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# Record No. 5205

## In the Supreme Court of Appeals of Virginia at Richmond

## ELIZABETH A. SCOTT, ET AL. ETC.

v.

## STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

FROM THE CIRCUIT COURT OF ROTETOURT COUNTY

### RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

**Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.**

IN THE

# Supreme Court of Appeals of Virginia

AT RICHMOND

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## Record No. 5205

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VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 6th day of June, 1960.

ELIZABETH A. SCOTT, ET AL., ETC., Appellants,

*against*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Appellee.

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From the Circuit Court of Botetourt County

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Upon the petition of Elizabeth A. Scott and Roy E. Scott, an infant, by Stuart A. Barbour, Jr., his guardian *ad litem,* an appeal is awarded them from a decree entered by the Circuit Court of Botetourt County on the 7th day of December, 1959, in a certain chancery cause then therein depending wherein State Farm Mutual Automobile Insurance Company, a corporation, was plaintiff and Paul M. Herndon, Administrator of the Estate of Robert M. Herndon, deceased, the petitioners and others were defendants; upon Elizabeth A. Scott, or some one for her, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs, no bond being required of Roy E. Scott, an infant.

# RECORD

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page 2 }

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## BILL OF COMPLAINT.

To the Honorable Earl Abbott, Judge of said Court:

1. Complainant, State Farm Mutual Automobile Insurance Company, respectfully represents unto the court the following in support of its prayer and request for a declaratory judgment as hereinafter set forth.

2. Plaintiff is a corporation, duly organized and existing under and by virtue of the laws of the State of Illinois, with its Home Office at Bloomington, Illinois, and is duly domesticated in the State of Virginia, and qualified to do business therein.

3. On or about the 3d day of August, 1957, the defendant, George E. Bower, through the complainant's agent,
page 3 } James A. Francisco, made application for a contract of insurance with the complainant for liability and other coverage for a 1949 Plymouth automobile, Motor Number P 1880263. In making this application, the said George E. Bower represented unto complainant's agent, James A. Francisco, that he, the said George E. Bower, was the sole owner of the said 1949 Plymouth automobile. The same representation as to sole ownership of the 1949 Plymouth automobile was contained in a written application for a contract of insurance, which application was signed by the said George E. Bower, and dated August 3, 1957.

4. On the basis of the aforesaid application and the representations therein, the complainant issued its automobile policy No. 880 431-B03-46 to the said George E. Bower effective one year from date of application.

5. On February 4, 1958, at approximately 9:40 p. m., the aforesaid 1949 Plymouth automobile was involved in a non-collision accident in Botetourt County, Virginia, on Botetourt County Road No. 738, a few hundred yards southwest of Colonial High School, Blue Ridge, Virginia. At the time of the accident the automobile was driven by Robert M. Herndon, who was at that time residing at 2715 Fairfield Drive,

N. E., Roanoke, Virginia. The said Robert M. Herndon died as a result of injuries received in the aforesaid accident. Subsequently, on August 22, 1958, the defendant, Paul M. Herndon, father of the said Robert M. Herndon, qualified as the administrator of the estate of Robert M. Herndon, deceased. The qualification was had in this court.

6. At the time of the aforesaid accident, the defendants DeWitt Francis Swanson and Roy E. Scott were passengers in the aforesaid 1949 Plymouth automobile operated by the said Robert M. Herndon. Both of these defendants, DeWitt Francis Swanson and Roy E. Scott, were injured in the accident and have asserted claims against Paul M. Herndon, as administrator of the estate of Robert M. Herndon, and against the complainant on the basis of the aforesaid policy No. 880 431-B03-46.

page 4 } 7. The defendant, Roy E. Scott, suing by the defendant Elizabeth A. Scott as his mother and next friend, has instituted proceedings in the Circuit Court of the City of Roanoke, Virginia, against Paul M. Herndon, administrator of the estate of Robert M. Herndon, deceased, to recover damages for injuries sustained in aforesaid accident of February 4, 1958. The motion for judgment in these proceedings was filed on February 18, 1959. Grounds of Defense were duly filed by the defendant, Paul M. Herndon, administrator of the estate of Robert M. Herndon, deceased, and the parties are at issue. No date has been set for a trial of this action.

8. Immediately after the aforesaid accident on February 4, 1958, the complainant through its agents made an investigation of the circumstances pertaining thereto. As a result of this investigation, the complainant learned for the first time that the aforesaid 1949 Plymouth automobile was not in fact owned solely by the said George E. Bower. The investigation by complainant led to the conclusion that payment for the aforesaid 1949 Plymouth automobile was made partially if not entirely by the defendant Robert W. Bower, son of the defendant, George E. Bower. The complainant's investigation indicated further that the said Robert W. Bower was the principal owner of the aforesaid 1949 Plymouth, and prior to the time of the accident had negotiated its sale to the aforesaid Robert M. Herndon, deceased. The complainant's investigation indicated that the said Robert M. Herndon, deceased, had made partial payment toward purchase of the automobile, and that in accordance with an agreement reached between the said Robert M. Herndon and the said Robert W.

Bower, title to the automobile was to be changed from the name of the said George E. Bower to the said Paul M. Herndon. In accordance with the aforesaid purchase agreement, possession of the said 1949 Plymouth automobile was given to the said Robert M. Herndon, deceased, a short time prior to the accident.

page 5 } 9. The interest of the said Robert W. Bower in the said 1949 Plymouth automobile was never disclosed to the complainant in the application for the contract of insurance by the said George E. Bower, who represented that he was the sole owner of the vehicle in question. When the complainant learned of the interest of the said Robert W. Bower in the automobile as a result of the investigation conducted after the accident on February 4, 1958, the complainant advised the said George E. Bower, by letter dated April 9, 1958, that the policy number 880-431-B03-46, was being rescinded as of the date of issuance thereof, and was accordingly considered void from inception. All payments made by or on behalf of the said George E. Bower in connection with the said policy were refunded to him by the complainant. This rescission was made on the basis of the misrepresentation by the said George E. Bower that the automobile was solely owned by him, which the complainant avers was a material misrepresentation. The said policy of insurance was issued in reliance upon the statements made in the application, and if the true facts had been known, the application would have been rejected.

10. Complainant alleges and avers that there now exists between complainant and the defendants a judiciable controversy; that is, an actual, real and *bona fide* controversy as to whether or not under any contract of insurance complainant has any obligation or responsibility to the defendant Paul M. Herndon, as administrator of the estate of Robert M. Herndon, the operator of the said 1949 Plymouth automobile in question, in which the injured defendants DeWitt Francis Swanson and Roy E. Scott were riding at the time of the accident; which 1949 Plymouth automobile was owned principally by the defendant Robert W. Bower; and which 1949 Plymouth automobile was represented to complainant as being solely owned by the defendant George E. Bower in his application for a contract of insurance thereon.

