vol 686 - 1917 -

13

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

METROPOLITAN LUMBER COMPANY, a corporation, *Plaintiff-Respondent,* *v.* JOHN H. DUNN & SONS, a corporation, *Defendant and Appellant.*	*On Contract.* *On Appeal from Supreme Court.*

Brief for Defendant-Appellant.

The facts in this case as settled by the Trial Court, so far as they affect the grounds of appeal, are quite simple.

On September 9, 1914, defendant ordered from the plaintiff the lumber specified in the State of Demand filed herein, and on November 7, 1914, the lumber was delivered to the defendant at Newark. There is no question here raised as to the price or delivery. This lumber was comprised of the first five items shown on the bill delivered by plaintiff and marked Exhibit D. 1 (Printed Case, p. 15), and the price therefor was $374.62.

On September 16, 1914, the defendant ordered of the plaintiff another quantity of lumber described by the sixth item in said bill. The price therefor was $402.43.

Both orders of goods were delivered to the defendant at Newark in the same freight car on November 7, 1914. The freight charges on the both orders of lumber were $95.88, which it was agreed

New Jersey State Library

that the plaintiff should pay. These charges were in fact paid by defendant, for which reason it was entitled to credit therefor. The trial court has found as a fact that the lumber ordered on September 9, 1914, was to be paid for within one month from delivery and that ordered on September 16, 1914, was to be paid for "in cash."

On November 27, 1914, plaintiff presented to defendant the bill marked Exhibit D. 1 (Printed Case, p. 15), and accepted from defendant the latter's four months' note for $681.17, which represented the total of the two sales less the freight charges on both. The bill was then receipted. Upon the due date of the note, payment on the same having been stopped, it was protested for non-payment.

At the time of the trial of this action plaintiff had already brought suit against the defendant and recovered a judgment for $306.55, representing the last item on the bill above mentioned ($402.43) less the freight charges on both orders of goods ($95.88).

On this state of facts, the evidence of the former judgment having been properly placed before the court, defendant moved for a judgment.

The claim of the plaintiff against the defendant for $681.17 was an entire and inseparable demand for which reasons a recovery of a judgment for part thereof is *res adjudicata* as to the whole claim.

I.

THE CLAIM WAS ENTIRE AS EVIDENCED BY THE FACT THAT THE CREDIT FOR FREIGHT CHARGES WAS DEDUCTED FROM THE TOTAL AMOUNT OF THE SUM CLAIMED.

Both orders of goods were delivered to defendant on the same car although ordered on different days. The rule of law is that (disregarding the question

as to book accounts) goods ordered on distinct contracts and upon different terms of credit constitute distinct causes of action, unless the parties expressly or impliedly agree otherwise. The action of the plaintiff itself in billing these goods to defendant as a whole, and giving credit upon the whole amount due, for the freight charges of all the goods ordered, clearly bears out the appellant's contention that from the conduct of the parties but one understanding can be consistently implied—that this was one entire transaction.

In this action the appellee seeks to recover the price of the lumber sold on September 9, 1914. According to the agreement of the parties the freight charges paid by appellant were to be credited to it, but it has received no such credit in the judgment entered in this case. The reason for this, of course, was that credit was given upon the judgment entered in the first suit, a condition which clearly indicates that, even granting the appellee's contention that the account may be split up, a part of the amount which should properly have been credited to the appellant in this action has already been adjudicated, as a consequence of which it is estopped from bringing suit for the balance.

II.

THE CLAIM IS ENTIRE BY REASON OF THE ACCEPTANCE BY PLAINTIFF OF THE DEFENDANT'S PROMISSORY NOTE FOR $681.17, THE FULL AMOUNT DUE.

Admitting, as a fact, that on November 27, 1914, the debt of the defendant for the order made on September 16, 1914, was due, while that for the other order was not yet due, is is also a fact, as proved by the plaintiff in its own case, that on that day plaintiff presented to defendant bill Exhibit D. 1, showing a balance due of $681.17 and accepted

defendant's promissory note for four months for that amount. The legal effect of the acceptance of this note irrespective of any other facts in this case, is clear and concise. It did not operate as an absolute payment of the debt, but only as a payment conditional upon the payment of the note in due course. It did, however, operate to extend the time for the payment of the debt then due until the maturity of the note, as well as the time for the payment of the goods here sued for. As a result of this; *i. e.,* this arrangement between the plaintiff and defendant, the former's claim was in abeyance during the period within which the note was in force, and was revived again on March 27, 1915, (the due date of the note) *as of that date* upon the non-payment of the note. It will thus be seen that speaking as of the time of the institution of this suit, all of the debt, consisting of the sum of $681.17 fell due upon the same day, to-wit, March 27, 1915.

