.</p> <p style="text-align: center;">VULCAN INSURANCE Co., Defendant-Appellant.</p>
----	---

To: William E. Blackman, Esq., Attorney of Plaintiff:

20 TAKE NOTICE that the defendant, Vulcan Insurance Co., appeals to the Court of Errors and Appeals from the whole of the judgment of the Supreme Court entered in this cause:

And for grounds of appeal specify the following:

- (1) The Supreme Court erred in affirming the judgment of the District Court against the defendant instead of reversing it for the reasons assigned by the appellant in its specifications of reasons on appeal in Supreme Court.
- 30 (2) The Supreme Court erred in not ordering a judgment to be entered in favor of the appellant or granting a new trial to the appellant for the reasons there assigned in the specifications of reasons on appeal in Supreme Court.
- 40 (3) The Supreme Court erred in reviewing the finding of fact by the Trial Court that the car was an old car, because there was evidence to support the finding of the Trial Court.

Notice and Grounds of Appeal

(4) The Supreme Court erred as an Appellate Court in making a finding that the car was a new car upon a review of evidence taken in the Trial Court.

(5) The Supreme Court erred in not reversing the judgment of the Trial Court, because it found there was no proof that J. Chauncey Van Horne or the Van Horne Co. was the duly authorized agent of the defendant, although the Trial Court based its judgment upon a finding of such agency. 10

(6) The Supreme Court erred in affirming the judgment rendered in the Trenton District Court, whereas the Supreme Court should have reversed said judgment or given judgment for the defendant for the following reasons specified and assigned therein, *viz.*: 20

1. The Trial Court erred in refusing a nonsuit upon motion of the defendant for the following reasons:

(a) Because it affirmatively appeared that the plaintiff had misstated a material fact in his application to wit; that the automobile he insured was new when purchased by him, and thereby perpetrated a fraud upon the defendant company. 30

(b) Because it affirmatively appeared that the plaintiff had misstated a material fact in his proof of loss to wit; that the automobile he insured was new when purchased by him, and thereby perpetrated a fraud upon the defendant company.

(c) Because it affirmatively appeared that the plaintiff falsely swore touching the matter of the condition of the car at the time he purchased the same both before and after the loss of the car. 40

Opinion

(d) Because the policy of insurance provides that the policy shall be void if the insured or his agent concealed or misstated in writing or otherwise any material fact or circumstance concerning the insurance or subject thereof, and the plaintiff's case disclosed such a misstatement of a material fact.

(e) Because the plaintiff did not prove all of the elements necessary to establish his case nor full compliance with the terms of the policy. The Trial Court erred in refusing to give judgment for the defendant upon the evidence submitted in the case because

(f) The representation that the automobile was new when purchased by the insured was a material representation and warranty and its untruth voids the policy.

HERSHENSTEIN AND FINNERTY,
Attorneys for Deft.-Appellant.

Opinion

NEW JERSEY SUPREME COURT

30
 DAVID RABINOWITZ,
 Plaintiff-Respondent,
 vs.
 VULCAN INSURANCE COMPANY,
 Defendant-Appellant.

40 Argued June Term, 1916, before Justices Garrison, Parker and Bergen.

Opinion

Hershenstein & Finnerty for appellant.
William E. Blackman, for respondent.

PER CURIAM:

This action was brought on a policy of insurance issued to the plaintiff by the defendant company against, among other things, loss by theft or robbery, the basis of the action being a loss by theft or robbery. The plaintiff had a verdict and the defendant appeals. The loss by theft is not contested, but the defendant claims that it was entitled to have allowed by the Trial Court its motion for nonsuit upon the ground that in the application for the insurance and in the proof of loss the machine is described as a new one, whereas the defendant claims that this was false and therefore the plaintiff was not entitled to recover.

