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Notice and Grounds of Appeal.

Filed April 9, 1934.

New Jersey Supreme Court.

SUPERIOR FINANCE CORPORATION, a corporation, Plaintiff, vs. JOSEPH M. McCRANE, Defendant.	Notice and Grounds of Appeal.

10

To: FEDER & RINZLER, ESQS.,
Attorneys for Plaintiff, or
TO WHOM THIS MAY CONCERN:

20

Sirs:

PLEASE TAKE NOTICE that the Defendant, Joseph M. McCrane, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered against him in this cause on the following grounds; to wit:

30

1. Because the Trial Court refused to permit Plaintiff's witness Samuel Slaff to answer the following question on cross-examination:

"Q. Then, at the time that this car was repossessed and purchased by your Company for One Dollar ($1.00), do you know what the value of that automobile was at that time."

2. Because the Trial Court refused to permit 40

Plaintiff's witness Samuel Slaff to answer the following question on cross-examination:

> "Q. And is it not true or doesn't it appear on this page as the records of your Company that the loss taken on that is Three Hundred Ninety-Seven Dollars
> 10 ($397.00)."

3. The Trial Court erred in refusing to permit Defendant to offer into evidence two (2) audits (Marked D-1 for identification) prepared by Plaintiff's accountants, James F. Welch & Company, when duly moved so to do by Defendant.

4. The Trial Court erred in refusing to permit Defendant's witness, Samuel Glass, to answer the following question duly propounded by Defend-
20 ant:

> "Q. Did you or did you not make a new agreement—a definite agreement— with Mr. McCrane subsequent to the execution of that Conditional Sales Contract." (Referring to Exhibit P-1).

5. The Trial Court erred in striking out the following testimony adduced from Defendant's witness, Samuel Glass (which was offered as sec-
30 ondary evidence, because of Plaintiff's failure to produce certain account cards, altho duly served with a notice to produce the same).

> "Q. Now, what records were kept in your Company so far as this particular case is concerned?
>
> A. Why, at the inception of the deal an account card was made out, and then an entry was made in the customers ledger,
> 40 and as receipts—as payments were made

against the account they were entered in the customers receipt book and also on account card. " * * *

Q. When did you leave this concern?

A. In July, 1928.

Q. July, 1928?

A. Yes.

Q. And as far as you can remember, at the time that you left that Company was this particular card that I am referring to, in existence? * * * * 10

Q. When you left, two years after this contract was signed, as far as you recall, was that card there?

A. By 'there' what do you mean?

Q. In the office of the Superior Finance Corporation. 20

A. That card?

Q. Yes.

A. Yes, absolutely, sir. I thought you said 'car'.

Q. No, card; c-a-r-d.

A. Yes, that was at the office.

Q. It was there two years after you left?

A. Yes.

Q. Do you recall of your own knowledge how many payments there were on that card? 30

A. I do not.

Q. You, of course, don't know what happened to that card, do you?

A. No, I don't know just what has developed. * * * *

Q. Now, do you recall that card as you are sitting on the stand?

40

Mr. Rinzler: Just yes or no.

Q. Do you?

A. Yes.

Q. Was it a small card or a large one?

A. I should judge about five by eight. * *

A. In the upper left-hand corner was a
10 space for the number of the account.

Q. Yes?

A. Right underneath that was a line bearing the date of the contract. To the right of that was the purchaser's name and to the right of that was the amount of the check issued to the dealer, plus the finance charge made, and then the total amount of the note. * *

Q. Proceed.

20 A. Underneath that were eighteen lines, supposedly representing eighteen months. In other words, room for eighteen installments. Different installments were entered on the card, and in a column to the right of that was space for a rubber stamp and initial, showing when payments were to be made. On the extreme right were two lines, one marked 'with R,' representing recourse * * * *

30 Q. The last one saying 'Without Recourse'?

And one saying 'Without R', meaning recourse, and by putting an X * * * *

Q. Not the procedure—just what was the card.

A. On that particular card the X was underneath 'Without R.' * * *

Q. What did you say it said so far as
40 'Without R' or 'With R'? * * * *

A. It said 'Without R'.
Q. Was there anything else on the card?
A. The dealer's name in the extreme right-hand corner, lower corner.
Q. And as you recall it, anything else?
A. I do not. * * * *
Mr. Rinzler: I respectfully move, your Honor, that this testimony be stricken out as to what he testified was shown or appeared on the card. 10
The Court: It will be stricken out, except with regard to payments.
Mr. Rinzler: That is right.
The Court: And an exception will be allowed to the Defendant."

6. Because the Trial Court erred in refusing to permit Defendant's witness, Samuel Glass, to answer the following question on direct-examination: 20

"Q. Now, any of these payments that were made on account, did they, so far as you know, bear notations indicating that they were being paid with or without recourse."

7. Because the Trial Court erred in refusing to permit Defendant, Joseph M. McCrane, to answer the following question on direct-examination: 30

"Q. What was the first thing that you did in regard to this deal."

8. Because the Trial Court erred in refusing to permit Defendant, Joseph M. McCrane, to answer the following question on direct-examination:

40

"Q. Were you ever, subsequent to that time, requested to make any payments."

9. Because the Trial Court erred in refusing to permit Defendant, Joseph M. McCrane, to answer the following question on direct-examination:

10 "Q. Now then, did you ever have any definite agreement between the officers of the Superior Finance Corporation or with any of the officials of the Finance Corporation about this agreement being a recourse or without recourse deal."

10. Because the Trial Court erred in refusing to grant Defendant's motion for a non-suit.

11. Because the Trial Court erred directing a 20 verdict in favor of the Plaintiff and against the Defendant.

COHN & KOHLREITER,
Attorneys for Defendant.

30

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JUDGMENT RECORD.

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

SUPERIOR FINANCE CORPORATION,
a corporation,
Plaintiff,

vs.

JOSEPH M. McCRANE,
Defendant.

FEDER & RINZLER,
Attorneys of Plaintiff.

ABRAM A. LEBSON,
Attorney of Defendant.

10

20

Complaint.

Plaintiff, a corporation of the State of Delaware, duly authorized to transact business in the State of New Jersey, with offices in the City of Passaic, in the County of Passaic and State of New Jersey, says that:

1. On October 2nd, 1926 Mercer Beverage Distributors, Inc., a corporation purchased a Reo Sedan from the defendant herein, and made and executed a certain conditional sales agreement, a copy of which is hereto annexed, made part hereof, and marked Schedule "A".

30

2. Under the terms of said contract, the said Mercer Beverage Distributors, Inc., a corporation agreed to pay the defendant herein, for the said Reo Sedan, the sum of Six Hundred Seventy Two ($672.00) Dollars which was paid on the date of

40

the aforesaid purchase, and the balance of Thirteen Hundred Forty-Five ($1345.00) Dollars, payable in eleven monthly installments of One Hundred Twelve ($112.00) Dollars, and one monthly installment of One Hundred Thirteen ($113.00) Dollars, the first of which installments was to become due one month after the execution
10 of the aforesaid agreement, and the remaining installments each and every month thereafter.

3. After the execution of the aforesaid contract, the defendant herein assigned the aforesaid contract to the plaintiff, and the plaintiff herein paid good and valuable consideration therefor to the said defendant.

4. In addition to the assigning of the afore-
20 said contract, the defendant herein, for valuable consideration, guaranteed the full performance of said agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses, costs and attorney's fees, and agreed to pay the attorney's fees and costs of enforcing the said agreement; and said defendant herein waived any and all notice of non-payment, demand, presentment or protest, which may be required under said agreement, or
30 note mentioned in same, or in connection therewith, and further agreed that any extensions granted to the aforesaid, Mercer Beverage Distributors, Inc., a corporation shall not in any manner release the said defendant herein.

5. The amount due on the aforesaid contract is the sum of Eight Hundred Ninety Seven ($897.00) Dollars, besides interest.

6. Although plaintiff has duly demanded the
40 payment of the aforesaid balance sum of Eight

Hundred Ninety Seven ($897.00) Dollars, the said defendant herein has failed and refused and still fails and refuses to pay the whole or any part thereof.

Wherefore, plaintiff demands damages in the sum of Eight Hundred Ninety Seven ($897.00) Dollars, together with lawful interest thereon and costs of suit. 10

FEDER & RINZLER,
Attorneys of Plaintiff.

Schedule "A".

New Jersey Conditional Sale Agreement.

(Made part of this record as Exhibit P-1)

———— 20

Answer.

The defendant, Joseph M. McCrane, answering the complaint of the plaintiff, says:

1. He denies all the allegations contained in the complaint.

FIRST SEPARATE DEFENSE.

The plaintiff herein accepted the Reo Sedan mentioned in the complaint herein, in full satisfaction and discharge of all promises and agreements and of all sums of money mentioned in the complaint. 30

SECOND SEPARATE DEFENSE.

The plaintiff has been paid all sums claimed by it to be due under the contract mentioned in the complaint. 40

THIRD SEPARATE DEFENSE.

Plaintiff and defendant had many transactions similar to the one described in the complaint herein. As a result of such transactions and the agreement of the parties hereto, a custom arose and existed between the parties hereto, that
10 where the note, mentioned in the conditional sales contract which is made a part of the complaint, was made direct to the plaintiff without any endorsement by the defendant, it was understood that the defendant was absolved and released from any further claim arising out of the transaction. The note mentioned in the said contract set forth in the said complaint was made direct to the order of the plaintiff and was not endorsed by the defendant.

20

FOURTH SEPARATE DEFENSE.

During the course of business between the plaintiff and the defendant it became the custom that where a contract and note was assigned by the defendant to the plaintiff, said assignment was to be either "with recourse" or "without recourse". When the assignment was "without recourse" it was understood that there was to be
30 no further liability on the part of the defendant to the plaintiff. The assignment of the conditional sales agreement and note mentioned in the contract described in the complaint was made "without recourse".

FIFTH SEPARATE DEFENSE.

Prior to the institution of the above entitled suit, the plaintiff caused the Reo Sedan named in
40 the complaint herein, to be sold but did not apply

the money received therefor on account of the amount due according to the terms of the conditional sales agreement mentioned in the complaint herein.

SIXTH SEPARATE DEFENSE.

At the time of the assignment of the contract mentioned in the complaint and notwithstanding the terms of said contract, there was an express agreement between the plaintiff and the defendant, that the transaction was without recourse to or liability against the defendant.

10

SEVENTH SEPARATE DEFENSE.