This proposition has invariably held in this State but the citation of only one recent decision clearly setting forth the rule is deemed sufficient to indicate the law. This is the case of *Taylor* v. *Wahl,* 72 N. J. L., 10, in which case Chief Justice Gummere, sitting in this Supreme Court, wrote the decision and Justices Dixon, Garrison and Swayze concurred.

In that case plaintiff furnished labor and materials to one Cramer, the general contractor of the defendant in the erection of certain buildings, and having on August 10, 1901, served a stop-notice on the defendant who was the owner, instituted suit against him under the third section of the Mechanic's Lien Act.

Defendant interposed as a defense that at the time of the service of the stop-notice upon him, the $1,000 claimed by the plaintiff to be owing from Cramer was not in fact due, and that defendant had

paid out to other creditors of Cramer all the money due from him to Cramer. To support this contention that Cramer was not indebted to plaintiff on August 10, 1901, defendant proved that on May 23, 1901, Cramer gave to plaintiff his promissory note payable in three months. This note was not paid, and the plaintiff on the theory that the non-payment of the note put him in *statu quo,* brought this action. The Trial Court instructed the jury that the plaintiff was entitled to their verdict, unless it should be found as a fact that the note was given to and accepted by the plaintiff as a *payment* of his claim to the extent of $1,000.

The Supreme Court held this charge to be error, and in its opinion laid down the following rule:

> "A promissory note, given for an antecedent debt, although it does not operate to discharge the debt, in the absence of any agreement that it should have that effect, extends the credit until the note matures. Fry *v.* Patterson, 20 Vroom (p. 612). In the present case, therefore, the effect of the note, if it was given on account of Cramer's indebtedness to the plaintiff, was to extend the time for the payment of the indebtedness until the maturity of the note, August 24, 1901, 13 days after the "stop-notice" was served. No obligation rests upon the owner of a building, under section three of the mechanic's lien law, to retain in his hands money of the contractor to meet the demand of a stop-notice, unless the sum claimed in such notice is actually due at the time when it is served. (Kirtland *v.* Moore, 13 Stew. Eq., p. 109). The Trial Court should have instructed the jury that if they found the note was given on account of Cramer's indebtedness to the plaintiff, then *even though it was not given and accepted as payment of that indebtedness, still it ex-*

tended the time of the payment thereof until the date of the maturity of the note, and that as the plaintiff's demand on the defendant was made prior to that time the defendant was justified in refusing to recognize that demand and in paying out to other creditors of Cramer the funds of the latter in his hands."

The following Massachusetts case also puts the rule very clearly.

Appleton v. *Parker,* 15 Gray (Mass.) 173 at 175.

"As to these questions, the first point of inquiry would seem to be whether the taking of the note, payable at a more extended period, was absolute in its effect in disabling the plaintiffs to enforce a claim on Frederick Parker at any earlier period than the time fixed by the note. This, we suppose, must be the effect of it, though it does not prevent the plaintiffs suing in an action of contract for the goods after the note is payable. *The parties have by the note declared the term of credit, and the plaintiffs are so far bound by it.*"

From the rule as laid down in the above cases, it will be seen that even though between November 7, 1914, and November 27, 1914, the plaintiff was in a position to bring the action for the goods recovered in suit No. 1, the presentation of the itemized bill and the acceptance of the note postponed the maturity of the whole debt until March 27, 1914, when the note fell due and was unpaid. The nonpayment of the note revived the liability of the defendant as of the due date of the note, and the plaintiff then had its option either to sue upon the note or for the price of the goods sold. It chose to do the latter, and having so chosen it was clearly in this position: The amount due it from the defendant was the sum of $681.17, which was repre-

sented by six items of account. These items then constituted, in effect, an ordinary book account (of which account Exhibit D. 1 is a copy), and all of the items by the rule of the scene of *Taylor* v. *Wahl* (*supra*), had become due on March 27, 1915. Clearly then it must be held that but one cause of action accrued to the plaintiff, and that was for the amount due it as shown on its books. Having brought such an action, even though there was omitted therefrom certain of the items, it is forever precluded from bringing such another action.

III.

THE CLAIM OF PLAINTIFF AGAINST DEFENDANT COMPRISED A BOOK-ACCOUNT, AND JUDGMENT HAVING BEEN RENDERED FOR PART THEREOF, THE MATTER WAS *RES ADJUDICATA*.