The Trial Court found that the car was insured by the defendant company and that it had been purchased by one Van Horne for the plaintiff, the car to become the property of the plaintiff as soon as paid for; that two or three months after the purchase the policy was taken out by the plaintiff upon the car which was then his property, and that in his application he stated that the car was new. He also found that Van Horne, when the policy of insurance was applied for, he being the agent of the defendant company, had as much knowledge of the fact as the plaintiff; that whether the car was a new one or not was a question of facts; that there was no representation by the plaintiff which was not known to the defendant company, and thereupon gave judgment for the plaintiff. At the argument the Court allowed a rule on the Trial Court whether the car was a new one, and in compliance with that order he

Opinion

certified that the testimony disclosed that the automobile was purchased in the month of January, 1915, by Van Horne, who was the employer of the plaintiff, and that Van Horne testified the auto was purchased by him with the intention of turning it over to the plaintiff as soon as the latter had earned sufficient funds to pay for it; that in the month of March following the plaintiff earned such amount and that the automobile was then turned over to the plaintiff. After this statement the Trial Court certified "Of course, from the testimony produced before me, the car was an old one, having been purchased from the manufacturers by Van Horne, a license being issued in his name, and subsequently the title passed from him to the plaintiff at least two months after the purchase by Van Horne."

The application contained this question and answer. Q. "Was the automobile new or second-hand when purchased by the present owner? A. New." It is so described in the proof of loss, but it is not so described in the policy. The policy bears date June 25th, 1915, and the year in which it was built is put down as 1915. We think the Trial Court was in error when it based the judgment for the plaintiff upon the theory that the agent of the defendant had full knowledge of the fact concerning the age of the machine because there is no proof in this case that Van Horne was authorized in writing to be the agent of the defendant company. On the other hand I think the Trial Court was not justified in finding that the car was not a new one within the meaning of the policy of insurance. The car was new in January, 1915; it was bought by Van Horne for the plaintiff

Opinion

and the title remained in Van Horne until about the first of March when the plaintiff was able to pay for the machine. The undisputed facts are that plaintiff needed a car for use in the real estate business of Van Horne by whom he was employed, and his employer having a trading account with a dealer in automobiles and having also an open credit account with the plaintiff, bought the car for him and kept in his, Van Horne's garage and turned it over to him when his credits amounted to the cost. This amounted to a purchase for plaintiff as much as if the credit had been given to him directly by the seller. 10

We think the machine was new within the meaning of the policy and that therefore the judgment should be affirmed, but not for the reasons given by the Trial Court. 20

Order of Affirmance

SUPREME COURT OF NEW JERSEY

DAVID RABINOWITZ, vs. VULCAN INSURANCE COMPANY.

10

This cause having been argued at the last June term of this Court on the specification filed, and the Court having duly considered the same and being of the opinion that there is no error in the Judgment and proceedings of the Court below:—

It is ordered that said Judgment be in all things affirmed, with costs to the appellee to be taxed; and it is further ordered that execution issue out of this court therefor. 20

Entered October 23, 1916.

On motion of
 WILLIAM E. BLACKMAN,
 Atty.

SUPREME COURT OF ERRORS AND APPEALS.

NEW JERSEY COURT OF ERRORS AND APPEALS.

David Rabinowitz,)
<i>Respondent</i> Appellant,)
-and-)
Vulcan Insurance Company,)
Respondent.)
<i>appellant</i>)

There are only two points that I think are necessary in answer to the appellant, and they are:

1. Point.

That the Supreme Court may in the appeal to it from the District Court find that the trial court was not justified in finding a certain fact when the evidence does not justify it.

11. Point.

That the Supreme Court in its decision in finding that the automobile in question was a new car, did so as a matter of law, that after the facts were admitted it was a question of law in this case whether the car was new or old.

William P. Blackman
Atty for Respondent

NEW JERSEY COURT OF ERRORS
AND APPEALS.

))

David Rabinowitz,

Respondent.

-vs-

Vulcan Insurance Co.

Appellant.

On Appeal.

Wm. F. Blackman?
Trenton, N.J.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NEW JERSEY COURT OF ERRORS AND APPEALS.

David Rabinowitz,)
Respondent Appellant,)
~~-vs-~~)
Vulcan Insurance Company,)
Respondent.)
appellant

There are only two points that I think are necessary in answer to the appellant, and they are:

1. Point.

That the Supreme Court may in the appeal to it from the District Court find that the trial court was not justified in finding a certain fact when the evidence does not justify it.

II. Point.

That the Supreme Court in its decision in finding that the automobile in question was a new car, did so as a matter of law, that after the facts were admitted it was a question of law in this case whether the car was new or old.

William E. Blackman
atly for Respondent

NEW JERSEY COURT OF EQUITY
AND APPEALS.

