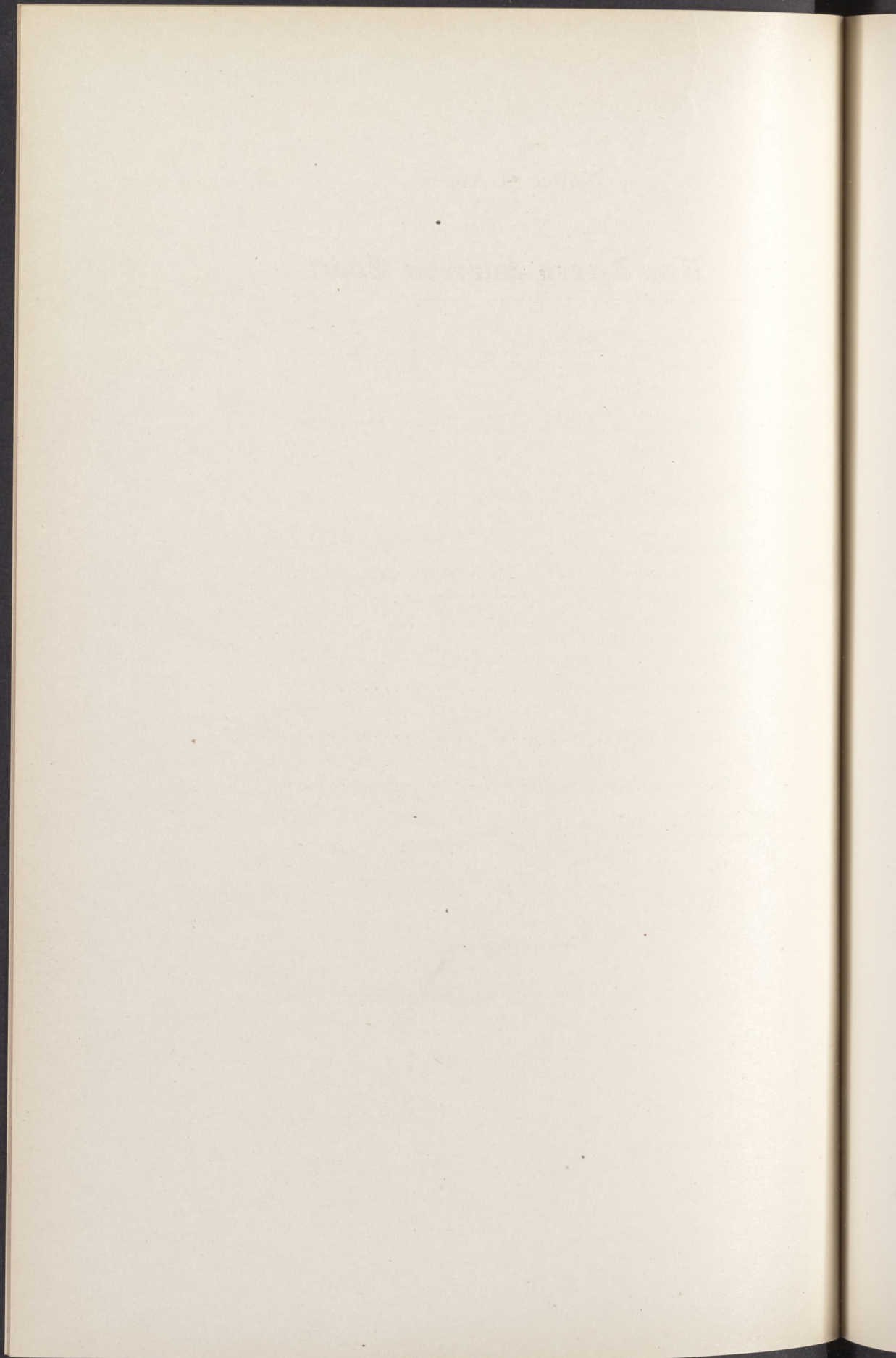


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Notice of Appeal

Filed May 11th, 1929

New Jersey Supreme Court

PARAMOUNT UPHOLSTERING
WORKS, INC., a Corporation of
New Jersey,
Plaintiff-Appellant,

vs.

MORRIS DAVID AND HELEN DAVID,
Defendants-Appellees.

On Contract

10

To: The above-named Defendants, or
SAMUEL L. HIRSCHBERG, Esq., their
Attorney.

TAKE NOTICE, That the plaintiff, Paramount Upholstering Works, Inc., a corporation of New Jersey, hereby appeals to the Court of Errors and Appeals, in the last resort in all causes from the affirmation of the judgment of the First District Court of Jersey City, Hudson County, New Jersey, by the New Jersey Supreme Court, decided February 4th, 1929, on the following grounds:

20

1. That the New Jersey Supreme Court erred in affirming the judgment of the First District Court.

30

2. That the New Jersey Supreme Court failed to consider and render a decision on the first, third and fourth specifications of objections to the determination of the District Court.

Dated: May 4th, 1929.

GEORGE ROTHSTEIN,
Attorney for Plaintiff.

Service of the within Notice of Appeal is hereby acknowledged this 9th day of May, 1929.

SAMUEL L. HIRSCHBERG,
Attorney for Defendant.

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Notice of Appeal

Filed February 10, 1928

FIRST DISTRICT COURT OF JERSEY CITY

10	PARAMOUNT UPHOLSTERING WORKS, INC., a Corporation of New Jersey, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div>	}	On Contract
	vs.		
	MORRIS DAVID AND HELEN DAVID, <div style="text-align: right; margin-right: 20px;"><i>Defendants.</i></div>		

20 To: The above-named Defendants, or
 SAMUEL L. HIRSCHBERG, Esq., their
 Attorney.

30 TAKE NOTICE, That the plaintiff, Paramount
 Upholstering Works, Inc., a corporation of New
 Jersey, hereby appeals to the New Jersey Supreme
 Court from the judgment in the First District
 Court of the City of Jersey City, Hudson County,
 New Jersey, rendered in the above-stated action
 by a jury on the 26th day of January, 1928.

Dated, February 2, 1928.

GEORGE ROTHSTEIN,
Attorney for Plaintiff.

FIRST DISTRICT COURT SUMMONS

STATE OF NEW JERSEY }
 COUNTY OF HUDSON } ss:
 CITY OF JERSEY CITY }

The State of New Jersey, to the Sergeant-at-Arms
 of the First District Court of the City of Jersey
 City or to any Constable of said County. 10

Summons

“MAX” DAVID and “MINNIE” DAVID (*both
 first names fictitious, true names unknown*)
 to appear before the FIRST DISTRICT COURT
 of Jersey City, to be held at the First National
 Bank Building, Entrance, No. 20 York Street, in
 said City, on the *third* day of *January*, One Thou-
 sand Nine Hundred and *Twenty-eight*, at ten
 o'clock in the forenoon, to answer unto, *PARA-*
MOUNT UPHOLSTERY CO., a corporation of
New Jersey, in an Action upon Contract Demand
FIVE HUNDRED Dollars. 20

WITNESS, CHARLES L. CARRICK, Esq., Judge
 of said FIRST DISTRICT COURT at Jersey City
 aforesaid, the *22nd* day of *December*
 in the year One Thousand Nine Hundred and
twenty-seven.

B. FRANCES MARRON, Clerk. 30
 GEORGE ROTHSTEIN, Plaintiff's Attorney

I served the within summons December 23, 1927,
 on “Minnie” David, the defendant, by reading the
 same to her and delivering to her a copy thereof.