If the defendant guaranteed the performance of the agreement mentioned in the complaint, the signature of the defendant was procured by the plaintiff through the fraud of the plaintiff practiced on the defendant.

20

EIGHTH SEPARATE DEFENSE.

The action commenced by the plaintiff herein is barred by the statute of limitations in such case made and provided.

NINTH SEPARATE DEFENSE.

30

The agreement mentioned in the complaint on which plaintiff bases its cause of action provided for the delivery of a promissory note to the plaintiff. Said note was delivered to the plaintiff and accepted by the plaintiff in payment of all claims due the plaintiff under the aforesaid agreement.

40

TENTH SEPARATE DEFENSE.

Heretofore the plaintiff mentioned herein commenced a suit against the defendant mentioned herein and at the trial of same, said suit was nonsuited by the Court. The costs assessed against the plaintiff in that case have not been paid to the
10 defendant to the date hereof, wherefor this suit has been prematurely commenced.

ABRAHAM A. LEBSON,
Attorney for the Defendant.

Reply.

Plaintiff, replying to the answer filed by the
20 defendant in the above entitled matter, says that:

1. Plaintiff joins issue with the defendant on the allegations of his answer and denies each and every allegation of each and every separate defense.

RESERVATION OF MOTION.

Plaintiff hereby reserves the right, to move, at the time of the trial of the within cause, or previous thereto, on notice to the said defendant, or
30 his attorney, to strike out the third, fourth, sixth and tenth defenses on the ground that they do not set forth any facts constituting a defense to the action;

The Seventh Separate Defense on the ground that it pleads fraudulent conclusions, but does not set forth any facts constituting fraud, or show what the fraud was.

40

Reply.

With regard to the tenth separate defense, the plaintiff also alleges that no costs have been assessed and no notice of the taxation of the costs given to the plaintiff and no copy of the same furnished by defendant, and that an appeal has been taken from the said alleged judgment of non suit and the same is now pending.

10

FEDER & RINZLER,
Attorneys of Plaintiff.

Judgment.

This cause being regularly on the list for trial in the January term, Nineteen Hundred and Thirty-four, and the same being called, and both parties appearing, and a jury empaneled and sworn, and the evidence of plaintiff and defendant having been offered, and the Court, on motion of counsel for the plaintiff, directed a verdict in favor of plaintiff and against the defendant in the sum of One Thousand Two Hundred and Sixty-four Dollars and Seventy-seven Cents.

20

WILLIAM B. HARLEY,
Judge.

30

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Clerk's Certificate.

I, the undersigned, Clerk of the Supreme Court of the State of New Jersey do certify that the foregoing is a true transcript of the pleadings in the above stated cause as the same remain on file in my office.

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

10 (Seal)

FRED L. BLOODGOOD,
Clerk.

20

30

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Notice to Produce.

NEW JERSEY SUPREME COURT.
PASSAIC COUNTY.

SUPERIOR FINANCE CORPORATION,
a corporation,
Plaintiff,

vs.

JOSEPH M. MCCRANE,
Defendant.

10

(Second Case)

TO SUPERIOR FINANCE CORPORATION, OR FEDER & RINZLER, its attorneys:

20

TAKE NOTICE, that you are hereby required to produce to the Court and Jury, on the trial of this cause, a certain written contract, dated the Second day of October, 1926, between McCrane-Reo Co. and Mercer Beverage Distributors, Inc., relating to one (1) Reo Sedan, Serial Number 94364, Motor Number 97707, together with the original Assignment of said Contract made by Joseph M. McCrane to the Superior Finance Corporation; a certain promissory note made by the said Mercer Beverage Distributors, Inc. and/or Alexander Marcus to Superior Finance Corporation; together with all other letters, books, papers, cards, records and writings whatsoever in anywise relating to the matters in question in this cause.

30

And Take Notice that in the event you fail to

40

Notice to Produce.

produce such documents, letters, books, papers, cards, records and writings, secondary evidence will be introduced to prove the contents thereof.

Yours respectfully,

ABRAM LEBSON,
Attorney of Defendant.

10

Service of the within Notice to Produce is hereby acknowledged this 3rd day of March, 1934.

FEDER & RINZLER,
Attorneys of Plaintiff.

20

30

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Testimony.

NEW JERSEY SUPREME COURT.

PASSAIC CIRCUIT.

SUPERIOR FINANCE CORPORATION, a corporation, Plaintiff, vs. JOSEPH M. MCCRANE, Defendant.	At Law.

10

Paterson, N. J., March 8, 1934

Before—HON. WILLIAM B. HARLEY, Judge, and a Jury.

20

APPEARANCES:

For the Plaintiff: FEDER & RINZLER, ESQS., by JACK RINZLER, ESQ.

For the Defendant: ABRAM A. LEBSON, ESQ.

(A jury was duly empaneled and sworn and counsel for the respective parties opened the case to the jury.)

30

SAMUEL SLAFF, sworn.

Direct-examination by Mr. Rinzler:

Q. Mr. Slaff, are you a resident of Passaic? A. Yes.

Q. Have been for how many years? A. Thirty-five.

40

Q. Are you an officer of the Superior Finance Corporation, the plaintiff? A. Yes, sir.

Q. What officer? A. President.

Q. Have been for how many years?

Mr. Lebson: What is his office?

Mr. Rinzler: President.

10 Q. Have been for how many years? A. Since 1925.

Q. And prior to that were you an officer of the same company? A. Yes.

Q. What officer? A. Vice-president.

Q. Vice-president. Have you the conditional sales contract and the guarantee that is the basis of this suit? A. Yes, sir (handing a paper to counsel).

20 Q. Produce it, please. From whom did the plaintiff purchase this contract? A. From Joe McCrane.

Q. The defendant? A. Yes.

Q. And I show you the signature on the back of this contract where the guarantee agreement is and ask you if you recognize the signature (indicating). A. Yes, sir.

Q. Whose signature is it? A. Joe McCrane's.

Q. The defendant's? A. The defendant's.

30 Q. And you have seen him write his name several times? A. Yes.

Q. You know his signature? A. Yes.

Q. And that is it? A. Yes.

Mr. Rinzler: I offer it in evidence.

Q. By the way, the same signature is his on the face of that conditional sales agreement, too, isn't it? A. Yes.

Mr. Lebson: If your Honor please, I

40

have no objection to this conditional sales agreement being offered in evidence, provided the note which is a part of this contract is introduced at the same time.

The Court: Well, it will have to be introduced before the non-suit stage. I will allow it.

10

(Paper marked Exhibit P-1 in evidence.)

Q. Is the plaintiff still the holder and owner of this contract, P-1? Is the plaintiff still the holder and owner of this contract, P-1? A. Yes.

Q. And did the plaintiff actually pay a valuable consideration for it? A. Yes.

Q. How much—I mean to the defendant? A. Yes. $1,167.

Mr. Rinzler: May I read an abstract of it to the jury, your Honor?

20

The Court: Yes.

Mr. Rinzler (To the jury): This is a conditional sales agreement entered into the 2nd of October, 1926, between McCrane-Reo Co. of Hackensack and Mercer Beverage Distributors, the McCrane-Reo being named the seller and the Mercer Beverage Distributors the buyer. The make of car is Reo Sedan, model G, manufacturer's serial number 94364, motor number 97707, number of cylinders and so forth, and it says the selling price is $1,839 and it is payable $112 one month after date and then $112 each month thereafter, and the final payment is $113 thirteen months thereafter. May I be permitted to state, without reading the long series of clauses, that there is a provision in the contract that the

30

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title is reserved and remains in the seller, the Reo dealers, until these sums are paid off in the manner stated.

Mr. Lebson: I think the better way would be to just give the contract to the jury.

Mr. Rinzler: I want them to know, in substance, what this case is about.

10

The Court: Let them take it.

Mr. Rinzler: And then on the back of it it says this: "For value received—Dealers must fill out and sign this form officially. For value received, the agreement on the reverse side"—that is, the side I just mentioned—"and the note herein mentioned." Then it says, "Buyer's name here, and the undersigned and the property therein described, and all the right, title, and interest therein of the undersigned, are hereby sold, assigned, and transferred to Superior Finance Corporation, Paterson, New Jersey, its successors or assigns. The undersigned jointly and severally hereby guarantees the full performance of the said agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses, costs, and attorneys' fees, and agrees to pay the attorneys' fees and costs of enforcing this agreement. The undersigned jointly and severally hereby agrees that in the event of the non-compliance with any of the conditions of this agreement, whether or not repossession has been made or undertaken, suit may be brought by the holder against any one or more or all of the parties hereto, whether or not suit has been commenced

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30

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against the party or parties to the agreement and without waiving any rights to later repossess. The undersigned jointly and severally hereby waives any and all notice of non-payment, demand, or presentment of protest which may be required under said agreement or note mentioned in same or in connection therewith, and agrees that any extensions which may be granted by the holder hereof to the parties to said agreement shall not in any way release the undersigned. Dated the 2nd day of October, 1926, at Hackensack, New Jersey. Signed J. M. McCrane." On the bottom it says, "County of Passaic, New Jersey." On the face of the contract there is a provision that if the sums are not paid the car may be repossessed by the dealer or its successors.

10

20

Mr. Lebson: If your Honor please, just to digress from the ordinary procedure, I have a witness here who is very anxious to get away. In fact, he is required elsewhere, and the only purpose for which I will put him on the stand is to identify his signature to an original audit that he made at one time at the request of this company. Now, will counsel stipulate that this original, which bears his signature, can be admitted in evidence at the proper time, so I can permit him to go?

30

Mr. Rinzler: For what?

Mr. Lebson: For whatever it is—that this is the original that was prepared by him for your client.

Mr. Rinzler: Proving what?

40

Mr. Lebson: Well, let me prove whatever is in it.

Mr. Rinzler: I want to know.

The Court: Assuming it is evidential, will you say it is an accurate statement, so the gentleman can go?

Mr. Rinzler: I want to have a chance to consult with my client before I do that.

Mr. Lebson: Consult with him now, since my witness is very anxious to—

Mr. Rinzler: There should be some privacy between us. I don't want to advertise what is going on. Just look this over, Mr. Slaff, please.

Your Honor, I suggest we let the witness testify now, if he wishes, and let us get it definite.

Mr. Lebson: All right.

(The witness was temporarily withdrawn.)

JAMES F. WELCH, sworn as a witness on behalf of the defendant.