)))))))))

David Rubinshtein,

Respondent.

-vs-

Fulcan Insurance Co.

Appellant.

On Appeal.

Wm. E. Blackman?
Trenton, N.J.

New Jersey Court of Errors and Appeals

DAVID RABINOWITZ, Plaintiff-Appellee, vs. VULCAN INSURANCE COMPANY, Defendant-Appellant.	}	Action at Law. On Appeal from Supreme Court.
--	---	--

BRIEF OF DEFENDANT-APPELLANT

Statement of Facts

Plaintiff brought suit in the District Court to recover \$400.00 on a policy of insurance issued by the defendant insuring plaintiff's Ford automobile against loss by theft. The case was tried by the Court without a jury and no contention was made as to the loss under the policy. The defense was based upon the grounds that in the application for insurance the plaintiff had falsely stated in writing and in the proof of loss had falsely sworn that the car was a new car when purchased by him and that by reason of the untruth of that statement, the defendant was not liable under the express provisions of the policy.

The evidence disclosed that the VanHorn Company, plaintiff's employee, bought the car from one Brock in its own name in January, 1915 (p.

24, l. 15), and considered itself the owners (p. 24, ll. 35-38; p. 25, ll. 15-22), and kept possession of the car (p. 13, ll. 11-13; p. 18, ll. 22-27), and applied for a license in its own name in January (p. 26, ll. 6-12 and Exhibit D-6), and the company did not transfer title and possession to plaintiff until June (p. 25, l. 23), when paid for by plaintiff (p. 23, ll. 6-10), although plaintiff from memory erroneously thought he got title in March (p. 16, ll. 31-33); that the insurance by plaintiff was not effected until June 25th (p. 23, ll. 18-20 and Exhibit D-3); that it was not owned by plaintiff in January (p. 25, ll. 10-14); that plaintiff bought the car from the VanHorn Company (p. 6, ll. 39-40); that there had been an accident to the car before title conveyed to plaintiff or insurance effected and repairs had been made to the car prior to May 18th, costing \$110.57, as appears by Exhibit D-5 of that date being the bill rendered therefor to VanHorn Company; that plaintiff stated in his application (Exhibit D-3) and in the proof of loss (Exhibit D-2) that the car when purchased by him was a new one.

There was also testimony that the VanHorn Co., had verbally agreed that it would sell^{car} to plaintiff as soon as he was able to pay for it.

The policy provides:

“This policy is made and accepted subject to the foregoing stipulations and conditions and to the following stipulations and conditions printed on back hereof which are hereby specially referred to and made a part of this policy. * * *

“This entire policy shall be void if the insured or his agent has concealed or misstated, in writing or otherwise, any material fact or circumstance, concerning this

insurance or the subject thereof; or if the interest of the insured be other than unconditional and sole ownership, or if the subject of this insurance be or become encumbered by any lien or mortgage, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss or damage."

Plaintiff moved for a non-suit (p. 32, *et seq.*), upon the ground that there was a material misrepresentation in the application for insurance and proof of loss in that plaintiff there stated that the car was a new one when purchased by him whereas it appeared it had been originally purchased by VanHorn Co., several months prior to conveyance of title and possession to the plaintiff by VanHorn; and that such misrepresentation voids the policy under its terms (Exhibit P-1, ll. AA and 6-10).

The Court refused the non-suit and after the matters of defense were established gave judgment for the plaintiff on the theory that whatever statement was made was equally known to the defendant's agent at the time of the application and failed to make a finding whether the car was new or old.

Later upon being ruled to do so, the Trial Court certified that of course from the testimony the car was an old one (p. 48B).

The Supreme Court has reversed the Trial Court's finding of agency on the ground that there was no proof of any authority of such agency in writing as required by the policy and therefore there only remained before the Supreme Court the question whether the judgment could be affirmed upon any other ground presented to the

Court than that of agency upon which the Trial Court relied.

The Supreme Court purports to have found such a ground for affirmance by reviewing the testimony and reversing the finding of the Trial Court that the car was an old one and itself holding that the car was new within the meaning of the policy.

The defendant-appellant urges that the Supreme Court erred in not reversing the judgment of the District Court or granting judgment for defendant upon the following grounds:

A. Because Supreme Court erred in reviewing and reversing a finding of fact, though there was evidence to support such finding.