The Defendant *MAX DAVID* could not be found
 and I served the within summons on *him* the *23rd*
 day of *December*, 1927, by leaving a copy thereof
 at *his* usual place of abode in the presence of a
 person of *his* family over the age of fourteen
 years, whom I informed of the contents thereof. 40
John Solferino, Constable

State of Demand

Filed December 22nd, 1928

FIRST DISTRICT COURT OF JERSEY CITY

10	PARAMOUNT UPHOLSTERY Co., a Corporation of New Jersey, <i>Plaintiff,</i>	}	On Contract
	vs. "MAX" DAVID AND "MINNIE" DAVID, (both first names fic- titious, true names unknown), <i>Defendants.</i>		

20 Plaintiff, complaining of the defendants, says that:

FIRST COUNT

1. On November 7th, 1927, the defendants ordered the plaintiff to manufacture and deliver certain goods, wares and merchandise consisting of living room suites with pillows to match as per the schedule hereto annexed and made a part hereof, and agreed to pay therefor the sum of \$492.00 besides delivery charges.
- 30 2. The said goods, wares and merchandise specified in the schedule hereto annexed and made a part hereof, were specifically made immediately thereafter by the plaintiff for the defendants.
3. At the time of the giving of the order defendants paid to the plaintiff \$50.00 on account thereof.
- 40 4. On November 16th, 1927, the goods, wares and merchandise specified in the schedule hereto annexed and made a part hereof, were delivered by the plaintiff herein to the defendants, who

State of Demand

then and thereupon refused to accept the same and refused to pay the balance of the cost thereof, besides the trucking charge of \$10.00.

5. Plaintiff has always been ready, willing and able to deliver the said merchandise to the defendants and hereby tenders itself ready and willing to do so. 10

SECOND COUNT

1. On or about November 7th, 1927, plaintiff sold and delivered to the defendants, certain living room furniture as specified in the schedule hereto annexed and made a part hereof for the agreed price of \$492.00 besides trucking charges.

2. Defendants paid on account thereof the sum of \$50.00 and agreed to pay the balance together with the trucking charges upon the delivery of the furniture. 20

3. On November 16th, 1927, a delivery of the furniture was tendered by the plaintiff, but the defendants refused to accept the same and refused to pay the balance of the purchase price besides the reasonable express or trucking charges incident thereto.

Plaintiff demands judgment in the sum of \$452.00 besides interest and costs of suit. 30

GEORGE ROTHSTEIN,
Attorney for Plaintiff.

SCHEDULE

1 3 Pe. suite Red moh. castle fr.....	\$240.00	
1 3 Pe. suite Mulberry moh. castle fr.....	240.00	
		<hr/>
4 Pillows to match.....	12.00	
		<hr/>
	\$492.00	40

State of Demand

Trucking	10.00
	<hr/>
	\$502.00
Deposit	50.00
	<hr/>
	\$452.00

10

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Specification of Defenses

Filed January 4th, 1929

FIRST DISTRICT COURT OF JERSEY CITY

PARAMOUNT UPHOLSTERING WORKS, INC., a Corporation of New Jersey, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div>	}	On Contract
vs.		
"MAX" DAVID AND "MINNIE" DAVID, both first names being fictitious, etc., <div style="text-align: right; margin-right: 20px;"><i>Defendants.</i></div>		

10

The following is a specification of defenses that the above-named defendants will interpose at the trial of the above suit.

20

1. The defendants deny the allegations contained in the State of Demand filed herein.

2. The plaintiff demanded a greater sum than it was legally entitled to, by the terms of the order or contract, given or made.

3. The goods tendered by the plaintiff were not of the quality and grade to be furnished and were not of the style and workmanship.

4. The goods tendered were not previously examined.

30

5. Although the defendant, Helen David, requested the plaintiff and the carrier, who tendered the same, refused to give the said defendant, a reasonable opportunity to examine them, for the purpose of ascertaining whether or not they were in conformity with the contract made or order given.

6. The said goods were sold by description and sample, and the goods tendered did not correspond therewith.

40

Specification of Defenses

7. The plaintiff and the carrier, who delivered the said goods, demanded the costs of carrying same, from the defendant, Helen David, although by the terms of the agreement made, the plaintiff agreed to pay the same, and upon the refusal to pay the same, did not deliver the said goods.

SAMUEL L. HIRSCHBERG,
Attorney for Defendants.

20

30

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Counterclaim

Filed January 4th, 1929

FIRST DISTRICT COURT OF JERSEY CITY

PARAMOUNT UPHOLSTERY WORKS,
INC., a Corporation of New
Jersey,

Plaintiff,

vs.

“MAX” DAVID AND “MINNIE”
DAVID, both first names being
fictitious, etc.,

Defendants.

10

On Contract

The defendant, Helen David, sued as “Minnie” David, by way of counterclaim against the plaintiff, says that:

1. On or about the 17th day of November, 1927, the defendant ordered the plaintiff manufacture certain furniture and other goods, for which she agreed to pay the sum of Four Hundred and Sixty-two (\$462.00) Dollars.

2. The said furniture and goods were to conform to a certain description, style and sample, pursuant to which the same were ordered.

3. By the terms of the said agreement, the defendant paid the sum of Fifty (\$50.00) Dollars on account of the purchase price.

4. By the terms of the said agreement, the plaintiff agreed to pay the express charges of carrying the said goods, and to deliver the same to the defendant, at her residence.

5. Thereafter the plaintiff tendered certain furniture and goods to the defendant, and refused to give the defendant a reasonable opportunity

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40

Counterclaim

10 to ascertain whether or not the same were in conformity with the contract or order given by the defendant, and in addition thereto, the plaintiff and carrier of the said goods, demanded that the defendant pay the express charges for carrying the same, a greater sum than was due to the plaintiff, all of which was contrary to and in violation of the agreement entered into and between the plaintiff and the defendant.

6. Although the defendant tendered the balance justly due and owing to the plaintiff, the said goods were not delivered to the defendant.

By reason of the same, the defendant demands the sum of Five Hundred (\$500.00) Dollars.

20

SAMUEL L. HIRSCHBERG,
Attorney for Defendant.

30

40

Transcript

FIRST DISTRICT COURT OF NEW JERSEY

STATE OF NEW JERSEY
 COUNTY OF HUDSON
 CITY OF JERSEY CITY

} ss:

10

Before
 CHARLES L. CARRICK, Esq., *Judge*

No. 168909
 PARAMOUNT UPHOLSTERY Co., a
 Corporation of New Jersey,
Plaintiff,

vs.

“MAX” DAVID AND “MINNIE”
 DAVID, both first names being
 fictitious, true names un-
 known,

20

Defendants.

Upon
 Contract
 Demand \$500.

COST	CITY	AL.
Summons	\$1.60	
Service		\$.90
Mileage		.64
Order	1.00	
Sum. Jury	1.25	
Att. Jury		1.50
Jury Fees		9.00
Trial Fees	1.50	
Bond	1.00	

30

GEORGE ROTHSTEIN,
Plaintiff's Attorney.
 SAMUEL L. HIRSCHBERG,
Defendants' Attorney.