11. The said Roy E. Scott, Elizabeth A. Scott, and DeWitt Francis Swanson are made parties defendant to this bill of complaint and also Robert W. Bower, George E. Bower, and Paul M. Herndon, in order that all interested parties will be before this honorable court, and have an opportunity to

present such evidence as may be deemed material and proper insofar as their rights are concerned.

page 6 } 12. Complainant further represents that the defendants DeWitt Francis Swanson and Roy E. Scott are infants under the age of 21 years.

13. Jurisdiction of this court is proper as the amount of claims asserted by the injured parties, and others interested in their behalf, and the potential amount involved is in excess of the sum of $300, as required under Section 16.1-77 of the 1950 Code of Virginia, as amended. This court further has jurisdiction by virtue of the provisions set forth in Section 8-578 and Section 8-579 of the 1950 Code of Virginia pertaining to declaratory judgments.

IN CONSIDERATION WHEREOF your complainant prays that:

(a) Paul M. Herndon, George E. Bower, Robert W. Bower, DeWitt Francis Swanson, Roy E. Scott, and Elizabeth A. Scott may be made parties defendant hereto and required to answer same, but not under oath, answer under oath being expressly waived;

(b) That an injunction may be issued enjoining Roy E. Scott, and his mother and next friend, Elizabeth A. Scott, from further proceedings in the case brought in the Circuit Court of the City of Roanoke, Virginia, by the said Roy E. Scott, suing by his mother and next friend, Elizabeth A. Scott, against Paul Morgan Herndon, administrator of the estate of Robert Morgan Herndon, deceased.

(c) That a decree may be entered herein, adjudicating that the representation of George E. Bower to complainant's agent that he was the sole owner of the 1949 Plymouth automobile in question was a material misrepresentation, thereby constituting grounds for rescission of the policy issued on the basis of such material misrepresentation.

(d) That a decree may be entered herein, adjudicating and ordering that because of the material misrepresentation made in the application for a contract of insurance with the complainant by George E. Bower, the policy number 880-431-B03-46 issued by the complainant was void and null from the date of its inception.

(e) That a decree may be entered herein, adjudicating and ordering that the complainant has no obligations whatsoever under policy No. 880-431-B03-46 and further that no rights of any kind accrue under the said policy to Paul M. Herndon, George E. Bower, Robert W. Bower, DeWitt Francis Swanson, Roy E. Scott, or Elizabeth A. Scott.

(f) That complainant recover its taxable costs.
page 7 } (g) That your complainant may have such other relief, both general and special, as may be proper.

Respectfully,

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
By ROBERT J. ROGERS
Of Counsel.

Filed in the Clerk's Office the 23 day of April, 1959.

Teste:

R. D. STOWER, Clerk
By B. M. ALLEN, D. C.

* * * * *

page 22 }

* * * * *

ANSWER.

The answer, in proper person, of Stuart A. Barbour, Jr., guardian *ad litem* of the infant defendant, Roy E. Scott, duly appointed to defend his interest in this suit, to a bill of complaint filed against said infant defendant and others, in the Circuit Court of Botetourt County, by State Farm Mutual Automobile Insurance Company.

This defendant, for answer to said bill, or to so much thereof as he is advised it is material that he should answer, answering says:

1. That the allegations of Paragraphs 2, 3, 4, 5, 6, 7, and 12 of the Complainant's Bill are substantially true and correct, as far as this defendant knows or is advised, with the exception that the allegation contained in Paragraph 5 of said Complainant's Bill as to the appointment and qualification of Paul M. Herndon as Administrator of the Estate of Robert M. Herndon, deceased, before this court is erroneous, said personal representative having been appointed by and qualified before the Court of Law and Chancery of the City of Roanoke, Virginia.

2. That the allegations of Paragraphs 8, 9, and 10 of the Complainant's Bill are denied.

3. That all other allegations contained in the Complainant's Bill not herein specifically admitted are denied.

page 23 } And having fully answered he prays to be hence dismissed, with his reasonable costs and charges.

STUART A. BARBOUR, JR.,
Guardian *ad litem,* for Roy E. Scott, infant defendant.

Filed June 22, 1959.

B. M. ALLEN, Dep. Clk.

* * * * *

page 24 }

* * * * *

ANSWER.

To the Honorable Earl L. Abbott, Judge of said Court:

The answer of Elizabeth A. Scott to the bill of complaint filed in this court by State Farm Mutual Automobile Insurance Company seeking a declaratory judgment against the interest of your respondent in her capacity as mother and next friend of her infant son, Roy E. Scott.

This respondent for answer to said bill, or to so much thereof as she is advised it is material that she should answer, answering says:

(1) That the allegations contained in paragraphs 2, 3, 4, 5, 6, 7 and 12 of the Bill of Complaint are substantially true and correct, as far as this respondent knows or has been advised and believes to be true and correct, with the exception that the allegation contained in said paragraph 5 as to the fiduciary appointment of Paul M. Herndon before this court is erroneous, said appointment and qualification as the personal representative of the decedent, Robert M. Herndon, having been had before the Court of Law and Chancery of the City of Roanoke, Virginia.

(2) That the allegations contained in paragraphs 8, 9 and 10 of the Bill of Complaint are denied.

(3) That all other allegations contained in the
page 25 } Bill of Complaint not herein specifically admitted
are denied.

And now having fully answered, this respondent prays to be hence dismissed with her reasonable costs in this behalf expended, including an attorney's fee to be awarded her counsel.

ELIZABETH A. SCOTT
By STUART A. BARBOUR, JR.
Of Counsel.

Filed June 22, 1959.

B. M. ALLEN, Dep. Clk.

* * * * *

page 28 }

* * * * *

Received and filed Jan. 26, 1960.

EARL L. ABBOTT, Judge.

TRANSCRIPT OF EVIDENCE.

Fincastle, Virginia. September 22, 1959.

Appearances: Messrs. John H. Thornton, Jr. and Robert J. Rogers, (Woods, Rogers, Muse and Walker), of counsel for the Plaintiff;
Messrs. T. W. Messick and John Allen, of counsel for the claimant, Scott; and
Stuart A. Barbour, Jr., Esq., Guardian at liem.

Stenographic report of all the testimony, together wtih the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and other incidents of the trial of the case of State Farm Mutual Automobile Insurance Company *v.* Paul M. Herndon, Administrator of the Estate of Robert M. Herndon, deceased, et al., tried at Fincastle, Virginia, on September 22, 1959, before Honorable Earl L. Abbott, in The Circuit Court of Botetourt County, Virginia.

Reported by: Marcus A. Bieler, Court Reporter, 1743 Devon Road, S. W. Roanoke, Virginia.

* * * * *

page 30 } September 22, 1959
10:00 o'clock, A. M.