B. Because Supreme Court erred in reviewing the evidence and itself making a finding, as an Appellate Court, contrary to the finding of the Trial Court.

C. Because Supreme Court erred in not reversing judgment of District Court after reversing the finding of District Court upon the question of agency upon which that Court based its judgment.

D. Because the Trial Court should have nonsuited plaintiff for the reasons urged before the Trial Court or should have given judgment for the defendant.

The above points will be relied upon by appellant and discussed in this brief under the following heads:

I. The Trial Court was justified in finding the car was an old one within the meaning of the policy and the Supreme Court erred in reversing such finding.

II. The Supreme Court should have reversed the judgment of the District Court or given judgment for defendant.

III. The representation that the automobile was new when purchased by the insured was a material misrepresentation and warranty and its untruth voids the policy.

POINT I

The Trial Court was justified in finding the car was an old one within the meaning of the policy and the Supreme Court erred in reversing such finding.

This point is raised by the third and fourth ground of the appeal, which can be discussed together.

The Trial Court at first made no finding whether the car was new or old, but on rule to certify the fact, then certified that "of course, from the testimony produced before me, the car was an old one" (p. 48B). The Supreme Court after referring to portion of the evidence, holds the Trial Court's finding was not justified and finds the car was a new one within the meaning of the insurance policy without however holding that there was *no evidence* to support the Trial Court finding. In other words, the Appellate Court itself made a *finding* from the evidence selected and referred to by it.

This is not permissible, if there was *any evidence* to support the finding of Trial Court, even though another Trial Court or Judge would have found differently upon such evidence.

Upton vs. Slater, 83 N. J. L., 373.

Thomas vs. National Benefit Association, 84 N. J. L., 281.

The evidence shows these facts: The Van Horn Company bought the car from one Brock in its own name in January, 1915 (p. 24, l. 15), and considered themselves the owners (p. 24, ll. 35-38; p. 25, ll. 15-22), and kept possession of the car (p. 13, ll. 11-13; p. 18, ll. 22-27); applied for license in their own name in January (p. 26, ll. 6-12 and Exhibit D-6); and the company did not transfer title and possession to plaintiff until June (p. 25, l. 23, etc.) when paid for by plaintiff (p. 23, ll. 6-10) although plaintiff from memory erroneously thought he got title in March; that the insurance by plaintiff was not effected until June 25th (p. 23, ll. 18-20 and Exhibit D-3); that it was not owned by plaintiff in January (p. 25, ll. 10-14); that plaintiff bought car from VanHorn Co. (p. 6, ll. 39-40); that there had been an accident to the car before title conveyed to plaintiff or insurance effected and repairs were made prior to May 18th, costing \$110.57, as appears by Exhibit D-5 of that date and bill rendered to the VanHorn Co.; that plaintiff stated in his application (Exhibit D-3) and in the proof of loss (Exhibit D-2) that the car when purchased by him was a new one.

It is true also, that the VanHorn Company made a verbal agreement with plaintiff that it would sell the car to him, as Supreme Court opinion says, "As soon as the latter *had earned sufficient funds* to pay for it," or as Trial Court says, "the car to become the *property* of the plaintiff as soon as paid for."

It is evident by the concluding portion of the Supreme Court opinion, that they based their affirmance of judgment below upon their reversal of a fact found by Trial Court, and held the car to be a new one under the policy, because of this

understanding or agreement between plaintiff and the VanHorn Co., for it states "this amounted to a purchase for plaintiff as much as if the credit had been given to him directly by the seller." This view might be proper in equity if the proceedings were between the plaintiff and the VanHorn Co., in case the latter tried to deprive plaintiff of the right to take and pay for the car, but it must be kept in mind that this is a suit at law to recover upon an insurance policy and the matter of absolute title in the insured is material. It is common knowledge that in all such policies, as in this one, there are provisions that the entire policy shall be void if the interest of the insured

"be other than unconditional and sole ownership, or if the subject of this insurance be or become encumbered by any lien or mortgage, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject there, whether before or after the loss or damage" (Exhibit P-1, ll. 6-10 of conditions on back of policy).