Direct-examination by Mr. Lebson:

Q. Mr. Welch, what is your business? A. Certified public accountant.

Q. And your office is where? A. 129 Market Street.

Q. And did you at one time, at the request of the Superior Finance Corporation, make an audit of their records during the year 1928? A. Yes.

Q. You did. I show you two audits, one bearing date of the 7th of June, 1928, and the other dated March 27, 1928, each of which appears to

be signed by James F. Welch & Company, by J. F. Welch, certified public accountant, and ask you if those are the audits and if the signature on each is yours. A. Yes.

Q. And they were prepared for the Superior Finance Corporation? A. Yes.

Q. And they are the true copies of those particular audits? A. Yes, they are the originals. 10

Q. And, in your opinion, they portray the true portrayal of the condition at the time of these audits—the condition of this business at the time of your audit? A. They do.

Mr. Lebson: You may cross-examine.

Mr. Rinzler: No questions.

Mr. Lebson: I will offer them in evidence.

Mr. Rinzler: You want them marked for identification, don't you? 20

Mr. Lebson: What is that? I want to mark them in evidence.

The Court: For identification.

(Papers marked Exhibit D-1 for Identification.)

SAMUEL SLAFF, recalled. 30

Direct-examination (continued) by Mr. Rinzler:

Q. Now, Mr. Slaff, will you produce the note that is referred to in the conditional sales contract, P-1? A. (The witness handed a paper to counsel.)

Q. That is the note that you acquired at the same purchase from the defendant? A. Yes, sir.

Mr. Rinzler: I offer it in evidence.

(Paper marked Exhibit P-2 in evidence.) 40

Mr. Rinzler (to the Jury): A note from the Mercer Beverage to the order of Superior Finance Corporation, dated October 2, 1926, in the sum of $1,345, payable in the installments that the other contract was payable, and endorsed by the Superior.

10 Q. Is the plaintiff still the holder of that note, Mr. Slaff, and the owner? A. Yes, sir.

Q. Now, Mr. Slaff, will you please state what payments were made on account of the sum involved in that conditional sales contract? A. On November the 10th, 1926, $112.

Q. November 10? A. Yes. January the 8th, 1927, $112. April the 5th, 1927, $112.

Q. April 5, 1927? A. Yes.

Q. Yes? A. And April—May 7, 1927, $112.

20 Q. That is a total of $448 payments? A. $448 payments: balance due $897.

Q. The balance due is $897? A. Yes.

Q. That is a balance of principal; is that correct? A. Balance of principal.

Q. Has anything or any part of the sum—has any part of the sum of $897 been paid? A. No, sir.

Q. Is the entire sum still due and owing? A. Yes, sir.

30 Q. Now, when—I will withdraw it. No payment having been made after the payment of May 7, 1927, what, if anything, did the Superior Finance Corporation do with regard to the automobile described in the contract, P-1? A. They repossessed it.

Q. And that is in accordance with the contract? A. With the contract, yes.

Q. And was notice duly given to the defendant? A. Yes, sir.

40

Q. By registered mail? A. By registered mail.

Q. And notice was duly posted in three public places in the City of Hackensack, New Jersey? A. Yes, sir.

Mr. Rinzler: There is no question about that, is there?

Mr. Lebson: No.

10

Q. Well, at any rate, then, ultimately the sale was held; is that right? A. Yes, sir.

Q. Is there any question about the advertisement, sale, and notices?

Mr. Lebson: No. You have shown me the advertisement notice and I am satisfied.

Q. All right. Then, when the sale was held, what happened at the sale? A. The car was bought in and stowed away by Mochenheim.

20

Mr. Lebson: The car was what?

Mr. Rinzler: Bought in and stored away at Mochenheim's.

Q. It was at Mochenheim's garage that the sale was held, was it not? A. Yes.

Q. And it was bought in by whom? A. By the Superior.

Q. By the plaintiff? A. Yes.

Q. And bought in by the plaintiff? A. Yes, sir.

30

Q. And is this the bill of sale that the plaintiff received from the bailiff? A. Yes, sir.

Mr. Rinzler: I offer it in evidence.

Mr. Lebson: I have no objection.

(Paper marked Exhibit P-3 in evidence.)

Q. And is this the notice, of which one was sent to the defendant and another to the Mercer Beverage? A. Yes, sir.

40

Q. And these are the registry return receipts? A. Yes, sir.

Q. For the registered mail for these notices? A. Yes, sir.

Mr. Rinzler: I offer them in evidence.

Mr. Lebson: No objection.

10

(Papers marked Exhibit P-4 in evidence.)

Mr. Rinzler: Together with the proof of publication.

Mr. Lebson: No objection.

Mr. Rinzler: All as one exhibit.

Q. And then did anybody else bid in at that sale? Were there any other bidders at the sale? A. No, not that I know of.

20

Q. After the plaintiff bought in that car and received a bill of sale where did the plaintiff store the car? A. Mochenheim's.

Q. For how long was it stored there? A. Till 1931.

Q. Then what did the Superior Finance Corporation do with regard to that car? A. Took away the car and stored away in Henry's Garage.

30

Q. Is it still in his storage ever since? A. It is still in his possession now.

Q. Has the plaintiff ever sold or otherwise disposed of that automobile mentioned in the contract, P-1, at any time? A. No, sir. No, sir.

Q. And it is still in storage? A. Yes, sir.

Q. Has the Superior Finance Corporation ever had a buyer or been able to sell that car? A. No, sir.

Q. I don't hear you? A. No.

40

Q. Now, as a result of the default and as a

result of the seizure of the car and the inability to sell it, and giving the defendant all credits to which it is entitled, you say that the balance due the plaintiff is $897, with interest? A. Yes, sir.

Q. And is that the basis, then, for this suit? A. Yes, sir.

Q. On that guarantee? A. Yes.

Q. And that is the extent of the plaintiff's loss and damage? A. Yes, sir. 10

Mr. Rinzler: That is all. Cross-examine.

Cross-examination by Mr. Lebson:

Q. You were president of this company for how long a time? A. Since 1925.

Q. And part of your duties was to appraise automobiles for loan purposes? A. No. 20

Q. In other words—

Mr. Rinzler: One moment. I object to it as irrelevant to the issues, beyond the scope of the direct-examination, as well.

Mr. Lebson: If your Honor please, I think that I am entitled—if it is not I will consent—just two more questions—I will consent to strike it out.

The Court: All right. 30

Q. As part of your duties—

Mr. Rinzler: May I note an exception?

Q. It was part of your duties to appraise automobiles to determine the extent of a loan which your company would loan on that particular car?

Mr. Rinzler: I object to that, your Honor please. Now, that certainly does not mat- 40

ter in this case, what the value of the car was.

The Court: I don't know what Judge Lebson has in mind, but let us find out. We will strike it out if it is not relevant.

Mr. Rinzler: The irrelevancy already appears, I think, and I ask for an exception.

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The Court: All right.

Q. What is your answer to that, Mr. Slaff? A. No, that was not my part.

Q. Then, at the time that this car was repossessed and purchased by your company for a dollar, do you know what the value of that automobile was at that time?

Mr. Rinzler: One moment. I object to that, your Honor please, because the statute, the conditional sales statute of New Jersey, the Uniform Act, says that the seller may buy in at the sale.

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Mr. Lebson: That is right.

Mr. Rinzler: Now, your Honor can understand how ridiculous it would be if that weren't the fact, if nobody else appeared and made a bid or if others did appear, even if a flock of them appeared and didn't make a bid, the sale would go to pieces for that reason alone.

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Mr. Lebson: I don't object to that.

Mr. Rinzler: And it matters not what the value of the car was.

Mr. Lebson: If your Honor please, I think it does, because here is a company that repossesses an automobile that presumably has some value, and if it is the contention of this plaintiff that at that time they conducted a sale in the usual way, sold

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this car for a dollar, my contention is that this car had some worth and the jury ought to know it.

Mr. Rinzler: It doesn't matter. We are controlled by the contract, and neither the Court nor anybody else can make a better contract for them than they made themselves, and that is the test in this case.

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The Court: And particularly where the McCrane Company had notice of the sale. I will sustain the objection and allow the defendant an exception.

Mr. Lebson: All right.

Q. Now, Mr. Slaff, at the time—this is a 1926 Reo automobile? A. Yes.

Q. And at the time that this car was taken over, or, rather, at the time that your company advanced any money, who were the officers of the Superior Finance Corporation? A. Myself as president and Mr. Sam Glass as secretary.

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Q. Mr. Sam Glass as secretary? A. That is right.

Q. And Mr. Glass and you were both actively engaged in that particular business? A. I was actively engaged in that business since January the 1st—

Q. No. I say, at that time were you and Mr. Glass both actively engaged in that business? A. Yes.

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Q. Now, then, as mentioned before, or, rather, you were given payments of $112 apiece for four times. What were you referring to when you were reading, when you were giving those figures? A. A statement that was taken from the books.

Q. May I look at that? A. Yes, sir.

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Mr. Rinzler: My distinguished adversary, the books are here.

The Witness: The books are there, too, if you want them.

Q. Now, then, are you familiar with the bookkeeping system and the record system of your company? A. Yes, sir.

10 Q. Now, isn't it a fact that for each car that you advanced money you have a card in a file or a system of cards? Is that correct? A. Yes.

Q. And those cards indicated whether a sale was a recourse or without recourse; isn't that correct?

Mr. Rinzler: I object. One moment, sir.

(The question was read by the reporter.)

20 Mr. Rinzler: That latter question I object to, sir. Whether or not there was such a card is not relevant or material and would not affect the legal status of the parties or their liability or non-liability under the contract. It is the solemn written agreement that is the test and that controls their liability or non-liability. That contract is the determining factor as to whether or not there is a recourse or non-recourse with liability thereunder.

30 Mr. Lebson: I will withdraw the question.

Q. Was this sale or was this agreement that you had with Mr. McCrane a recourse or non-recourse deal?

Mr. Rinzler: I object on the same ground, that that is a deduction of law that must be drawn or made from the written contract that is the basis of this suit.

The Court: Couldn't they make a subsequent contract?

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Mr. Rinzler: There is no such claim here in this case, sir. There is no such issue before your Honor. No, sir, there is not a single allegation in the answer that that was subsequently modified by any other agreement, and that after-thought is too late now. They don't allege that there was a subsequent oral agreement to alter that written solemn contract that they entered into. That is what contracts are for, to determine rights and liabilities.

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(Discussion.)

The Court: I will allow it.

Mr. Rinzler: I ask for an exception.

The Court: We will see what the status is at the end.