Mr. Thornton: Your Honor, you asked about counsel in the case. Mr. Jim Brice, from Roanoke, represented him certainly at one stage of the proceeding and as far as I know still does. Is Mr. Herndon here?

Mr. Herndon: Yes, sir.

Mr. Thornton: Was Mr. Brice supposed to be down here today, Mr. Herndon?

Mr. Herndon: No, sir.

Mr. Thornton: He was not supposed to be here?

Mr. Herndon: No, sir.

Mr. Thornton: All right.

The Court: The last time we were down here, wasn't some kind of an order entered, Mr. Rogers?

Mr. Rogers: Judge, there was a decree entered overruling a plea in abatement filed.

The Court: That's right; a plea in abatement.

Mr. Rogers: Mr. Kennett filed it.

The Court: All right. Who do you represent, Mr. Messick?

Mr. Messick: I represent Roy Scott for his injuries.

The Court: Against Bower? That was dismissed—Bower was dismissed—George Bower and Robert Bower.

Mr. Rogers: I don't know.

page 31 } Mr. Messick: Kennett represented Bower.

Mr. Rogers: He indicated before he would not be present.

The Court: All right. Mr. Messick, it looks like it is up to you then to take up the question of the demurrer.

Mr. Messick: Judge, I don't believe that—I didn't file a demurrer. Did Stuart file it?

The Court: Yes.

Mr. Messick: I don't believe that the grounds of a demurrer are good, sir.

The Court: I think that's what Mr. Barbour told Mr. Thornton.

Mr. Rogers: And told me at one time. I talked with him, and, in fairness to him, I talked to him later and he said possibly his second ground of the demurrer might have some merit and he was going to give that further consideration.

Mr. Messick: I don't think so.

The Court: I think that question came up in the filing of the demurrer—the second question—and that is that it would probably be a question of fact rather than a question of law.

Mr. Rogers: There would be some question of
page 32 } fact involved.

The Court: In order to get started, suppose I overrule your demurrer?

Mr. Messick: All right.

The Court: Mr. Kennett represents George Bower and Robert W. Bower and an order entered here—an order entered on June 17, 1959 was entered—holding that George Bower and Robert W. Bower had no financial interest in the outcome of the cause and that the purpose of their plea in abatement was to test the right of the other defendants to defend against a prayer of declaration that the policy of insurance was null and void, with exception, and the Court then went on to rule that hereafter no notice of the taking of depositions and hearing before the Commissioner or a hearing on the case need be given to George Bower or Robert W. Bower, or their counsel.

Mr. Messick: May I see that order please, sir?

The Court: Yes; you may. (Order handed to Mr. Messick for inspection.) We had a hearing on that in June—on that part of it.

Mr. Rogers: Yes, sir.

Mr. Thornton: No notice of that was given to the defendants.

The Court: That's right. That doesn't affect you in any way.

page 33 } Mr. Thornton: Is Bower here?

The Court: Which one are you?

Mr. Bower: I am Robert.

The Court: Is George here?

Mr. Bower: Yes.

The Court: All right; both of them are here.

Mr. Messick: Mr. Bower, you gentlemen come here a minute. I would like a few minutes talk to them, your Honor.

The Court: All right.

(Mr. Messick and the Messrs. Bower left the courtroom to confer and returned in a few minutes.)

Mr. Thornton: Ready, your Honor.

The Court: You gentlemen wish to make opening statements? You don't have to unless you want to. I think I understand what is before us.

*Paul M. Herndon.*

Mr. Thornton: No, sir; I don't think we want to.
The Court: All right.
Mr. Thornton: We call Mr. Herndon.
The Court: All right, Mr. Herndon, come around please.

MR. PAUL M. HERNDON,
called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION.

page 34 } By Mr. Thornton:
Q. You are Mr. Paul Herndon; is that right?
A. Yes, sir.

By the Court: (interposing)
Q. This is Paul M. Herndon?
A. Yes, sir.

By Mr. Thornton: (continues examination)
Q. And where do you live, Mr. Herndon?
A. 2715 Fairfield Drive, Northeast.
Q. And in the City of Roanoke?
A. Yes, sir.
Q. Now, sir, would you talk up just a little louder so the Judge can hear you?
A. All right, sir.
Q. That is in the City of Roanoke?
A. City of Roanoke; yes, sir.
Q. Where are you employed, Mr. Herndon?
A. I am employed with the Lindsey Water Conditioning Company.
Q. With who, sir?
A. Lindsey Water Conditioning Company.
Q. Lindsey Water Conditioning Company?
A. Yes, sir.
Q. Now, as I understand the facts, and what we are trying to establish here today, it was your son who was
page 35 } driving this automobile—this '49 Plymouth—when the accident occurred in which he was killed; isn't that correct?
A. That is correct; yes, sir.
Q. On the night that—well, let me put it this way. Do you know, of your own personal knowledge, of your son's previous operation of that automobile prior—

*Paul M. Herndon.*

Mr. Messick: I don't know what the operation of the car has to do with it, if your Honor please. This car was sold to Mr. Bower—George E. Bower—and the policy of insurance was issued on the 3rd of August, 1957, to Mr. Bower and titled, "Motor Vehicle Department."

The Court: I don't think the question and answer you want is material but I see no objection to his answering it.

By Mr. Thornton: (continues examination)

Q. I will rephrase the question this way. Do you know what type of automobile your son was driving at the time he was in the accident?

A. '49 Plymouth, sir.

Q. Now, do you know how your son happened to be driving that Plymouth automobile?

A. Yes, sir; I do.

Q. How did he happen to have the car?

Mr. Messick: That is the same objection.

The Court: Objection overruled.

page 36 } Mr. Messick: Exception.

The Witness: How did he happen to be driving it?

By Mr. Thornton:

Q. (Continued) Yes, sir.

A. Well, sir, at that time my son and Robert Bowers was good friends and Robert was over to our house a lot and my son was over at his house a lot and, as I understand it from what my son told me, that at that time Robert Bowers didn't have a permit or something or the other of that type or something concerning his permit that he couldn't drive.

So my son would go pick him up and take him places and, of course, at that time also my son had talked to Robert Bowers about buying the car from him, but as far as I know there was no transaction taken place as towards buying the car but at that time he was driving the car for the purpose of carrying he and Robert Bowers to the ball games and so forth and so on, and Robert was letting him use the car at that time.

Q. Did the car stay over at your house a good bit?

A. As I remember, the last week, it did; yes, sir.

Q. And on the occasions that your son got the Bower automobile, do you know of your own knowledge—I mean, did you

see the Bower automobile or what we term the Bower automobile being brought to your house?