Such provisions are to protect the company and bear upon the assumption of the risk or continuance of risk and whatever tends to lessen or qualify the interest of insured in the property, to that extent, lessens his interest in protecting and preserving the same. The question whether the car is new or old, when acquired by the insured is also material in the same sense and affects his interest in protecting the property and also the company's risk and the question of value. It is also common knowledge that there is a rapid depreciation in value of automobiles, immediately after purchase and use by an owner,

and it will be observed in this case that the amount of insurance \$400.00 is the full value of a new Ford machine, such as this was stated to be. How material that statement was in this case appears from the fact that before June, when the title was transferred to plaintiff and he had completed paying therefor, and before the policy herein was effected, the car had been in possession and use of VanHorn Co., and had suffered a serious accident and had been repaired at a cost exceeding \$100.00 prior to May 18th, the date of bill rendered for repairs (Exhibit D-5).

Again, the view of the Supreme Court, is unwarranted because plaintiff even does not claim title in himself from January when originally purchased by VanHorn (p. 16, ll. 20-38) but only from March as he says from memory, though in fact title was not conveyed to him until June as above stated (p. 23, ll. 6-10; p. 25, l. 23, etc.), and the Trial Court's finding is that the car was not to become the property of the plaintiff until paid for and was purchased from the manufacturers by VanHorn, a license being issued in his name and subsequently the title passed from him to the plaintiff, at least two months after the purchase by VanHorn.

And to hold that the plaintiff was the owner from January would work a grave injustice to the defendant because if any such claim or contention had been made by plaintiff at or before the trial, the defendant was entitled to rely upon the fact that such alleged ownership was not "unconditional and sole ownership," in that the *legal title* certainly was then held by VanHorn Co., and the car registered in their name as owners and plaintiff had no right to compel VanHorn Co., to give him possession or title until paid for; and

payments in full were not made until June nor title and possession given to him. And defendant could also have relied in that event, upon the contention, that if plaintiff be viewed as owner in January, then the retention of legal title and possession by VanHorn until June, should be considered a "lien or encumbrance" for unpaid purchase price. Certainly the retention of legal title and possession by VanHorn can only be considered either as deliberately and intentionally a retaining of ownership or as security for unpaid purchase price in lieu of a chattel mortgage. In either of which case, the policy would be void by its terms. The theory of the Supreme Court not only goes further than plaintiff ever contended but is contrary to the Trial Court's finding that plaintiff did not pay for or become the owner until at least two months after purchase by VanHorn from the manufacturers; and no such claim was made or tried out in the District Court, and cannot be now introduced.

Axel vs. Kraemer, 75 N. J. L., 688.

Barnes vs. Wallington & Co., 78 N. J. L., 490.

Camden vs. McAndrews & Forbes Co., 85 N. J. L., 260.

Furthermore, how could the plaintiff have successfully maintained a claim of unconditional and sole ownership from the very lien or encumbrance dating from January when he had not completed paying for the car until June, in view of the facts, that admittedly in case of his failure to pay, or leaving of his employment, or his death, neither he nor his legal representatives could have compelled VanHorn to turn over possession or legal title unless and until fully paid for.

Considering all the facts and circumstances in evidence, can it be said that the agreement between VanHorn and the plaintiff must necessarily and conclusively be construed as an *agreement to extend credit*, as the Supreme Court says, and that plaintiff was the absolute owner from the date of original purchase by VanHorn from the manufacturer? Do the proofs compel such a construction? Certainly not. On the contrary, the retention of legal title and possession by VanHorn until the car was fully paid for in June and billed to plaintiff and the fact that the plaintiff could not have compelled VanHorn before that date to give him such possession and title, leads rather to the conclusion, that the agreement was an *agreement to sell*, only upon performance of the condition of full payment and not otherwise. And the fact that no insurance was taken out by plaintiff until June, confirms this construction.

If the agreement merely amounted to an extension of credit by VanHorn to the plaintiff "as much as if the credit had been given to him directly by the seller" (meaning Brock from whom VanHorn took title) why did not plaintiff have possession and control of the car from the very beginning as he would have had if purchased direct by him from Brock upon credit?