All of the testimony in this case was given by one Jacobson, secretary of the appellee, who, quoting from the facts as found by the trial judge (Printed Case, p. 13, l. 2), "said on cross examination, that he did not know whether the bill referred to, marked Exhibit D. 1, was a copy of any book-account between the parties; and that the note referred to, marked Exhibit P. 1, was given for all that was due from defendant to plaintiff at the time."

The law as to the inseparable nature of a book-account was settled in a very early case in this State—*Smock* v. *Throckmorton,* 8 N. J. L., p. 216, wherein the court laid down the rule which has been the law ever since.

> "It was insisted at the bar that unless this rule prevailed a creditor on a book-account may bring as many actions as there are items in his account. But this consequence does not follow.

A book-account as we have always been accustomed to consider it and especially where, there being items of both debit and credit, the balance is the real debt, is a single, connected cause of action.

It is submitted that the appellee cannot from the nature of its book-keeping transform what would otherwise be a book-account into a series of distinct contracts. The bill presented by appellee to the appellant has all the requisites of a book-account. It shows the specific items for which payment is claimed, gives credit for the allowance which should be allowed upon the whole bill, and indicates the net amount due upon all transactions between the parties. That is exactly what is intended to be shown by a book-account and it is submitted that the account between the parties to this suit is of such a nature.

IV.

THE CIRCUMSTANCES SURROUNDING THE PRESENTATION BY THE APPELLEE TO THE APPELLANT OF THE BILL, EXHIBIT D. 1, CONSTITUTED AN ACCOUNT STATED BETWEEN THE PARTIES.

When an account is stated between two parties, the one in whose favor the balance is found to exist has but one cause of action against the other. Such is the case in this action. The appellee presented to the appellant the bill, Exhibit D. 1, which showed the itemized charges of all claims against the latter together with the credit which was to be allowed. The appellant concurred in this account by giving its promissory note therefor, and thereupon the balance shown to be due, to-wit: $681.17 became an account stated between the parties.

This proposition is laid down in the case of *Weigel* v. *Hartman Steel Company,* 51 N. J. L., p. 446 at p. 451, where the court (Reed, *J.*) says:

> "But now it seems to be entirely settled, that it is not essential that there should be mutual or counter accounts between the parties to support an action for an account stated.
>
> A bill of items rendered, or even a single item presented to a party and acknowledged to be correct, will constitute such an account.
>
> But it seems obvious that, whether the subject matter of the agreement is an unilateral account, or comprises mutual accounts, there must be an acknowledgment of the correctness of the footing, if it is composed of several items or the correctness of a single item, if it consists of but one. There must be a promise to pay a single sum, whether such sum is the single item presented or is the totality of all the items admitted to be correct, or is the balance remaining after the mutual application in payment of each other of such items of counter accounts as are mutually admitted to be correct."

Respectfully submitted,

JOSEPH E. CONLON,

Attorney for Defendant and Appellant.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

METROPOLITAN LUMBER COMPANY, a corporation, *Plaintiff-Respondent,* *vs.* JOHN H. DUNN & SONS, a corporation, *Defendant-Appellant.*	*On Contract.* *On Appeal from New Jersey Supreme Court.*

Brief of Plaintiff-Respondent.

The plaintiff sued in the Second District Court of Newark to recover the price of lumber sold to the defendant September 9, 1914, and delivered November 7, 1914.

The delivery and non-payment was admitted.

On September 16, 1914, the plaintiff sold the defendant other lumber which was delivered with the first lot.

The first lot was sold on thirty days' credit and a promissory note was to have been given therefor, but was not given. The second lot was sold "for cash."

The second lot not being paid for, a judgment was obtained for the price thereof.

In the present suit, which was for the contract price of the first lot, the defendant moved for judgment in its favor "on the ground that the whole debt for the purchase price of the goods sold constituted an entire and inseparable demand and that judgment, having been entered in the first suit for a part of the demand, the matter was *res adjudicata.*"

This motion was denied, and the trial judge, sitting without a jury, found for the plaintiff.

The defendant appealed from said judgment to the New Jersey Supreme Court, and on Feb. 16, 1916, the New Jersey Supreme Court affirmed the judgment below, and the Supreme Court, after stating the facts as above set forth, proceeds as follows:

> "It is clear that each sale constituted a separate cause of action.
>
> "It is true that on November 27, 1914, a promissory note was given by defendant to the plaintiff covering the entire indebtedness, but that note fell due, was dishonored before either suit was brought. Its only effect, of course, was to postpone the time of payment until the maturity of the note. When, at maturity, it was unpaid, the plaintiff's right of action was the same as before it was given.
>
> The judgment below will be affirmed, with costs."

I.

When the Note of November 27, 1914, Was Dishonored, Appellee Was at Liberty to Sue on Each Contract of Sale Separately.

