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PLAINTIFF'S EXHIBITS.

DEFENDANT'S EXHIBITS.

Notice and Grounds of Appeal.

Filed Nov. 1, 1926.

New Jersey Supreme Court.

THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation, Plaintiff-Appellant, vs. WARREN EAGLES, Defendant-Respondent.	On Appeal to New Jersey Court of Errors and Appeals. Notice and Grounds of Appeal.

To the Defendant-Respondent WARREN EAGLES, or KING & VOGT, his Attorneys:

Take Notice that the plaintiff appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause, on the following grounds:

1. The following questions were admitted:

   (a) To the witness Alonzo DeVoe: "Whatever paper it was to which you referred, it was the intent, if this was the paper to release Mr. Eagles from any liability on the notes and on the book account?"

   (b) To the witness Warren Eagles: "Look at the two lines appearing above the signatures and see if those are the lines to which you refer?"

(c) To the witness Warren Eagles: "What statement did Mr. DeVoe make at the time of the execution of this paper in reference to what was intended to be accomplished by the paper?"

2. The answers to the following questions were not stricken out:

(a) To the witness Warren Eagles: "What conversation took place prior to the release?" "You may tell."

3. The Court denied plaintiff's motion for direction of verdict on the following grounds:

(a) The terms of the paper purporting to be a release could not be varied orally.

(b) The paper was not a release.

(c) There was no release of the claims sued upon.

CORN & SILVERMAN,
Attorneys of Plaintiff-Appellant.

Judgment Record.

NEW JERSEY SUPREME COURT,

THE MODEL PLAN FINANCE CORPORATION, a New Jersey corporation,
Plaintiff,
vs.
WARREN EAGLES,
Defendant.

Judgment Record.
Action at Law.
On Postea.
Judgment for Defendant.
Seth H. Ely, Attorney.

Warren Eagles, the defendant in this cause was summoned to answer unto The Model Plan Finance Corporation, a New Jersey Corporation the plaintiff therein in an action at law upon the following complaint:

(Summons issued October 23, 1926).

Complaint.

Plaintiff, a corporation of New Jersey having its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

FIRST COUNT.

1. On March 7, 1921 defendant, Warren Eagles made and delivered his note of that date for Two Hundred Seven Dollars and Twenty-five Cents ($207.25) with interest thereon at six per cent per annum, payable to the order of A. DeVoe on January 7, 1922 at National Union Bank, at Dover, New Jersey.

2. Simultaneously therewith, defendant Charles Vanderburgh endorsed said note.

3. Said A. DeVoe thereafter endorsed said note to Leon Wagman, who thereafter endorsed the same to plaintiff.

4. On the day the said note fell due, it was presented for payment at the place where payable, but was not paid.

5. Due notice thereof was given to defendant Charles Vanderburgh.

6. Said note is now the property of plaintiff and is unpaid.

SECOND COUNT.

1. On March 7, 1921 defendant, Warren Eagles, made and delivered his note of that date for Two Hundred Seven Dollars and Twenty-five Cents ($207.25) with interest thereon at six per cent per annum, payable to the order of A. DeVoe on February 7, 1922 at National Union Bank, at Dover, New Jersey.

2. Simultaneously therewith, defendant Charles Vanderburg endorsed said note.

3. Said A. DeVoe thereafter endorsed said note to Leon Wagman, who thereafter endorsed the same to plaintiff.

4. On the day the said note fell due, it was presented for payment at the place where payable, but was not paid.

5. Due notice thereof was given to defendant Charles Vanderburgh.

6. Said note is now the property of plaintiff and is unpaid.

THIRD COUNT.

1. On March 7, 1921 defendant, Warren Eagles

made and delivered his note of that date for Two Hundred Seven Dollars and Twenty-five Cents ($207.25) with interest thereon at six per cent per annum, payable to the order of A. DeVoe on March 7, 1922, at National Union Bank, at Dover, New Jersey.

2. Simultaneously therewith, defendant Charles Vanderburgh endorsed said note.

3. Said A. DeVoe thereafter endorsed said note to Leon Wagman, who thereafter endorsed the same to plaintiff.

4. On the day the said note fell due, it was presented for payment at the place where payable, but was not paid.

5. Due notice thereof was given to defendant Charles Vanderburgh.

6. Said note is now the property of plaintiff and is unpaid.

FOURTH COUNT.

1. From February 24, 1921 to January 31, 1922 one Alonzo DeVoe sold and delivered to defendant Warren Eagles upon a book account, of which a copy is attached hereto, certain goods therein mentioned, the entire price of which is still due and unpaid.

2. Thereafter said Alonzo DeVoe duly assigned said book account to one Leon Wagman, who thereafter assigned the same to plaintiff.

3. Plaintiff is still the owner thereof and the same nor any part thereof has been paid.

FIFTH COUNT.

1. On December 7, 1921, defendant Charles Vanderburgh made and delivered his note of that date for Two Hundred Sixteen Dollars and Seven-

ty Cents ($216.70) with interest thereon at the rate of six per cent per annum, payable to the order of A. DeVoe on April 7, 1922 at National Union Bank, at Dover, New Jersey.

2. The payee afterwards endorsed said note to Leon Wagman, who thereafter endorsed the same to plaintiff.

3. On the day said note fell due, it was presented for payment at the place where it was payable, but was not paid.

4. Said note is now the property of plaintiff and is unpaid.

Plaintiff demands damages as follows:

1. On the First Count, against both defendants, for Two Hundred Seven Dollars and Twenty-five Cents ($207.25) with interest thereon from March 7, 1921.

2. On the Second Count, against both defendants, for Two Hundred Seven Dollars and Twenty-five Cents ($207.25) with interest thereon from March 7, 1921.

3. On the Third Count, against both defendants, for Two Hundred Seven Dollars and Twenty-five Cents ($207.25) with interest thereon from March 7, 1921.

4. On the Fourth Count against defendant Warren Eagles for Seven Hundred Seventy-two Dollars and Twenty-one Cents ($772.21) with interest thereon from January 31, 1922.

5. On the Fifth Count against defendant Charles Vanderburgh for Two Hundred Sixteen Dollars and Seventy Cents ($216.70), with interest thereon from December 7, 1921.

CORN & SILVERMAN,
Attorneys of Plaintiff.

WARREN EAGLES

Dover, New Jersey.

February 24, 1921.

Repairing Brake 4 hrs. time @ $1.25	5.00		
1 #780	3.25		
1 #782	.55		
1 #783	.30		
3 #758	.30		
1 #767	.50		
1 #772	2.85		
2 #770	.20		
1 #769	.15		
1 #775	.40		
1 #774	.75		
1 #773	.85		
1 Brake Guide Arm. Melee	.75		
	$15.85		
5 7 10% on $10.10	1.51	$17.36	
March 1, 1921			
1 #1070	.75		
1 #1253	1.72		
1 #1256	.50		
2 Hrs. Labor @ $1.25	2.50	5.47	
March 8, 1921.			
Repairing real spring carburetor & gas tank			
12 hrs. labor @ 1.25	1.50		
1 #1077	17.85		
4½ S.A.E. mutes	.20		
2 #1153	5.76		
4 #1154	.68		

	4 #1155	.28	
	2—⅝ S.A.E. Nuts	.10	
	2 #1143	.94	41.79
	Mar. 19, 1921		
	Grinding valves, taking auto rear in		
10	rear end 23 hrs. labor @ 1.25	28.75	
	1 #881	1.72	
	2 #882	.70	
	1 #750	3.62	
	1 #701	57.50	
	1 #741	24.43	
	1 #740	24.43	
	2 Spark Plugs @ 1.25	2.50	
	Bushing T. Rad	2.50	
	1 Bushing	.90	
20	2 #23 @ 1.38	2.76	149.81
	Apr. 1, 1921		
	3/1 #41 @ .28	.56	
	1 1 #917	.18	
	1 Br. Labor	1.25	
	3/4 1 ¼" Rod	.25	
	1 #917	.18	
	1½ Hrs. Labor 1.25	1.88	
30	3/30 1 #183	.12	
	3 #182	.28	
	2 #811 C.A. 9.02	18.04	
	2 #811 12.36	24.72	
	2 #812-C 1.72	3.44	
	8 #813 .12	.96	
	1 #100	6.90	58.76
40			

Complaint.

May 31, 1921

Taking out Motor 4/15 9 hrs. labor 1.25		11.25		
4/13 13 hrs. labor	1.25	16.25		
Putting motor in frame and repairing T. Rod 4/18 22 hrs labor		27.50		
4 Motor		200.00		10
Rivet frame		10.50		
2 ½x1 Cup Screws	.10	.20		
1 #325		1.40		
1 3 #1062		.46		
1 #1061		.46		
1 #886		1.10		
1 #887		.23		
1 #888	.75	1.50		
1 #917		.18		20
1 #919		.18		
1 #920		.07		
2 #327	.10	.20		
1 lb grease		.30	271.78	

May 31, 1921

#8 May 4 Relining brakes & new hub 5½ hrs. labor	1.25	6.93		
1 #791		23.00		30
4 #795		.92		
4 #796		.48		
26 Rivets		.52		
1 #769		.18		
1 #770		.12		
1 #771		.06	32.21	

#1086 2/5/16 x ¼ Bolt	15		
1 ½ x 3 bolt	15		
2 Lockwasher	12		40

2 Gaskets	40	.82	

May 31, 1921

To Removing & Pressing on Tires		12.00	
4 Tires 36 x 5		172.40	184.40

June 30, 1921

Taking wheels from one truck to put on your truck 3 hrs. labor		1.25	3.75

Aug. 3, 1921

To new motor block repairs to universal joints and general overhauling			
2 #60c		4.60	
32 Bearing screws		.64	
15 #64		5.25	
3 #55		3.35	
1 #71		2.04	
1 #2		75.00	
1 #14		.80	
5 #16		.03	
3 #37		.18	
8 #12		.12	
1 #41		.35	
2 7/16x2 cap screws		.24	
2 6/16 nuts		.12	
3 7/16 lockwashers		.15	
2 3/8 nuts		.40	
1 #1030		.12	
2 #34		.58	
1 #130		.12	
6 qts. Oil		.58	
3 3/8 lockwashers		1.20	

1 #449		.40	
4 760		.48	
4 758		1.40	
3 dz. 1x3/32 cotter peas		.36	
1 lb. grease		.20	
12 867		.46	
3 863		1.15	
3 864		.69	
3 862		1.15	
1 865		.28	
1 860		6.90	
1 871		.45	
1 872		.12	
1 873		.12	
96¼ hrs. labor	1.25	120.30	
1 23		1.43	
1 1198B		.58	
1—1198C		.12	$222.80

Sept. 1, 1921

Use of truck and Time on Wheels		5.50	
New Tan Bl. Belts			
1 #1198B		.60	
1 795		.92	
4 796		.48	
1 132		5.52	
Labor		2.50	15.52

Aug. 20, 1921

Wheel to Jones	J 55		42.00

Sept. 16, 1921

See Account			175.31

Jan. 31, 1922

	New Bearings throughout				
	1	318		3.90	
	1	340		1.28	
	3	327		.18	
	1	325		1.15	
10	1	306		5.00	
	1	213		.50	
	2	273		.30	
	1	105		3.20	
	1	106		3.20	
	1	107		3.20	
	1	108		3.20	
	1	109		3.70	
	1	110		3.70	
	3	60		7.20	
20	4	65A		.80	
	12	64		1.20	
	2	96		.25	
	2	97		.25	
	36	Cotter Pais.		.25	
	1	Crank Case Bickuit		4.80	
	1 time	"		.80	
	87 hrs.	labor	1.25	108.75	156.31
30			Total		$1377.77

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Answer.

Filed Nov. 12, 1926.

The defendant, Warren Eagles, of the Borough of Wharton, County of Morris and State of New Jersey, in answer to the complaint in the above entitled matter says that:

FIRST COUNT.

He denies paragraphs 1-2-3-4-5 and 6, and he further denies that the plaintiff is entitled to any damages as against him.

SECOND COUNT.

He denies paragraphs 1-2-3-4-5 and 6, and he further denies that the plaintiff is entitled to any damage as against him.

THIRD COUNT.

He denies paragraphs 1-2-3-4-5 and 6, and further denies that the plaintiff is entitled to any damage as against him.

FOURTH COUNT.

He denies paragraphs 1-2 and 3, and further denies that the plaintiff is entitled to any damage as against him.

FIFTH COUNT.

1. He denies paragraphs 1-2-3 and 4.

2. Defendant further denies that the plaintiff is entitled to any damage on the 1-2-3-4 or 5th counts of said complaint as against him.

FIRST SEPARATE DEFENSE.