A. Oh, yes; yes, sir.

Q. Did you see Robert Bower over there with the
page 37 } car?

A. Robert Bower with the car?

Q. Yes.

A. At times; yes, sir.

Q. And did you ever see Robert Bower drive the car?

A. No, sir; I did not.

Q. You are not stating that he never drove it; you are just stating—

A. I'm not stating he never drove it; I never did see him drive it.

Q. You never did see him drive it?

A. That's right.

Q. You saw your son drive the car?

A. Yes, sir; I did.

Q. And it was over at your house a week prior to this accident?

A. Well, I would say it was in and out; yes, sir.

Q. Did you yourself have any conversation with Robert Bower concerning the ownership of this car?

A. As I remember, one day I was out at my father's house—

Mr. Messick: (interposing) One minute. Your Honor, the ownership is decided by the certificate of title and any statement made by Robert Bower wouldn't be admissible as against—

Mr. Thornton: I didn't catch the first part of
page 38 } that, Mr. Messick. Did you say the ownership is decided by the title of the car?

Mr. Messick: Yes, sir; in the law of Virginia.

The Court: That's what the Court is supposed to decide here today; that's one of the issues. That's one of the issues here before the Court right now. I am going to overrule your objection and I may strike it out later though. I think it is evidence that should come before the Court.

The Witness: Shall I answer the question, sir?

By the Court:

Q. You may answer the question.

A. I was out at my father's house and Robert and some other boy and my son came out there and picked me and my

*Paul M. Herndon.*

wife up that day and we were driving back and Bobby—that's my son—was saying, "Robert wants to sell this car," and I said, "He does?" And he said, "Yes, he does." I said, "Well, how much does he want for it?" He said, "$100.00," and he said, "What do you think about it?" I said, "Well, we'll discuss that later on," and that's all that was said.

By Mr. Thornton:

Q. Did you, or did you not, ever talk to Mr. George Bower, Robert's father?

A. No, sir; I never met Mr. George Bowers until my son was killed in the accident, as I remember.

page 39 } Q. All right. And the only conversation was one time you say that you were riding in the car with Robert?

A. Robert and Bobby—that's my son—

Q. Yes.

A. —and some other boy; I don't know who it was, and my wife. That was the Sunday before he was killed in the accident on Tuesday.

Q. And your son, as I understand it, said, "Robert wants to sell the car for $100.00"?

A. Yes, sir; the best of my knowledge, that's what my son said at that time. Now, I was mistaken—it was not the Sunday before, sir; it was about a week before—something like that.

Q. The father was not mentioned in that conversation?

A. The father was never mentioned; no, sir, not to me, sir. The only time that the—the only time the father was ever mentioned to me was when my son said, "Daddy, are you going to buy the car for me?" And I said, "I can't buy the car from Robert." He said, "Well, you and Mr. Bowers can get together."

Q. Uh-hum.

A. That's the only time that Mr. Bowers' name was ever brought up in the subject.

Q. Did you know of your own knowledge who the car belonged to—

A. I know that it belonged to—

page 40 } Q. —at the time you were talking to those boys?

A. I knew that it belonged to Mr. George Bowers; yes, sir.

Q. How did you know that, Mr. Herndon?

A. Well, as I remember from what my son told me, that we would have to transfer the papers through Mr. George Bowers if we bought the car.

Q. I see. Your son had told you that Mr. George Bowers—

A. My son said that I would have had to sign for him and the same as Mr. Bowers would have had to sign the car over, even if it was his son's car.

Q. George Bower, I take it, was under age?

A. Sir?

Q. Not George Bower but Robert Bower was what—how old was he—18 or 19?

A. Well, as I remember, to the best of my knowledge, he was—yes, sir, my son was 18.

Mr. Thornton: All right, sir. That's all.

Mr. Messick: No questions.

The Court: You may stand aside.

The witness stands aside.

MR. GEORGE E. BOWER,

called as a witness in behalf of the plaintiff, being duly sworn, testified as follows:

page 41 } DIRECT EXAMINATION.

By Mr. Thornton:

Q. You are Mr. George E. Bower?

A. Yes, sir.

Q. Is that correct? Where do you live, Mr. Bower?

A. 2832 Huntington Boulevard, Northwest, Roanoke.

Q. What do you do for a living, sir?

A. I work for the Norfolk and Western Railroad in the Signal Department.

Q. In the Signal Department?

A. Yes, sir.

Q. What are your duties in the Signal Department?

A. Lineman.

Q. Sir?

A. Lineman.

Q. You say you are a lineman?

A. Yes, sir.

Q. You work, say, in the Shops, Mr. Bower, or do you work out on the road; how is that?

*George E. Bower.*

Mr. Messick: I don't know what the materiality is there.
Mr. Thornton: I intend to show, Mr. Messick—
The Court: Objection overruled.
Mr. Thornton: —and intend to tie it in.

The Witness: I work out on the road, all over
page 42 } the system.

By Mr. Thornton: (continues examination)
Q. Sorry, sir. You say you do work out on the road?
A. Yes, sir.
Q. All over the system?
A. Yes.
Q. And are you home every night?
A. No, sir.
Q. Well, could you describe to us briefly, sir, do you go down, say, to Shaffer's Crossing, or some place and go out on the train early in the week and then come back later in the week?
A. No; I generally go out Sunday night and come back Friday night.
Q. And you work out of one of these cars that I—I just don't understand what a signalman does, Mr. Bower. That's my problem.
A. Well, I worked—I did work on camps awhile and then I worked on mostly and stay around in hotels now when I'm out.
Q. I see. You go out on a Sunday night and work wherever they require your services on the road?
A. Yes; wherever they require me.
Q. And you come in on Friday or on a Friday?

A. Yes.

page 43 } Q. Now, I'll direct your attention back to the 19th of August of 1957 when this '49 Plymouth was acquired by you—of July or the Summer of '57. Do you recall offhand the details of you buying that car?
A. Yes; I guess so.
Q. Who did you buy it from, Mr. Bower?
A. It wasn't Breeden—it was—
Q. Some used car dealer in Roanoke?
A. Yes; a used car dealer in Roanoke on Campbell Avenue.
Q. On Campbell Avenue. Do you remember what you paid for it?
A. $250.00.
Q. $250.00?