And because an automobile is deemed second hand and greatly depreciates in value almost immediately after purchase from the manufacturer and such a purchaser no matter how soon after he buys the car as new, can never resell it for anything near original cost—if defendant had known this car was purchased in January from the maker, by someone other than plaintiff, and used until June (or only March even as claimed by plaintiff) before title was given to plaintiff and

that it had been seriously injured in the meantime, is it reasonable to believe that they would have insured it for \$400.00?

Can this be so, in view of the fact that thereby a convenient scheme for defrauding insurance companies can be carried out thus: A by understanding with B, agrees to buy a car from the maker with his own money and that he will turn the car over to B as soon as B pays for it; A uses the car for several months and turns it over to B who insures it for full value as a new car, and uses it until some alleged accident or theft occurs, and collects the full insurance from the company; thus A and B have had a season's use free of cost to them. It is not contended that this plaintiff was party to any such scheme but the possibility shows the fallacy of the view of the Supreme Court, so far as it affects the absolute and unconditional ownership required in matters of insurance.

All these considerations emphasize the injury or legal fraud upon the defendant insurance company, in taking out insurance to practically the full value of a brand new Ford car, by representing the car as new, though purchased and used by another for some months previous to its transfer to the plaintiff and especially after a serious accident to the car which cost over \$100.00 to repair.

It is therefore respectfully submitted, that the Supreme Court erred in reviewing and reversing the finding of fact by the Trial Court that the car was an old one, since there was evidence upon which to base such a finding and also in that the Court itself make a finding of fact, as an Appellate Court, upon a review of the evidence.

Even when the question is a mixed one of law and fact, the rule is the same that an Appellate Court will not review such a finding.

Larned vs. McCarthy, 85 N. J. L., 589.

POINT II

Supreme Court erred in not reversing the judgment of District Court or granting judgment for defendant.

The Trial Court having given judgment against the defendant upon an erroneous theory that the agent of the defendant knew all the facts and conditions as well as the plaintiff; and the Supreme Court having set aside that finding, because there was *no proof* of such agency in writing; and the Trial Court having further found that the car, though represented to be new, was in fact an old one when purchased by plaintiff, there would seem to have been no ground left to support a judgment for the plaintiff and the Supreme Court should therefore either have reversed the judgment and granted a new trial or entered judgment for defendant according to Section 206 of District Court Act. As the case had been fully tried, it would seem that the Supreme Court should have entered judgment for defendant.

The only apparent reason one of these things was not done in the Supreme Court is that it erroneously reversed the finding of fact and made a contrary finding as is discussed in the preceding point.

POINT III

The representation that the automobile was new when purchased by the insured was a material misrepresentation and warranty and its untruth voids the policy.

This point was relied upon as a ground for non-suit in the Trial Court.

It may be ^{un}necessary to discuss this point in view of the fact that it may be deemed to have been impliedly decided favorably to defendant, because Supreme Court found it necessary to overcome the finding of the Trial Court that the car was an old one and hold it to be a new one in order to sustain the judgment below; but as the Supreme Court did not expressly rule on the point, it may be well to call this Court's attention to the fact that the point was presented and the evidence shows defendant relied upon the representation as true and material and if untrue, it voids the policy under its terms. We therefore urge that the Trial Court's finding that the car was an old one is final and being material voids the policy.

The statement of an applicant for insurance that the automobile was new when purchased by him is a material representation which forms the basis of the policy of insurance and upon which the Insurance Company has a right to rely in issuing the policy. The law is well settled in this state that a material representation in an application for insurance where the application is made a part of the insurance policy amounts to a warranty or a condition upon the breach of which, no recovery can be had upon the policy. Where the policy in express terms refers to the application or other papers relative to the risk and adopts them as part of the contract of insurance, they become part of the policy and the statements therein relative to the situation, use or character of the property are warranties on the part of the assured and the validity of the contract of insurance depends upon the truth and fulfillment of the warranties and conditions therein expressed.

Dewees vs. Manhattan Insurance Co.,
34 N. J. L., 244.

Millicen vs. Woodward, 64 N. J. L.,
44.

Carson vs. J. C. Insurance Co., 43 N. J.
L., 300.

In the case at bar, the description of the automobile is set out in the policy and the policy contains the following conditions (Exhibit P-1, II. AA, and 6-10):

“This policy is made and accepted subject to the foregoing stipulations and conditions, and to the *following* stipulations and conditions printed on back hereof which are hereby specially referred to and made a part of this policy.”