1. The defendant says that the plaintiff is not a holder in due course on the notes referred to in the complaint or said book account.

2. That defendant, on the 8th day of August, 1921, for a valuable consideration, was released from the payment of said notes and book account by Alonzo A. DeVoe.

3. That the plaintiff purchased said notes after maturity from Leon Wagman, who purchased said notes after maturity from the said Alonzo A. DeVoe, and that said notes, so far as this defendant is concerned, are paid and satisfied, discharged, cancelled and released.

SECOND SEPARATE DEFENSE.

1. Defendant repeats paragraph 1 of the first separate defense.

2. The notes referred to in the various accounts in the complaint represent the balance due on the purchase price in the conditional sale of a certain automobile by one Alonzo A. DeVoe to one Charles Vanderburgh. Said notes were assigned to the plaintiff along with the conditional sale contract.

3. The plaintiff, or Alonzo A. DeVoe, for the plaintiff, repossessed said automobile prior to the institution of this suit, and failed to put the same up for sale as required by the Uniform Conditional Sales Act.

4. The plaintiff, or Alonzo A. DeVoe for the plaintiff, used and sold said truck at private sale, thereby discharging the defendant on said notes.

THIRD SEPARATE DEFENSE.

1. Plaintiff repeats paragraphs 1 and 2 of the second separate defense.

2. The plaintiff, by its failure to conform with the Uniform Conditional Sales Act, has discharged this defendant from all obligations on these notes referred to in the complaint, or any liability to the plaintiff.

FOURTH SEPARATE DEFENSE.

The notes sued for in the complaint have been fully paid and satisfied.

FIFTH SEPARATE DEFENSE.

Defendant says that on August 8th, 1921, the said Alonzo A. DeVoe, for a valuable consideration, thereby released and discharged the said Warren Eagles from the claims of the plaintiff on account of said book account.

COUNTER-CLAIM.

The agreement, as and for a counter-claim to the complaint of the plaintiff says that:

1. He repeats paragraphs 1, 2 and 3 of the second separate defense.

2. There has been paid on account of said conditional contract the sum of Eight Hundred Twenty-nine ($829) Dollars.

3. The plaintiff has failed to comply with section 23 and 25 of the Conditional Sales Act, thereby damaging this defendant to the extent of $5000.

Defendant demands as damages the sum of Five Thousand ($5000) Dollars.

SETH H. ELY,
Attorney of Defendant.

Reply.

Filed Nov. 24, 1926.

Plaintiff replying to the Answer of defendant Warren Eagles, says that:

1. It joins issue on the Answer.

2. It denies the matters contained in the First Separate Defense except that it admits that it purchased said notes after maturity.

3. It denies the matters contained in the Second Separate Defense.

4. It denies the matters contained in the Third Separate Defense.

5. It denies the matters contained in the Fourth Separate Defense.

6. It denies the matters contained in the Fifth Separate Defense.

By way of Answer to the Counter-claim filed by Defendant Warren Eagles, in this cause, Plaintiff says that:

1. It denies each and every allegation therein contained.

2. It reserves the right to move, at or after the trial, to dismiss said Counter-claim on the ground that it discloses no cause of action as against this plaintiff.

CORN & SILVERMAN,
Attorneys of Plaintiff.

Replication.

Filed Dec. 9, 1926.

The defendant, Warren Eagles, in reply to the Reply to Answer and Answer and Counter-claim filed in the above entitled cause, says that:

He joins issue on said reply.

SETH H. ELY,
Attorney of Defendant.

Judgment.

This matter was tried before Judge Nelson Y. Dungan with a Jury at the Essex Circuit, on March 8th, 1929.

By consent the counterclaim was stricken out.

The Jury rendered a general verdict against the plaintiff and in favor of the defendant, Warren Eagles, of no cause for action.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant Warren Eagles do recover of the said plaintiff The Model Plan Finance Corporation, a New Jersey Corporation, his costs which have been taxed at the sum of Forty-six dollars.

Costs $46.00.

Judgment signed and entered March 20, 1929.

Clerk's Certificate.

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this fourteenth day of April, A. D., nineteen hundred and thirty.

(Seal)

FRED L. BLOODGOOD,
Clerk.

Testimony.

NEW JERSEY SUPREME COURT,

ESSEX CIRCUIT.

Friday, March 8, 1929.

MODEL PLAN FINANCE CORPORATION, vs. WARREN EAGLES,	Action at Law.

Before HON. NELSON Y. DUNGAN, J., and a Jury.

APPEARANCES:

For Plaintiff appear CORN & SILVERMAN, (by JOSEPH J. CORN).
For Defendant appear KING & VOGT, (by ELMER KING and ELMER S. KING).

(A jury is called and sworn).
Mr. Corn opens for Plaintiff.
Mr. King opens for Defendant.

Mr. Corn: If it please the Court, in the opening counsel have not referred to any of the other defenses in the case or the counterclaim—that is, the defenses set up in the answer are of course this release which he has referred to, but it also sets up non-compliance with the Conditional Sales Act, and I have not had any opening to the jury. I do not know whether that is missed by intention.

Mr. King: It is not. We have not opened.

Mr. Corn: Then I will ask that it be dismissed.

The Court: How is that?

Mr. Corn: I say there has been no opening of that, and I assume that they are waived, and the same with the counterclaim. There has been no opening to the jury.

The Court: I think we will meet that as we go along. I am not so sure that a full opening of the defense is quite as necessary as it is for the prosecution of the case. I think it is necessary for the prosecution of the case that counsel should tell everything that he expects to prove that is substantially so, but I do not know of any rule which provides that a defense must be taken as waived because it is not mentioned in the opening? Do you?

Mr. Corn: Yet, counsel refuses to open to the jury upon that.

The Court: I do not understand that counsel refused to open.

Mr. King: I have not.

The Court: If counsel wants an opening upon any other defense that you expect to raise, perhaps you ought to open on that.

Mr. King: We will rest upon the opening as it is, your Honor.

Mr. Corn: May I have my motion noted?

The Court: Yes.

Mr. Corn: An exception to it.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. Corn: I move for a dismissal of the counterclaim—I raised that in my reply—on the ground

that it sets forth no cause of action against the defendant.

The Court: Is there any objection to that?

Mr. King: We are not questioning it.

The Court: It will be dismissed.

Mr. Corn: May I say at this time, your Honor, that it is admitted that the defendant Warren Eagles executed these notes, that there has been nothing paid on account and that the plaintiff is the present holder of these notes and of the book account.

Mr. King: With the condition that they came over to their hands without any consideration moving in the purchase.

Mr. Corn: Oh, yes. We are not an endorser for value at all, a holder for value, none whatsoever. Any defense available against the payee of the notes is available against this plaintiff.

(The papers referred to are received in evidence and marked Exhibits P-1, P-2 and P-3, respectively.)

The Court: They do not seem to be set out in the complaint.

Mr. Corn: No, they are not set out at length.

ALONZO DEVOE, sworn in behalf of plaintiff.

Direct-examination by Mr. Corn:

Q. Mr. DeVoe, have you computed the interest on these notes? A. I beg your pardon?

Q. Have you computed the interest on these notes? A. Yes, sir.

Q. Will you tell us what the interest on these notes today is.

The Court: Let us see. They are $207.25 each.

Mr. Corn: Yes, sir.

The Court: One is due March 7th, one February 7th and one January 7th.

Mr. Corn: They all bear interest from their date, your Honor.

The Court: From their date?

Mr. Corn: Yes, from March 7, 1921.

The Witness: I had that memorandum here and I cannot seem to locate that now. One note is two hundred—in fact, all three are $207.25 with interest from March 7, 1921. That is eight years. The interest onto them I figure up $298.44.

By the Court:

Q. That would be eighteen per cent. interest, wouldn't it, on $621.75? A. Yes, sir.

Mr. Corn: Forty-eight per cent. That is, eight years at six per cent.

The Court: Oh, yes, eight years.

By the Court:

Q. What did you make it? A. $298.44.

The Court: I think that is right.

By Mr. Corn:

Q. Mr. DeVoe, were you during the year 1921 in the automobile business? A. Yes, sir.

Q. Have you an account against Warren Eagles? A. Yes, sir.

Q. Are these your original books of account? A. These are the day books and this is the ledger account.

Q. Will you open your ledger to the account of Warren Eagles? Were those entries there made under your supervision? A. Yes, sir.

Q. Can you tell what the balance appearing on your books is as against Warren Eagles? A. I made a memorandum, $557.57 plus interest.

Q. With interest from when? A. From August 3, 1921.

Q. The interest amounts to how much? A. I figure it as $254.25.

Q. Has any part of that been paid? A. No part of this has been paid, no, sir.

Mr. Corn: Cross examine.

Mr. King: I suppose the books ought to be offered.

Mr. Corn: Oh, yes. I offer the books in evidence.

(A book referred to is received in evidence and marked Exhibit P-4.)

Mr. Corn: I offer these three too.

The Court: What are they?

Mr. Corn: These are the day books from which the totals are entered into the ledger.

The Court: All right.

(The books referred to are received in evidence and marked Exhibits P-5, P-6 and P-7.)

Cross-examination by Mr. King:

Q. This ledger account contains additional items under the name of Warren Eagles that are not in-

cluded in your suit here, in the suit, is that so? A. It contains additional accounts?

Q. Additional accounts. You have charged down this sum, $222.80, and below that appear four items. A. Under the same account, yes, sir.

Q. Why were those items carried against Warren Eagles, those additional items? A. Well, they were kept on the same ledger account on account of pertaining to the same truck.

Q. Then this book account does not represent an account against Eagles, but it represents an account against the truck? A. Of that particular truck; yes, sir. Warren Eagles is the owner of the truck.

Q. Was he the owner after August 8, 1921? A. Why, he was the owner as far as I was concerned; yes, sir.

Q. You say he was the owner as far as you were concerned? A. Yes.

Q. On August 8, 1921, did you in writing agree that he was not the owner after that time?

Mr. Corn: I object, your Honor. It is a matter that calls for a conclusion. The writing should be introduced.

Q. I will show you the paper. Is this the paper that was executed by you on the 8th day of August, 1921? A. No, sir.

Q. It was not signed by you? A. No, sir.

Q. Is your name on the paper? A. Yes, sir; it is on as a witness.

Q. As a witness alone? A. Yes, sir.

Q. Are you quite sure about that? I want to be fair with you. A. Yes, absolutely.

Q. Was this case tried and were you a witness

in this same case where Judge Mountain sat on the bench? A. I don't know what judge it was.

Q. When Judge Smith sat on the bench? A. I remember there was another case pertaining to this; yes, sir.

Q. Involving the same transaction? A. Yes.

Q. Do you remember whether Judge Smith was the judge that sat in the case? A. I couldn't tell you that.

Q. As to the date, was it on Monday, May 24, 1926? A. Well, it seems as though it was about two years ago; I don't remember the exact date.

Q. Was this question asked you? I will have to read the question and answer before to get it in sequence. "Question: Do you mean that you agreed to release him on these notes that I have referred to?" speaking of about Mr. Eagles, and did you answer, "The truck seemed to run him into much heavier bills. That was the complaint of Mr. Eagles, that he couldn't make any money. Mr. Vandenberg complained that the truck was being driven too hard. That is why it was costing so many repairs." "Question: You agreed? Answer: I agreed to whatever this paper says." Now, when you made that answer was this paper before you?

Mr. Corn: I object to the question as not proper on cross-examination, that that matter has not been gone into on the direct-examination. That is a matter of defense which must be specifically raised with the defendant.

By the Court:

Q. What is your connection with the plaintiff company? A. What is that?

Q. What is your connection with the plaintiff in this case? A. Oh, you mean the finance company?

Q. Yes. A. Well, the only thing was that when these notes—

Q. What is your personal connection? A. None whatsoever. I have no connection with the finance company themselves any more than they have bought several items.

The Court: I thought you asked him if he was the holder of these notes.

Mr. Corn: If the plaintiff was the holder. It was admitted that the plaintiff, the Model Plan Finance Company, was the holder of these notes and of the book account. I thought that was admitted.

The Court: I have not yet gotten the connection of this witness with the transaction. How does he know anything about it?

Mr. Corn: The notes were made to him and the book account was incurred in his favor. He is the Alonzo DeVoe who owned this book account that has been sold to the plaintiff.

The Court: The question may be answered.

Q. Was this the paper referred to by you when you made that answer, this paper I have just shown you? A. What was the answer? What was the question?

Q. The question which I read to you from the evidence was, "You agreed? Answer: I agreed to whatever this paper says." When you made that answer was that the paper to which you referred? A. I couldn't answer that now. I don't remember

this paper or I don't remember that question at that time.