In re. Paton v. *Doyne* (65 Atlantic 843, N. J. Supreme Court), Doyne gave five promissory notes to one P., which were sold at maturity by P. to Paton, who gave in payment for said notes his check for $1,270.03. Separate suits were brought on each note, judgment was entered on one of them. At the trial of one of the other actions Doyne moved for judgment because said notes were not sued on in one action. Our Supreme Court ruled this contention to be without foundation, declaring these notes to be several, distinct causes of action, and that suit could be maintained on each.

II.

THE TWO CONTRACTS OF SALE DID NOT CONSTITUTE A BOOK ACCOUNT.

There is no evidence of any book account existing between the parties hereto. The testimony on that subject is that of Jacobson that he did not know whether Exhibit D. 1 was a copy of any book account between the parties. There was no point raised by appellant either at the trial or in the specification of determinations. that there was an account stated between the parties.

In *Badger* v. *Titcomb,* 15 Pick. 409, the Court held that it cannot be sustained that a running account for goods sold at different times, will constitute an entire demand unless there is an agreement to that effect.

III.

THE TWO CONTRACTS OF SALE DID NOT CONSTITUTE AN ENTIRE AND INDIVISIBLE DEMAND. A SEPERATE CAUSE OF ACTION EXISTED ON EACH CONTRACT.

In *Smock* v. *Throckmorten,* cited by appellant, the court held that a judgment to form a bar to the prosecution of a subsequent suit, must be for the same cause of action. Judgment in an action in the same style and nature, in which the demand might have been but was not included, is not sufficient.

In *McIntosh* v. *Down,* 49 Barb. 550, Judge Walls says in part: The true question in all such cases is not whether the rule allowing separate actions to be maintained for separate items, would lead to a multiplicity of suits or would operate oppressively, but it is whether the former action was for the identical cause or demand as that for which the subsequent is brought.

In *Zimmerman* v. *Erhard,* 83 N. Y. 74, defendants urged that another action was pending for the

same cause of action. The other action was brought to recover the value of goods sold and delivered at a date prior to those for the recovery of which this action is brought. The court held each sale was separate and that a cause of action existed on each, and that the rendering of an account containing all the items did not change the nature of the contracts of sale or evince that the contracts of sale were not seperate and distinct. *Staples* v. *Woodridge,* 21 Barb. 317, is to the same effect. *Buttonhole Co.* v. *Thornton,* 10 N. W. (Minn.) 425 is to the same effect.

In re. Staple v. *Steel,* 1 N. W. (Mich.) 1046, it appears that plaintiff bought of defendant goods on four months' credit from September 15, and on the same day bought another bill of goods on four months' credit from October 1. Neither bill was paid and suit was brought on the first bill. The court held that seperate suits might be brought for each bill, and the fact that they were brought at the same time did not, after the expiration of the credit on the last bill, constitute them one account. The court gave judgment for plaintiff in each case.

In re. Secor v. *Sturgis,* 16 N. Y. 548. The business of ship carpenters, and the business of ship chandlers was carried on by the same firm, although separate books were kept for the two branches of the business. The carpentry branch repaired a brigg, charging $139, and thereafter sold articles of ship chandlery for the same brigg for $521. The New York Court of Appeals held in this case, that the two accounts should not constitute one claim, but form two causes of action, and the opinion of Judge Strong is in part as follows:

> "Entire claims only cannot be divided within this rule. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes

the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each * * * and all demands of whatever nature, arising out of separate and distinct transactions may be sued upon separately. It makes no difference that the causes of action might be united in a single suit.

"The true distinction between the demands which are singular and entire, and those which are several and distinct is, that the former arises out of one and the same act, or contract, and that latter out of different acts or contracts."

In re Carlton v. *Wood,* 28 N. H. 290, the court held that where a stock of goods were sold at the same time, but each article was for a separate and distinct value the contract of sale is not entire and indivisible.

Wherefore, it is respectfully submitted that judgment should be affirmed.

NATHAN H. BERGER,
Attorney for Plaintiff-Respondent.

INDEX.

I.

Notice of Appeal.

Notice of Appeal.

Filed.

New Jersey Supreme Court.

METROPOLITAN LUMBER COMPANY, a corporation, *Plaintiff-Appellee,* *v.* JOHN H. DUNN & SONS, a corporation, *Defendant-Appellant.*	*On Contract.* *Notice of Appeal to Court of Errors and Appeals.*

To Nathan H. Berger, Esq., Attorney for Metropolitan Lumber Company, Plaintiff-Appellee.