“This entire policy shall be void if the insured or his agent has concealed or misstated, in writing or otherwise, any material fact or circumstance, concerning this insurance or the subject thereof; or if the interest of the insured be other than unconditional and sole ownership, or if the subject of this insurance be or become encumbered by any lien or mortgage, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, written before or after the loss or damage.”

If there was therefore a material misrepresentation or an untrue representation, it is a breach of a warranty or condition of the policy and the insured forfeits all rights to recover thereon, and it is immaterial whether the misstatement resulted from bad faith or from accident or ignorance.

Marshall on Insurance, 251.

Wood vs. Hartford Insurance Co., 13
Con., 544.

Franklin Fire Ins. Co. vs. Martin, 40
N. J. L., 568.

Clement on Fire Insurance, Vol. 2, page 15, says
as follows:

“Representations of an applicant become the basis of insurance if they be false, touching matters material to the risk, the contract obtained through their influence cannot be enforced, and it is in such cases quite immaterial whether the misstatement resulted from bad faith or from accident or ignorance.”

Cooley's Briefs on the Law of Insurance, Vol. 2, page 1166, say as follows:

“It is a well-settled rule supported by abundant authority that where the insurer is induced to enter into the contract by a representation as to a material fact, the policy will be avoided whether the misrepresentation was made wilfully with intent to deceive or through an innocent mistake.”

In *Armour vs. Transatlantic Fire Insurance Company*, 19 N. Y., page 450, it was held that:

“A material misrepresentation made in applying for a policy of insurance will, although honestly made, void the policy.”

In *Kasprzyk vs. Metropolitan Life Insurance Company*, 29 Misc., 263, the authorities on this proposition are carefully collated and after a review of the decisions, the Court said as follows at page 270:

“The misrepresentations made in the application for the policy here under consideration were of facts; they were not mere matters of opinion. All of them were material to the risk and the result of them was the issuance of a policy on a risk entirely different from the one which the appellant thought it was undertaking; and the policy is, therefore, void, whether the insured knew that the statements were false or not.”

Nor is there any doubt that the statement that the car was new was a misrepresentation or misstatement material to the risk of the policy. There cannot be any question that a car which has been run three or four hundred miles is not a new car whether used for demonstration purposes or otherwise and its value depreciates greatly. The Courts have even gone so far as to hold that when a car was insured in 1909 as a 1907 model and was in fact a 1906 model, that this was such a material misrepresentation as to the identity of the insured property in the application for insurance that it rendered recovery on the policy impossible. This was decided in *Harris vs. St. Paul Fire and Marine Insurance Co.*, 126 N. Y. Suppl., 118. The Court said in that case at page 119:

“It is perfectly clear that a used car constructed in 1906 and insured in November, 1909, is not of the same insurable value as a car constructed in 1907, and the statement of the plaintiff that the car was of 1907, was a material representation upon which the defendant had a right to rely in issuing the valued policy in the sum of \$2,000.00. The motion for a nonsuit made at

the close of plaintiff's case and renewed at the close of the entire case should have been granted."

In the case at bar, the defendant company issued a valued policy on the plaintiff's statement that the car was new when purchased by him, whereas in fact, it was not new and consequently was not worth the amount for which the Vulcan Insurance Co., insured it. It is common knowledge that no old Ford car is worth \$400.00. As soon as the car is purchased it loses 35 to 50 per cent of its value. The insured wilfully misstated the fact, and the defendant company relied upon that fact in issuing the policy. The testimony of Mr. Kahn, the president of the defendant company, is absolutely unequivocal that the insurance company would not have issued the policy had Mr. Rabinowitz stated that the car was old when he purchased the same (test., p. 36, ll. 21-36), and the reliance upon this fraudulent statement bars recovery whether the application were part of the policy of insurance or not.

Dewees vs. Manhattan Insurance Co.,
supra.

Wherefore it is respectfully contended that the judgment of Supreme Court should be reversed and a new trial ordered in District Court or judgment entered in Supreme Court for defendant.

Respectfully submitted
HERSHENSTEIN & FINNERTY,
Attorneys for Defendant-Appellant.

Charles Hershenstein,
Frank W. Hastings, Jr.,
Of counsel.