A. Yes.

Q. Did your son, Robert, go with you when you bought the car?

A. Yes.

Q. And how much of the $250.00 did Robert pay toward the purchase of the car?

A. Oh, I believe he paid about $200.00.

Q. Where was Robert working at that time?

A. He was working for the Norfolk and Western Railroad.

Q. Had you all paid cash for the car?

A. Yes, sir.

Q. Now, that was roughly within a month. Do
page 44 } you think that was in July of '57?

A. No; it was somewhere along there though.

Q. How many sons have you got, Mr. Bower? I mean, is Robert your only son?

A. No; I have five.

Q. You have five sons. How many were living at home at the time this car was purchased?

A. Well, four of them.

Q. Four living at home. What were their ages, sir?

A. Well, Robert, he was 19, I believe.

Q. Robert was 19. Was he the oldest?

A. He was the oldest.

Q. And who was the next son?

A. Andre, I guess; he was about 17 or 18, or 18 at the time.

Q. Andre was 17 or 18?

A. Yes.

Q. And who was—what is the name and age of your next son?

A. Jerry.

Q. How old was he, sir?

A. Well, Jerry is about 17 now; he was about 16 then.

Q. About 16?

A. Yes; 15 or 16 at that time.

Q. And I take it, the fourth or the next son—
page 45 } A. The next son was younger.

Q. Was younger. Now, any of those boys drive a car?

A. No.

Q. Sir?

A. No; not at the time—not when I bought that car.

Q. None of them could drive?

*George E. Bower.*

A. None of them drove.

Q. Had they ever drove?

A. Well, Robert, he never has drove.

Q. Sir?

A. The oldest boy, he never has been able to drive.

Q. Uh-hum. Now, what do you mean, sir, when you say he hasn't been able to drive?

A. He never learned; he never had learned to drive a car.

Q. Had he ever had a learner's permit?

A. No.

Q. You don't think you could be mistaken about that?

A. No; he never had a learner's permit.

Q. To your knowledge, he has never been behind the wheel of a car?

A. Well, he may have been behind the wheel of a car.

Q. How about the 17 year old boy; he never had driven the car either?

A. Well, since then, he's had a permit and page 46 } drives. He's in the Air Corps.

Q. Was he in the Air Corps at the time this car was purchased?

A. Let's see. I don't know whether he was or not. He's been at it going on, I guess,—he was,—I believe he was. He had gone in January and the car wreck was in February, I believe it was.

Q. You say you think he went in the Air Force in January of the year the car wrecked, or the wreck happened?

A. I believe he did.

Q. February. Why did you buy the car, Mr. Bower?

A. Well, I bought it partly to use when I was working to get back and forwards to work.

Q. To get backwards and forwards to work. How many other cars did you have?

A. That's the only one.

Q. Thats' the only one. Now, when you say you bought it to get back and forth from work, you mean you'd drive it from your home in the Town to some point where you got to the train and leave it, and then pick it up when you'd come back?

A. Well, sometimes when I was working close enough home, I could drive it to where I was working.

Q. But what would you do on the other occasions?

*George E. Bower.*

A. The other time I would ride the train and be away from home a good piece.

page 47 } Q. And when you rode the train, would you drive it?

A. No.

Q. Who else in your household drove, Mr. Bower?

A. There wasn't nobody driving at that time that I bought the car.

Q. Sir? You were the only person in the house?

A. I was the only driver.

Q. The only person that could operate the car?

A. (The witness nodded his head.)

Q. Well now, when you were away, how about the use of this automobile?

A. Well, if my boy, Robert, had—he had to get somebody to drive for him wherever he went.

Q. He couldn't drive?

A. He couldn't drive.

Q. Well, you were—as I understand it, the way you work, Mr. Bower, you are away most of the week?

A. Yes, sir.

Q. And when you would go away that car just sat in your driveway unless you had it off to the job somewhere?

A. (The witness nodded his head.)

Q. Does your wife drive?

A. No.

Q. Well then, when you went away—I mean, when you were working, you didn't really know what was

page 48 } happening to the automobile, did you?

A. No; I was away during the week.

Mr. Messick: I don't object but I don't see what the materiality is.

The Court: Objection overruled.

Mr. Messick: Well, all right.

By the Court: (interposing)

Q. Did I understand that you let your son have the use of the car while you were away, provided someone drove it for him since he couldn't drive?

A. Yes, sir.

Q. Is that what you are saying?

A. Yes, sir.

Q. I mean, with your consent, your son used the car?

A. Yes, sir.

*George E. Bower.*

Q. Let me ask you this now. If it were your automobile and you purchased it for your own use, why did your son pay $200.00 of the $250.00 purchase price?

A. Well, he could go places in it.

Q. I didn't understand your answer.

A. Well, he used it. Even so, he couldn't drive but he'd get somebody to take him.

Q. Well, I know but if it was your automobile, why did your son pay for it; why didn't you pay for it?

A. Well, he helped me pay for it.

page 49 } Q. Well, I know he helped you pay for it, but why did he pay $200.00; was it his automobile? Now, that's the point I'm trying to find out. Did you buy it for him?

A. Well, me and him bought it together.

Q. All right. You all bought it together. Was it a joint ownership—you owned it and he owned it jointly?

A. Well, I'd say so; yes.

Q. And it was put in your name because your son was under 21; is that right?

A. Right.

Q. All right, sir. When you applied for insurance on the automobile, it is alleged in the bill you did not disclose to the insurance company that your son, Robert, had an interest in the automobile; is that correct?

A. Well, I don't remember.

Q. Well, you stated to the insurance company you were the sole owner; do you remember that?

A. Well, I reckon they were right; that's right.

Mr. Thornton: That's all.

CROSS EXAMINATION.

By Mr. Messick:

Q. Mr. Bower, you were the sole owner of the car, weren't you?

A. It was in my name.

Q. And you were the one that bought it and you

page 50 } were the one that paid for it except that your son was working for the Norfolk and Western and contributed $200.00 toward the purchase price; isn't that right, sir?

A. That's right.

*George E. Bower.*

Q. It was your automobile and considered as your automobile?

A. I would think so.

Q. Did you exercise jurisdiction over your son—your 19 year old son—and give him permission to use the car if somebody else drove it?

A. Yes.

Q. Just as you testified to, sir?

A. Yes, sir.

Q. Did the agent ask you whether or not anybody else owned the automobile besides you?

A. No; I don't know—I don't think he did.

Q. Was there anything said about the ownership of the car when you applied for an insurance policy on it?

A. Well, I told him it was in my name—it was my car in my name.

Q. Your name and your car. Did anybody have authority to use that automobile without your consent, sir?

A. No; I guess not.

Q. And, as you told the Court and in direct examination by Mr. Thornton, that you gave your son per-
page 51 } mission to use the car if somebody else would drive it. He couldn't drive it; is that correct, sir?

A. Yes, sir.

Q. And you bought the car to go back and forwards to work in and for your use; is that correct, sir?

A. Yes, sir.

Q. Was that car used for family purposes; did you ride in it on Sunday, you and your wife and other members of the family?

A. Yes, sir.

Q. Did you take it and go out on Sunday in the car, or whenever the occasion came up, that you all wanted to—you and your wife and the other children, too?

A. Yes, sir.

Q. What did your son do for the Norfolk and Western—that is. Robert?

A. Well, he worked in the Timing Department.

Q. In the Time Department. And, as I understand it, when you all bought this automobile he let you have $200.00 toward the purchase price of it?