40

Transcript

- A summons was issued tested December 22, A. D. 1927, returnable January 3, A. D. 1928, at 10 o'clock in the forenoon at the Court Room of the said Court in the City of Jersey City. The Constable returned the summons as follows, viz.:
- 10 I served the within summons December 23, A. D. 1927, on Minnie David, the defendant, by reading the same to her and delivering to her a copy thereof. The defendant, Max David, could not be found, and I served the within writ on him the 23rd day of December, 1927, by leaving a copy thereof at his usual place of abode in presence of a person of his family over the age of fourteen years whom I informed of the contents thereof. John Solferino, Constable.
- 20 Plaintiff's demand was filed December 22, A. D. 1927.
- January 4, 1928, Specification of Defenses and Counterclaim filed.
- January 3, 1928, Order for Interrogatories filed.
- January 4, A. D. 1928, Demand for Jury Trial filed.
- January 26, A. D. 1928, the plaintiff appearing and the defendant appearing, the trial of the cause was proceeded with as follows:
- 30 The Constable returned the Venire with the following named persons summoned: William J. Holmes, Peter C. Johannes, Walter Buck, George W. Levering, John H. Braun, Benjamin Glowacki, George Miller, George Ehlin, Joseph McElroy, William Stringham, John M. Tietje and Anthony Brunco, who were jointly and severally sworn as Jurors.
- 40 Upon application of plaintiff summons and all proceedings were amended to be in the name

Transcript

PARAMOUNT UPHOLSTERY WORKS, INC.,
 plaintiff, and Morris David and Helen David, de-
 fendants.

On the part of the plaintiff—Samuel Siegel,
 Samuel E. Gerber, Frederick Klein and Sadie
 Gerber were sworn and testified.

10

On the part of the Defendant—Helen David and
 Jacob Nasher were sworn and testified.

The jury retire and after due deliberation re-
 turn into Court and say they find a verdict in
 favor of Morris David and Helen David, defen-
 dants, and so say they all.

February 10, 1928, Notice of Appeal filed.

February 11, 1928, Appeal Bond filed.

I, B. FRANCES MARRON, Clerk of the First
 District Court of Jersey City, Charles L. Carrick,
 Esquire, Judge, do hereby certify that the fore-
 going is a true copy of the Summons, State of
 Demand, Specification of Defenses, Counterclaim
 and transcript of a judgment of the said Court.

20

IN WITNESS WHEREOF, I do hereby set my
 hand as Clerk of the said Court and affix the seal
 of the said Court this eighteenth day of February,
 nineteen hundred and twenty-eight.

B. FRANCES MARRON, *Clerk.*

30

State of Case on Appeal

FIRST DISTRICT COURT OF JERSEY CITY

	Case No. 168,909 PARAMOUNT UPHOLSTERY WORKS, INC., a Corporation of New Jersey, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; margin: 5px 0;">vs.</div> MORRIS DAVID AND HELEN DAVID, <div style="text-align: right; margin-right: 20px;"><i>Defendants.</i></div>	}	Action at Law
--	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	---	---------------

20 The parties in the above-entitled action, or their attorneys, being unable to agree upon the form of the case on appeal, and having applied to me, Charles L. Carrick, Judge of said court, within the time limited by law, I do hereby settle the case as follows:

30 The plaintiff sued to recover \$442.00, being the balance of the purchase price of two suits of upholstered living room furniture, consisting of six pieces, which were to be manufactured by the plaintiff. At the time of the contract a deposit of \$50.00 was paid by the defendants. The defendants counterclaimed, alleging that the contract had been breached by the plaintiff. The trial was before the court with a jury.

40 The plaintiff's evidence was that it was engaged in the business of manufacturing living room furniture for the trade. On November 7, 1927, it contracted with the defendants to manufacture for them two living room suits, which were to be made up by the plaintiff in accordance with the pattern, style and color selected by the defen-

State of Case on Appeal

dants. An order was drawn up by the plaintiff at that time (Exhibit P-1), a copy of which was given to the defendants, and the deposit of \$50.00 was then paid on account of the agreed price of \$492.00. The order directed "ship to Mrs. David at 56-19th St., W. N. Y., N. J., Terms, net cash." 10
On November 16th, 1927, the furniture was shipped to the residence of the defendants by a truckman employed by the plaintiff. The truckman told the defendant, Helen David, who lived on the second floor of a two-family house, that he had the furniture on his truck, and handed her a copy of the invoices showing the balance of the purchase price, with trucking charges of \$10.00 (Exhibit P-2). Mrs. David requested the truckman to bring up the furniture into her apartment, so that she might examine it, but the truckman said it was a C. O. D. order, and that the furniture would not be taken off the truck until he was paid the balance of \$442.00, together with the trucking charges of \$10.00. The truckman refused to carry the furniture up into the apartment of defendants before receiving the amount of the balance and truckage, but upon defendant's insistence, brought one high-back upholstered chair into the hall, which the defendant examined, and with which she expressed no dissatisfaction. As the defendant refused to pay to the truckman the balance, and the truckman refused to carry the furniture into the defendant's home without being paid, the chair was replaced on the truck, and brought by the truckman with the other furniture to the plaintiff's place of business. Subsequently, the plaintiff attempted to resell the merchandise, but as it had been manufactured to the particular taste of 20
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State of Case on Appeal

the defendants, it was unable to do so. The plaintiff testified that the furniture had been manufactured exactly according to the defendant's order.

The evidence of the defendant was that Mrs. David had been called by the plaintiff's representative on the evening before the attempted delivery, and informed that the property would be delivered on the following day, when it would have to be paid for. She replied that she had the money there, and was ready to pay for it. When the furniture arrived, Mrs. David requested the truckman to bring up the furniture, so that she might be given an opportunity to examine it to see whether or not it was in conformity with the contract. The truckman refused unless she would pay him the balance called for by the invoice (Exhibit P-2), and upon his refusal to bring the furniture to her apartment, she refused to pay the balance, although he did bring into the hall a high-back chair.

At the close of the case plaintiff moved for a direction of a verdict in its favor, on the ground that the order or contract provided for a net cash or cash on delivery purchase, and that therefore by virtue of the Sales of Goods Act, page 4659, Section 47, rule 3, the defendants being the purchasers of goods on terms that the same should not be delivered by the carrier to them until they had paid the price, the defendants were not entitled to examine the goods before payment of the balance of the price. The court declined to direct a verdict and an exception to the court's ruling was prayed by the plaintiff and granted.

The court charged the jury that the Sales of Goods Act provides that where goods are delivered

State of Case on Appeal

ered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity to examine them, for the purpose of ascertaining whether they are in conformity with the contract, and that it was for the jury to decide whether or not the defendants had a reasonable opportunity in this case to examine the goods, and if they had, the verdict should be for the defendants. 10

Counsel for the plaintiff requested the court to charge as follows:

Sale of Goods Act, p. 4657, Sec. 43: Apart from contract, usage or trade, the place of delivery is the seller's place of business.

P. 4658, Sec. 46: Where, in pursuance of a sale, the seller is authorized or required to send the goods to the buyer, delivery of goods to the carrier for the purpose of transmission to the buyer, is deemed to be delivery of the goods to the buyer (except as in Sec. 19, Rule 5). 20

P. 4659, Sec. 47, Rule 3: Where goods are delivered to a carrier by the seller, upon terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price the buyer is not entitled to examine the goods before payment of the price. 30

The court declined so to charge, to which ruling the plaintiff prayed and was granted an exception.

The jury returned a verdict in favor of the defendants for \$50.00.

Case settled and signed by me this fifth day of April, 1928.

CHARLES L. CARRICK,
Judge. 40

Exhibit P-1

Date 11/7 1927

Ship to Mrs. David
 56-19th St.
 West New York, N. J.

How Ship

10	Terms Net Cash		
	Salesman Siegel		
	<hr/>		
	1 3 Pc. Suite Red Moh. R-C and all Backs Castle Fr.		\$240.
	2 Pillows not filled		6.
	1 3 Pc. suite Mulberry Moh. R-C and all Backs - Castle Fr.		240.
	2 Pillows not filled		6.
			<hr/>
			\$492.
20		Deposit	50.
			<hr/>
		Balance	\$442.

30

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Exhibit P-2

PARAMOUNT UPHOLSTERING WORKS, Inc.

Manufacturers of
 UPHOLSTERED FURNITURE
 1102-1110 Jefferson Street
 Hoboken, N. J.