(The question was read by the reporter.)

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Mr. Rinzler: One moment. I think this, if your Honor please, that if he were going to ask whether there was any other agreement entered into and then if he answers yes, what it was, that might be a different thing, but not whether this was a recourse or non-recourse. Then let him put some one on to give—

Mr. Lebson: I expect to.

Q. Will you answer the question, Mr. Slaff? Was this agreement between your company and McCrane a recourse or non-recourse?

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Mr. Rinzler: I object, because "this agreement" refers to the agreement in suit.

The Court: He wants to know whether there was a later agreement, and then follow it up.

Q. Was there any conversation between your

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company and Mr. McCrane at which you were present wherein it was discussed and agreed upon that this agreement was to be a without recourse deal?

Mr. Rinzler: Now I say he has not fixed the time, whether it was after this agreement or not. I want to know. That is the law on this thing and I want to have my client's rights protected.

The Court: All right, don't get excited. Fix the time.

Q. Mr. Slaff, were you present when Mr. McCrane's deal was first negotiated? A. I don't remember.

Q. You don't remember? A. I don't remember.

Q. What is the first that you knew about there being a purchase agreement on the part of your company where Joe McCrane was involved? A. Where I had to pass upon this loan.

Q. When was the first time that you knew about it? A. When I signed the check and handed it over to Mr. McCrane.

Q. So the deal had already been made? A. Yes.

Q. And if you didn't make that deal, Glass made it with McCrane; is that correct?

Mr. Rinzler: I object to it as argumentative and conjectural.

The Court: All right.

Mr. Lebson: All right, withdraw it.

Q. Who made it, if you didn't?

Mr. Rinzler: If he knows.

Q. If you know? A. If I didn't, Mr. Glass did.

Q. Mr. Glass did. All right. Now, then, you

know your system of bookkeeping in your company? A. Yes, sir.

Q. And immediately upon the execution of an agreement or where you purchase a conditional sales contract you make out a card, don't you? A. Yes.

Mr. Rinzler: I object to that as irrelevant, sir. We can't go beyond this contract, your Honor. 10

Mr. Lebson: Well, if your Honor please, here is a man says he didn't make the agreement, Mr. Glass did. I am going to have Mr. Glass testify today. This man is now in control of the records and knows the system, and he can testify as to what he did in this particular case.

Mr. Rinzler: No, the card cannot alter or enlarge or minimize or affect the liability that is the embodiment of the contract sued upon. That is what contracts are for. 20

Mr. Lebson: This man didn't make the agreement.

Mr. Rinzler: The agreement is in evidence, however.

The Court: How do you get around the parol evidence rule barring the altering or amending of a written contract? 30

Mr. Lebson: On the ground that the other officer of the company, who had authority and who made the original agreement with McCrane, is a man who is to testify here today and who, according to our evidence later on, is the person who made this agreement.

Mr. Rinzler: Prove it.

Mr. Lebson: This man can testify to the

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system of bookkeeping in existence there, because that is within their control.

The Court: But here is the point, the legal difficulty, as I see it: You have a written contract, a note—

Mr. Lebson: I will withdraw it and connect it another way.

10 The Court: All right.

Q. Now, Mr. Slaff, when was the first time that you saw this agreement that has been marked as Exhibit P-1? A. When I had to sign the check.

Q. How long after the deal had been made? A. A day, probably.

Q. So, then, you didn't see McCrane sign that, did you? A. I didn't see this particular signing.

Q. You didn't see this agreement—you didn't

20 see this signed? A. No.

Mr. Rinzler: Is the signature of the defendant denied?

Mr. Lebson: No. We admitted it before.

The Court: For the purpose of fixing the time.

Mr. Rinzler: All right.

Q. Now, then, you know—you said before that this "J. M. McCrane" is his signature? A. Yes.

30 Q. And, of course, he signed that on the right line, didn't he? A. Yes.

Q. In other words, he signed it where it is supposed to be signed? A. Yes.

Q. That is right. Now, then, there was $1,345 due on this car at the time you took it over? A. Yes, sir.

Q. For which your company gave $1,167? A. Correct.

Q. For which you made about $170—

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Mr. Rinzler: I object to that. That is not material here, sir. It doesn't make any difference what he made.

The Court: No.

Mr. Lebson: I will withdraw it.

Q. Now, then, as soon as you did that or as soon as you advanced the money to McCrane, you proceeded to collect these various payments from Mr.—from the Mercer Beverage Company? A. Correct, sir. 10

Q. And during that period of time you received four payments? A. Yes.

Q. Then you didn't get any more and you went through with the foreclosure? A. Yes.

Q. And then you took the car? A. Yes, sir.

Q. Now, then, do you remember the car being brought to you? A. No. 20

Q. Do you know where the car was taken from? A. I don't know from where the car was taken.

Q. Of your own knowledge? A. No.

Q. You don't know? A. No.

Q. The first thing you knew this car was in Mochenheim's storage— A. Yes.

Q. —place. Now, then, you have had other deals with McCrane, haven't you? A. Yes.

Q. And isn't it a part of your business dealings with McCrane and others that where you take an automobile and you don't have—and you have it without recourse you usually return it, don't you? 30

Mr. Rinzler: I object to that on the ground—

Mr. Lebson: All right, withdraw it.

Q. Now, then, Mr. Slaff, this car was left at Mochenheim's? A. Sir?

Q. This car was left at Mochenheim's garage? A. Yes, sir. 40

Q. Never was returned to McCrane? A. No.

Q. So far as you know? A. No.

Q. And during the period of three or four weeks when you went through the sale you purchased it for a dollar? A. No, it went through the sale in ten days, I guess.

Q. In ten days? A. Yes, something like that.

10 Q. Didn't you advertise it for three weeks? A. No.

Q. You did not? A. No.

Q. All right. And then you purchased this car for a dollar, didn't you? A. Yes, sir.

Q. Didn't you? And then you left it at Mochenheim's, didn't you? A. Yes.

Q. And then was it staying outside or inside? A. Inside.

20 Q. Inside. And then the next time that car ever left Mochenheim's was when it was taken to Henry's? A. That is right.

Q. About how many years later? A. About three years later.

Q. And where is Henry's place? A. Clifton.

Q. And that is his last name, isn't it? A. Yes.

Q. What is his first name? A. His first name is Henry and his last name is Fornelius.

Q. He is in court here? A. He is in court, yes.

30 Q. Yes. Now, isn't it true that that car today does not belong to the Superior Finance Corporation?

Mr. Rinzler: I object to that. Well, I will withdraw it.

Mr. Lebson: He testified before—

A. Yes.

Q. Isn't it true that that car today doesn't belong to the Superior Finance Corporation? A. Yes, it does.

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Q. It does? A. Yes.

Q. Isn't there a conditional sales contract on that car today? A. No, sir.

Q. Giving—just a moment—giving possession to Henry, but title is kept by your company? Isn't that true? A. No, sir.

Q. And wasn't that car given together with eight or nine other cars to Henry on a conditional sales— 10

Mr. Rinzler: I object to that, sir.

A. No, sir.

Mr. Rinzler: Once that was bought in he had the right to do what he chose with it.

The Court: It goes to his credibility, because he testified it still belongs to him.

Mr. Rinzler: Excepting that as a matter of law he can do anything he wants with his own property. 20

The Court: Yes, only merely that he testified it still belongs to him.

Q. Now, then, when was the last time you saw the car? A. When it was brought to Henry Fornelius.

Q. The car is now about eight years old? A. The car would be about eight years old, yes.

Q. And you never received anything more from the Mercer Beverage Corporation, did you? A. No, sir. 30

Q. And did you ever try?

Mr. Rinzler: I object to that as irrelevant.

Mr. Lebson: If your Honor please, why isn't that necessary under their agreement to use every effort to try to get as much as they possibly can for the benefit of the 40

Samuel Slaff—Recalled—Cross.

defendant, because they are called upon to pay for the full amount?

Mr. Rinzler: Where does the agreement say that? On the contrary, it says that the undersigned jointly and severally hereby guarantees—that is a very important word —guarantees the full performance of sale agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses and so forth.

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Mr. Lebson: To save time I will withdraw it.

Q. In other words, you haven't received anything from the Mercer Beverage to date? A. No, sir.

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Q. Now, then, did you at any time since 1926 have a conversation—did you at any time have a conversation with McCrane from 1926 to date? A. Yes, sir, many times.

Q. Did you or did you not at any time tell him that you knew that this was a without recourse deal?

Mr. Rinzler: I object to that, sir, because any oral statement tending to vary, alter, or contradict the terms of the written contract is inadmissible under the parol evidence rule, as determined by Naumberg vs. Young and many cases.

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Mr. Lebson: Except that we allege a definite agreement which we intend to prove.

The Court: Is this in corroboration of a definite agreement?

Mr. Lebson: Yes.

The Court: In writing?

Mr. Lebson: No. Under paragraph 6 of our answer—

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The Court: Yes, I know, but paragraph 6 of your answer can't change the parol evidence rule.

Mr. Lebson: That is right.

The Court: How do you get around that, that you are altering, amending, or varying the terms of a written contract by parol? **10**

Mr. Lebson: It is not intending to alter it or vary it; it tends to substantiate a conversation had between the principals in this case subsequent to the original deed being made.

The Court: It would have to be in writing.

Q. Now, then, Mr. Glass, who was connected with your company, is no longer connected with your company. 20 Now, then, I show you two audits prepared by Mr. Welch and ask you if they were not prepared at your request. These are the ones that you looked at before. A. Yes, sir.

Q. They were. And I refer particularly to Exhibit D-1 for identification, which is the audit of March the 27th, 1928, and referring to page marked "Schedule A-6," which is headed by the remarks "Superior Finance Corporation, repossessed cars, market values, loans, and not secured 30 by dealers' endorsement," and ask you if you see the Mercer Beverage Company listed there.

Mr. Rinzler: I object to that, your Honor please, as not being admissible, because no oral evidence may be used to vary, alter, or contradict the terms of a written contract.

Mr. Lebson: It is not being used for that purpose, sir. 40

The Court: All right.

Mr. Rinzler: May I have a ruling, sir?

The Court: I will allow it.

Mr. Rinzler: May I have an exception?

Q. Do you see that? A. Yes.

Q. Will you read what it says on the line so far as Mercer Beverages Company is concerned?

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Mr. Rinzler: I object to that on the ground that he can't read from something that is not in evidence.

Mr. Lebson: All right. I will withdraw that question.