A. (The witness nodded his head.)

Q. Is that correct, sir?

A. He paid $200.00 on it.

*George E. Bower.*

Q. All right, sir. Did he pay it to you and you paid for it?

A. He gave it to me.

page 52 } Q. He gave it to you and you bought the car?

A. Yes, sir.

Q. And you titled the car in your name?

A. Yes, sir.

Q. Any conditional sales contract of any kind or character against the automobile?

A. No, sir.

Q. Was the car fully paid for when you paid for it to the second-hand dealer on Campbell Avenue in Roanoke?

A. Yes, sir.

Q. And as far as ownership is concerned, you owned the car—the only thing is, your son, who works for the Railroad Company, had contributed $200.00 toward the purchase price of it?

A. Yes, sir.

Q. And he let you have it to pay for it; that's correct, isn't it?

A. Yes.

Q. Now, Mr. Bower, you have raised a large family, haven't you?

A. Six.

Q. Six—six children?

A. Yes.

Q. And to buy an automobile and raise a large family like you did, you had to get money some place with to buy it with, didn't you?

page 53 } A. Yes, sir.

Q. And your son was 19 years old and working for the Railroad Company. He let you have $200.00 towards the purchase price of it, is that correct? He let you have the $200.00 toward the purchase price?

A. Yes; to help me buy the car.

By the Court: (interposing)

Q. Did he loan that to you or was it a gift?

A. Well,—

Q. Were you supposed to pay it back to him?

A. No; I wasn't supposed to pay it back.

Q. All right. Let me ask you this question. Did you sell or have any agreement to sell the automobile to Robert Herndon?

A. Yes, sir.

*George E. Bower.*

Q. What was that agreement?

A. Well, he was supposed to buy it for—and give $100.00—to buy it for $100.00.

Q. You were going to sell it to him and he was going to pay you $100.00 for the automobile?

A. Yes.

Q. Was the sale ever consummated? In other words, did he ever pay you the $100.00?

A. No, sir.

page 54 } Q. You just had the agreement that he was going to pay it to you and you were going to sell it to him; is that right?

A. Yes, sir.

Q. In other words, when he paid you the $100.00, you were going to transfer the title to Robert Herndon?

A. Yes.

Q. But he never paid you the $100.00?

A. No, sir.

Q. At the time Robert Herndon was driving this automobile, when it was in collision at Blue Ridge, had you delivered the car to him as his car or was it still yours then?

A. How was that?

Q. At the time Robert Herndon had the accident, had you delivered the automobile to him and he hadn't paid you for it or what was the situation then?

A. Well, I hadn't delivered the car to him. He was using it at the time.

Q. He just used it like he had been using it before?

A. Yes; and when my boy—my oldest boy—was going to the ball game there, when the wreck happened.

Q. Was your son in the car at the time the wreck happened?

A. No; they had been—he was at the ball game and this boy taken the car and leaved the ball game, I think, when he wrecked.

page 55 } Q. Did he take your son to the ball game that night?

A. Yes, sir.

Q. And left him at the ball game?

A. Yes.

Q. And after he left is when he had the collision?

A. Yes, sir.

Q. And your son was at the ball game when it happened?

A. Yes, sir.

*George E. Bower.*

The Court: All right, sir. All right, Mr. Messick.
Mr. Messick: That's all, your Honor.
Mr. Thornton: I'd like to ask him a few more questions.
The Court: All right.

RE-DIRECT EXAMINATION.

By Mr. Thornton:

Q. Mr. Bower, this question of selling this car to Robert Herndon, your son Robert had the connection with the Herndon boy, didn't he—you didn't know the Herndon boy, did you?

A. Yes; I seen the boy.

Q. Sir?

A. Yes; I have seen the boy.

Q. You have seen him but, at the time this sale was going to take place, you didn't know him, did you?

A. He had been over to my house.

Q. Sir?

page 56 } A. He had been over to my house a few times.

Q. He had been over to your house a few times?

A. Yes; him and—

Q. It was your son and not you that discussed the sale of this car to Herndon, was it not?

A. Yes; they discussed the sale and asked me about it.

Q. Sir?

A. And he had asked me about it.

Q. They asked you about it?

A. Yes.

Q. Now, the Judge asked you if the money was paid—Robert Herndon paid some of the money, didn't he?

A. I believe he paid $10.00.

Q. He paid it to you or to your son?

A. Huh?

Q. Did he pay it to you—did he pay it to your son?

A. Yes.

Q. And just to save time, I want to be certain about this answer you gave Judge Abbott. Out of the $250.00 purchase price of this car, your son paid $200.00 of it?

A. Yes.

Q. And I believe you told the Judge, in answer to his question, as far as you were concerned you all were joint owners of the car?

*George E. Bower.*

A. Well, he was making me own part of it; the
page 57 } car was in my name.
Q. That's right. But it would make him own part of it and I think you told Judge Abbott there isn't any question that you did not tell the insurance agent about him owning a part of it, is there?
A. (There was no response.)

Mr. Messick: He said he didn't recall anybody asking him anything about it.
The Court: Well, just wait a minute.

Q. Don't be afraid to answer the question; it's perfectly all right.
A. Well, I don't know whether that question was even brought up or not when I was at the insurance—

By Mr. Thornton: (continues examination)
Q. But you remember signing the application for the insurance, don't you, sir?
A. Yes; I signed the application for the insurance.
Q. And you remember, in signing the application, you represented yourself to be the sole owner of the car?
A. Thats' right.
Q. And actually that isn't correct, is it?

Mr. Messick: Well, he was the sole owner of the car . As a matter of law, he is the sole owner.
The Court: That's what the Court has to pass on.
Mr. Messick: You know he's the sole owner.

page 58 } By Mr. Thornton:
Q. You don't deny that you represented yourself to be the sole owner of the car to the insurance company?
A. (The witness nodded his head.)

The Court: I guess the application will show that, too.
Mr. Thornton: Yes, sir; but I wanted to—(copy of application of insurance handed to the witness). I will show this to you, Mr. Messick, first—(photostat handed to Mr. Messick for inspection).
Mr. Messick: May I have a minute to look this thing over, your Honor?
The Court: Yes.

*George E. Bower.*

(A recess was then taken from 11:00 o'clock, A. M., to 11:05 o'clock, A. M.)

By Mr. Thornton: (continues examination)

Q. Mr. Bower, I was simply showing you this application that you signed for this insurance. I have a photostatic copy and this is the original of it (indicating).

A. Yes.

Q. And I will ask you, sir, if that is not your signature (indicating)?

A. Yes, sir.

Q. G. E. Bower. And I will ask you, sir, if when you signed this application you did not represent that you

page 59 } were the sole owner of it?

Mr. Messick: The application speaks for itself.

Mr. Thornton: The sole owner of the automobile.