Q. May I read to you the two questions previous? Speaking to you, "Did you give a release to Mr. Eagles from the payment of any of the notes which he gave you dated after August 8, 1921?" The objection was overruled and then was your answer, "As I recall it it is sometime ago, I can't just recall the exact transaction, but as I recall it Mr. Vandenberg and Mr. Eagles came in the place —I think it was on Monday morning. Mr. Eagles said he wanted to get out of the trucking business and he asked me if I will let Mr. Vandenberg take the truck over and release him from any responsibility on the truck. Mr. Vandenberg and I went in the private office and he told me the work he could get, and he said he could do better business alone, and we drew up the release for Mr. Eagles on the truck. There was some talk as to how some bills were to be paid, but what it was I can't give you word for word. Question: Do you mean that you agreed to release him on these notes that I have referred to? A. The truck seemed to run him into much heavier bills. That was the complaint of Mr. Eagles, that he couldn't make any money. Mr. Vandenberg complained the truck was being driven too hard and that was why it was costing so many repairs. Question: You agreed? Answer: I agreed to whatever this paper says." Now, with that to refresh your memory will you say that that was not the paper to which you referred in your examination of May 24, 1926? A. Well I am under the same impression now that I was then, that this paper, this agreement, is between Vandenberg and Eagles and not I and Eagles.

Q. That isn't what I am asking you. Is that the paper to which you referred in your prior examination? A. That I can't remember.

Q. Well, whether you remember it, it seemed to be all right, didn't it? You identified the paper and say it was a release. Now, do you still say that you don't remember that that is the same paper? A. Well, it is written on Lockland stationery. Now, according to those questions it says I wrote it. Now, if it had been written by me it would have been written on DeVoe stationery.

Q. I call your attention to the stenographer's notation on the top, Plaintiff's Exhibit P-2. Now, with that to help you can you remember? A. I can't honestly recall it to be frank and honest. I can't recall whether this is the paper that was there. There was some paper.

Q. Whatever paper it was to which you referred, it was the intent, if this was the paper, to release Mr. Eagles from any liability on the notes and on the book account?

Objected to.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. Why, just as I understood it then I understand it now, that Mr. Eagles was selling his rights and titles to Mr. Vandenberg, and Mr. Vandenberg was giving Mr. Eagles a release. That is what I understood at the time and that is what I understood at the other trial and that is what I understand now.

Q. What did you understand you were doing?

A. I was witnessing a release or the paper that Mr. Vandenberg was giving Mr. Eagles.

Q. Did you hear this read or did you read it, "It is further agreed by A. DeVoe that he will release Warren Eagles of any further obligations on above mentioned truck"? Did you hear that read to you? A. No, sir I never remember hearing that.

Q. What did you mean then in your testimony here when you say that, "I agreed to do whatever this paper says"? What did you mean by that? A. I can't tell you now. I don't know whether that was this paper or not.

By the Court:

Q. Was there any other paper between you? A. There was two or three. There was a bill of sale or release agreement of some kind at that time at that trial, as I recall it, a release agreement from me to Eagles. In fact, I sold the truck to Mr. Eagles and Mr. Eagles was reselling the truck or his interests in the truck to Mr. Vandenberg.

Q. I will pass that for the moment. Was this question asked you, "My question is those charges —speaking now of the book account—should have been made to Mr. Eagles, should they?" and did you answer, "No, they should not be made direct to Mr. Eagles, but I guess—I can't recall"? A. which charges are you speaking of?

Q. The book account. A. Just as I said here, from the 3rd of August the book account should not have been charged to Mr. Eagles.

By the Court:

Q. Should not? A. No, from the 3rd of August down.

Q. They should not be charged to Mr. Eagles?

A. And I think that is what I mean right there.

Q. So all of the items in your complaint here beginning with the 3rd of August should not be charged against Mr. Eagles? A. No, sir.

By Mr. King:

Q. I want to ask you about one more thing. In these day books I wish you would look with me, and I am pointing to No. 308. Who made the writing that appears in this day book? A. Why, my bookkeeper.

Q. I call your attention to the word "Eagles" and "Warren" written after it. A. Yes.

Q. Is that word "Warren" in your bookkeeper's handwriting or yours? A. It is not in mine. I am pretty positive. It is in the bookkeeper's.

Q. I point you to No. 337. I call your attention to the fact that something before the name of Eagles has been erased. Who did that? A. I think I did that for Mr. Eagles.

Q. Never mind. I am asking you who did it? A. I think I did it.

Q. When did you do it? A. By Mr. Eagles' request.

Q. When did you do it? A. I can't tell you when.

Q. When in reference to instituting the first suit? A. It was done while Mr. Eagles was still in the operation of the truck.

Q. What word did you erase from this No. 337? A. It iooks to me as though it is Vandenberg.

Q. Vandenberg? A. Yes.

Q. I call your attention to 358, and there it appears Vandenberg and Eagles. A. Yes.

Q. Is that right? A. Yes.

Q. On No. 202 under date of August 3rd there

appears something erased before the word "Eagles." A. It looks to me as though it is Vandenberg.

Q. Who did that? A. I imagine I did it.

Q. When did you do it? A. At the time that Mr. Eagles requested me to do it.

Q. When was that? A. I can't tell you when. During the operation of the truck.

Q. When in reference to August 8, 1921? A. Well, I would say about the time I received the bill.

Q. I point you to No. 764. There is no erasure there. A. No, sir.

Q. What Eagles is that? A. Warren Eagles.

Q. How do you know? A. He is the only Eagles that we had any account with. He was the only Eagles. It just says "Eagles" in two of these sheets and he was the only man by the name of Eagles that we had business with.

Q. No. 759 is just Eagles? A. Yes, sir.

Q. No. 781 is Warren Eagles? A. Yes, sir.

Q. Now, why, if you were erasing a portion, didn't you erase all? A. All that we erased was the name Vandenberg.

Q. Here is Warren Eagles. Oh, you only took out Vandenberg? A. Yes, that was the only erasing that I can remember and recall of doing.

Q. Here is Eagles, Warren, Warren following. A. Yes, sir.

Q. Isn't it apparent to you that that is in a different handwriting? A. No, sir.

Q. Who wrote the word "Warren"? A. The same man that wrote the word "Eagles," the bookkeeper.

Q. That is on No. 783. Here is No. 796—R, Warren Eagles. A. Yes.

Q. What is the "R" for? A. You see there is an "M" on the original sheet. That goes on here. There is a white sheet all lined off. On the original sheet it is all lined off, and capital "M" is there and you put a Mr. or Mrs., whatever the account may be. Now, if you want to check up on that "Warren," I think by going back you can do it.

Q. Come back to this paper that is dated August 8, 1921. Is that your signature to which I point? A. Yes.

Q. Whose signature is to the right? A. Eagles.

Q. Did you see him write his name? A. I think I did.

Q. And the signature below is? A. Looks like Charles Vandenberg.

Q. Did you see him write that name? A. I am pretty sure I did when I witnessed them.

Mr. King: I offer the paper for identification.

(The paper referred to is marked Exhibit D-1 for identification.)

Mr. King: With permission of the Court, may I ask counsel for the other side whether he will permit this paper to be marked in evidence at this time?

Mr. Corn: I am objecting to it being brought into evidence at all, not for any technical reason for failure to prove, but my objection to it is that it is not any contract of the plaintiff or his predecessors or of Mr. DeVoe, that this is at the best a self serving declaration.

The Court: It may be marked for identification.

Mr. King: My only thought was the case

logically hinges about this paper. There is not any—

The Court: Suppose we let it be marked in evidence subject to a motion to strike it out at the conclusion of the case if I think it is not proper.

Mr. Corn: Oh, yes, that is proper.

(The paper previously marked Exhibit D-1 for identification is received in evidence and marked Exhibit D-1.)

By Mr. King:

Q. Under this agreement a hundred dollars was to be paid? A. I beg your pardon?

Q. Under the agreement which the Court has in his hand a hundred dollars was to be paid? A. I don't remember that.

The Court: A hundred dollars per week, it says, until the back debts on the truck have been paid up.

Q. Now, look at your account in your ledger account and see if you don't find a credit for a hundred dollars after the date of this paper, August 8, 1921. A. Payment by Vandenberg, paid one hundred dollars on—

By the Court:

Q. What date? A. Looks like October 15th to me.

Q. Haven't you your glasses with you? A. No, I can't tell whether that is October 15th or not. It looks like October 15th. It is very small.

By Mr. King:

Q. Is this the agreement under which the automobile was purchased? A. Yes, sir.

Mr. King: May I also put this in evidence, and to let us shorten our case, subject to the same reservation?

Mr. Corn: I have no objection to it at all.

(The same is received in evidence and marked Exhibit D-2.)

Redirect-examination by Mr. Corn:

Q. In this figure of $557.57 balance on the account that you have computed in your books have you included any items after August 3rd, 1921? A. No, sir, there is nothing included—This is up to August 3, 1921.

Q. Up to and including? A. Yes.

Q. And that amount is the balance which appeared on your books on August 3, 1921 against Warren Eagles? A. Yes, sir.

Mr. King: If I may be permitted, if your Honor please, there is another question about those notes I did not ask him.

Recross-examination by Mr. King:

Q. Each of these notes have your endorsement on the back? A. Yes, sir.

Q. To whom did you transfer those notes, and when? A. Do you mean where they were discounted?

Q. No. To whom? A. I transferred them to a Mr. Leo Wagner, I think. Wagner I think his name was.

Q. Did you transfer them to him after the time they became due?

Mr. Corn: I do not see the materiality of that, your Honor. We admit that we are not a holder for value.

A. I don't know whether it was before or after.

PLAINTIFF RESTS.

Defendant's counsel moves that the plaintiff be non-suited on the following grounds:

That the present plaintiff, having taken the notes after maturity and without value, without payment, took them subject to the equities existing between the original maker and the payee; and any equities or any defenses that may be set up between the two are available against the present plaintiff;

That the release which has been offered in evidence binds Mr. DeVoe;

That the book account has not been established.

Motion denied.

Defendant's counsel prays an exception to this ruling o fthe Court.

Exception noted as ground of appeal.

WARREN EAGLES, defendant, sworn in his own behalf.

Direct-examination by Mr. King:

Q. Mr. Eagles, you live in Dover? A. In Wharton.

Q. Did you buy a truck from Mr. DeVoe? A. Yes, sir.

Q. And that was on February 7, 1921? A.

Around that date; I just couldn't give you the date.

Q. This truck was bought in your name? A. Yes, sir.

Q. Now, subsequent to the purchase of the truck and on the 8th day of August, 1921, did you convey, make an assignment of your conditional bill of sale to Mr. Vandenberg? I show you the paper. A. Might I ask you to give me that question?

Q. (Question read by stenographer.) Now, subsequent to the purchase of the truck and on the 8th day of August, 1921, did you convey, make an assignment of your conditional bill of sale to Mr. Vandenberg? I show you the paper. A. Yes, sir.

Q. When was this assignment made in relation to the execution of Exhibit D-1; that is, this so-called agreement? A. It was made on the day that this was made up.

Q. Wasn't it one transaction? That is what I am after. A. It was.

Q. On your notes the assignment appears upon the original conditional bill of sale which has been offered in evidence. I notice the name of the subscribing witness to this assignment of bill of sale is Mr. DeVoe. Is he the same witness who signed the other agreement, Exhibit D-1? A. Yes, sir.

Q. And the same person from whom you bought the truck? A. Yes, sir.

Q. You have made some payments on account of the truck, haven't you? A. Yes, sir.

Q. And you weren't getting along very well? A. Yes, sir; made them as required, I think, every note.

Q. I mean to say you weren't getting along very well with the truck, were you? A. No, sir.

Q. Were these papers signed at one time with Mr. DeVoe? A. Yes, sir; and Mr. Vandenberg present.

Q. At the same time? A. The release?

Q. Yes. A. Yes, sir.

Q. What conversation took place prior to the release?

Mr. Corn: I object, your Honor, to any conversation that took place prior to the signing of a written agreement. That is merged in the agreement.

The Court: I do not believe it is all to the written agreement. I do not believe that is the purpose of it. I am assuming the purpose is to show the capacity in which Mr. DeVoe signed the agreement.

Mr. Corn: The capacity?

The Court: Yes.

Mr. Corn: If that is as far as it goes I will allow it.

Q. You may tell. A. I took the truck back to Mr. DeVoe. When I went in with it to give it up, that was on the day that the last note, that particular one was due. When I went in with it and told Mr. DeVoe the way I felt about it, in our conversation it seems that Mr. Vandenberg wanted the truck, and I said to Mr. DeVoe, "Nobody can have that truck until I am absolutely released from it." Mr. DeVoe said, "I will have one drawn up," and he went direct across the way from his business and had this paper drawn up, not all that is on there, and returned it to me and asked me if it suited me, and I said no, and then he put in those two lines, "I will agree hereby further,"

just as that reads there. I just can read it off that one line where it releases Warren Eagles.