Q. I am referring to loan 2,315 to the Mercer Beverage Company, a Reo sedan, 1926. Is it not true that at that time, at the time of this audit, there was $397 due on this car?

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Mr. Rinzler: As shown on that page, you mean?

Q. As shown on that page; is that correct? A. Yes.

Q. And is it not true or doesn't it appear on this page as the records of your company that the loss taken on that is $397?

Mr. Rinzler: Now, one moment. Now, if your Honor please, it is obvious that counsel is trying now to determine a loss in this manner: Here is a company that has an accountant, apparently, go over its books to determine whether it is worth anything in this world, and if so, how much. Now, they go over their assets and if it is a lumber man he says, "I have so many feet of lumber," or any other business, and they say, "I think its value now is so much

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money." But does that, your Honor, tend to affect the liability of a debtor toward his creditor?

(Discussion.)

The Court: I will sustain the objection.

Mr. Lebson: All right.

The Court: And allow you an exception.

Q. Mr. Slaff, where it says here that the balance due on the loan is $897 and the loss taken is $397 and the market value of the car $500, what do you call this $397, a cash loss taken or what? A. This audit is not made for the purpose of—

Q. Now, will you answer the question, please? Do you call this loss of $397 that you have here in your books, making the market value of that car as $500—do you call that a cash loss or what kind of a loss?

Mr. Rinzler: I object to that, your Honor please.

The Court: You should establish what it was.

Mr. Rinzler: That doesn't make any difference, your Honor please. Absolutely not. This plaintiff did what it had the right to do at that sale. If the defendant wanted to come there and bid in it was his prerogative to do that, and whomever paid more money or made the higher bid had the inalienable right to have the bid accepted and receive the car on payment of the money, and after that no power in the world could do anything to him.

Q. What does the $397 show, a cash loss taken on this car? A. No, this $397 shows just by the audit our assets. We bought the car for one dollar.

Q. Yes? A. The car has no value even today.

Q. I am not talking about today; I am talking about 1928 when this audit was made. Did you consider it worth a dollar or five hundred?

Mr. Rinzler: I object to that. That doesn't make any difference at all.

10 Q. Was it worth a dollar or five hundred?

The Court: What they did, not what they did not.

Q. So this was just a book loss; it wasn't a cash loss? A. That was an audit that we are making every time for ourselves, to establish some assets about our company.

Q. All right. Then, when we refer to the other one a month or so later, that was established the

20 same way as the other one? A. Yes, sir.

Q. Have you with you today the card which I referred to before?

Mr. Rinzler: I object to it as irrelevant and immaterial, because it cannot affect the legal liability as governed and controlled by the solemn contract that is the basis of the suit.

The Court: I don't know how you get

30 around Naumberg vs. Young.

Mr. Lebson: I am trying to get around it in every way that I know. All right, you may take the witness.

Mr. Rinzler: I have nowhere to go with him. That is all.

HENRY FORNELIUS, sworn.

Direct-examination by Mr. Rinzler:

Q. Mr. Fornelius, where do you live? A. On 554 Clifton Avenue, Clifton, New Jersey.

Q. How long have you lived in Clifton? A. Oh, about twenty-five years, I guess.

Q. Do you know this Reo sedan that is referred to in this case, in the contract P-1? A. I sure do. 10

Q. And was that car put in storage with you by the Superior Finance Corporation? A. It was.

Q. About how long ago? A. Well, I have the original authorization. It was February 24 when I got it, the end of February, 1932.

Q. 1932? A. That is right.

Q. And you have had it ever since? A. Had it ever since.

Q. Is the car in storage or is it used? A. It is in storage. 20

Q. No registration for it or anything at all? A. Not a bit.

Q. You got it when Mochenheim went out of business? A. That is right, when Mochenheim went out of business.

Mr. Rinzler: That is all.

Cross-examination by Mr. Lebson: 30

Q. Who gave it to you? A. What is that? The car?

Q. Yes. A. I had an authorization from the Superior to go and get it. Edelstein, the owner of the building, gave it to me.

Q. Is that the authorization? A. That is the authorization. The place was bankrupt and it was not used and he had to come up there and release it so I could get it. 40

Q. Now, Mr. Fornelius, isn't it true that there is a conditional sales contract on record today affecting that Reo car? A. I don't know anything about it. All I know that I got authorization to go and get it and put it in storage in my place.

Q. So far as you know there is no conditional sales— A. I don't know anything about the deal at all.

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Q. And you never signed anything? A. Not a thing.

Q. Nothing at all? A. On the Reo?

Q. Yes. A. Well, I don't believe I did.

Q. You are just keeping that car without a signature or anything? A. I got an authorization here to have it, from Mr. Slaff.

Q. But you never gave them anything? A. No, sir.

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Q. No signature of any kind? A. Oh, yes, I believe I did sign that I had the two cars, the Chrysler and the Reo.

Q. Something like this conditional sales contract? A. Oh, no, no, no.

Q. Sure about that? A. Oh, absolutely. Why should I sign anything like that?

Q. That is what I want to know. That is all.

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Mr. Rinzler: That is all. We rest.

The Plaintiff Rested.

Mr. Lebson: If your Honor please, I would like to make a motion for a non-suit now. In the first place, this contract which has been introduced in evidence has on the reverse side of it, the bottom part, "Dealer must fill out and sign this," and it is signed

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by J. M. McCrane. Your Honor will notice on the first page of this agreement the word "Seal" opposite the name, and where the line appears, "Dealer sign here" on the first page—

Mr. Rinzler: On the face of it.

Mr. Lebson: —on the face of it, there is the word "Seal," indicating that if a person signed on that line they would have to put a seal opposite, but the last line is "By," indicating that where somebody signs for a dealer, as owner, officer, or firm member—there is also the word "Seal," intending that if anybody signed on the face of it, of course, it should be an agreement under seal. The reverse part of the contract states, or, rather, the line says "Signed," with the words under it, "Dealer," with the words "Seal" after it; "By," which is signed by J. M. McCrane, has no seal opposite it. This contract was dated on the 2nd of October, 1926. This lawsuit was commenced on the 6th of December, 1932, and my contention is that if McCrane signed that agreement and if it is not an agreement under seal, therefore it was commenced outside of the six-year term set forth by the statute, and I move for a nonsuit on the ground that this case has been brought out of time. That is one point.

(Discussion.)

The Court: All right. Any further grounds? I will rule on the statute of limitations, if you want me to.

Mr. Lebson: Yes.

The Court: This is a motion to non-suit

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on the ground that the statute of limitations has run, the bar being six years, because the contract is not under seal. The case relied upon is Smith vs. Dowden, 92 Law, 318, which holds in the opinion by Justice Bergen, "The endorser of a negotiable note is not a joint obligor with the maker, and payments on account by the maker do not suspend the running of the statute of limitations as to the endorser." And in the body of the opinion by Justice Bergen the point is exactly decided on page 319 where Justice Bergen says, "Taking up the next question whether the same rule applies to the contract of guaranty, we start with the settled rule of law that the statute of limitations begins to run the moment that a right of action accrues, and if the right of action began when the note, the payment of which was the subject of the guaranty, matured, then the statute had run when this action was commenced and was a bar to its prosecution."

Under the circumstances, therefore, the statute of limitations did not run in this case. I will deny the motion and allow you an exception.

Mr. Lebson: I ask that it be noted.

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DEFENDANT'S TESTIMONY.

SAMUEL GLASS, sworn.

Direct-examination by Mr. Lebson:

Q. Mr. Glass, on the 2nd of October, 1926, what was your occupation? A. Secretary for the Superior Finance Corporation.

Q. In other words, Mr. Slaff was then the president and you were the secretary? A. Yes. 10

Q. And were you actively engaged in that capacity for that company? A. Yes.

Q. You devoted your entire time to it? A. That is right.

Q. Now, what were your particular duties with that company at that time? A. General manager of the company.

Q. Do you know Mr. McCrane? A. Very well. 20

Q. How long have you known him? A. Approximately ten to twelve years.

Q. Do you recall the deal that you had with Mr. McCrane involving this Reo sedan? A. I do.

Q. Do you remember that it was a Reo sedan which was purchased by the Mercer Beverage Company from McCrane? A. Yes.

Q. You recall, also, the conditional sales contract? A. Yes.

Q. Did you make this deal yourself with him? A. I did. 30

Q. Did Mr. Slaff have anything to do with the final execution of the agreement? A. Yes, his confirmation was effected when he signed the check.

Q. Now, then, I show you an exhibit which is marked P-1 in evidence and ask you whether that is the original conditional sales agreement? A. Yes, it is.

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Q. I show you a note which has been marked in evidence as Exhibit P-2 and ask you if you have ever seen this note before? A. I have.

Q. I also show you two audits which have been marked for identification and ask you if you have ever seen those before? A. I have seen them.

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Mr. Lebson: I offer these two audits in evidence at this time.

Mr. Rinzler: I object on the ground that they are entirely irrelevant and immaterial to the issues in this case, as controlled by the pleadings and the contract which is the basis of the suit.

The Court: The purpose of the offer is to show that the price or the value of the automobile was $500 and not $1?

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Mr. Lebson: That is one; and the other is to show that this is a true audit, made at the suggestion and at the request of the plaintiff, as has been substantiated by the person who made it, and I submit that they are admissible in evidence for whatever they may be worth.

The Court: I will sustain the objection and allow the defendant an exception.

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Q. Now, did you have any conversation with Mr. McCrane from the 2nd of October, 1926, until—Did you have any conversation with him after the original deal was made? A. You mean this particular transaction?

Q. Yes. In other words, after this assignment was made to the Superior Finance Corporation you saw him from time to time, didn't you? A. Yes, very often.

Q. Did you or did you not make a new agree-

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ment, a definite agreement, with Mr. McCrane subsequent to the execution of that conditional sales contract?

Mr. Rinzler: Now, if your Honor please, I object to that on several grounds. In the first place, if your Honor please, it is not alleged in the answer that there was any subsequent agreement. I say there is no allegation in the answer that there was a subsequent binding agreement made subsequent to the date of the original agreement sued upon, and that is as I have already argued before. Aside from that, I urge as a ground of my objection that a secretary, by virtue of his office, as the authorities say, would have no such power to modify or change an agreement entered into between a corporation by which he is employed. A secretary stands in the position merely of an employe, providing he acts as such. Not every secretary is an employe, but it would be a very dangerous thing, your Honor please, if without any proof of any authority some secretary of the Standard Oil Company, for example, or any corporation, could, without any proof of authority emanating from his corporation—by resolution, for example—go in and say, "This loss was made for this property; I will change it and do it this way." Or, "This agreement was made to sell this man oil at this price; I will cut the price, anyhow." Or, "This man made this agreement with the corporation; I will slash it another twenty per cent." Therefore, it must be shown that this gentleman

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had authority from the corporation to make such an agreement binding upon the corporation, to alter an existing agreement already entered into between the parties. He can't just take that responsibility or assume such a duty himself. It must be shown that he had authority.