10

3393

Nov. 16, 1927

Sold to Mrs. M. David
 56 19 St
 W New York N. J.

Terms Net Cash C.O.D.	Shipped Via Truck	
1 3 pc suite Red moh castle fr	\$240.00	
1 3 pc suite Mulberry moh. Castle fr.	240.00	
4 pillows to match	12.00	
	Trucking	10.00
		—————
		\$502.00
	Deposit	50.00
		—————
		\$452.00

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DUPLICATE INVOICE

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Specifications of Objections to the Determination of the District Court

Filed April 12, 1928

NEW JERSEY SUPREME COURT

10

PARAMOUNT UPHOLSTERING
WORKS, INC., a Corporation of
New Jersey,
Plaintiff-Appellant,

vs.

MORRIS DAVID AND HELEN DAVID,
Defendants-Appellees.

} On Appeal

20

The Plaintiff-Appellant, in compliance with the rules of the Court, hereby specifies its objections to the determination and direction of the District Court with respect to which it is dissatisfied in point of law, as follows:

30

1. The District Court erred in point of law in denying at the close of the case plaintiff's motion for a direction of the verdict in its favor on the ground that the order of contract provided for a net cash or cash on delivery purchase, and that therefore, by virtue of the Sale of Goods Act, 4 C. S., page 4659, Section 47, Rule 3, the defendants being the purchaser of goods on terms that the same shall not be delivered by the carrier to them until they had paid the price, that the defendants were not entitled to examination of the goods before payment of the balance of the price.

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2. The District Court erred in point of law in denying plaintiff's request to charge that by the Sale of Goods Act, 4 C. S., 4658, Section 47, Rule 3: Where goods are delivered to a carrier

*Specifications of Objections to the Determination
of the District Court*

by the seller, in accordance with an order from or agreement with the buyer, upon the terms that the goods shall not be delivered by the carrier to the buyer until he has paid the price, whether such terms are indicated by marking the goods with the words "Collect on Delivery" or otherwise, the buyer is not entitled to examine the goods before payment of the price, in the absence of agreement permitting such examination. 10

3. The District Court erred in point of law in failing, neglecting or refusing to construe the words "net cash" on the order, under all the circumstances surrounding the transaction, as equivalent to C.O.D. or cash on delivery.

4. The District Court erred in point of law in failing to leave to the determination of the jury the question whether or not the order or sale was a C.O.D. order or sale. 20

*Attorney for and of Counsel
with Plaintiff-Appellant.*

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Opinion

Filed February 4th, 1929

NEW JERSEY SUPREME COURT

No. 417—May Term, 1928

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PARAMOUNT UPHOLSTERING
WORKS, INC., a New Jersey
Corporation,

Plaintiff-Appellant,

vs.

MORRIS DAVID AND HELEN DAVID,
Defendants-Appellees.

} On Contract

20

On appeal from First District Court of Jersey City.

Before Justices Trenchard, Kalisch and Lloyd.

For the Appellant, George Rothstein.

For the Appellees, Samuel Hirschberg.

30

Per Curiam: This cause came on for trial before Judge Carrick, sitting with a jury. The plaintiff-appellant sued to recover \$442.00, the balance of the purchase price of two suites of upholstered living room furniture, consisting of six pieces, which were to be manufactured by it. At the time of the contract a deposit of fifty dollars was paid by the defendants-appellees. The latter counter-claimed for the \$50 alleging the contract had been breached by the plaintiff. The jury found a verdict on behalf of the defendants on their counter-claim for the sum of fifty dollars.

40

Counsel for the plaintiff below requested the court to charge as follows: "Sale of Goods Act, P. 4657, sec. 43; apart from contract, usage or

Opinion

trade, the place of delivery is the seller's place of business.

P. 4658, sec. 46: "Where, in pursuance of a sale, the seller is authorized or required to send the goods to the buyer, delivery of goods to the carrier for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, (except as in Sec. 19, Rule 5). 10

P. 4659, sec. 47, rule 3: "Where goods are delivered to a carrier by the seller, upon terms that the goods shall not be delivered by the carrier until he has paid the price, the buyer is not entitled to examine the goods before payment of the price."

The court declined so to charge, to which ruling the plaintiff prayed, and was granted an exception. 20

It is to be observed that the plaintiff's exception was, in substance, a general exception to the court's charge.

The second request was not properly stated. It did not embody all of the instructions which the court was asked to give, but requested the court to incorporate in it Section 19, Rule 5, of the Sale of Goods Act. Hence, that request was bad. We think the other two requests were good.

As has been observed, the exception taken was a general one, to the denial of the court of the requests, and, of course, if one of the requests is bad, the exception fails. In *Thieband vs. Hanley*, 95 N. J. L. 180 (Court of Errors and Appeals), the headnote reads: 30

"If an exception to the judicial charge embraces several legal propositions, and any of them to be unexceptionable, the exception fails. Counsel must put its finger on the erroneous proposition and thus point the mind of the judge to it; if he challenges 40

Opinion

any part of the charge in bulk assigning no reason for such challenge, and a bill is allowed on the point, the risk of any legal ingredient being found in such bulk is that of the party so excepting."

10

This being true, the converse would follow if several requests are handed to the trial judge, some of which are good and some of which are faulty, an exception which does not point out the faulty one is fatal. See *Gardner vs. State*, 55 N. J. L., p. 18, headnote 6; *State vs. Contarino*, 92 Id., p. 381. Court of Errors and Appeals.

The views expressed lead to an affirmance of the judgment.

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New Jersey Court of Errors and Appeals

PARAMOUNT UPHOLSTERING WORKS, INC., a Corporation of New Jersey, <i>Plaintiff-Appellant,</i>	}	On Contract On Appeal From Supreme Court
vs.		
MORRIS DAVID AND HELEN DAVID, <i>Defendants-Appellee.</i>		

BRIEF FOR PLAINTIFF-APPELLANT

Statement of Facts

The plaintiff was engaged in the business of manufacturing living room furniture for the retail storekeeper. On November 7th, 1927, defendants purchased from plaintiff two living room suites which were to be made up with the pattern, style and color selected by the defendants. An order was drawn at that time (Exhibit P-1, State of Case), a copy of which was given to the defendants who paid a deposit of \$50.00 on account of the agreed price of \$492.00. The order provided for shipment to Mrs. David, 56-19th St., W. N. Y., N. J., terms "net cash." On November 16th, 1927, after the furniture had been manufactured exactly according to defendants' order, the furniture was shipped to the residence of the defendants by truck. The truckman told the defendant, Helen David, who lived on the second floor of a two-family house, that he had the furniture on his truck ready to be carried up into her house,

and handed her an invoice showing a balance of the purchase price besides a trucking charge of \$10.00 (Exhibit P-2, State of Case). The defendant, Mrs. David, who claimed to have the money ready to pay for the furniture, demanded before payment that the truckman install the furniture in her apartment and the right to an examination. The truckman informed her that it was a C. O. D. order and that he could not bring up the furniture into her apartment so that she might examine it unless he was paid the amount called for. However, upon defendant's insistence, he brought into the hall one high-back upholstered chair which the defendant examined and with which she expressed no dissatisfaction. As she, however, refused to pay the balance unless all the furniture was carried up into her apartment, and also was given the right before payment to examine all the furniture, and as the truckman refused to do this without being paid, the chair was replaced on the truck and returned by the truckman with the other furniture to the plaintiff's place of business.

Point I.

The New Jersey Supreme Court erred in affirming the judgment of the District Court.