Q. Look at these two last lines on the paper.

Mr. Corn: I ask that that last answer be stricken out. The question was admitted to show only in what capacity Mr. DeVoe signed, and the testimony goes entirely beyond; that is, the answer went entirely beyond it. It went to show what transpired at the time with reference to what was in it rather than to the capacity in which he signed.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. Look at the two lines appearing above the signatures and see if those are the lines to which you refer.

Mr. Corn: I object to the question for the same reason.

Objection overruled.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A. This one that he put after, the lower line, "It is further agreed by A. DeVoe that he will release Warren Eagles from any further obligations on the above mentioned truck."

By the Court:

Q. Who put that in? A. Mr. DeVoe took it back and had it put in before it was executed.

Q. That wasn't in when he brought it to you the first time? A. No, sir; this line wasn't in, the bottom line. Down to there (indicating).

By Mr. King:

Q. Now, some mention is made in there of a hundred dollars. By whom was that hundred dollars paid? A. Mr. DeVoe agreed that if I would transfer this over in a verbal agreement, that the first hundred dollars that Mr. Vandenberg paid—

Mr. Corn: I object to the witness testifying to any verbal agreement.

The Court: The question may be answered, "By whom was it paid?"

Q. By whom was the hundred dollars paid? A. As yet I have never known who it was paid by. I never seen it.

Q. Did you pay it? That is the point. After the signing of this paper did you pay the hundred dollars? A. No, sir; I did not.

Q. No further payments were made by you? A. No, sir; I have not paid one cent.

By the Court:

Q. Whose name is that under Mr. DeVoe's? A. Those signatures?

Q. The name under that of Mr. DeVoe. A. H. D. Bau. I couldn't tell you who it is.

Q. Was there a mention of any such name as that there at the time? A. I couldn't say. That was all executed right there. They were all there that signed.

Q. All those names put on at one time? A. Yes.

Q. Those names over there as well as over here? A. Yes, sir.

By Mr. King:

Q. What statement did Mr. DeVoe make at the time of the execution of this paper in reference to what was intended to be accomplished by the paper?

Mr. Corn: I object to that question as entirely improper. It is going to vary the terms of a written instrument which is already in evidence.

The Court: I am inclined to admit that question, permit that question on the same theory that I permitted the question with reference to the preparation of the agreement, my thought being that it can go no further than to show, or ought to go no furter than to show the capacity in which Mr. DeVoe signed this paper.

Mr. King: That is the only object.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q. (Question read by stenographer.) What statement did Mr. DeVoe make at the time of the execution of this paper in reference to what was intended to be accomplished by the paper? In reference to himself. What did he tell you he was trying to do? A. I don't just get the question.

Q. What did he say in reference to the manner in which he was signing it, as a principal or as a witness? Tell me what he said. A. He signed it—

The Court: What did he say?

Q. What did he say, because the other is a conclusion? What did he say when this agreement

was prepared? A. Your Honor, I don't know just how to answer that question.

Q. I see I am getting too involved for you. If he signed as a witness he was not a party to the proceeding. A. He signed it as a party.

Q. Now, why do you say that he signed as a party? Why do you say that?

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

The Court: It will be unless it is cured by the answer to this question, since he can't say that unless by reason of what Mr. DeVoe said to him, and then unless it be, we will strike it out.

Q. What did Mr. DeVoe say in reference to this agreement, if he did, whether he was signing it as a witness to your signature or whether he was signing it as a party to the proceeding? A. He said he was signing that—

Mr. Corn: I object to that question as leading.

The Court: The question may be answered.

A. He was signing it as a party to the agreement to release me from the truck absolutely.

Q. Is that what he said? A. Yes, sir.

Q. Now, in reference to these accounts that you have here, after August 8, 1921, was any bill rendered to you for these charges on the ledger for repairs to the truck prior to August 8, 1921? A. I never had any bills rendered to me.

Q. Have you had any bill rendered to you for

the charges appearing after August 8, 1921? A. No, sir.

Q. Since August 8, 1921, you have no bill of any other character rendered to you for these items, of course? A. No, sir.

Q. Was any demand made upon you for payment? A. Never had any demand made at all other than what came through—

Q. No demand made upon you for payment of these notes? A. No, sir.

Q. You did have a suit against you by a man by the name of Leon Wagman, did you not? A. Yes.

Q. That was down in Newark also? A. Yes, sir.

Mr. King: Would it be improper if I state the result of that suit?

The Court: I don't know. Is there any objection?

Mr. Corn: Oh, certainly.

The Court: I would rather think so.

Q. Was there a judgment rendered on the suit? A. No, sir.

Mr. Corn: I object, your Honor. I think that that is entirely improper and I am almost inclined to ask for a mistrial. I do not think that that question should be brought here at all.

The Court: I do not think it amounts to anything as it now stands because he said no judgment was rendered, and the only thing that could result then would be a mistrial or a disagreement, so that is the only thing that appears now.

Mr. King: I have a certified copy of it from the judge of the Supreme Court, and my only object was not to show that that had any effect upon this, but to show that outside of that suit and this suit no demand had ever been made upon him.

The Court: I understand it is objected to, the record that you now offer. I will sustain the objection and an exception to that ruling may be noted.

Q. Then outside of two suits which I will say were demands, you have had no demand made upon you for the payment of either the account or the notes? A. No, sir.

Cross-examination by Mr. Corn:

Q. Mr. Eagles, did you get a letter from me on July 7, 1923 demanding payment of these notes, and that you referred to your then counsel, Seth Ely? A. Not to my knowledge.

Q. You know Mr. Ely's signature, do you not? A. I cannot say that, no, sir.

Q. He was your attorney? A. Yes, sir.

Q. Do you recall his writing that letter at your direction after you read it? A. I couldn't say. I don't recall it. In fact, I forgot the whole thing because I thought it was a thing of the past.

Q. Your recollection is rather hazy, is it not? A. No, sir.

Q. That is your name, Warren Eagles of Dover, mentioned in this letter? A. My name Warren Eagles. I am not of Dover.

Q. And Mr. Ely was your attorney in July of 1923? A. Mr. Ely has handled this case all the

way through for me, if that is the date.

Q. Did you see the date? A. That is the date, but I have not got no record of the case at all.

Q. And there was no letter that we wrote to you before the institution of the first suit? A. My knowledge doesn't recall it if there was.

Q. But your mind is very clear, your memory is very clear as to what transpired several years before this in August, 1921? A. Not in everything.

Q. It is clear as to what Mr. DeVoe said to you at the time the paper was signed? A. Yes, as far as what is on the paper is concerned.

Q. Now, when you bought this truck Charles Vandenberg was connected with you in business, was he not? A. We weren't in business. The truck was all in my name.

Q. He was working for you? A. He was working with me.

Q. Wasn't it at your request that he endorsed these very notes in question here? A. I think that was the situation. I wouldn't want to vouch for the situation of Mr. Vandenberg.

Q. He used your truck, did he not? He worked the truck? A. He worked on it.

Q. And he had repairs made on the truck? A. All the repairs that was made onto it before he got it was through me.

Q. What did you do? Pay him a salary? A. We both had a salary and a scant one.

Q. You drew equal salaries? A. Well, we had what was left.

Q. After the payment of the debts on the truck? A. After we kept the thing going we had what was left, divided it up.

Q. Equally? A. Yes, as far as I know we both had the same.

Q. All that happened, then, on August 8, 1921, was that you stepped out of the picture and Mr. Vandenberg took over the whole truck, is that right? A. All that happened?

Q. Yes. A. I got out of the business and Mr. Vandenberg took the truck.

Q. The earnings of the truck paid the notes on this truck, did they not? A. Paid them all but the last one, I think, all but the last one that I paid on that. I think that I had to add money to that out of my own pocket.

Q. And after the payment of these notes on the truck, whatever was left was divided between you and Vandenberg equally, is that true? A. Yes. We each had the same amount as far as I know, unless he got more than I did.

Q. How old a man are you, Mr. Eagles? A. Fifty-two, I think.

Q. How long have you been in business for yourself? A. That is the only time. While I had that truck was the only time that I was in business for myself, whatever those notes date.

Q. You can read English, can you not? A. Yes, sir.

Q. Did you see the way Mr. DeVoe signed this paper? A. The way he signed it?

Q. Yes. A. I don't just grasp your meaning, but I saw him sign it.

Q. Did you see where on the paper he signed? A. I didn't notice it all due to the fact that he was executing the thing and I left it in his hands.

Q. Did you sign the paper? A. I signed it, yes.

Q. Did you sign it before or after him? A. I couldn't say who just signed it first. I couldn't say whether I signed it first or second or last.

Q. And when you signed the paper you say that there were two lines typed in there for signatures; right? A. I don't know that I saw the two.

Q. Do you see it now? A. Yes.

Q. On one of these lines of signatures you signed, did you not? A. Yes.

Q. And on the other one Mr. Vandenberg signed, did he not? A. I imagine that looks like Mr. Vandenberg's signature. This is mine I know, and that looks like his.

Q. On the other side where it says attested there were also two lines typed in for signatures? A. Why, yes.

Q. One of them was Mr. DeVoe. A. The top one looks like Mr. DeVoe's signature.

Q. And that is Mr. Bau? A. That is the one I couldn't make out, the last part of it here.

Q. You did not consider that Mr. Bau was bound by this agreement, did you? A. No, sir.

Q. But you do consider that Mr. DeVoe was in the same position as Mr. Bau? A. The reason I did that—

Q. I am asking you for the fact. A. That was due to the fact that he had it executed for me. I asked him to get this made out and he did. That is the reason I considered him responsible for it.

Q. Did you read this paper before you signed it? A. If I may answer it this way, Mr. DeVoe brought that paper over to his place. I did not go with him when it was made out at all. He brought it over to his place to me, and I said a few moments ago I was dissatisfied and then he returned it and had the two lines put in and then I read it and was satisfied.

Q. You were satisfied with this paper when you signed it? A. After he had in where he did re-

lease me, then I was satisfied with the paper.

Q. And you have held this paper in your possession until 1921? A. Why, I think that paper was in a box where I keep my insurance papers and things until I had notice of the suit.

Q. Did you ever tell Mr. DeVoe that you found that he had signed as a wintess and not as a party? A. No, sir.

Q. At that time did you know that there were three more notes outstanding on this truck unpaid for? A. Yes. I knew that they weren't all paid for. I couldn't just say what the amount was. I knew that the notes were all made as required up to this date.

Q. You asked Mr. DeVoe for the notes? Did you ask him for the remaining notes? A. No, sir, I did not feel it would be necessary inasmuch as I was released entirely from it.

By the Court:

Q. The suit which was brought before and was tried in Judge Mountain's court—did that involve notes which were given for this truck? A. I think it did.

Q. You think it did? A. Yes, sir.

Q. Do you know when that suit was started? A. I could not say just when it started. I haven't kept any record of any of the proceedings. I forgot it since that date.

Redirect-examination by Mr. King:

Q. Now, may I ask you whether the notes in the other suit were the same as the notes and book account in this suit? A. I imagine they were.

Q. Imagination won't go. What is your recollection about it? A. That they are.

Mr. King: This transcript—may I show it to the Court and to the jury?

The Court: I think in view of the testimony that this is the first he has been asked to pay any of these notes or book accounts, it might be relevant to show when he had had previous notice, if it be an agreed fact in the case that it did involve these same notes and book account. Do you know anything about it, Mr. Corn?

Mr. Corn: I do not just grasp the point, your Honor.

The Court: As showing when he had a demand made upon him by suit. It might be relevant and important to show that the subject of the former suit was the same as the subject in this suit, if that be the fact.

Mr. Corn: Yes. Just the subject, rather, not what transpired at the trial.

The Court: That is agreed to, is it?

Mr. Corn: I have no objection to it.

The Court: Perhaps you may also agree as to the date that suit was brought.

Mr. Corn: December 3, 1923. I have the official transcript.

Mr. King: Can we stipulate that the complaint in this suit was the same as the complaint in this suit?

Mr. Corn: Yes.

The Court: And the suit was brought on what date?

Mr. Corn: December 3, 1923.

Mr. King: Now, I think we can stipulate that was not brought in the name of the present plaintiff. It was brought in the name of Leon Wagman.

The Court: All right.

Mr. King: Would it be proper to add to that the result of that suit?

The Court: Is there any objection to that?

Mr. Corn: Why, yes.

The Court: I will sustain the objection.