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The Court: That is not the point. The question is whether you can alter by parol the terms of the written contract. If it is not in writing I will sustain the objection.

Mr. Lebson: If your Honor please, except that they can make a new agreement, and that is the thing we intend to prove.

The Court: Well, this is not a new agreement; this is part of the same agreement. It is not collateral. I will sustain the objection and allow you an exception.

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Mr. Lebson: I ask that it be noted.

Q. Now, Mr. Glass, what is the meaning—how many years have you been in this business? A. About ten or twelve years.

Q. Is there such a thing known in the trade as a recourse and non-recourse—

Mr. Rinzler: Oh, I object to that, if your Honor pleases. We don't have to call upon the witness to give us a definition of a term like that. There is nothing unusual about the words recourse or non-recourse. And aside from that, the liability, whether there is recourse or not, should be determined from the contract solemnly entered into between the parties.

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Mr. Lebson: I will withdraw it.

Q. After you executed this agreement in writ-

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ing what did you do then? A. Why, we issued a check to the McCrane-Reo Company.

Q. For the amount that has been testified to here? A. Yes.

Q. And then what did you do? A. Then we hoped to get the money.

Q. Now, then, what did you do thereafter? I mean, what was your particular conduct with this case after that time? A. At what particular time, Judge? 10

Q. You gave a check and then you just waited for the payments to come in? A. Yes.

Q. Now, what records were kept in your company so far as this particular case is concerned? A. Why, at the inception of the deal an account card was made out, and then an entry was made in the customers' ledger, and as receipts—as payments were made against the account they were entered in the customers' receipt book and also on the account card. 20

Q. And noted on the card. Now, describe the card.

Mr. Rinzler: Now, I object to that, if your Honor please, because that does not affect the liability or non-liability of this defendant in this case.

The Court: Unless the card showed more than four payments. 30

Mr. Rinzler: That is a different thing. Let him show four payments.

Mr. Lebson: All right, then. I served you with a notice to produce the card. Let us see it.

Mr. Rinzler: Have you any card?

Mr. Slaff: No.

Mr. Rinzler: We have a book in the gentleman's handwriting. 40

The Witness: Show us the card in my handwriting.

The Court: They demanded the production of a card. Have you got it?

Mr. Rinzler: We have no card, sir.

Mr. Lebson: Have you any of the cards at all that pertain to this case?

10 Mr. Rinzler: No, we have no cards. We have books, permanent book records.

Mr. Lebson: Have you any letters pertaining to this deal which I called for in the notice to produce?

Mr. Rinzler: Have you any letters, Mr. Slaff?

Mr. Slaff: I don't know what you mean. (Discussion.)

20 The Court: Don't argue. Don't waste time.

Q. Now, Mr. Glass, you testified that this was noted upon a card?

Mr. Rinzler: I object to that, sir.

Mr. Lebson: Isn't this secondary evidence?

Mr. Rinzler: No, no, no, no, no.

The Court: It has to be material, first,

30 before it can be evidential. It has to be material first.

Mr. Lebson: That is right. It may be material to show payments.

Mr. Rinzler: Ask him whether there were any payments made.

Q. When did you leave this concern? A. In July, 1928.

Q. July, 1928? A. Yes.

Q. And, as far as you can remember, at the

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time that you left that company was this particular card that I am referring to in existence?

Mr. Rinzler: I object to that, sir, as irrelevant and immaterial. It is not competent to the issues in this case.

The Court: It may show payment.

Mr. Rinzler: He can ask the man whether there were any additional payments made. 10

Mr. Lebson: I have to ask one thing at a time.

The Court: I will allow it.

Mr. Rinzler: Exception.

Q. When you left two years after this contract was signed, as far as you recall was that card there? A. By "there" what do you mean?

Q. In the office of the Superior Finance Corporation? A. That card? 20

Q. Yes. A. Yes, absolutely, sir. I thought you said car.

Q. No, card, c-a-r-d. A. Yes, that was at the office.

Q. It was there two years after you left? A. Yes.

Q. Do you recall of your own knowledge how many payments there were on that car? A. I do not. 30

Q. You, of course, don't know what happened to the card, do you? A. No, I don't know just what has developed.

Mr. Rinzler: Counsel returns the letters to me. I want it noted on the record.

The Court: All right.

Mr. Lebson: I wasn't going to steal them.

Q. Now, do you recall that card as you are sitting on the stand now? 40

Mr. Rinzler: Just yes or no.

Q. Do you? A. Yes.

Q. Was it a small card or a large one? A. I should judge about five by eight.

Q. Five by eight, as you recall that card.

Mr. Rinzler: Just one moment. At this time, your Honor please, I want to put in evidence the letters that counsel called for under his notice to produce and in accordance with which he asked me a few minutes ago to produce, which he examined after I handed them to him, and which makes them admissible in evidence.

The Court: Let me see them.

Mr. Lebson: If your Honor please, I am going to put them in.

Mr. Rinzler: I want the Court and jury to have them—

The Court: One at a time.

Mr. Rinzler: —in evidence.

Mr. Lebson: I would like everything I asked for, but I can't get it. I want the card.

Q. Now, as you visualize this card, which was five by eight, what was on it?

Mr. Rinzler: I object to that, if your Honor please, on the ground that it has not been established that the—the object is to show payments and your Honor has otherwise ruled already, that except to show additional payments, if any, that were made the card is incompetent, irrelevant, and immaterial to the issues in this case.

Mr. Lebson: If I had a check that I wanted to introduce in evidence I couldn't just

say, "Well, what is the amount of that check?" I must introduce the whole thing.

Mr. Rinzler: But as your Honor said he has to prove its relevancy first, before he can prove what was on it.

The Court: Go ahead.

Mr. Rinzler: Pardon me?

The Court: I am allowing it merely to show payments. 10

Mr. Rinzler: That is my point.

Q. As you recall the card, describe it.

Mr. Rinzler: No. Your Honor said merely to show payments.

The Court: Show what was on it, if he knows.

Mr. Lebson: I have never seen the card.

Mr. Rinzler: But, your Honor— 20

The Court: Go ahead. I will handle the legal end of it.

A. In the upper left-hand corner was a space for the number of the account.

Q. Yes? A. Right underneath that was a line bearing the date of the contract. To the right of that was the purchaser's name and address and to the right of that was the amount of the check issued to the dealer, plus the finance charge made, 30 and then the total amount of the note.

Mr. Rinzler: Now, you see, your Honor said you would allow it—

Mr. Lebson: Just a moment.

Mr. Rinzler: Wait a minute, please—merely to show payments.

The Court: I am going to strike out the other part when he is finished.

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Q. Proceed. A. Underneath that were eighteen lines, supposedly representing eighteen months. In other words, room for eighteen installments. Different installments were entered on the card, and in a column to the right of that was space for a rubber stamp and initial, showing when payments were to be made. On the extreme right were two lines, one marked "With R," representing recourse—

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Mr. Rinzler: Now, if your Honor please, I object to this. Your Honor can see what counsel is trying to do—get around your Honor's ruling, and it is improper.

The Court: I will admit it. Let us find out.

Mr. Rinzler: He should ask specifically whether there were any payments, not what—

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Mr. Lebson: I am asking him to describe a card which I have never seen.

Mr. Rinzler: Can he describe something that is not material?

The Court: You will have to get it in the record, and then if I direct a verdict you may be able to reverse me.

Q. The last one saying "Without recourse"? A. And one saying "Without R," meaning recourse, and by putting an X—

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Mr. Rinzler: I object to that, if your Honor please.

Q. Not the procedure. Just what was on the card? A. On that particular card the X was underneath "Without R."

Mr. Rinzler: I object to that, sir, because that cannot be put in evidence for the pur-

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pose of affecting the liability or non-liability of the parties.

The Court: I will agree with that. When he gets done we are going to strike it out, except the $112 or except the payments.

Q. What did you say it said so far as "Without R" or "With R"? 10

Mr. Rinzler: Oh, I object to that.

Mr. Lebson: If you let me alone, I can—

The Court: Don't waste time.

Q. Will you answer that, please? A. I didn't hear the question.

(The question was read by the reporter.)

A. It said "Without R."

Q. Was there anything else on the card? A. The dealer's name in the extreme right hand corner, lower corner. 20

Q. And, as you recall it, anything else? A. I do not.

Q. Do you recall how many payments were indicated as having been paid on those eighteen lines? A. I do not.

Mr. Rinzler: I respectfully move, your Honor, that this testimony be stricken out, as to what he testified was shown or appeared on the card. 30

The Court: It will be stricken out, except with regard to payments.

Mr. Rinzler: That is right.

The Court: And an exception will be allowed the defendant.

Q. Now, then, were you ever present when there was a conversation between Mr. McCrane, Mr. 40

Slaff, and yourself subsequent to the execution of the original agreement? A. I don't remember any particular conversation. We had many.

Q. Do you ever recall a conference prior to the date of the assignment of the guarantee? A. Yes, we had several.

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Q. Was there ever any question or discussion concerning the future liability in the event of a default?

Mr. Rinzler: I object to that, your Honor please.

The Court: Sustain the objection, unless you can show it is in writing.

Q. Now, this card that you referred to before, did that bear anybody's signature? A. No.

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Q. Now, any of these payments that were made on account, did they, so far as you know, bear notations indicating that they were being paid with or without recourse?

Mr. Rinzler: I object to that, your Honor.

Mr. Lebson: So far as he knows.

Mr. Rinzler: No. So far as he knows or does not know can't affect the liability as determined by the contract.

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The Court: Sustain the objection and allow the defendant an exception.

Q. What was done with this note after it was delivered to your company? A. Why, it reposed in the safe for some time and after that was deposited at a bank against a loan.

Mr. Lebson: Take the witness.

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Cross-examination by Mr. Rinzler:

Q. Mr. Glass, is this a book of the Superior Finance Corporation (handing)? A. It is.

Q. And is this your handwriting, sir? A. Yes, that is.

Q. And here is the Mercer Beverage Company account, which is the McCrane account in question; is that right? A. Yes.

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Q. And that shows that there was due $1,345? A. That is right.