The only point apparently considered by the Supreme Court was the plaintiff's requests to charge. There were three separate and distinct propositions of law requested by the plaintiff to be charged to the jury, each request being isolated in a paragraph and individually numbered, the numbers being the same as designate and distinguish the identical legal propositions in the Compiled Statutes. The District Court declined to charge these requests to which ruling an exception

was granted to the plaintiff. The Supreme Court held the first and third request to charge good, but considered the second request not properly stated, (State of Case, page 23, lines 23 to 28). The ground for the affirmance by the Supreme Court of the judgment, was that it considered the exception taken by the plaintiff to the District Court's refusal to charge the three requests a general exception. In this the plaintiff respectfully submits that the Supreme Court fell in error.

The cases cited by the Court in support of its decision, are not applicable to the case at bar, for very pertinent reasons. In this case the District Court was asked to charge three distinct, separate and distinguishable requests, each one being isolated in a paragraph and individually numbered. Being so, the one exception taken to the Court's refusal to charge these three requests must be considered as an exception to the Court's refusal to charge each one of the three. There is no question but that was the intention of the exception. It is respectfully urged that the plaintiff did not have to pray for three exceptions, since that would have been merely useless repetition. The one exception that the plaintiff took, served the purpose of three exceptions. As the one exception went to the Court's refusal to charge the three requests, it, in effect, acted as an exception to the refusal to charge each distinct request.

The case sub judice, plaintiff respectfully submits, is on all fours and exactly in point with that of:

Consolidated Traction Co. vs. Chenowith,
61 N. J. L., 554; 35 Atl. 1067,

a Court of Errors and Appeals' decision.

In that case, as set forth in the last paragraph of the decision, the defendant's request to charge involved six distinct propositions, stated in six paragraphs, each of which was numbered. There was one exception. The criticism of the Supreme Court was that the exception treated the six propositions as a single request, every part of which should be well founded or the whole should fail. This Court, while it did not commend the form of the exception, nevertheless deemed that under the request it was intended to present to the Court for its charge, six separate propositions, and that the exception was intended, as the almost universal practice in our trial courts has established, to challenge the failure to charge each of the six propositions. In other words, being taken in the hurry of the conclusion of the trial, it was meant to answer the purpose of several distinct exceptions, and the intention of the exception being clear, this Court thought and considered that the plaintiff in error, in that case, should have the review the exception was designed to secure for it.

The facts in the case just cited are identical with the facts of the case at bar. Here there were only three requests, and each one was in a separate paragraph and received a separate and distinct number. The requests and the exceptions were made in a hurry at the conclusion of the trial in the District Court, in fact, at the conclusion of the Court's charge to the jury, and just before the jury retired. It was meant to answer the purpose of three separate distinct exceptions. It was intended to present to the Court for its charge three separate propositions, and the exception, which was taken to the Court's refusal to charge, was intended to challenge the failure to charge each of the three propositions.

In these respects this case is distinguishable from the cases cited by the Supreme Court, to wit:

Thibodeau vs. Hamley, 95 N. J. L., 180.

Gardiner vs. State, 55 N. J. L., 18.

State vs. Contarino, 92 N. J. L., 381.

In the *Thibodeau* case, *supra*, an exception was taken to the charge of the Court, which charge contained more than one distinct legal proposition. This exception was held as a general exception to the entire Court's charge, and therefore bad. There was nothing to distinguish the propositions, they were not separately and individually designated. The duty was upon the exceptant to point out the propositions and identify them. As said in that case:

“Counsel must put his finger on the erroneous proposition and thus point the mind of the Judge to it; if he challenges any part of the charge in bulk, assigning no reason for such challenge, and a bill is allowed on the point, the risk of any legal ingredient being found in such bulk, is that of the party so excepting.”

In the case at bar, it is submitted that plaintiff, in making its three separate, individual, distinct and distinguishable requests, by its exceptions put its finger on three erroneous propositions, thus pointing the mind of the Court to them. The Court refused to charge any. Plaintiff was entitled to have at least two of the three charged.

Gardiner vs. State, *supra*, is also distinguishable from the case at bar. In that case, it seems that the exception was taken to the refusal of the Court to charge the words requested by counsel. It

seemed that the Court had already covered in its charge the points in counsel's request. The Supreme Court laid down the rule therein, that a Judge is not required to adopt the form or words or the collocation of phrases in which the request to charge is framed, and that all the matters contained in the request to each charge or either substantially charged, or related to facts not in dispute. In the manner and form in which the request in that case was made, the Court's decision was proper. The facts being different in that case, the rule therein is not applicable to that of the case at bar.

State vs. Contarino, supra, involves a Court's charge, and is similar in facts to the Thibodeau case, supra, and therefore needs no further comment than what has been said in reference to the Thibodeau case.

The Consolidated Traction Co. case, supra, is a decision of this Court, unchallenged for about 35 years. Therefore, since that case and the case at bar are practically synonymous in point of fact, the decision of this Court ought to be controlling.

It is also respectfully urged that the Supreme Court's decision that the second request was not properly stated is erroneous. The said request sets out word for word the statute. The Supreme Court said that it did not embody all of the instructions which the Court was asked to give, but requested the Court to incorporate in it Section 17, Rule 5, of the Sale of Goods Act. That is not so. From a plain reading of the request it is apparent that it contains all the Court was asked to charge. There is no reference anywhere to a request to incorporate another section of the statute. On the contrary, the said request particularly excepts Section 19, Rule 5, and the Court was asked to

charge only Section 46 which enumerates that particular second request. If the wording of the section of the statute be faulty because there is a reference to another section, plaintiff ought not be punished, because said request is taken verbatim from the statute. There is nothing to indicate that the mere reference to Section 19, Rule 5, warrants its incorporation or is indicative of a request that it be incorporated. On the contrary, the very fact that the request to charge contained the words "except as in Section 19, Rule 5," which words are further sequestered and isolated by parentheses, clearly shows that there was not intended any incorporation or any request to the Court to incorporate.

Without doubt, plaintiff was entitled to have the District Court charge the jury the first and third requests. It is plaintiff's contention that the second request also should have been charged. Hence, it is respectfully submitted that the District Court erred in its failure to charge these three requests, and that the Supreme Court erred in affirming the judgment of the District Court, and that in consequence, the judgment should be reversed to the end that a venire de novo be granted.

Point II.

The District Court erred in point of law in denying at the close of the case plaintiff's motion for a direction of a verdict in its favor.

The facts in this case are practically undisputed. The plaintiff was a manufacturer of living room furniture, selling to the retail storekeeper. The defendants were consumers, that is, people who usually buy from the retail store. They

were not in business and hence had no credit or rating. This was an isolated order and presumably not carried on the books as regular orders or business. They ordered the plaintiff to manufacture for them this furniture, paying a deposit. The balance of the purchase price was to be paid "net cash" (Exhibit P-1, State of Case). The goods were to be shipped to the defendant at 56 19th St., West New York, N. J. No other terms were mentioned. This made the sale a C. O. D. or cash on delivery sale, and consequently the defendants had no right to an examination before the payment of the balance (Sale of Goods Act, 4 C. S. 4659, Section 47, Rule 3).

The order was silent as to the time of payment, excepting so far as the words "net cash" may refer to the time. Ordinarily, the word "net" used as an adjective, means "what is left after deducting all expenses." Of course, in the business world in dealings among and between manufacturers, jobbers, wholesalers, distributors, and retailers, where there are usually involved discounts, credits, allowances, offsets, etc., the words "net cash" would probably have the foregoing definition. This transaction, however, was a direct sale by a manufacturer to a consumer, a private family, who were not engaged in this line of business but bought the furniture for their own use. Consequently, the words "net cash" could not under any stretch of imagination have any such commercial meaning, there being patently no expenses to be deducted, no discounts to be taken off and no credits allowed. Hence, the words "net cash" can only refer to the time for payment of the balance. This would be concurrently with the delivery of the manufactured articles. Under all the circumstances surrounding this transaction,

the only feasible and proper construction of the order would be that this was a C. O. D. or cash on delivery order, and that therefore, the defendants had no right to an examination before payment to the carrier of the balance, and the carrier in behalf of the plaintiff, the seller, was justified in refusing to deliver without such concurrent payment by the buyer.