The Court: I think so.

The Witness: Yes, sir.

The Court: I think so. It speaks for itself.

Mr. Thornton: We would like to introduce this photostatic copy.

The Court: Mark that Exhibit #1, Mr. Bieler.

(The application for insurance, referred to above, was received in evidence and marked, Plaintiff's Exhibit #1.)

Mr. Thornton: Also, to make up the record, Judge, we'd like to tender a certified copy of the policy that was issued.

The Court: Mark that #2, Mr. Bieler, please.

(Certified copy of policy, referred to above, was received in evidence and marked, Plaintiff's Exhibit #2.)

Mr. Thornton: That is material, sir, to complete the record. Stand aside.

RE-CROSS EXAMINATION.

By Mr. Messick:

Q. Let me ask you one question. Mr. Bower as I understand, you are a poor man having raised a family of six children?

page 60 } A. Yes, sir.

Q. And, as I understand it, you bought this car

to be used by you to go backwards and forwards to work and for family purposes. That's correct, isn't it?

A. Yes, sir.

Q. Now, on the face of this policy, it says, "Eligibility for family purpose:" and it is marked, "Yes." You told them you bought it for family purposes?

A. Yes.

Q. And you told them you had a family, didn't you?

A. I imagine I did.

Q. Yes, sir. And didn't you also state to the agent that it would be used to go back and forwards to work and that is what you used it for?

A. (The witness nodded his head.)

Q. And for other family purposes, taking the family out, and doing as you pleased with them?

A. Yes.

Q. Now, the car was fully paid for, wasn't it?

A. Yes, sir.

Q. The only thing in regard to the purchase price of it is that your 19 year old son, who was working, let you have $200.00 toward the purchase price of it. That's correct, isn't it?

A. Yes.

Q. Did the Commonwealth of Virginia issue a
page 61 } certificate of title to this automobile solely in your name?

A. (The witness nodded his head.)

Q. That's correct, isn't it?

A. Yes, sir.

Q. Do you have that certificate of title with you?

A. No; I don't.

Q. I'd like to—where is it, Mr. Bower?

A. It's at home.

The Court: I don't think there is any question about that. I think it is conceded by everybody that title to it was issued to Mr. George Bower.

Mr. Thornton: We will stipulate that the record title was in Mr. Bower's name.

By Mr. Messick: (continues examination)

Q. The agent asked you to sign this application and it says, "The undersigned hereby applies for the insurance indicated above and represents that the statements herein are correct, and that he is the sole owner of the described auto-

mobile except with respect to encumbrances shown above, or other interests identified in the remarks section of this application."

Were you, in this application,—were you ever asked whether anybody else had any interest in the automobile?

A. I don't know; I don't reckon I was.

Q. You don't recall anybody ever asking you whether or not—is there any question in here as to whether
page 62 } anybody has any interest in the automobile other than you (indicating)? Look at it and see if you can see any question there of any interest in the automobile other than you.

(Application handed to witness.)

A. No; I reckon it's not.

Q. Don't see any in there, do you?

A. (There was no response.)

Q. They asked you the actual cost. You told them $250.00 and it was purchased July '57 and it was a used car. "Any other insurance? No. Any liens of any kind?" It was no. You told them what you did, where you lived, that you were a lineman for the Norfolk and Western; worked for them 21 years. Is there any question in there asking you or anybody else if they owned any part of the automobile—any questions you ever saw or heard of anybody else owning any part of it?

A. (There was no response.)

Mr. Messick: His answer is "No."

By the Court:

Q. Mr. Bower, when Robert Herndon paid your son $10.00 on the purchase price of the automobile, as you have testified to a moment ago, did your son, Robert Bower, give you any part of that $10.00?

A. No, sir.

The Court: All right, sir.

By Mr. Messick: (continues examination)

page 63 } Q. Any question ever arose in the family as to who would use the automobile; who had the authority to say who was to use it—you or your son, Robert?

A. I did.

*George E. Bower.*

Q. You did. You exercised dominion and control and ownership over the car, didn't you, sir?
A. Yes, sir.

By the Court:
Q. I understood you to say that to be a fact, but did you not also testify that you had given unlimited authority to your son, Robert, to use the automobile anytime he wanted to, provided someone drove it for him?
A. Well, I let him use it.
Q. Anytime he wanted to?
A. Anytime he wanted to.
Q. In other words, he had a general authorization to use it anytime he wanted to, if someone else drove it for him, except when you were using it yourself?
A. Yes, sir; except that I let Robert—except when I was using it.

Mr. Messick: That's all.
Mr. Thornton: No further questions.
The Court: All right, you can stand aside.

The witness stands aside.

page 64 } Mr. Thornton: If it please the Court, in view of Mr. Bower's testimony, the rest of our evidence is pretty much cumulative. I think we've got the legal question here, as it appears to me, from his evidence that he admits the purchase price and we admit the record title was in him, and he admits that he represented that he was the sole owner and he also says, in his *eivdence*, as far as he was concerned the car was jointly owned and I think we get down to the legal question which Mr. Messick raised in this matter that the record title was in Mr. Bower is absolutely conclusive of the ownership. and we can put on the rest of these witnesses but, as far as the facts are concerned, I think it is pretty clear.
The Court: Let me ask Mr. Messick a question. Won't you more or less concede the rest of the evidence along that line would be cumulative?
Mr. Messick: I don't know what the rest is. No, sir; I don't know what evidence he's got.
The Court: Well, you can do what you want to, Mr. Thornton. If you don't call them, Mr. Messick can call them.

Mr. Thornton: We take the position we have made out a *prima facie* case.

The Court: All right. Then you rest?

page 65 } Mr. Thornton: We will rest.

Mr. Messick: He rests? We rest.

The Court: You rest, too?

Mr. Messick: We don't know anything about the transaction.

The Court: Well, I think the evidence so far is pretty clear as to what the situation was. It is just a question now of what the application reveals to the law and the facts, so let me hear you, Mr. Thornton.

Mr. Thornton: Will the Court give us about five minutes for us to go get the law books that we left in the car?

(By agreement of Court and counsel, the case was to be submitted to the Court on briefs, which are to be in the hands of the Court by October 20, 1959.)

(The proceedings were Concluded at 11:30 o'clock, A. M.)

page 66 }

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## DEMURRER.

To the Honorable Earl L. Abbott, Judge of the above styled Court:

The demurrer of the respondent, Elizabeth A. Scott, to a bill of complaint exhibited against her in the Circuit Court of Botetourt County by State Farm Mutual Automobile Insurance Company.

This respondent says that the said bill is insufficient in law, and especially in this:

(1) That the automobile liability insurance contract issued by the complainant and the application therefor executed by the insured, the *vechicle's* duly registered and titled owner, George E. Bower, constituting a part of said contract prayed by the complainant to be construed and adjudicated herein is not exhibited herein.