Q. And then it shows a payment of $112? A. Yes.

Q. And then it shows—where is the next one—a second payment of $112? A. Yes. This is not my handwriting here.

Q. This second payment is not in your handwriting? A. No. The second payment is in my handwriting, but the balance carried over is not.

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Q. But the payment entry is in your handwriting? A. Yes.

Q. And the third one? A. The third one is not in my handwriting.

Q. Not in your handwriting, but under your supervision? A. Yes.

Q. That is $112 for a third time, is it? A. Yes.

Q. And there is the fourth one; is that right? A. That is right.

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Q. So that was in whose handwriting? A. Miss Faulk, I believe.

Q. But under your supervision? A. Yes.

Q. So that there were four payments of $112? A. That is right.

Mr. Rinzler: That is all. No further questions.

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JOSEPH M. McCRANE, sworn.

Direct-examination by Mr. Lebson:

Q. Mr. McCrane, you are the defendant in this case? A. Yes.

Q. Now, what is your business? A. Automobile business.

10 Q. And you have been in the automobile business for some time? A. Yes.

Q. Now, do you recall making this sale to the Mercer Beverage Company? A. Yes.

Q. What kind of a car was it? A. Reo sedan.

Q. And it was sold on a conditional sales contract? A. Yes.

Q. Now, payment was made on account and the balance was to be paid in installments? A. Uh, huh.

20 Q. Now, then, subsequent to that time did you assign this agreement to the Superior Finance Corporation? A. At the time the deal was made we made the assignment.

Q. What was the first thing that you did in regard to this deal? A. As soon as we took the order from the Mercer Beverage Company for the job we telephoned in the financial statement of the Mercer Beverage.

30 Mr. Rinzler: I object to that, sir. The contract is—the document—everything preceding it merged with it.

The Court: I will sustain the objection and allow you an exception.

Mr. Lebson: I ask that it be noted.

Q. Now, at the time that you were preparing this agreement who did you make your negotiations with? A. Mr. Glass, of the Superior Finance.

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Q. And that was the man who preceded you on the stand? A. Yes.

Q. Now, had you had any prior dealings with him? A. Yes.

Q. At the time you assigned this contract, a note for $1,345 was delivered to the Superior Finance Corporation; is that right? A. Yes. 10

Q. Does your name appear on that note in any place?

Mr. Rinzler: It is in evidence. It speaks for itself.

A. No.

Mr. Rinzler: It didn't have to. The contract and guarantee refers to it.

The Court: Don't argue.

Q. Your name does not appear anywhere? A. No. 20

Q. And you delivered this note to the Superior Finance Corporation? A. Yes.

Q. Accepted by them? A. Yes.

Q. Were you ever, subsequent to that time, requested to make any payments?

Mr. Rinzler: I object to that, your Honor please, as irrevant and immaterial.

The Court: I will sustain the objection and allow you an exception. 30

Mr. Lebson: I ask that it be noted.

Mr. Rinzler: Oh, your Honor, I don't want to forget about these letters that your Honor examined. I want to have them marked in evidence.

The Court: All right, wait until Judge Lebson finishes.

Q. Was this car delivered to them? A. Yes.

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Q. Subsequently this car was repossessed? A. So they say.

Q. You didn't go to the sale? A. No.

Q. Why not?

Mr. Rinzler: I object to that as irrelevant and immaterial.

10 Mr. Lebson: Withdraw it.

Q. Now, then, did you ever have any definite agreement between the officers of the Superior Finance Corporation or with any of the officials of the finance corporation about this agreement being a recourse or without recourse deal?

Mr. Rinzler: I object to that. The contract speaks for itself.

The Court: That is true.

20 Mr. Lebson: If your Honor please, I don't like to be asking questions continually and having them objected to, except my contention is that an agreement of this nature, which does not assign to the original person, in this case the Superior Finance Corporation, the original agreement alone, but in addition a note, by a person other than this defendant—it is my contention, sir, that any agreement that may have been 30 made by the Superior Finance Corporation with this defendant should be permitted in evidence, on the ground that it is an additional agreement, and not necessarily for the purpose of violating the parol evidence rule, because that is not the intent here. But I say that any agreement that may have been made by Mr. Glass and this man, whether it was the day after or an 40 hour after the execution of this guarantee

or assignment, is admissible because it is not only fair but I think it is proper from a legal point of view, because it is a new agreement affecting the parties or granting them an additional privilege.

The Court: If you can point out to me in *Naumberg vs. Young,* where they refer to five or six exceptions to the parol evidence rule, that that is one of them, I will agree with you.

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Mr. Lebson: Well, now, isn't it true, sir, that you take a written lease where the rent is stipulated for a certain amount for a certain term—isn't it permissible to have a subsequent agreement after the execution of that lease and vary or even alter the terms of the lease, so far as a reduction in rent is concerned? That has been held to be permissible, I understand—or even to extend the term. I am mentioning that not merely because of the fact that the law itself extends the lease by operation of law where it continues over the term definitely mentioned, but especially in these days where rents have been negotiated for a lower amount, that has been permitted to be a variance—and really not a change of *Naumber* vs. *Young*—as a different agreement. I would not necessarily consider it a novation, because it is not entirely a novation, but it is an additional privilege which, construed with the original agreement, sets forth for the benefit of this Court and jury the entire understanding and agreement between the parties.

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The Court: Well, that is the very vice of

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parol evidence and that is the very reason for the rule that where people solemnly bind themselves together in a written contract the law says it will regard that written contract until they amend it in writing, the purpose being to avoid litigation where one person says we said this and that by parol, and the only exceptions I know of are the exceptions that the Court lays down in *Naumberg* vs. *Young*. If you can show that this comes within it I would go along with you. It seems to be a harsh rule, but I didn't make it; I am only here to enforce it.

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(Extended discussion.)

The Court: It is unfortunate, but what he should have done was to have gone home and dictated a letter and got a reply; then it would have been in writing. I am sorry, but that is the law as I interpret it, and I will have to sustain the objection and allow you an exception for the record.

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Mr. Lebson: I ask that it be noted.

Q. Now, then, do you know of your own knowledge, Mr. McCrane, whether any attempt has ever been made by the plaintiff, the Superior Finance Corporation, to collect any part or all of this from the Mercer Beverage Company?

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Mr. Rinzler: I object to it as irrelevant and immaterial to the issues in this case.

Mr. Lebson: If your Honor please, this is a contract of guarantee. Isn't it an obligation on their part to exert every possible remedy for the benefit of the defendant?

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The Court: It doesn't say so in the contract.

Mr. Lebson: No, except that is the general law in these cases, that they say they should sell automobiles and dispose of them—

Mr. Rinzler: This contract of guarantee says, "that they guarantee to pay whether or not repossession has been had or undertaken," sir. 10

The Court: I will sustain the objection and allow you an exception. That was the old common-law difference between suretyship and guarantee, and the distinction is that this contract is different from the old common-law cases.

Mr. Lebson: I am trying not only common law, but I am trying the present case and trying to make future law. 20

Q. You received notice, did you not, Mr. McCrane, from the Superior Finance Corporation that this car had been repossessed? Or what was the first notice that you had that it was repossessed?

Mr. Rinzler: Well, I object to that. There is no allegation in the answer that there was a faulty repossession or anything of that sort. 30

Mr. Lebson: That is not the purpose. The purpose is that the car was accepted in full—

The Court: I will allow it.

A. I had no knowledge that the car had been repossessed or we had any liability until about two and a half years ago when we were served with 40

papers that we were being sued. Personally I had no knowledge.

Mr. Rinzler: I ask that the answer be stricken out, because it is not what he was inquiring about.

Mr. Lebson: What is that?

10 Mr. Rinzler: I ask that his answer be stricken out.

Mr. Lebson: On the ground that what?

Mr. Rinzler: It is not a competent, responsive answer to the question. It is a volunteered statement.

The Court: I will allow it.

Mr. Rinzler: Exception.

Q. Now, then, Mr. McCrane, you say that prior 20 to the time of the execution of this agreement there was some conversation between you as to recourse and non-recourse?

Mr. Rinzler: I object to that, if your Honor please, as irrelevant and immaterial.

Mr. Lebson: If your Honor please, I am proceeding now under the 7th separate defense. My contention there, sir, is that the defendant entered into an agreement with 30 this plaintiff, according to my contention, based upon a definite understanding of the certain facts, which this defendant later found to his detriment, and my contention is, sir, that if he signed this agreement and if he has not received the benefits that he expected to receive, that this defendant's signature was procured through fraud.

The Court: I think maybe you are in the 40 wrong court, then.

Mr. Lebson: Well, I realize what your Honor has in mind, but fraud is a matter that must be set up as a defense.

The Court: I mean, ordinarily you would pursue your remedy in Equity.

Mr. Lebson: Yes, but can't we overstep the true interpretation of the parol evidence rule where we even allege fraud? 10

The Court: Not in this court. That is an equitable matter. You see, you have a solemn binding contract here and we don't dare to change it. The law does not permit us to. If there was some different arrangement made than was embodied in your contract, that is merged by the written contract. That is good law. That is sound.

Mr. Lebson: Well, I will have to adopt every defense I have listed, and I have loads of them there. 20

Q. Mr. McCrane, have you ever to the date hereof received costs from the plaintiff as a result of the other suit before this court?

Mr. Rinzler: I object to that, if your Honor please. Last week Mr. Lebson, my adversary, made a motion with regard to that before Judge Mackay and his application was denied, and that is not before your Honor now. 30

The Court: I think the time to have done that was before the case was pursued to this length. I will sustain the objection and allow you an exception.

Mr. Lebson: Take the witness.

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Cross-examination by Mr. Rinzler:

Q. Mr. McCrane, who is Duneen? A. He was employed by us at one time—by the bookkeeper.

Q. That is the party whose name appears on the registry return receipt card when the notice of repossession and sale was sent you? A. It maybe his signature.

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Q. He was working for you at the time? A. That is right.

Mr. Rinzler: That is all. No further questions.

GEORGE A. TURNER, sworn.

Direct-examination by Mr. Lebson:

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Q. Now, Mr. Turner, you were formerly employed, in 1926, by whom? Well, I will withdraw that and put it this way: You know something about this Reo sedan, don't you? A. Yes.

Q. And were you the bailiff who sold this car under the conditional sales procedure? A. That is right.

Q. And you sold it at the request of the Superior Finance Corporation? A. Correct.

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Q. Whom did you receive your instructions from?