When the truckman appeared at the residence of the defendants at No. 56-19th St., West New York, N. J., ready, willing and able to and offering to turn over to and carry into the home of the defendants the furniture, which without contradiction had been manufactured exactly in accordance with the order (State of Case, page 16, lines 5 to 7), the agreement on the part of the plaintiff had been carried out, the property in the goods passing to the defendants, and it then and there became the duty of the defendants to pay the balance of the purchase price to the carrier before being entitled to the possession of the articles.

24 R. C. L. 46, Sec. 309, on the subject of C. O. D. shipments, says:

“The general property in the thing sold passes to the buyer by the delivery to the carrier, though he cannot entitle himself to possession until he pays the price to the carrier. The carrier is his agent to receive the thing sold and the agent of the seller to receive the price . . . The seller has a mere lien on the property for the price and the right of possession until it is paid.”

In this case, if the truckman, after payment of the balance of the price, had carried the furniture up two flights of stairs and into the apartment

of the defendants, he would have done more than he was legally obliged to do. The order provided for shipment to Mrs. David, 56-19th St., West New York, N. J. All that the plaintiff was obliged to do was to comply with that direction. This it did. When the truckman brought the merchandise to Mrs. David at 56-19th St., West New York, N. J., and tendered the same to her, the plaintiff had fulfilled its contract. It was not incumbent upon the plaintiff or upon the carrier to carry up the furniture two flights and install it in her apartment. In fact, all that was required was a sidewalk delivery. The plaintiff was a reliable and responsible manufacturer, and it was the duty of the buyer to pay simultaneously with the delivery, and subsequently make her examination, there being no agreement to the contrary.

Our Sale of Goods Act, 4 C. S. 4657, Par. 42, provides as follows:

“Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.”

Although there seem to be no authorities in this State on the particular point in issue, the principles of law in the various texts and reported decision of other States seem to be uniform.

23 R. C. L. 1382, Sec. 205, on the subject of sale, says:

“Where nothing is said between the parties as to the time of the payment of the

price, the transaction is understood to be a cash sale, the payment and delivery are immediate and concurrent acts, and the seller may refuse to deliver and the buyer may refuse to pay before delivery or tender."

Leonard vs. David, 17 U. S. (L. Ed.) 222.

Chapman vs. Lathrop, 6 N. Y., p. 110.

Hall vs. Stevens, 116 N. Y., p. 201.

Bauchamp vs. Archer, 58 Calif. 431.

Gilfallan vs. Gilfallan, 168 Calif. 23.

In the case at bar, the order by mentioning "net cash" refers to the time of payment of the price. The plaintiff, through the carrier, made tender of delivery, and upon the defendants, the buyers, refusing to pay, the carrier was justified in refusing to deliver.

"Refusal of the seller to permit inspection does not relieve the buyer from the obligation to pay where under the contract payment and delivery are simultaneous acts."

Herman vs. Hullmann, 205 App. Div. 119.

Owderkirk vs. Bayless Pulp and Paper Co., 199 N. Y. Sup. 336.

In the case at bar, payment and delivery could be and were simultaneous acts.

"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions."

14 L. R. A. 1201.

Gorman vs. Kennedy, 126 Mich. 182.

Barnet Record Co. vs. Fall, 62 Tex. Civ. App. 391.

In the case under consideration, the only agreement was that evidenced by the order, which in addition to the surrounding circumstances made it only too apparent that payment of the price and delivery were immediate and concurrent conditions. When the carrier tendered delivery at the place designated therefor and the defendant refused to pay but insisted that the plaintiff do more than the contract called for, namely to bring the furniture into her apartment so that she might examine the same, the plaintiff performed its part of the contract, but the defendants defaulted and breached their part of the contract.

35 Cyc. on page 252, states:

“Where the sale is for cash, the seller is excused from making delivery if the buyer fails or refuses to pay the price”;

and on page 262,

“As a general rule the obligation of the buyer to pay the price is a condition concurrent with the obligation of the seller to deliver, especially when the contract provides merely that payment is to be made on delivery”;

and further on page 264,

“If the contract of sale is silent as to the time of payment the law implies that payment shall be made on delivery, the presumption being that a cash sale is intended. Under such a contract, the seller is entitled to demand payment immediately on delivery, *irrespective of the right of the buyer to inspect the goods, and is not under any*

obligation to part with its property until payment is made.'

The last quotation is directly in point. Even if we say, for the sake of argument, that the words "net cash" in the order do not refer to the time of payment, the contract or agreement of the parties would then be silent, but by implication of law the seller, the plaintiff, would have been entitled to payment upon tender of delivery to the defendant, Mrs. David, at 56-19th St., West New York, N. J., and the defendants would have no right to inspect the goods before payment of the balance of the purchase price.

The defendant, Mrs. David, testified that the day before the furniture came, the plaintiff's representative telephoned her that the property would be delivered the following day and would have to be paid for. She replied that she had the money and was ready to pay for it (State of Case). Doesn't this conversation corroborate the fact of a cash or C. O. D. sale, and negative any other idea, particularly that of the right of a prior examination? If she wanted an examination and thought she was entitled to one, why did she say, in reply, that "She had the money and was ready to pay for it"? Why didn't she say that she desired to examine the furniture before she would pay for it? But she remained silent as to that. Isn't it probable and likely that if the transaction had provided for such prior examination, that she would have reminded the plaintiff's representative of that fact at the time that he telephoned her, and would have told him not to send the furniture until she came down to look at it? If there was the right to a prior inspection, why would the plaintiff telephone the defendants informing

them when delivery would be made, and that payment would have to be made upon delivery? Again, if the defendants were entitled to an inspection, is the defendants' apartment, her residence, the proper place for a prior examination or isn't it a fact that the proper place for an examination would be the plaintiff's place of business which is within four miles of the defendants' residence and readily accessible by bus and trolley. It seems to me that all of this evidence, all these circumstances and all these facts are overwhelmingly in favor of the plaintiff's contention, namely, that the transaction was a C. O. D. or cash on delivery or cash sale transaction, and hence with no right to an examination by the defendants before payment, and that therefore, plaintiff's motion for a direction of the verdict should have been granted.

Point III.

The District Court erred in point of law in failing, neglecting or refusing to construe the words "net cash" on the order, under all the circumstances surrounding the transaction, as equivalent to C. O. D. or cash on delivery.

Upon the assumption that the construction of the expression "net cash" was for the Court, I respectfully submit that the Court erred in failing to give any construction to the words "net cash" or if it did, it failed to construe it as equivalent to C. O. D. or cash on delivery. I have been unable to find any construction of the words "net cash" in the decisions of either this State or any of the States of the United States or in the Federal Courts. I maintain, however, that the only proper construction of this expression in this case, in view of the circumstances surrounding this

transaction, is that the words "net cash" can only be equivalent to C. O. D. or cash on delivery. Of course, as I have stated in my argument under Point I, the dictionary defines the words "net cash" as meaning "after deducting all expenses." But that is only an abstract meaning of the words standing by themselves. A word or phrase at law may be susceptible of two meanings or constructions, and that occurs when there are attending circumstances which negative the usual meaning or construction and that is clearly so in this case. There were no expenses and could have been none at the time of the making of the order. There were no allowances, credits or discounts, and there could have been none. This was not a customary transaction between a manufacturer and his wholesaler or retailer, but a direct special sale by the wholesaler to a private family. The defendants apparently had no financial standing, since they were not engaged in business. In view of all these attending circumstances, there can be no other construction of this phrase "net cash" but that it is equivalent to "C. O. D." or "cash on delivery" and that it was so understood and intended at the time of the making of the order. I respectfully urge that that is the only construction that can be given to that phrase or expression in this case.