Take notice that the defendant appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment of the New Jersey Supreme Court entered in this cause, upon the following grounds:

1. The Supreme Court did not reverse the judgment of the Second District Court of the City of Newark.

2. The Supreme Court affirmed the judgment of the Second District Court of the City of Newark.

3. The Supreme Court held that the note of November 27, 1914, operated to postpone the time of payment of the account until the maturity of the note, but did not hold as a consequence of

this that the claims of the plaintiff constituted but one cause of action.

4. The Supreme Court held that each sale constituted a separate cause of action.

5. The Supreme Court held that each sale constituted a separate cause of action, in spite of the fact that freight charges on both lots (which were paid by defendant) were credited upon the total amount due and not on the amount due on each sale separately.

6. The Supreme Court held that each sale constituted a separate cause of action, in spite of the fact that both lots of lumber were delivered together, and that by virtue of the acceptance of the plaintiff of the promissory note, the time for the payment of both sales was the same, the time of payment for each lot having been postponed until the maturity of the note.

7. The Supreme Court held that the promissory note being unpaid at its maturity, the plaintiff's right of action was the same as before it was given.

JOSEPH E. CONLON,
Attorney for Defendant-Appellant.

Notice of Appeal.

Filed June 11, 1915.

Second District Court of Newark.

METROPOLITAN LUMBER COMPANY, a corporation, *Plaintiff,*	*On Contract*
vs.	*Notice of Appeal.*
JOHN H. DUNN & SONS, a corporation, *Defendant.*	

To Nathan H. Berger, Esquire, attorney for Metropolitan Lumber Company, Plaintiff:

Sir:—Take notice that the defendant, John H. Dunn & Sons, hereby appeals to the New Jersey Supreme Court from the judgment of the Second District Court of Newark rendered in the above stated action on the ninth day of June, 1915.

JOSEPH E. CONLON,
Attorney for Defendant.

Dated Newark, N. J., June 9, 1915.

Service of the within notice is acknowledged this tenth day of June, 1915.

NATHAN H. BERGER,
Attorney for Plaintiff.

State of Demand.

State of Demand.

Filed April 3, 1915.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

METROPOLITAN LUMBER COMPANY, a corporation, *vs.* JOHN H. DUNN & SONS, a corporation.	*On Contract.* *State of Demand.*

1. On September 9, 1914 the plaintiff sold to the defendant

1x2	No. 2	Barn	Wh.	Pine	D4S	1131 Ft.
1x4	No. 2	"	"	"	"	1030 Ft.
1x6	"	"	"	"	"	2822 Ft.
1x8	"	"	"	"	"	4202 Ft.
1x10	"	"	"	"	"	2167 Ft.
						11,352 Ft. $374.62

2. On November 7, 1914 plaintiff delivered these goods to defendant and defendant gave plaintiff a promissory note to secure payment of this sum of $374.62 and other indebtedness due from defendant to plaintiff. On the due date of said note it was protested for non-payment.

3. The full amount of $374.62 is due and owing from the defendant to plaintiff, and plaintiff demands judgment for said amount, with interest and costs of suit.

NATHAN H. BERGER,
Attorney for Plaintiff.

State of Demand.

Take notice that the plaintiff will demand trial of this case on the return day.

Take further notice that the plaintiff demands that the defendant file with the Court and serve on the plaintiff a specification of the defenses that the defendant will offer to prove at the trial of this case, as provided by statute.

Copy of Clerk's Docket.

METROPOLITAN LUMBER COMPANY,
Plaintiff,

vs.

JOHN H. DUNN & SONS, a New Jersey corporation,
Defendant.

PLAINTIFF'S COSTS.

Summons	$2.10
Listing fee	1.50
Attorney's fee	19.25
Total costs	$22.85
Statement	.50

Nathan H. Berger, Attorney for Plaintiff.

A summons in the above stated cause was issued on the fifth day of April, 1915 returnable on the twelfth day of April, 1915, wherein the plaintiff demands of the defendant the sum of five hundred dollars.

The plaintiff filed a state of demand April 3, 1915.

The summons was served and returned as follows:

"I served the within summons April 5th, 1915 on John H. Dunn, he being the president of John H. Dunn & Sons, the within named defendant by reading it to him and giving him a copy thereof.

"GUSTAVE HAAS,
"Constable."

Copy of Clerk's Docket.

April 21—The plaintiff and defendant appeared and the cause was tried and determined at a later date, decision reserved.

Jacob Jacobson was sworn on behalf of the plaintiff.

The evidence being closed the Court reserved decision.

June 9th—Decision filed and judgment thereupon entered in favor of the plaintiff and against the defendant in the sum of Three Hundred and Eighty Five Dollars and eighty-four cents, damages and costs.