Mr. King: Will you also stipulate that the present plaintiffs became the possessor of these notes after the other suit was tried?

Mr. Corn: Yes, certainly.

Mr. King: And when did it become the possessor of the notes?

Mr. Corn: I do not know that that is material. We are not suing as a holder at all.

Mr. King: That is our case excepting that I would rather leave the record straight, if I may recall Mr. DeVoe just for a moment.

ALONZO DEVOE, recalled by defendant.

Further cross-examination by Mr. King:

Q. Mr. DeVoe, these items appearing on the day books and in your ledger and which are the subject of a suit in this case were for materials and services rendered to the automobile in question, were they not? A. The Schacht truck that was sold to Mr. Eagles, that is the only truck that they had and that is the only one that they brought in for repairs.

Q. They answered and said that they are. A. Yes. They are the items charged to that Schacht truck.

Q. Which Mr. Eagles subsequently sold to Mr. Vandenberg? A. Yes, sir.

DEFENDANT RESTS.

ALONZO DEVOE, recalled in behalf of plaintiff in rebuttal.

Direct-examination by Mr. Corn:

Q. Mr. DeVoe, did you say to Mr. Eagles at the time that paper was signed that you were signing as a principal and not as a witness? A. No, sir. I signed it as a witness.

Q. Did you see what was in that paper before you signed it? A. I don't recall reading the paper over.

By the Court:

Q. Where did you get it from? A. Why, as I recall this, Mr. Eagles and Mr. Vandenberg went over to this notary public across the street and had this made up themselves by the notary, and brought it over here, came over for me to go over there and sign as a witness to it.

Q. Who is this H. D. Bau whose name appears on there? A. I don't know unless it was some man that worked over at Lawrence's place. I do recall the name of the notary public, Miss Lyons. She was a notary and she acknowledged quite a lot of bills of sale of different sales.

By the Court:

Q. Was this paper signed in your office or in the Lyons office or before the notary public? A. It was signed before the notary public, which was in Mr. Lawrence's building.

Q. Were you there at the time? A. I must have been to witness it, yes, sir.

Q. You don't recall it, though? A. Well, I recall witnessing the paper, yes, sir.

Q. Do you recall when it was signed and whether

you were present when it was signed? A. Why, it was signed in Mr. Lawrence's bookkeeper's office. Miss Lyons was his head bookkeeper and also a notary.

Q. You see you are not quite answering my question. The question is whether you recollect when it was signed and whether you were present when it was signed. A. That is over at Mr. Lawrence's office.

The Court: That answers it.

By Mr. Corn:

Q. And this assignment of bill of sale from Warren Eagles to Vandenberg, your name also appears as a witness? A. Yes, sir.

Q. And Mr. Bau appears as a witness? A. Yes.

Q. And the notary is the same notary? A. Same notary.

Mr. Corn: This has been marked for identification. Do you want me to put it in evidence?

(The paper previously marked Exhibit D-3 for identification is received in evidence and marked Exhibit D-3.)

Cross-examination by Mr. King:

Q. So there may be no question about this, is it your recollection that the other suit involved the same notes and the same book account that were involved in this suit? A. Yes, sir; as far as I know.

Q. Now, when the counsel said to you, showing witness a paper, "I ask you if that is your signature," did he show you the paper that I showed

you a few minutes since? A. When counsel asked me if that was my signature?

Q. I am asking you whether the paper that he showed you was the same paper that we have been talking about this afternoon. A. Well, there was three or four papers.

Q. No, no. Stick to this one thing. Wasn't this paper, this release that we are talking about —is that the paper shown you? A. That paper was shown to me at some time; yes, sir; but I can't tell you if that is the one.

Q. Will you listen to your answer?

Mr. Corn: Your Honor, this is going through the matter over again. I object.

The Court: I can't tell until I hear it.

Q. "Answer: I witnessed that, yes, sir." Did you give that answer? A. I witnessed it? Yes, sir; I witnessed two papers.

Q. Now, looking at the paper before the Court, this so-called release, now with that evidence on your part, won't you tell this jury whether that was the paper that you saw then which is the paper we are discussing this afternoon? A. Well, I witnessed both of these papers at that time.

Q. Is that it? Now, let me read further. Was this question asked you: "Question: Is that your signature? Answer: That is my signature. Question: I ask you to look at this paper and ask you if that is your signature. Answer: Yes, sir. (Showing witness another paper.) Question: Is that your signature too? Answer: Yes, sir." Now we have got two papers, haven't we? Are those the same papers that we are speaking about today, this assignment of bill of sale and the so-called re-

lease? A. Well, I would imagine they are.

Q. Was this question asked you: "Isn't it a fact that Mr. Eagles returned this truck as shown by the terms of the agreement? Answer: Yes, sir." Did you answer that? A. I didn't quite understand that question.

Q. "Isn't it a fact that Mr. Eagles returned this truck as shown by the terms of the agreement?" and in answer to that did you say, "Yes, sir"? A. I can't recall that now.

Q. Was the truck returned to you after the execution of these papers at that time? A. A long time after.

Q. Wasn't it returned to you at that time? A. Well, they had the truck in front of the door, and when he had these papers signed up he took the truck away again.

Q. Who took the truck? A. Mr. Eagles and Mr. Vandenberg, the same men who brought it.

Q. But you had left in your possession an assignment of the bill of sale and you also had in your possession a copy of this paper that was signed? A. No, sir, I did not. There was only two copies made and Mr. Vandenberg had one and Mr. Eagles the other.

Q. Now, this may be running over it again, but if the Court will permit it—"Question: Did you give a release to Mr. Eagles from the payment of any of the notes which he gave you dated after August 8, 1921?" Your answer is, "As I recall it, it is sometime ago. I can't recall the exact transaction, but as I recall Mr. Vandenberg and Mr. Eagles came into the office—I think it was on a Monday morning—Mr. Eagles said he wanted to get out of the trucking business and he asked me if

I would let Mr. Vandenberg take the truck over and release him from any responsibility on the truck. Mr. Vandenberg and I went in the private office and he told me the work he could get, and he said he could do better business alone, and we drew up the release for Mr. Eagles on the truck and there was some talk as to how some bills were to be paid, but what it was I can't give you word for word." Did you give that answer under oath before Judge Smith and a jury in Essex County in 1926? A. If that is my testimony I must have made it.

Q. Do you deny that this is true? Do you now deny that this is the truth? A. No. That is just as I understood it at that time; yes, sir.

Q. Now, then, when you used the words, "and we drew up the release," you were speaking of yourself and Mr. Vandenberg, weren't you? A. No, sir, I was speaking of all of us.

Q. Well, listen. "Mr. Vandenberg and I went in the private office, and he told me the work he could get and he said he could do better business alone, and we drew up the release for Mr. Eagles on the truck." Now, did you and Mr. Vandenberg draw the release for Eagles on the truck? A. No, I didn't draw the release at all.

Q. Did you intend to give Eagles a release on the truck? A. No, sir, not a direct release, no.

Q. What do you mean by "direct release"? A. Well, I did not release Mr. Eagles of anything that he owed on the truck.

Q. You said, "direct release." What do you mean by that? A. That is just what I mean. If Mr. Eagles owed me $50 or $1500, I did not release him for anything that he owed me at the time.

Q. Now, listen. Did you mean that you agreed to release him of these notes that I have referred to? A. No, sir, I did not.

Q. And your answer, "The truck seemed to run into much heavier bills. That was the complaint of Mr. Eagles, they couldn't make any money. Mr. Vandenberg complained that the truck was being driven too hard, and that was why it was costing so many repairs," and the question, "You agreed?" and your answer, "I agreed to whatever this paper says"—did you make that answer under oath before Judge Smith when this case was partially tried before? A. I don't recall making that answer.

Q. Will you now say that you did not say that? A. I won't say I did not, but I don't recall making that answer.

Q. Then you may have said it? A. I may have said it.

Q. And when you referred to a paper, you referred to this release, didn't you? A. Well, if that was the only two papers in the case I must have referred to it.

Q. Have you any doubt that it referred to that? A. Well, I have a doubt that I released Mr. Eagles or anyone else of any obligations that was on the truck then, and I don't think that that release says anything about obligations that was on the truck. It says further releases, if that is what you mean.

Q. Now, speaking of the charges appearing on the books, my question is, those charges should not have been made to Mr. Eagles, should they? A. Those were the charges after August 3rd.

Q. They were? A. Yes, sir.

Q. I will read one of your other answers, if I may, and ask you whether you made it. "Ques-

tion: Tell us why you asked him for charges on September 1, 1921, October 20th, October 16th and January 13, 1922, totaling $384 if you agreed to release him from any further charges on this truck?" and your answer, "Of course as I say now I don't remember the figures or the dates of this here book account but when I assigned this book account there I assigned everything that was in it." Did you say that? A. I guess I did.

Q. Is that the truth? A. I assigned everything that was in it?

Q. Yes. A. Yes, sir.

Mr. Corn: Will you admit that in evidence?

Mr. King: I consent to that.

Mr. Corn: A letter dated July 26, 1927.

(The paper referred to is received in evidence and marked Exhibit P-8.)

Mr. Corn: If your Honor please, at this time I want to raise my objection to that release and to move to strike out all the testimony pertaining to it for two reasons:

The release, or the paper as it is there, is definite and distinct. It shows who signed and who witnessed, and Mr. DeVoe is there distinctly and plainly as a witness and Mr. Eagles and Mr. Vandenberg are there as signatories to the agreement. I do not believe that any evidence could be admitted properly to change the status of the parties to show that one who signed as a witness is a maker or one who signed as a maker is only a witness. That would vary the terms unless, of course, they were to show fraud or illegality.

The Court: Or mistake.

Mr. Corn: Or mistake, yes, sir.

Now, my second objection to it is this, that admitting or conceding that Mr. DeVoe may have signed this as a maker, that release does not operate in this case. The wording is very plain. He says he will release from further obligation. Now, all of these obligations on which we are suing now were obligations before this paper was signed. The notes have been executed. They certainly were obligations. They are obligations on the date when they were made. This book account on which we are suing were obligations continuing, the last item being August 3rd. Now, a release from further obligations, that he will release, that contemplates something in the future, that he will release from further obligations; and further obligations means that there were certain obligations that he won't release him from. The word "further" used as an adverb here, has received a meaning of future. "Further" ordinarily used as an adjective means future. That release could not operate on past indebtedness, on indebtedness on obligations that were there at the time this paper was signed.

Now, if that is disposed of, of course that would dispose of the whole question if decided in our favor, because that is the only defense that has been introduced in this case that I can see. The answer did bring in defenses of the Conditional Sales Act, and there is not an iota of evidence of any default on our part or Mr. DeVoe's part in any of the terms of the Conditional Sales Act;

and the only defense then that I can see in this case is this paper. If it is not properly in evidence or if the wording of it does not refer to these obligations, as I contend, I beleive we are entitled to a direction of verdict.

The Court: The motion will be denied.

Plaintiff's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Mr. King sums up for defendant.

Mr. Corn sums up for plaintiff.

CHARGE OF THE COURT.

The Court charges the jury as follows:

DUNGAN, *J.*

Gentlemen, it appears that in March, 1921, Mr. Eagles, the defendant, purchased a Schacht truck from Mr. DeVoe. In part payment of that Schacht truck he gave him three notes of $207.25 each dated on that day, March 7, 1921, and payable January 7th, February 7th and March 7, 1922, with interest. Admittedly, Mr. Eagles has never paid these notes. There is no question but that the amount now due upon these notes is the face of the notes; that is, $207.25 each, making a total of $621.75 for the three notes. As I have stated, they draw interest from date. This being about the eighth anniversary or one day later of the giving of these notes, interest at six per cent. would be $298.44, making a total due upon the notes $920.19.

After Mr. Eagles purchased this truck, he took

it to Mr. DeVoe for servicing and repairs. He admits that. Up to the 3rd day of August, 1921, he contracted bills for the servicing and repairs to the truck, the unpaid part of which bills at this time amounts to $557.57. Figuring interest from the 3rd day of August, 1921, on that sum, makes $254.25, or a total of $811.82 due upon the book account. The total amount of the items for the three notes and the book account plus the interest is $1732.01, and if the defense in this case has not been established, that should be the amount of your verdict in favor of the plaintiff and against the defendant.

The plaintiff in this case is the Model Plan Finance Corporation, to which, after maturity, Mr. DeVoe assigned these notes and the book account. Therefore, any defenses which would have been available against Mr. DeVoe are available against the plaintiff in this case, the Model Plan Finance Corporation, although this suit is not brought by Mr. DeVoe.