In conclusion, I respectfully submit that the Supreme Court erred in:

1. Affirming the judgment of the District Court.
2. Failing to consider and determine the District Court's error in denying at the close of the case plaintiff's motion for a directed verdict in its favor.

3. Failing to consider and determine the District Court's error in failing, neglecting or refusing to construe the words "net cash" on the order, under all the circumstances surrounding the transaction, as equivalent to C. O. D. or cash on delivery.

GEORGE ROTHSTEIN,
Attorney of and Counsel for
Plaintiff-Appellant.

New Jersey Court of Errors and Appeals

PARAMOUNT UPHOLSTERING
WORKS, INC., a Corporation of
New Jersey,

Plaintiff-Appellant,

v.

MORRIS DAVID and HELEN DAVID,
Defendants-Appellee.

On Contract.

On Appeal
from the
New Jersey
Supreme Court.

*(Italics, etc., except where otherwise noted, are
mine.)*

BRIEF OF DEFENDANTS-APPELLEE.

Statement of the Case.

Plaintiff is a corporation engaged in the furniture business and sued to recover the sum of \$442, the balance alleged to be due on the purchase price of two (2) suits of upholstered living room furniture.

This furniture was not in existence at the time the order for the same was given, to the plaintiff, but was to be manufactured in accordance with the pattern, style, and color selected by the defendants (State of Case, p. 14, ll. 38-40), and in accordance with their particular taste (State of Case, p. 15, ll. 39-40).

The order given to the plaintiff (Exhibit P-1), did not contain the letters "C. O. D.", but the invoice (Exhibit P-2), which was given to the carrier by the plaintiff, did contain the letters "C. O. D.", and this was presented to the defendant, Helen David, by the carrier when payment was demanded. The carrier refused to permit the defendant Helen David, to examine the furniture before payment, stating that it was a "C. O. D." order, and the furniture would not be taken off his truck until he received the balance of \$442, together with trucking charges of Ten (\$10) Dollars. The carrier brought one high back upholstered chair into the hall of the defendants' premises upon the insistence of the defendant, Helen David, and she refused to pay the balance until she had examined all of the furniture, which the carrier refused to permit her to do, and returned the furniture to the plaintiff (State of Case, p. 15, ll. 13-38). It was not the customary purchase of articles in existence, and ordered to be sent C. O. D., but the goods were to be manufactured in accordance with a pattern, style and color selected by the defendants, and their particular taste. This was a direct sale from the manufacturer to the consumer.

The case was heard before the Hon. Charles L. Carrick, and a jury, and resulted in a verdict for the defendants in the sum of Fifty (\$50) Dollars, on their counterclaim for the deposit paid on the order, and judgment was entered thereon. From that judgment the plaintiff appealed to the Supreme Court, and the Supreme Court affirmed the judgment of the District Court. The rule affirming the judgment of the District Court does not appear in the State of Case.

POINT I.

The judgment of the Supreme Court should be affirmed.

The plaintiff took no exception to the court's charge. The exception taken to the refusal of the court to charge as requested was a general one. The requested charge contained three (3) legal propositions, which were not separately numbered, and the exception taken as stated was a general one (State of Case, p. 17, ll. 15-35).

In the case cited by the plaintiff:

Consolidated Traction Co. v. Chenowith,
61 N. J. L., 554,

the exception was "To the refusal of the Court to Charge *specifically* as requested" (Court's italics), and in that case the requests were separately numbered in separate paragraphs. There the intention of the exception was clear, but not so in the case sub judice. The second request was as follows:

"P. 4658, Sec. 46: Where, in pursuance of a sale, the seller is authorized or required to send the goods to the buyer, delivery of goods to the carrier for the purpose of transmission to the buyer, is deemed to be delivery of the goods to the buyer (except as in Sec. 19, Rule 5)."

State of Case, p. 17, ll. 20-26.

Section 19, rule 5 of the Sale of Goods Act, which was not embodied in the request, is as follows:

“Delivery at particular place. If a contract to sell requires the seller to deliver the goods to the buyer, or at a particular place or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. (P. L. 1907, p. 319.)”

The Supreme Court said :

“The second request was not properly stated. It did not embody all of the instructions which the court was asked to give, but requested the court to incorporate in it Section 19, Rule 5, of the Sale of Goods Act. Hence, that request was bad. We think the other two requests were good.

As has been observed, the exception taken was a general one, to the denial of the court of the requests, and, of course, if one of the requests is bad, the exception fails. In *Thieband v. Hanley*, 95 N. J. L. 180 (Court of Errors and Appeals), the headnote reads :

‘If an exception to the judicial charge embraces several legal propositions, and any of them to be unexceptionable, the exception fails. Counsel must put its finger on the erroneous proposition and thus point the mind of the judge to it; if he challenges any part of the charge in bulk assigning no reason for such challenge, and a bill is allowed on the point, the risk of any legal ingredient being found in such bulk is that of the party so excepting.’

“This being true, the converse would follow if several requests are handed to the trial

judge, some of which are good and some of which are faulty, an exception which does not point out the faulty one is fatal. See *Garnder v. State*, 55 N. J. L., page 18, headnote 6; *State v. Contarino*, 92 Ld., page 381. Court of Errors and Appeals."

State of Case, pages 23-24.

In the case of *Thieband v. Hanley*, supra, there were two distinct legal propositions in the requested charge, set forth in separate paragraphs, on pages 182 and 183 of the court's opinion, and on page 184, the court said:

"In the present case the statement by the court that it is not negligence in itself for a passenger to extend his or her arm or elbow from a window of a jitney, and that it was for the jury to determine whether, under all the facts and circumstances of the case, the plaintiff was guilty of negligence in doing so, if he did so, as a correct legal proposition, is unassailable. The other distinct legal proposition in the charge of the judge was as to what he said was the measure of duty resting upon the operator of the jitney upon the public highway, and even if it had appeared that the judge erred in his statement of the law in that respect, and that has not been made to appear to us, it would not have availed the appellants, since there was not specific objection made to the charge upon that ground."

The charge requested by the plaintiff was improper for other reasons. The first and second requests were not relevant to the issue, which was

whether or not the defendants had a reasonable opportunity to examine the goods shipped by the plaintiff.

Manchester Building & Loan Ass'n v.
Allee, 81 N. J. L., 605,

this court said:

“Charges to juries must be confined to the issues.”

and so in the early case of

Westcott v. Garrison, 6 N. J. L., 132,

it was held that a court need not instruct on a matter, regarding which there is no dispute or point raised.

In

Faith v. Thompson, 58 N. J. L., 180:
Headnote,

this court stated:

“The court, in the trial of an issue, is not required to rule upon abstract questions not dispositive of the rights of the parties. If the real issue be pointed out to the jury, the judgment will not be disturbed because of the judicial refusal to adopt some particular mode of presenting the issue, or to give conclusive effect to otherwise faultless legal formulae applicable to a group of facts isolated from the rest of the cause.”

The third request of the plaintiff was improper as it assumed that the buyer had authorized the

seller to ship the goods C. O. D. This was a controverted fact in the case.

An instruction is properly refused that assumes a material and controverted fact.

Cavanagh v. Ridgefield, 94 N. J. L. 147
(Err. & App.).