June 9th—State for docketing.

June 11th—Defendant filed Notice of Appeal and Bond.

June 18th—Order filed.

June 30th—Order filed.

Aug. 14th—Order filed.

Sept. 2—Order filed.

Order Extending Time.

Filed June 18, 1915.

SECOND DISTRICT COURT OF NEWARK.

METROPOLITAN LUMBER COMPANY, *Plaintiff,* *vs.* JOHN H. DUNN & SONS, a corporation, *Defendant.*	*On Contract. Order.*

Application for this order having been made it is on this 18th day of June, 1915 on motion of Joseph E. Conlon, attorney for the defendant, herein ordered that the time for the filing of the agreed state of facts on the appeal of the above entitled action be and the same is hereby extended ten days.

FREDERIC L. JOHNSON,
Judge.

Order Extending Time.

Filed June 30, 1915.

SECOND DISTRICT COURT OF NEWARK.

METROPOLITAN LUMBER COMPANY, *Plaintiff,* *vs.* JOHN H. DUNN & SONS, a corporation, *Defendant.*	*On Contract. Order.*

Application for this order having been made it is on this 30th day of June, 1915 on motion of Joseph E. Conlon, attorney for the defendant herein ordered that the time for the filing of the agreed state of facts on the appeal of the above entitled action be and the same is hereby extended to August 15th, 1915.

FREDERIC L. JOHNSON,
Judge.

Order Extending Time.

Filed August 14, 1915.

SECOND DISTRICT COURT OF NEWARK.

METROPOLITAN LUMBER COMPANY, *Plaintiff,* *vs.* JOHN H. DUNN & SONS, a corporation, *Defendant.*	*On Contract. Order.*

Application for this order having been made it is on this thirteenth day of August, 1915 on motion of Joseph E. Conlon, attorney for the defendant herein ordered that the time for the filing of the agreed state of facts on the appeal of the above entitled action be and the same is hereby extended from August 15th, 1915 to September 10th, 1915.

FREDERIC L. JOHNSON,
Judge.

Order Extending Time.

Filed September 2, 1915.

SECOND DISTRICT COURT OF NEWARK.

METROPOLITAN LUMBER COMPANY, a corporation, *Plaintiff*, *vs.* JOHN H. DUNN & SONS, a corporation, *Defendant*.	*Order.*

Application for this order having been made it is on this second day of September, 1915 on motion of Joseph E. Conlon, attorney for the defendant, ordered that the time for the filing of the agreed state of facts upon the appeal of the above entitled action be and the same is hereby extended to October 4th, 1915.

FREDERIC L. JOHNSON,
Judge.

Certificate of Clerk.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

METROPOLITAN LUMBER COMPANY, *Plaintiff,* *vs.* JOHN H. DUNN & SONS, a New Jersey corporation, *Defendant.*	*On Contract.* *Certificate.*

I, John H. O'Connor, Clerk of the Second District Court of the City of Newark, do hereby certify that attached hereto are true copies of all the papers filed in this Court in the above entitled cause and a true transcript of the record and proceedings had therein.

JOHN H. O'CONNOR,
Clerk.

[L. S.]

Dated October 20th, 1915.

Agreed State of Case.

SECOND DISTRICT COURT OF THE CITY OF NEWARK.

METROPOLITAN LUMBER COMPANY, a corporation, *Plaintiff,* *vs.* JOHN H. DUNN & SONS, a corporation, *Defendant.*	*On Contract.* *On Appeal.* *State of Case Settled By Court.*

Nathan H. Berger, Attorney for Plaintiff-Appellee.

Joseph E. Conlon, Attorney for Defendant-Appellant.

The parties hereto, or their attorneys, being unable to agree upon a state of the case, and having applied to me, Judge of said Court, within the time limited by law as extended by orders made herein, and the time for settling said case having been further extended by an order filed herein, I do hereby settle the case as follows:

The action was brought to recover the purchase price of goods sold by the plaintiff to the defendant September 9, 1914, and delivered November 7, 1914. The goods in question were 11,352 feet of white pine, and the agreed purchase price was $374.62.

Delivery of the goods to defendant and non-payment of the purchase price were admitted by defendant.

The case was tried by the Court without a jury.

From the evidence I found: That on September 9, 1914, at Simonton, in North Carolina, plaintiff sold to defendant the lumber specified in the state of demand for the sum of $374.62, and that it was agreed that defendant was to have one month from the date of the delivery of the goods in which to pay the purchase price, for which defendant was to give to plaintiff its promissory note payable one month after the date of delivery. Defendant never gave to plaintiff such a note.