The defendant says that these notes and this book account have been entirely released by Mr. DeVoe. If that be true, then notwithstanding the admission that the defendant has not paid these notes and this book account, the plaintiff, the Model Plan Finance Corporation, which stands in the shoes of Mr. DeVoe in this case, cannot recover. The defendant says that by an agreement dated the 8th day of August, 1921, Mr. DeVoe released Warren Eagles, the defendant in this case, from the payment of those notes and the book account, the circumstances being these:

Mr. Eagles was not successful in the conduct of the trucking business. Associated with him was a Mr. Vandenberg, and on that date, according to

the story of Mr. Eagles, he brought the truck which he had purchased back to Mr. DeVoe, told him that he couldn't make it go, and he was about to turn it in when Mr. Vandenberg said that he would like to have the truck and he would try to make a go of it. To this Mr. DeVoe agreed, and he says that it was discussed that if the transfer of the truck was made by Mr. Eagles to Mr. DeVoe, that Vandenberg was to assume the indebtedness upon the truck and DeVoe was to release him from any obligations, which included, of course, the book account which was due up to that time and the notes which were then unpaid. He said that Mr. DeVoe agreed to that and said that he would go across the street and have an agreement drawn up. He did go across the street, according to Mr. Eagles, and returned with this agreement which has been read to you by Mr. King, attorney for the defendant; that he showed it to Mr. Eagles, who said it was not satisfactory. He said, "I don't see where I am released by that agreement." He said that Mr. DeVoe then took it back and added this last paragraph, "It is further agreed by A. DeVoe that he will release Warren Eagles of any further obligations on the above mentioned truck." He then signed it, but he does not appear to have signed it, according to the agreement itself, as anything more than a witness.

This document, as you will see when you take it to the jury room, has a place over to the right where there are the two signatures, W. Eagles and Charles Vandenberg. To the left is a place for witnesses. It says, "Witnesseth, A. DeVoe and H. D. Bau."

Of course, even though it was agreed between Eagles and Vandenberg that DeVoe would release

Eagles, that is not an agreement on the part of Mr. DeVoe to do so; but Mr. Eagles says that it was discussed before that time, that DeVoe was to agree to this release and that DeVoe said that he was signing this release as a party to release him from the truck absolutely.

Now, there is no harm, of course, in signing a document in any particular place, provided a person signs as a party, whether he signs at the top or at the bottom or at the place marked "Witness" or at any other place in an agreement. Evidence has been introduced to show the capacity in which Mr. DeVoe signed this agreement. Mr. Eagles says that Mr. DeVoe told him he was signing as a party for the purpose of releasing him absolutely. If he did so sign it, then the present holder of the notes is bound by the agreement which was made in writing and cannot recover anything either upon the notes or the book account. That must be proved by the greater weight of the evidence.

Mr. DeVoe denies that. He says he did not so state; that he did not sign it as a party but signed it as a mere witness. If he did, he is not bound by any agreement between Eagles and Vandenberg. He himself must have agreed to release Mr. Eagles.

If he did agree, the plaintiff can recover nothing in this suit; if he did not agree, the plaintiff is entitled to your verdict for $1,732.01.

We hear a great many things about compromise verdicts. Perhaps there can be such things, and courts find them, and there may be cases in which they are justified, but in this case there can be no such verdict; you must find a verdict for the plaintiff for the full amount or you must find for the defendant.

Exhibit P-1.

$207.25 Newark, N. J.
No. 12 March 7, 1921

For Value Received, on March 7, 1922, the undersigned promises to pay to the order of A. De Voe Two Hundred Seven and 25/00 Dollars ($207.25) in funds current in the City of Newark at National Union Bank; City of Dover, State of N. J. with interest thereon at the rate of six per cent. per annum from date. This note is one of a series of Twelve notes of like date and of the aggregate principal amount of Twenty four Hundred Eighty Seven Dollars ($2487.00), all executed by the undersigned to the same order.

WARREN EAGLES.

Exhibit P-2.

$207.25 Newark, N. J.
No. 11 March 7, 1921

For Value Received, on Feb. 7, 1922, the undersigned promises to pay to the order of A. De Voe Two Hundred Seven and 25/00 Dollars ($207.25) in funds current in the City of Newark at National Union Bank; City of Dover, State of N. J. with interest thereon at the rate of six per cent. per annum from date. This note is one of a series of Twelve notes of like date and of the aggregate principal amount of Twenty four Hundred Eighty Seven Dollars ($2487.00), all executed by the undersigned to the same order.

WARREN EAGLES.

Exhibit P-3.

$207.25 Newark, N. J.
No. 10 March 7, 1921

For Value Received, on January 7, 1922, the undersigned promises to pay to the order of A. De Voe Two Hundred Seven and 25/00 Dollars ($207.25) in funds current in the City of Newark at National Union Bank; City of Dover, State of N. J. with interest thereon at the rate of six per cent. per annum from date. This note is one of a series of Twelve notes of like date and of the aggregate principal amount of Twenty four Hundred Eighty Seven Dollars ($2487.00), all executed by the undersigned to the same order.

WARREN EAGLES.

Exhibit P-4.

Exhibit 4 is a Book Account, printed at pages 7 to 12 inclusive.

Exhibit P-8.

SETH H. ELY
Counsellor at Law
4 West Blackwell Street
Dover, N. J.

Telephone 189

July 26th, 1923

Corn & Silverman,
20 Clinton St.,
Newark, N. J.

Gentlemen:

I have your letter of July 25th, about the Warren Eagles notes and would advise that it is impossible for me to go into this matter on such short notice. I do not hesitate to say that you better be reasonably sure of your grounds as this man has a good defense and even if you are successful in obtaining judgment, it would be of no value to you.

I would say that if Mr. Eagles owes any money, he is absolutely honest and may be able to find some way to pay it.

Very truly yours,

SETH H. ELY.

Exhibit D-1.

L. LAWRENCE & COMPANY
292 Halsey Street
Newark, N. J.

Branches in all Principal Cities
and Foreign Countries.

Lawrence Scored Cylinders.

August 8, 1921.

I, Warren Eagle, hereby agree to sell and transfer all rights, titles and interests which I may have in a one three and one half ton Schacht truck, No. 1070 to Charles Vandenburg. It is understood that Charles Vandenburg is to pay all debts that is against this truck such as repair bills and balance of notes subject to the lease agreement. Charles Vandenberg agrees to pay all these above mentioned items under the condition that when same are paid, this truck becomes his property and he is to have a free and clear bill of sale for said truck. It is hereby agreed by Charles Vandenburg that he is to pay $100.00 per week until the back debts on the truck have been paid up, at such time, he is only to turn in enough to meet the notes which are still against the truck.

It is further agreed by all parties concerned that these payments are to be paid to A. De Voe at his place of business.

It is further agreed by A. De Voe that he will release Warren Eagle of any further obligations on above mentioned truck.

Witnesseth A. De Voe
H. D. Boer

Signed: W. Eagles
Charles Vandenburg

Sworn before me this 8th Day of August, 1921 at Newark, N. J.

Rachael A. Lyons
Notary Public of N. J. (L.S.)

Exhibit D-2.

LEASE AGREEMENT

This Agreement made this Seventh day of March 1921, between A. De Voe, 219 Halsey Street, Newark, N. J., first party, his or its successors, agents or assigns (hereinafter collectively called "Lessor," and Warren Eagles, Dover, N. J., second party (Hereinafter called Lessee").

Witnesseth:

That the Lessor has this day delivered in good condition and hereby leases upon the terms, rental and for the time below specified, to the Lessee one Schacht #1070, Model Truck, (hereinafter called the "Car",) valued at Forty-one hundred thirty-seven dollars, ($4137.00) for the use of which during this lease the Lessee has this day paid Sixteen Hundred Fifty dollars, ($1650) as first instalment of rental and agrees to pay the Lessor or order a total of twenty-four hundred eighty-seven dollars, ($2487.00), in further instalments of rental as follows:

$207.25 on April, 1921.
$207.25 on May, 1921.
$207.25 on June, 1921.
$207.25 on July, 1921.
$207.25 on Augut, 1921.
$207.25 on September, 1921.
$207.25 on October, 1921.
$207.25 on November, 1921.
$207.25 on December, 1921.
$207.25 on January, 1922.
$207.25 on February, 1922.
$207.25 on March, 1922.

and further agrees to pay and reimburse

the lessor with respect to any damage to the Car while the Car is in the Lessee's possession under this lease, except such depreciation as may be occasioned by ordinary wear and tear. Said installments of rental shall bear interest at the rate of six per cent per annum from date, and are to be evidenced by promissory notes made by the Lessee to the order of the Lessor bearing date hereof and maturing on the due dates of said respective installments. The term of this lease is from date hereof until the due date of said final instalment, unless sooner determined subject to the provisions and terms hereof.

The car is subject to manufacturer's warranty, if copy of such warranty is annexed hereto, and if not so annexed, Lessee leases Car as it stands and no warranty, guaranty or representation as to the Car or any of its equipment is otherwise made or given by Lessor.

It is Further Agreed that the Lessee shall not use for hire, underlet or encumber the Car or permit the same to pass from his possession; nor shall the Lessee assign this lease. Upon default by the Lessee with respect to any rental payments, evidenced by said notes, principal or interest, then the holder of any notes then unmatured, may at his option declare all of said notes immediately due and payable, and the same shall thereupon become immediately due and payable. The Lessee shall keep and maintain the Car in good order and repair and free from all taxes, liens and charges, and surrender the same to the Lessor at the expiration of this lease. Upon any default in payment of any installment of rental, or upon breach of any condition or covenant herein made by the Lessee, the Lessee shall on demand of the Lessor forthwith de-

Exhibit D-2.

liver the Car in as good condition as when received by the Lessee (ordinary wear and tear excepted) to Lessor, and should Lessee fail or refuse upon such demand to deliver the Car as aforesaid to Lessor, the Lessee agrees that the Lessor shall have the right without any further notice or demand, to terminate this lease, forthwith and to take possession of the Car wherever found, and for such purpose Lessee hereby licenses and authorizes Lessor to enter the premises of the Lessee with or without force or process of law and take possession of the Car. Lessor may at option, by collection, suit or otherwise, enforce payment of said notes, and no suits or legal proceedings with respect thereto shall, however, be deemed any waiver of said right of Lessor to take possession on default or breach as aforesaid. Lessee acknowledges receipt from Lessor of a true copy of this agreement.

In Witness Whereof, Lessor and Lessee, parties hereto, have hereunto subscribed their signatures and set their seals hereto in duplicate on the day and year first above written.

A. DE VOE (L.S.)

Witnesses: WARREN EAGLES (L.S.)

Charles Vandenburgh

Total Value made up as follows:

Exhibit D-2.

ASSIGNMENT

March 7, 1921.

For Value Received, the undersigned hereby, sells and assigns to:

Ridgewood Trust Company,
Ridgewood, New Jersey,

all right, title and interest in and to the within Agreement of Lease,
dated: March 7, 1921, between, Warren Eagles, and undersigned, and in and to the property therein described and undersigned hereby guarantees the full performance of said instrument and all its terms, and warrants that any and all notes referred to therein have been endorsed by undersigned and have been sold by undersigned to said assignee. The undersigned hereby waives any and all notice or notices of non-payment, demand, presentment or protest which would otherwise be required with respect to any of said endorsements or this guarantee, or in connection therewith, and hereby agrees that any extension which may be granted with respect to said instrument or said notes shall not in any manner release the undersigned from said endorsements or this guaranty.

A. DE VOE (L.S.)
291 Halsey Street
Newark, N. J.

Exhibit D-3.

Know all Men by these Presents: That A. De Voe, of the City of Newark, in the County of Essex and State of New Jersey, party of the first part, in consideration of the sum of As per lease agreement, dollars, paid by Warren Eagles, of Dover, in the county of Morris and State of New Jersey, party of the second part, has bargained, sold, granted and conveyed and by these presents do bargain, sell, grant and convey unto the said party of the second part his heirs, executors, administrators and assigns, Truck (motor vehicle), Schacht (make of car); 3½ Ton (model); 1070 (manufacturer's No.); to have and to hold the same unto the said party of the second part, his heirs, executors, administrators and assigns forever, and A. De Voe does for his heirs, executors, administrators or assigns, covenant and agree to and with the said party of the second part to warrant and defend the said described motor vehicle hereby sold unto the party of the second part, his executors, administrators and assigns against all and every person or persons whomsoever.

In Witness Whereof, I have hereunto set my hand and seal this Seventh day of February one thousand nine hundred and twenty-one.

A. De VOE.

Signed Sealed and Delivered
in the presence of
Helen Boer
Reed B. Mechamk.

Exhibit D-3.