The requests were properly refused for the reasons stated in

Mehkanjies v. North Jersey St. Railway
Co., 52 Atl. 280,

where the court said:

“The evidence was contradictory and it was for the jury to find what the facts were. The court charged the jury correctly on the law involved in the case. As to requests of the defendant not charged, they were abstract propositions. Not to charge such requests was not error.

Rule: Failure to charge abstract propositions is not error.”

POINT II.

The District Court did not err in point of law in denying at the close of the case plaintiff's motion for a direction of a verdict in its favor.

The defendants were entitled to a reasonable opportunity to inspect the furniture.

Sales Act—Section 47.

(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and

until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

The order was not a C. O. D. order, so that the C. O. D. shipment by the plaintiff was not authorized. This the plaintiff did when he added the letters "C. O. D." on the delivery receipt (Exhibit P-2), which letters were not on the original order (Exhibit P-1).

"Where there is no provision in the agreement between the parties to the sale of goods, which are to be shipped by carrier, inconsistent with the right of inspection, before acceptance and payment as provided by the personal property law, the seller cannot deprive the buyer of that right by adopting a method of collection not provided in the instrument as for example a *collection on delivery*."

Imperial Products Co. v. Capitol Chemical Co. (1919), 187 App. Div. 599, 176 N. Y. Supp. 49, aff. in (1920) 228 N. Y. 528, 126 N. E. 911.

The right of inspection in C. O. D. sales is discussed in

18 Harvard Law Review, 386,
where the writer states:

"But if the vendee had not authorized the shipment of goods C. O. D. he could not be

to taken to have contracted with reference to the rule of the carrier, his right of inspection would remain and such a consignment ought not to constitute a valid tender."

In

Bridgeport Hardware Mfg. Co. v. Bouniol,
89 Con. 254; 93 Atl. 674 (under Sales
Act),

the court held:

"The mere fact that no terms of payment are fixed in a contract, and that under such circumstances payment of the price and delivery of the goods concurrent conditions, will not deprive the buyer of his right of inspection."

In the case of

Imperial Products Co. v. Capital Chemical
Co., supra (under Sales Act),

Judge Page of the New York Court of Appeals
said:

"In this case there was no agreement that the shipment should be made 'Collect on delivery', nor was there any agreement that the buyer would pay the purchase price by sight draft to be attached to the bill of lading. No terms of payment were specified in the agreement between the parties. Under such a contract delivery and payment are concurrent obligations, Sec. 123, Per. Prop. Law. This is very different from payment of the purchase price by sight draft with bill of lading attached. In the first, the buyer has the right of

inspection to ascertain whether the goods are in conformity with the contract, when the seller tenders delivery, before he is required to accept and pay for the goods. In the latter, payment is a condition precedent to delivery, and hence inconsistent with the right of inspection. Inasmuch as there was no provision in the agreement between the parties inconsistent with the right of inspection before acceptance and payment, *the seller could not deprive the buyer of that right by adopting a method of collection not provided in the agreement.* Williston on Sales, page 840."

The cases cited by the plaintiff where no right of inspection existed, do not apply to the case at bar. Here the goods were not in existence when ordered and were not examined prior to the delivery to the buyer; they were to be manufactured in accordance with a pattern, style and color selected by the defendants. So, the following cases cited by the plaintiff are inapplicable, to wit:

Herman v. Hullman, 205 App. Div. 110;
Owderkirk v. Bayless Pulp and Paper Co.,
199 N. Y. Supp. 336,

because there the right of inspection was surrendered; the contract providing for payment of the price on receiving the documents of title; the documents not always arriving with the goods.

The case of

Pope v. Allis, 115 U. S. 363, 6 S. Ct. 69,

is exactly in point that the right of inspection exists when the goods reach their destination, the court said:

“The authorities cited sustain this proposition, that when a vendor sells goods of a specified quality, *but not in existence or ascertained* and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without invitation. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to reject them if they are not the quality required by the contract.”

In Mechem on Sales, Vol. 2, Section 1377, it is stated:

“The place of inspection in the absence of a contrary intention, must ordinarily be the place at which acceptance is due, as distinguished from the place of receipt—where they are separate, the place at which the buyer is finally bound to accept or reject the goods.”

See also, 35 Cyc. 226.

This is the better rule; it avoids circuitry of action and the vendee is not compelled to make any admission by payment of the purchase price.

The truckman refused to permit the examination that the defendant was legally entitled to (State of Case, p. 14, ll. 19-26).

The buyer's right to inspect at destination where goods are delivered to a carrier is discussed in

27 A. L. R. 520.

The case of
M. A. Newmark & Co. v. Smith (1915), 26
Cal. App. 339, 145 Pac. 1064,
presented a situation similar to the case sub judice,
and on page 530 (27 A. L. R.), it is stated as
follows:

“It was held that, upon a sale of beans f. o. b. place of shipment, the buyer had the right of inspection before being called upon to pay a draft attached to a bill of lading of the goods, and that it was justified in refusing to pay the draft until after it had been permitted to inspect them. The court said: ‘The contract being silent as to the time of payment, the law contemplates that the act of delivery and that of payment shall be concurrent.’ But defendant was not entitled to payment until he delivered ‘the thing sold,’ which in this case was ‘choice, re-cleaned, small white beans of 1911 crop.’ The right of plaintiff to repudiate the purchase and refuse payment because the article delivered failed to conform to the description of the goods purchased must be conceded. Defendant could not, under the guise of delivery beans, have delivered bags of corn and held plaintiff to payment. In no way other than by inspection could plaintiff ascertain whether it was getting the thing purchased and for which it was paying. Hence, it must follow, we think, that, as defendant was entitled to and did demand payment upon delivery, plaintiff was entitled to an opportunity to inspect the shipment of beans, and thus, before making payment, ascertain

whether or not they were the goods which it agreed to buy and pay for. If they were not, it had the right to reject them and insist upon delivery of goods of the description specified in the contract. In our opinion, the law applicable to the case is as contained in subd. 2 of Par. 34 of the English Sale of Goods Act, which is as follows: 'Unless otherwise agreed, when the seller tenders delivery of goods to the buyer he is bound on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.' "

The question whether the defendants had a reasonable opportunity to examine the goods was properly submitted to the jury.

POINT III.

The District Court did not err in point of law in failing, neglecting or refusing to consider the words "net cash" on the order under all the circumstances surrounding the transaction as equivalent to C. O. D. or cash on delivery.

There was no request by the plaintiff to the trial judge to charge that the transaction was a C. O. D. one. Hence, no question for appeal is presented.

Benz v. Central Railroad Co. of New Jersey, 82 N. J. Law, 192.

The order given to the plaintiff stated the amount to be paid *not the terms of payment*.

Nothing appears to indicate that the words "net cash" were used or intended to have any meaning

other than their ordinary one—i. e., no credits or discounts allowed.

The words refer to the amount to be paid not to the time of payment.

Words and Phrases—Vol. 3 (Second Series) page 590—Net Cash.

“Net Cash” as between buyer and seller means that the buyer shall pay the “net price” to seller, citing

Love v. Scatcheid, 146 Fed. R. 1,
Lurton, Circuit Judge (p. 8):

“Ten Dollars’ net cash meant that the buyer should pay the net price to the seller.”

Words and Phrases—Judicially Defined—
Vol. 5 (p. 4776):

“‘Net’ is the term used among merchants to designate the quantity, amount, or value of an article or commodity after all tare and charges are deducted.”

This is not the case of shipment by an express company which ordinarily does not permit inspection, but the seller shipped the goods, he engaged the carrier so that inspection was intended to be had at the destination.

Holt v. Pie, 120 Pa. St. 425, 14 Atl. 389.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

Respectfully submitted,

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with the Defendants-Appellee.