That on September 16, 1914, at the same place, plaintiff sold to defendant another lot of lumber for the sum of $402.43. That this sale was "for cash."

That both lots of lumber (i. e. that sold on September 9, 1914 and that sold on September 16, 1914) were delivered at Newark, on November 7, 1914, in the same freight car, together with other goods sold to other customers of plaintiff.

That on November 27, 1914, defendant, having given to plaintiff neither its note for the goods sold on September 9, 1914, nor cash for the goods sold on September 16, 1914, gave to plaintiff its four months' note for $681.17, representing the total amount due for the goods sold at both sales, after deducting the amount of a freight bill of $95.88, which last amount was paid by defendant but which as between the parties it had been agreed that plaintiff should pay. It was admitted by defendant that this note, offered in evidence by the plaintiff, and marked Exhibit P 1, was not paid when it became due and was still unpaid. At the time this note was given a bill or memorandum showing the whole amount due for the lumber sold and crediting the freight charge was presented by plaintiff to defendant and was marked "Paid" by an agent of the plaintiff. This bill was offered in

evidence by defendant, and marked Exhibit D 1. Jacob Jacobsen, secretary of the plaintiff, a witness sworn on behalf of plaintiff, said on cross-examination, that he did not know whether the bill above referred to, marked D 1, was a copy of any book-account between the parties; and that the note above referred to, marked P 1, was given for all that was due from defendant to plaintiff at the time.

Defendant in addition to Exhibit D 1, above mentioned, offered in evidence the judgment in an action brought by plaintiff against defendant in this Court, which judgment was entered on April 21, 1915, immediately before the trial of the present action. This judgment was in the sum of $306.55 besides interest and costs, and was for the amount due from the defendant to the plaintiff for the goods sold on September 16, 1914, after deducting the freight charges on all of the goods, amounting to $95.88, which charges were paid by defendant but for which plaintiff had agreed to pay, as set forth above.

At the close of the evidence defendant moved for a judgment for defendant on the ground that the whole debt for the purchase price of the goods sold constituted an entire and inseparable demand, and that, judgment having been entered in the first suit for a part of the demand, the matter was *res adjudicata.*

This motion was denied. Defendant asked that its objection to this ruling be noted.

I found that there was due to the plaintiff from the defendant for the purchase price of the goods sold as set forth in the demand, the sum of $374.62, together with interest amounting to $11.22, or $385.84 in all; and judgment was entered in favor

Exhibit P.1.

of the plaintiff and against the defendant for said sum.

Case settled by me, and signed this 15th day of October, 1915.

FREDERIC L. JOHNSON,
Judge.

Attest:
Clerk.

EXHIBIT P-1.

$681.17 Newark, N. J., November 27, 1914.

Four months after date we promise to pay to the order of Metropolitan Lumber Company SIX HUNDRED and EIGHTY-ONE and 17/100 DOLLARS at Broad & Market National Bank Newark, N. J.

JOHN H. DUNN & SONS,
EDWARD D. DUNN,
Treasurer.

Value Received
No. 9744 Due

Payment on the above note was stopped and the same was duly protested.

Exhibit D.1.

EXHIBIT D-1.

All Orders, Contracts and Quotations Subject to Accidents and Acts of Providence. Claims, if any, Must Be Reported Within Forty-eight Hours After Arrival of Car, Otherwise They Will Not Be Allowed.

Order No. 9/16
Car No. Sou. 36351.

Newark, N. J., Nov. 7, 1914.

Messrs. John H. Dunn & Sons,
786 Broad St., Newark, N. J.

METROPOLITAN LUMBER CO.
Manufacturers and Wholesale Dealers in Lumber

Ordway Building Address all communications to Box 338, Newark

1x2	No. 2	Barn	Wh.	Pine	D4S	1131 ft.			
1x4	"	"	"	"	"	1030 ft.			
1x6	"	"	"	"	"	2822 ft.			
1x8	"	"	"	"	"	4202 ft.			
1x10	"	"	"	"	"	2167 ft.			
						11352 ft.	33.	374.62	
½x6	"	"	"	Bev.	Sdg.	22357 ft.	18.	402.43	
								777.05	
Less freight								95.88	
								681.17	

Paid. THE METROPOLITAN LBR. CO.
McIntyre. (D.B. 10)

(The Dunn Corporation,
Newark, N. J.
Incorporated 1911) [STAMP]

Specification of Determinations.

(Filed)

New Jersey Supreme Court.