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

Be it Remembered, that on this seventh day of February, 1921, before me a Notary Public of the State of New Jersey, personally appeared A. De Voe, who, I am satisfied, is the seller mentioned in the within instrument, and I having personally made known to him the contents thereof he did thereupon acknowledge that he igned, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

RACHEL A. LYONS (Seal)
Notary Public of N. J.

ASSIGNMENT OF BILL OF SALE

I, Warren Eagles, of Wharton, County of Morris and State of New Jersey, for and in consideration of the sum of as per lease agreement dollars, to me in hand paid, do hereby sell, assign, transfer and set over unto Charles Perry Vanderburgh of Dover in the County of Morris and State of New Jersey, the said motor vehicle described in the attached Bill of Sale.

In Witness Whereof, I have hereunto set my hand and seal this Eighth day of August, 1921.

WARREN EAGLES.

Witness
A. De Voe
H. D. Boer
Rachel A. Lyons,
Notary Public of N. J.
(Seal)

New Jersey Court of Errors and Appeals

THE MODEL PLAN FINANCE CORPORATION, Plaintiff-Appellant, vs WARREN EAGLES, Defendant-Respondent.	On Appeal from New Jersey Supreme Court.

BRIEF OF PLAINTIFF-APPELLANT.

Facts.

Appellant brought this action on three notes of $207.25 each, made by respondent to the order of Alonzo DeVoe, dated March 7, 1921 and due January 7, February 7 and March 7, 1922; also on a book-account for goods sold to respondent by Alonzo DeVoe between February 24 and August 3, 1921. The notes and book-account were transferred to appellant.

Of the defenses raised by the answer, the sole one on which respondent produced any proof, was that Alonzo DeVoe signed a paper on August 8, 1921, whereby he is alleged to have released respondent from liability on the notes and book-account. Respondent's counterclaim was struck out at the trial.

Respondent, at the trial, admitted execution of the notes, that they were not paid and that appellant was the holder of the notes and book-account. Appellant proved the book-account and that there

was due on the notes, for principal and interest, $920.19, and on the book-account, for principal and interest, $811.82, making a total of $1,732.01.

From the testimony it appeared that early in 1921 respondent, by lease agreement, purchased a truck from Alonzo DeVoe, on account of the purchase price of which he gave the notes in question, and on which truck the items in the book-account arose. Respondent hired Charles Vanderburgh to operate the truck, on the basis of an equal division of the profits after payment of expenses. On August 8, 1921 respondent agreed in writing to transfer the truck to Vanderburgh when the latter had paid all debts against the truck. This agreement (Case, p. 64) provides "It is further agreed by A. DeVoe that he will release Warren Eagles of any further obligations on above mentioned truck"; this was signed by Eagles and Vanderburgh and witnessed by A. DeVoe and H. D. Boer. Over appellant's objection the Court permitted the introduction of testimony as to the intention to release respondent, and as to statements and conversations prior and at the time of the release, the object of this testimony being to show that DeVoe signed as a party and not as a witness to this "release" agreement.

At the close of the trial appellant moved to strike out the release and the testimony concerning it, and for a direction of verdict. This the Court denied.

The grounds of appeal are (1) testimony as to intent should have been excluded, (2) testimony as to statements made prior to or at the time of signing the "release" should have been excluded, (3) the "release" should not have been allowed in evidence, and (4) the "release" did not operate as a bar to appellant's claim.

POINT 1.

Testimony as to intent should have been excluded.

Over appellant's objection, Alonzo DeVoe, on cross-examination (Case, p. 27, ll. 21 to 24) was asked: "Whatever paper it was to which you referred, it was the intent, if this was the paper, to release Mr. Eagles from any liability on the notes and on the book acount?"

The paper referred to was the "release" agreement of August 8, 1921.

The witness was not the plaintiff, nor connected with nor employed by plaintiff corporation. No such matter came up in his direct-examination, and therefore could not be properly brought out on cross-examination.

> "He (the witness) should not be cross-examined in matters not covered by the examination in chief."
>
> Quellmaz v. Atlantic Coast Electric Ry. Co. (E. & A. Ct. 1920) 94 N. J. Law 474.

Evidence of intention as to a written instrument is inadmissible. The intent is to be gathered from the instrument itself. On the face of the writing it is clear that DeVoe did not release Eagles, for the former signs only as a witness and not as a party. The evident purpose of the question was to lay the foundation for showing that DeVoe signed as a party and not as a witness; but this would vary or alter the terms of the written instrument.

> "The refusal of the trial judge (to admit

oral testimony) was based upon the theory that the offer of the defendant was to show the meaning Albert Kloeblen (the maker of the instrument) intended to express in the writing and the conversations between James and his father at the time of its execution. The ruling of the trial judge in overruling the questions was correct."

Newcomb v. Kloeblen (E. & A. Ct. 1909) 77 N. J. Law 791.

"It is clear that the understanding of the parties as to when the purchase-money mortgage referred to in the contract should be made payable cannot be established by parol proofs."

Binns v. Smith (Chanc. Ct. 1921) 93 N. J. Eq. 33.

POINT 2.

Testimony as to statements made prior to or at the time of signing the "release" should have been excluded.

Appellant objected to respondent being asked: "What conversation took place prior to the release?" (Case, p. 36, l. 8). The Court restricted the answer to testimony as to the capacity in which DeVoe signed the paper, but the witness went on to tell all that transpired, yet the Court denied appellant's motion to strike out the extraneous matters (p. 36, l. 14 to p. 37, l. 20). Then respondent was asked, over objection, to identify two lines in the paper as to the ones he referred to in his answer to the prior questions (p. 37, ll. 21 to 31). Appellant again objected to respondent be-

ing asked: "What statement did Mr. DeVoe make at the time of the execution of this paper in reference to what was intended to be accomplished by the paper?" (p. 39, l. 3).

The "release" (p. 64) was admitted in evidence subject to a motion to strike out at the end of the case (p. 31, l. 21 to p. 32, l. 12). Appellant made such motion to strike out the "release" and all testimony given concerning it, but this motion was denied (p. 55, l. 22 to p. 57, l. 12).

The purpose of this testimony was to change the position of DeVoe from a mere witness to the agreement to a party bound by the agreement.

The writing is clear and unambiguous. The Court had no doubt that it did not operate to release Eagles and that DeVoe was not bound by its terms. At the close of appellant's case, respondent moved for a direction of verdict, one of the grounds being "that the release which has been offered in evidence binds Mr. DeVoe", which motion was denied (p. 34, ll. 10 to 24). In the charge to the jury, the Court said: "He (DeVoe) then signed it (the paper of August 8, 1921), but he does not appear to have signed it, according to the agreement itself, as anything more than a witness" (p. 59, ll. 29 to 32).

It is not permissible to show by parol that one, who signs in one capacity, has signed or is bound in another capacity. Thus in Hendrickson ads Hutchinson (Sup. Ct. 1861) 29 N. J. Law 180, it was held that parol evidence is not admissible to show that a person signed as surety where on the writing it appears he signed as principal.

Nor is parol evidence of statements made prior to or at the time of the execution of the writing admissible, as here, to vary or contradict the terms of the writing by showing that DeVoe signed, not

as appears in the writing as witness, but as a party to the execution of the writing.

> "There is no rule of law which is better settled than that which holds that parol evidence, of contemporaneous or prior understandings or negotiations, cannot be introduced to supersede, contradict, or vary valid written contracts."
>
> Wills v. Camden Lime Co. (E. & A. Ct. 1928), 104 N. J. Law 428.

> "Parol testimony cannot be introduced to vary, add to or alter a written instrument, which in itself is clear and free from doubt, in the absence of fraud, surprise or mistake, and, where a written agreement is complete, its terms cannot be varied or contradicted by parol evidence of a contemporaneous verbal understanding."
>
> Collins Realty Co. v. Sale (E. & A. Ct. 1929)—not yet officially reported—7 A. R. 173, 144 Atl. 585.

POINT 3.

The "release" should not have been allowed in evidence.

This paper was, as just said, admitted subject to motion to strike out, the testimony was taken, motion to strike out was made and denied.

On the face of the writing it appears that Alonzo DeVoe did not execute it, and therefore it is not his undertaking.

If an instrument may be introduced to bind one who has signed merely as a witness, no sane person would consent to act as witness to any writing obligatory. It is common knowledge that people sign as witnesses without reading the contents of the instruments, for a witness merely attests that he saw the party sign whose signature appears as a party. It will be noticed that another witness, besides DeVoe, appears on the agreement (p. 64), as does also a notary public, and that these same two witnesses and notary public signed in the same capacities the assignment of bill of sale of the truck from Eagles to Vanderburgh (p. 70). There can be no doubt that the agreement was intended to operate as a temporary bill of sale and was signed by two witnesses as required by the Motor Vehicle Law for transfer of title. The assignment of the bill of sale was produced by and evidently has been and still is retained by respondent because of the failure of Vanderburgh to carry out the terms of the August 8, 1921 agreement.

The "release" was not under seal. Even if it be considered that DeVoe is a party to the release, he is not bound without proof of consideration, and

there was no evidence whatsoever of consideration for DeVoe's promise to release, if he made such promise.

> "The true and effectual way to voluntarily deliver up or forgive a debt is to release it by an instrument of due solemnity. * * * Between the promise and the limit within which the debt may be collected is the *locus poenitentiae,* within which the promissor may draw back from his involuntary agreement. * * * The instrument of due solemnity should be an absolute release under seal, for the presence of the seal is necessary to dispense with the necessity of proving consideration."
>
> Landon v. Hutton (Chanc. Ct. 1893) 50 N. J. Eq. 500.

If this paper could be altered by moving DeVoe's name from the position of "witnesseth" where he signed, to the place where Eagles and Vanderburg signed, and striking out the witnessing capacity in which DeVoe signed, the law court would have accomplished a reformation of the contract. It would have made the writing read and mean differently from what it actually did. This cannot be properly done at law. Respondent should first have filed a bill in Chancery to reform the instrument, and, if successful, he could interpose the reformed instrument as a defense at law. The trial court had no more jurisdiction to entertain respondent's defense on this paper, than an equity court would have to entertain appellant's cause of action set out in the complaint.

POINT 4.

The "release" did not operate as a bar to appellant's claim.

Assuming that DeVoe signed as a party to the "release", this paper did not operate as a release of the claims sued upon.

A release of the notes is ineffective, unless in writing.

> "A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."
>
> Negotiable Instrument Act, sec. 122 (3 C. S. 3749).

As shown in Landon v. Hutton, supra, there is a distinction between a promise to release and a release itself; and a release must be absolute in order to operate as such.

The agreement here is that A. DeVoe "will release Warren Eagles of any further obligation on the above mentioned truck."

"Will" denotes something to be done in the future. This is a promise to release, from which DeVoe could draw back. Whether or not this agreement could be specifically enforced, surely a court of law cannot convert the promise to release into a release, by holding "will release" to mean "does hereby release". In effect the trial court has reformed the writing by substituting an undertaking of a present release in place of a promise for a future release.

The phrase "any further obligations on the above mentioned truck" cannot be construed to apply to

the notes and book-account sued upon. The writing (p. 64) provides:

> "That Charles Vandenberg is to pay all debts that is against this truck such as repair bills and balance of notes subject to the lease agreement. Charles Vandenberg agrees to pay all these above mentioned items under the condition that when the same are paid this truck becomes his property. * * * He is to pay $100.00 per week until the back debts on the truck have been paid up, at such time, he is only to turn in enough to meet the notes which are still against the truck. * * * These payments are to be paid to A. DeVoe".

And then follows the release sentence in question. Could the parties have intended by "any further obligations", to include the notes and book account? Surely not. The "repair bills" were admittedly the items in appellant's book account, most of which are for parts which went into the truck. The "balance of the notes subject to the lease agreement" included the three notes in appellant's claim, being the last three contained in that lease agreement (p. 65). The "back debts" were the book-account, this suit including no items charged after August 8, 1921. "The notes which are still against the truck" covered the three notes in this case. It seems clear, then, that the notes and book-account were present, and not "further", obligations. Had the parties intended that Eagles was to be released from the notes and the book- account, they would not have inserted the word "further" to qualify the obligations on which the release was to operate; nor can a law court construe this provision to embrace appellant's claims unless and until it is reformed by an equity court by striking out the word "further". The word "further", as here used as an adjective, means "ad-

ditional; future; other" (27 C. J. 935). It may well be that on August 8, 1921 respondent was indebted to DeVoe on some additional obligations or on some other transactions, on which the release might operate as a bar. But it would be a most strained construction to hold that the notes made by appellant on March 7, 1921 and the charges for parts up to August 3, 1921 were an additional or future or other obligation on August 8, 1921, particularly in view of the references in that agreement to the very obligations of the notes and the book-account.