(2) That as a matter of law, the insurable interest in an automobile liability policy lies to the registered owner of legal title to a vehicle, that a policy of automobile liability

insurance issued to an owner on a particular *vechile* inures to said owner and *vechile* until a legal transfer of title is effected in accordance with Title 46 of the 1950 Code of Virginia until the expiration date of said policy. That under the complainant's allegations, this case comes within the rule announced by the Supreme Court of Appeals of Virginia on January 26, 1959 in its decision of *Nationwide Insurance Company* v. *Storm,* 200 Va. ...., 106 S. E. (2d) 588.

page 67 }

ELIZABETH A. SCOTT
By STUART A. BARBOUR, JR.
Of Counsel.

Filed June 22, 1959.

B. M. ALLEN, Dep. Clerk.

* * * * *

page 68 }

* * * * *

DECREE.

This cause came on this day to be heard on the bill of complaint and the demurrers of the respondent, Elizabeth A. Scott, and the respondent, Roy E. Scott, an infant, through Stuart A. Barbour, Jr., guardian *ad litem* for the said Roy E. Scott, and was argued by counsel. And the court having duly considered the demurrers, doth ADJUDGE, ORDER and DECREE that the same be, and they hereby are, overruled.

And this cause is continued.

Enter 10-26-59.

EARL L. ABBOTT, Judge.

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page 90 }

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NINETEENTH JUDICIAL CIRCUIT

November 16, 1959.

Mr. Robert J. Rogers
Attorney at Law
Boxley Building
Roanoke, Virginia

Mr. Stuart A. Barbour
Attorney at Law
427 Washington Avenue, S. W.
Roanoke, Virginia

*Re*: State Farm Mutual Automobile Ins. Co. *v.* Paul M. Herndon. Botetourt County.

Gentlemen:

Upon consideration of the evidence taken orally before the court and the written briefs, it is my opinion that the admitted statement by the insured, George E. Bower, that he was the sole owner of the vehicle involved in the collision, was such a material misrepresentation as to void the policy of insurance.

See: *Didlake* v. *Standard Insurance Co.*, 195 F. (2d) 247; *Western States Mut. Auto Ins. Co.*, v. *May*, 18 Ill. App. (2d) 442, 152 N. E. (2d) 608;
*Royal Indemnity Co.*, v. *Hook*, 155 Va. 956, 157 S. E. (2d) 414.

The misrepresentation was material to the risk assumed and sufficient to declare the policy null and void.

A decree may be prepared to this effect to be entered in the cause.

Sincerely yours,

EARL L. ABBOTT.

bt

page 91 }

* * * * *

At a Circuit Court continued and held in and for the County of Botetourt at the Courthouse thereof in Fincastle this 7th day of December, 1959.

DECREE.

This cause came on this day to be heard on the papers formerly read, the decrees heretofore entered, the testimony heard *ore tenus* by the court on September 22, 1959, briefs of counsel, and was argued by counsel.

The court, having maturely considered the cause on its merits, including testimony heard *ore tenus* and written briefs, doth ADJUDICATE, DECREE, ORDER and FIND as follows:

(1) That a justiciable controversy exists between the parties herein; that the facts and circumstances present a proper case for a declaratory judgment; that this court has jurisdiction of the parties and subject matter of the controversy; and that this action was properly instituted and may be maintained in this court.

(2) That at the time the defendant, George E. Bower, made application to the complainant, State Farm Mutual Automobile Insurance Company, for a contract of insurance on a certain 1949 Plymouth automobile, the said George E. Bower represented to the complainant's agent that he was the sole owner of the said 1949 Plymouth, when in fact he was not the sole owner of this vehicle, but a joint owner with his minor son;

(3) That such representation by George E. Bower as to sole ownership was a misrepresentation which was
page 92 } material to the risk assumed by the complainant, State Farm Mutual Automobile Insurance Company, sufficient to void a policy of insurance, No. 880-431-BO3-46, issued by the complainant to the said George E. Bower on the basis of the said material misrepresentation.

(4) That because of the material misrepresentation aforesaid, the contract of insurance, No. 880-431-BO3-46, issued by the complainant to the said George E. Bower was void and null from the date of its inception.

(5) That because the aforesaid contract of insurance, No. 880-431-BO3-46, was void and null from the date of its inception, the complainant, State Farm Mutual Automobile Insurance Company, has no obligations whatsoever thereunder, and no rights of any kind accrue under the said policy to any of the defendants herein.

(6) That for his services for acting as Guardian *ad Litem*

for the infant, DeWitt Frances Swanson, John J. Allen shall receive a fee of $25.00, which shall be assessed and taxed as costs to be paid by complainant.

(7) That certified copies of this decree be furnished to any of the interested parties requesting same.

(8) That this case be dismissed from the docket.

To all of which counsel for Elizabeth A. Scott and Roy E. Scott duly excepted, objected and fully assigned their reasons.

Enter.

EARL L. ABBOTT, Judge.

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page 96 }

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Filed in the Clerk's Office the 3rd day of Feby., 1960.

Teste:

GEORGE E. HOLT, JR., Clerk

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

Counsel for Elizabeth A. Scott and Guardian *ad Litem* for Roy E. Scott, defendants in the above-styled proceeding in the Circuit Court of Botetourt County, Virginia, hereby give notice of appeal from the final order entered herein on December 7, 1959, and hereby give notice that they will apply to the Supreme Court of Appeals of Virginia, for a writ of error and *supersedeas*.

ASSIGNMENT OF ERROR.

ONE.

The Trfial Court erred in its entry of the decree entered on December 7, 1959, finding that the contract of insurance issued by the complainant, being its policy #880-431-BO3-46, insuring a vehicle owned and registered in the name of George

E. Bower, to be void and null from the date of its inception. That said finding by the Trial Court is erroneous and contrary to the evidence of the case and contrary to law.

ELIZABETH A. SCOTT
By T. W. MESSICK
Counsel.

page 97 } ROY E. SCOTT, BY HIS GUARDIAN *AD LITEM* STUART A. BARBOUR, JR.
Guardian *ad Litem.*

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

# INDEX TO RECORD


| | Page |
|---|---|
| Appeal Awarded | 1 |
| Record | 2 |
| Bill of Complaint | 2 |
| Answer of Stuart A. Barbour, Jr., guardian, &c. | 6 |
| Answer of Elizabeth A. Scott | 7 |
| Proceedings | 8, 29 |
| Witnesses: | |
| Paul M. Herndon | 11 |
| George E. Bower | 15 |
| Demurrer | 30 |
| Decree—October 26, 1959 | 31 |
| Letter—opinion | 32 |
| Decree—December 7, 1959 | 33 |
| Notice of Appeal and Assignments of Error | 34 |