METROPOLITAN LUMBER COMPANY, a corporation, *Plaintiff and Appellee,* *vs.* JOHN H. DUNN & SONS, a corporation, *Defendant and Appellant.*	*On Contract.* *On Appeal.* *Specifications of Determinations.*

To William C. Gebhardt, Clerk of the Supreme Court:

The following is a specification of the determinations or directions in the above entitled cause, of the Second District Court of Newark, with respect to which the appellant is dissatisfied in point of law.

1. That the trial court erred in finding a judgment for plaintiff whereas the court should have found a judgment against the plaintiff and in favor of the defendant.

2. Because there was no evidence before the trial court to sustain the judgment for the plaintiff.

3. That the trial court found as a fact that the goods ordered on September 9, 1914 and September 16, 1914 were delivered together on November 27, 1914, and that at the time judgment was

recovered for the price of goods sold on September 16, 1914 and at the time of the institution of this suit both amounts were due, and that on this evidence, the court should have given a judgment in favor of the defendant and against the plaintiff, because only one cause of action accrued to plaintiff which was determined by the entry of judgment for the price of goods sold on September 16, 1914 before judgment was entered in this cause.

4. Because the trial court in its opinion finds as a fact that the sales of lumber on September 9, 1914 and September 16, 1914 were separate and distinct sales, whereas such finding is in fact a finding of law which is not supported by the evidence.

5. Because the trial court found as a fact that on November 27, 1914, plaintiff accepted defendant's promissory note payable in four months from date for $681.17 which represented the total amount due for the orders on September 9, 1914 and September 16, 1914, but held that the acceptance of said note did not operate to extend the maturity of plaintiff's claims until the due date of the note.

6. Because the trial court did not find as a conclusion of law that but one cause of action accrued to the plaintiff by virtue of the sales of September 9, 1914 and September 16, 1914.

7. Because the trial court rendered judgment in favor of the plaintiff and against the defendant for the sum of $374.62 (with interest), which was the actual price of the goods ordered on September 9, 1914 whereas plaintiff's own testimony showed that freight charges were to be advanced by defendant and credited upon its account.

Specification of Determinations.

8. Because the trial court found as a fact that the payment of the goods purchased by the defendant of the plaintiff on September 9, 1914 was to be secured by a promissory note payable in 30 days from delivery, and the goods purchased on September 16, 1914 were to be paid for "in cash," and from these facts should have found that the goods were sold on the same terms of credit, because the words "in cash" mean within 30 days from delivery.

9. Because the trial court should have found from the evidence in this case that as a result of the transactions between plaintiff and defendant which resulted in the delivery of two orders of goods on November 27, 1914, but one cause of action accrued to the plaintiff which was enforced by plaintiff by the recovery of a judgment for part of the goods.

10. Because the trial court from the evidence should have found that claim of plaintiff against defendant comprised a book-account; and that judgment having been entered for part of the account, the matter was *res adjudicata* as to the whole account.

JOSEPH E. CONLON,

Attorney for Defendant and Appellant.

Opinion.

Filed, February 18, 1916.

NEW JERSEY SUPREME COURT.

November Term, 1915.

METROPOLITAN LUMBER COMPANY, a corporation,
Plaintiff and Appellee.

v.

JOHN H. DUNN & SONS, a corporation,
Defendant and Appellant.

Submitted December 3, 1915; Decided February 16, 1916.

On Appeal from the District Court.

Before Justices Garrison, Trenchard and Black.

For the appellant, Joseph E. Conlon.

For the appellee, Nathan H. Berger.

Per Curiam.

The plaintiff sued to recover the price of lumber sold to the defendant September 9, 1914, and delivered November 7, 1914.

The delivery and non-payment was admitted.

It appeared that on September 16, 1914, the plaintiff sold the defendant other lumber which was delivered with the first lot.

The first lot was sold on thirty days credit and a promissory note was to have been given therefor, but was not given. The second lot was sold "for cash."

The second lot not being paid for a judgment was obtained for the price thereof.

In the present suit, which was for the first lot, the defendant moved for judgment in its favor "on the ground that the whole debt for the purchase price of the goods sold constituted an entire and inseparable demand and that judgment having been entered in the first suit for a part of the demand, the matter was *res adjudicata.*"

This motion was denied, and the trial judge, sitting without a jury, found for the plaintiff.

We think this was proper.

It is clear that each sale constituted a separate cause of action.

It is true that on November 27, 1914, a promissory note was given by defendant to the plaintiff covering the entire indebtedness, but that note fell due and was dishonored before either suit was brought. Its only effect, of course, was to postpone the time of payment until the maturity of the note. When at maturity, it was uspaid, the plaintiff's right of action was the same as before it was given.

The judgment below will be affirmed, with costs.