Appellant respectfully contends that the judgment should be reversed, and that judgment should be entered for plaintiff-appellant against defendant-respondent for $1,732.01.

CORN & SILVERMAN,
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Plaintiff-Appellant.

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New Jersey Court of Errors and Appeals.

THE MODEL PLAN FINANCE CORPORATION, Plaintiff-Appellant, vs. WARREN EAGLES, Defendant-Respondent.	On Appeal from New Jersey Supreme Court.

BRIEF OF DEFENDANT-RESPONDENT.

Facts.

By straight bill of sale dated February 7, 1921, A. DeVoe sold a certain truck to Warren Eagles (Exhibit D-3, p. 69). On March 7, 1921 Warren Eagles executed and delivered a lease agreement to A. DeVoe covering this truck (Exhibit D-2, p. 65) and by the terms of that agreement serial promissory notes were made and delivered by Warren Eagles to A. DeVoe. Three of these notes, each dated March 7, 1921 and due January 7, February 7, and March 7, 1922, respectively, were negotiated without consideration and after maturity by A. DeVoe to Appellant (p. 34, lines 12-14) and are now the basis for the first-second and third counts of the complaint (pp. 3-4-5). The execution of these notes is admitted.

The fourth count of the complaint sets forth a book account against Warren Eagles running from February 24, 1921 to January 31, 1922 (pp. 5, 7, 8, 9, 10, 11 and 12). The name of Vanderburg on a number of the items against whom these charges were made was changed after the entry of the items on the ledger (p. 30, line 15). It was admitted at trial that all items on this account, subsequent to August 3, 1921, should not have been charged to

Warren Eagles (p. 29, lines 2-5). The book accounts were also assigned to appellant.

The fifth count alleges a note made by Charles Vanderburg, but no evidence was offered on this count.

On August 8, 1921 the following paper was drawn under the sole direction of A. DeVoe (p. 31, line 34).

> "I, Warren Eagles hereby agree to sell and transfer all rights, titles, and interest which I may have in a one three and one half ton Schacht truck, No. 1070, to Charles Vanderburg. It is understood that Charles Vanderburg is to pay all debts that are against this truck such as repair bills and balance of notes subject to the lease agreement; Charles Vanderburg agrees to pay all these above mentioned items under the condition that when same are paid, this truck becomes his Property and he is to have a free and clear bill of sale, for said truck.
>
> It is hereby agreed by Charles Vanderburg that he is to pay $100 a week until the back debts on the truck have been paid up, at such time, he is only to turn in enough to meet the notes which are still against the truck.
>
> It is further agreed by all parties concerned that these payments are to be paid to A. DeVoe at his place of business.
>
> It is further agreed by A. DeVoe that he will release Warren Eagles of any further obligations on the above mentioned truck."
>
> Signed, W. EAGLES
> CHARLES VANDERBURG.
>
> Witnesseth
> A. DEVOE
> H. D. BAER.
>
> Sworn before me this Eighth day of August 1921, at Newark, N. J.
> RACHAEL A. LYONS
> Notary Public of New Jersey (L. S.)

P. 64, Exhibit D-1

To consummate this transaction the original bill of sale was assigned by Warren Eagles to Charles Perry Vanderburg by assignment dated August 8, 1921 (p. 70, lines 19-35).

The notes set forth in the lease agreement dated March 7, 1921 above mentioned, were due each month from April, 1921 to March, 1922. The notes due and payable up to and including August, 1921 were paid by the Respondent. Subsequent to August 8, 1921, no payments were made by respondent either on the book account, or on the notes (p. 38, line 28). There were seven notes due after the execution of the release above mentioned, yet only three are sued on in this case.

The Appellant claimed that as the signature of A. DeVoe was written under the word "witnesseth" that he signed the same as a *witness* and not as a party.

The respondent contended that as the release provided.

> "It is further agreed by A. DeVoe that he will release Warren Eagles of any further obligations on the above mentioned truck"

that his signature on the release was that of a *party:* the Court admitted evidence of the intent of the parties, to clear up any ambiguity in this respect.

POINTS I AND II.

Appellant urges that,

I. "Testimony as to intent should have been excluded."

II. "Testimony as to statements made prior to or at the time of signing the release should have been excluded."

The release contains the following paragraph: "It is further agreed by A. DeVoe that he will release Warren Eagles of any further obligation on the above mentioned truck" (p. 64, lines 31-33). A. DeVoe signed the release below the word, "Witnesseth" (p. 64, line 36).

Appellant urges that the question propounded to A. DeVoe on cross-examination, "Whatever paper it was to which you referred, it was the intent, if this was the paper, to release Mr. Eagles from any liability on the notes and the book account" (p. 27, line 22) was improper cross-examination.

A. DeVoe was payee named in the notes (pp. 61-62) and was also the creditor named in the book account (p. 7).

It was stipulated at the time of trial that appellant was not a holder for value and any defense available against A. DeVoe, on the book account and/or the notes was available against appellant (p. 20, lines 18-24).

The witness A. DeVoe having been called by appellant to prove liability on the notes and book account is subject to cross-examination on any and all matters relating thereto, especially since a defense against him was available against appellant.

Evidence to show the capacity in which a party executes or signs an instrument is admissible where it is not clear on the face of the instrument.

In *Willis* v. *Fernold,* 33 N. J. L. 206.

> Evidence was admitted to show the meaning of an instrument and the court said: "Its affect was not to contradict or vary the terms of the written agreement, but simply to explain how it was to be carried out."

The same rule was applied in

Suffern v. *Butten,* 21 N. J. E. 410-413.

> "Where the language of a written contract is ambiguous or otherwise doubtful, such evi-

dence is admissible and may be very convincing to show the real intent of the parties."

In *Watkins* v. *Kirkpatrick,* 26 N. J. L. 84-88.

Oral evidence was admitted to show the liability of the endorser on the promissory note, which endorsement was regular upon its face. The court held "That it was lawful to prove by parole that the true character of the defendant's contract differed from what the law would have implied in the absence of extrinsic evidence."

Johnson v. *Martinis,* 9 N. J. L. 144.

The name of A. DeVoe appearing in the body of the instrument whereby he agreed to release respondent from liability on the truck, which included the notes, and his signature appearing on the face of the instrument, parole evidence was admissible to show the intent of the parties at the time it was signed. To show this intent, evidence of the conversation between Respondent and A. DeVoe was admissible.

Respondent on direct-examination testified:

"I took the truck back to Mr. DeVoe, where I went in with it to give it up, that was the day that the last note, that particular one was due. When I went in with it and told Mr. DeVoe the way I felt about it, in our conversation, it seems that Mr. Vanderburg wanted the truck, and I said to Mr. DeVoe, 'Nobody can have that truck, until I am absolutely released from it.' Mr. DeVoe said, 'I will have one drawn up', and he went direct across the way from his business, and had this paper drawn up, not all that is on there, and returned it to me and asked me if it suited me, and I said no, and he then put in those two lines, 'I will agree hereby further,' just as that reads there. I just can read it off, that one line, where it releases Warren Eagles" (p. 36, line 25; p. 37, line 2).

This evidence was admitted to show the capacity in which A. DeVoe signed the release and not for the purpose of varying or altering the release.

The position which a signature occupies on a release is immaterial where the same name appears in the body of the instrument.

In *Smith* v. *Howell,* 11 E. 349-354, the court said:

> "Wherever the name may appear in the writing, whether subscribed at the end or signed, that is, placed as a sign of authentication, in the body of the instrument itself, for the purpose of attesting it, such is a signing of the writing."

To the same effect is:

Archibald v. *LoTruglio,* 103 A. 988.

The name of A. DeVoe appearing on the face of the instrument (p. 64, line 31) and his signature being affixed thereto (p. 64, line 34), the same then became binding on appellant, a successor in title.

The scope of this testimony was limited by the Court in its charge to the jury when the Court said:

> "Of course, even though it was agreed between Eagles and Vanderburg that A. DeVoe would release Eagles that was not an agreement on the part of Mr. DeVoe to do so: but, Mr. Eagles says that it was discussed before that time, that DeVoe was to agree to this release and that DeVoe said that he was signing this release as a party to release him from the truck absolutely.
>
> Now, there is no harm, of course, in signing a document in any particular place, provided a person signs as a party, whether he signs at the top or at the bottom, or at a place marked, 'Witness', or at any other place, in the agreement. Evidence has been introduced to show the capacity in which Mr. DeVoe signed this agreement. Mr. Eagles says that Mr. DeVoe told him he was signing as a party, for the purpose of releasing him absolutely. If he did so sign it, then the present holder

> of the notes is bound by the agreement, which was made in writing and can not recover anything, either upon the notes or on the book account. That must be proved by the greater weight of the evidence" (p. 59, line 39 to p. 60, line 24).

The jury, under this charge and the evidence has determined that Mr. DeVoe signed as a party and released respondent from all liability.

Appellant has cited the case of *Quellmag* v. *Atlantic Coast Electric Railway Company* (94 L. 474), in support of its contention that the question propounded A. DeVoe on cross-examination was improper. It is respectfully submitted that this case is not in point because the statement made by the Court in that case referred to testimony which was clearly irrelevant and immaterial to the question in issue.

The case of *Binns* v. *Smith* (93 Eq. 33), cited by appellant, deals with an attempt to vary a written instrument and is not applicable here. Respondent has made no attempt to vary or alter any instrument but simply to interpret the release.

POINT III.

Appellant urges that,

"The 'Release' should not have been allowed in evidence."

It is urged that the release was not under seal and that there was no consideration therefor.

Respondent contends that there was a novation in this case.

In *Cook* v. *McAdoo,* 56 Vr. 692-693, the Court said:

> "Novation, a term borrowed from the Civil Law means this, that there being a contract in

> existence, some new contract is substituted for it, either between the same or other parties, the consideration mutually being a discharge of the old contract."

In *Parsons Manufacturing Company* v. *Hamilton Ice Manufacturing Company* (78 N. J. L. p. 309) the court said:

> "Novation consists of a bilateral agreement for the substitution of one obligation for another and may take place either by the substitution of a new agreement for the old, or by the substitution of a new agreement between the parties, or by change of the parties and agreement at the same time."

As has been stated under Points I and II, A. DeVoe agreed in the body of the release to release respondent of any further obligations on above mentioned contract and signing the same at the bottom, substituted Charles Vanderburg, in the place and stead of respondent.

The question of whether there was a novation or not is a question of fact for the jury, depending upon the intention of the parties.

Moorecraft v. *Allen,* 78 L. 729.

The paragraph releasing respondent from liability was inserted in the agreement at the instance of respondent by A. DeVoe, before the same was signed (p. 37, line 39). Respondent also testified (p. 45, line 24).

> Q. But you do consider that Mr. DeVoe was in the same position as Mr. Bau.
>
> A. The reason I did that——
>
> Q. I am asking you for the facts.
>
> A. That was due to the fact that he had it executed for me. I asked him to get this made out and he did. That is the reason I considered him responsible for it.
>
> Q. Did you read this paper before you signed it?

A. If I may answer it this way, Mr. DeVoe brought that paper over to his place. I did not go with him when it was made out at all. He brought it over to his place to me and I said, a few moments ago I was dissatisfied and then he returned it and had the two lines put in and then I read it and was satisfied.

Q. You were satisfied with this paper when you signed it?

A. After he had it in where he did release me, then I was satisfied with the paper.

The question of whether it was intended that the paper in question (p. 64) was intended as a release of respondent from liability and the substitution of Charles Vanderburg was a question of fact for the jury.

Moorecraft v. *Allen* (*supra*).

It was stipulated that any defense available against A. DeVoe was available against appellant (p. 20, line 9). If A. DeVoe had released respondent from liability on the book account, and the notes by the execution of the release above set forth, such release was binding on appellant and properly admitted in evidence.

POINT IV.

Appellant urges that,

"The 'release' did not operate as a bar to appellant's claim."

The release was not drawn by one skilled in legal phraseology but from the evidence above recited, it is apparent that all parties intended that the paper was to operate as a release. The question of this intention and the meaning of the release

was one of fact and properly left to the jury to determine.

Where the facts raise a disputed question which is properly left to the jury, this court will not disturb their verdict.

Washington Banking Co. v. *King,* 14 N. J. L. 45.

Knickerbocker Ice Co. v. *Anderson,* 31 L. 333.

In *Bennett* v. *Busch,* 75 L. 240, 244, the Court said:

> "In a conflict of testimony, when the facts found by the jury will sustain the verdict, the court will not set it aside. Although, in their opinion, the jury might, upon the evidence, have found otherwise."

Respondent respectfully contends that this appeal should be dismissed and the judgment sustained.

KING & VOGT,
Attorneys and Counsel for
Defendant-Respondent.