Mr. Rinzler: I object to that as irrelevant and immaterial.

Mr. Lebson: Well, if your Honor please, here is a man who was their employee, who pursued this procedure of disposing of this car under the terms of the contract. Now, if he can't testify, there is no person available.

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Mr. Rinzler: He has to testify to something material or nothing at all.

The Court: What is the purpose of it?

Mr. Lebson: The purpose is to show under what procedure he conducted the sale.

The Court: You do not allege in your answer that he did not follow the law, do you?

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Mr. Lebson: No, sir, but we do contend many other things. The purpose of this witness' testimony is this: Our contention is that this man was instructed by the plaintiff to proceed with the sale of this car and he was told where to place it after the sale and he was told why to place it there, and I contend that that is evidential.

The Court: I will sustain the objection and allow you an exception.

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Q. Did you serve the notices?

Mr. Rinzler: I object to that, because he said he did not defend on that ground, and the answer does not set up any failure to comply with the repossession law.

The Court: I thought the position was the plaintiff had complied with the—

Mr. Rinzler: With the Act.

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The Court: —1919 Act.

Mr. Lebson: That is right. All right.

Q. At whose suggestion did you start the repossession of this car?

Mr. Rinzler: I object to that. He says he was acting as the bailiff for the Superior. He brought that out himself.

The Court: All right.

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Q. After you sold the car what did you do with it?

Mr. Rinzler: I object to that, sir. That is not relevant or material in this case.

The Court: Sustain the objection.

Q. What did you sell the car for? A. One dol-
10 lar.

Mr. Rinzler: The bill—

Q. And who purchased it?

Mr. Rinzler: The bill of sale is in evidence; that is the best evidence.

The Court: I will allow it, to make the record. Go ahead.

Q. Who purchased it? A. I believe Mr. Glass.

Q. Were you ever present when there was any
20 conversation between Mr. Slaff, Mr. Glass, or Mr. McCrane about this particular deal? A. I was present at some several—on some several occasions. I don't know for sure whether this particular deal was mentioned or not.

Q. Did you see this car that was referred to before at any time? A. Oh, yes.

Mr. Lebson: Take the witness.

Mr. Rinzler: No questions.

30 (The defendant rested.)

The Court: I understand counsel for the defendant wants to convince me on the law. I am willing to take the time to make sure we make no error, and we will argue it in

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the morning and adjourn now until ten o'-clock tomorrow morning.

Mr. Rinzler: May I just get these letters marked in evidence, sir?

(Three papers marked Exhibit P-5 in evidence.)

(Adjourned to Friday, March 9, 1934, at 10 o'clock A. M.) 10

Paterson, N. J., March 9, 1934.

(Trial of the Cause Continued, 10 A. M.)

Mr. Rinzler: If your Honor please, may I read to the jury the letters that were marked in evidence yesterday? 20

The Court: All right.

(Mr. Rinzler read Exhibit P-5 to the jury.)

(Both Sides Rest)

Mr. Rinzler: Now, if your Honor please, the case being in, both sides having rested, I respectfully move to your Honor that you direct the jury to return a verdict in favor of the plaintiff and against the defendant in the sum of $897, besides the interest thereon at the legal rate of six per cent. per annum from October 2, 1926, on the ground that under the uncontradicted evidence in the case there is only one verdict that can legally be rendered, and that is a verdict for the plaintiff in the amount, plus interest, as I have just indicated, and on the ground that there is under the evidence no defense whatsoever to this case, and 30

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none of the defenses set up in the answer have been sustained by any evidence whatsoever.

(Mr. Lebson replied.)

The Court: (After lengthy discussion) This is a motion for a direction of a verdict by the plaintiff for $897 with interest from October 2, 1926, at 6 per cent. The suit is one based upon a guarantee for the performance of the conditions of a conditional sales contract for the sale of an automobile by the defendant to one Mercer Beverage Distributors, Incorporated, of Bloomfield Avenue, Passaic, New Jersey, a Reo sedan, under the conditions and the terms fixed by the sales agreement. There was in evidence a collateral note made between the finance company and the purchaser of the automobile.

This suit is based upon a guarantee for value received. "The agreement on the reverse side and the note herein mentioned between the buyer named and the undersigned, and the property therein described, and all right, title, and interest therein, are hereby sold, assigned, and transferred to the Superior Finance Corporation, Paterson, New Jersey, its successors or assigns." The guarantee signed by the defendant further agrees that "The undersigned jointly and severally hereby guarantees full performance of the said agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses, costs, and attorneys' fees, and agrees to pay the attorneys' fees and costs of enforcing this agreement. The undersigned jointly and severally hereby agrees that in the event of the non-compliance with any of the conditions of this agreement, whether or

not repossession has been made or undertaken, suit may be brought by the holder against any one or more or all of the parties hereto, whether or not suit has been commenced against the party or parties to the agreement and without waiving any rights to later repossess. The undersigned jointly and severally hereby waives any and all notice of non-payment, demand, presentment of protest, which may be required under said agreement or note mentioned in same or in connection therewith, and agrees that any extensions which may be granted by the holder hereof to the parties to said agreement shall not in any way release the undersigned."

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That is the guarantee signed by the defendant upon which the plaintiff sues. They do not sue upon the note. There was an attempt to have introduce in evidence evidence of a collateral agreement made after the signing of the guarantee, not in writing, which would attempt to change the terms of the contract to show that this particular transaction was without recourse. As I understand the case of *Naumberg* vs. *Young,* which I read very carefully last evening, the rule of evidence is that where parties have put their contract in writing the written contract shall be the only evidence of the contract as finally concluded, and that oral or parol testimony of what was said or done during negotiations will not be admitted either to contradict the written contract or to supply terms with respect to which the writing is silent. It is designed to enable the parties to make their written contracts the only evidence of their undertakings and to protect themselves from the hazards of uncertain oral testimony with

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respect to their engagements, and it is a rule indispensable to the security of contracting parties, and, as Justice DePue points out in *Naumberg* vs. *Young,* there are exceptions to the rule, necessarily, and the exceptions to the rule, as announced in that case, and which are still sound law in this State and good law, are, first, where the written contract is incomplete and on its face does not purport to contain the whole agreement between the parties, or, secondly, where the parties in negotiating their agreement, which is reduced to writing, have also entered into another agreement by parol which is collateral to the written contract and is on a subject distinct from that to which the contract relates.

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In this case, therefore, the endeavor by the defendant to show that there was a change in the contract, not of a collateral matter, but changing the very essence of the contract, violates the very essence of the law laid down in *Naumberg* vs. *Young,* which is sound law, and is necessary for the protection of business men who deal with each other in writing.

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Under the circumstances, therefore, there being no evidence to show a defense, there must be a directed verdict for the plaintiff for $897, with interest from October 2, 1926, at 6 per cent., and that is so directed.

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And, gentlemen of the jury, you will understand that there is no question of fact here involved, only a question of law. The parties reduced their agreement to writing. They never changed that in writing, which the law insists must be done, and properly so, and for that reason there is no disputed question of fact to be

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decided, and you will render a verdict for $897, with interest at 6 per cent. from October 2, 1926, in favor of the plaintiff and against the defendant.

And an exception will be allowed to the defendant.

(Side bar discussion between the Court and counsel.)

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Mr. Rinzler: Instead of saying interest from the date of the note, say interest from May 7, 1927, amounting to $367.77, or a total of $1,264.77.

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corporate name by officer signing who must be authorized to sign checks.

161 Herman St.,
Hackensack, N. J.

Exhibit P-1.

P I
3/8/34 J

NEW JERSEY

Conditional Sale Agreement

(ORIGINAL)

This Agreement, made this 2nd day of October 1926 between McCrane-Reo Co., (Dealer's Name) of Hackensack, N. J. (Dealer's Address) first party, his or its successors, or assigns (hereinafter called "Seller,") and Mercer Beverage Distributors Inc., (Buyer's Name.) at Bloomfield Avenue (Buyer's Street Address) in Passaic, N. J. (Buyer's Town and State) second party (hereinafter called "Buyer")

WITNESSETH:—THAT the Seller in consideration of the payments, agreements and conditions contained herein which on the part of the Buyer are to be made, done and performed, has this day delivered and agreed to sell and the Buyer has this day agreed to buy from the seller, but upon the conditions hereinafter recited, to the Buyer the following Passenger or Commercial Car, or Tractor (hereinafter called the "Car.")

MAKE	Type of Body	Model Letter or Number	Manufacturer's Serial No.	Motor No.	No. Cylinders	Advertised Horse Power	If Truck Tons Capacity	Year Model	List Price F. O. B. Factory	Selling Price
Reo	Sedan	G	94364	97707	6	24		1926		$1839.00

With extra equipment, and S. F. Corp. charges } for the sum of (Total Cost to Buyer) Dollars ($ 2017.00)

The Buyer has this day paid to the Seller (Total Payment Made) Dollars ($ 1345.00)

and the Buyer agrees to pay to the Seller, or order balance, in instalments as follows: Dollars ($) (Total Balance to Be Paid)

$ 112.00 One month after date.	$ 112.00 Five months after date.	$ 112.00 Nine months after date.
$ 112.00 Two months after date.	$ 112.00 Six months after date.	$ 112.00 Ten months after date.
$ 112.00 Three months after date.	$ 112.00 Seven months after date.	$ 112.00 Eleven months after date.
$ 112.00 Four months after date.	$ 112.00 Eight months after date.	$ 113.00 Twelve months after date.

which instalments shall bear interest after maturity until paid at the highest legal contract rate and are to be evidenced by a promissory note (not as payment, but as evidence of the amounts to become due hereunder) made by the Buyer to the order of the Seller, bearing date hereof, and maturing on the due dates of said respective instalments. Any extensions or assignments of this Agreement or said note shall not waive any conditions herein contained.

Title to the Car and extra equipment shall not pass by delivery to the Buyer but shall remain vested in and be the property of the Seller or Assigns until the purchase price has been fully paid. Buyer agrees to operate and control said Car in conformity with all Laws and Ordinances and to indemnify and save harmless the Seller from any and all loss, or damage to persons or property caused by said Car or by the use and operation thereof to which the Seller might possibly be subjected.

Buyer agrees and acknowledges that the within contract covers all conditions and agreements between the parties, that the loss, injury or destruction of said Car shall not release said Buyer from payment as provided herein. Buyer hereby acknowledges receipt of and accepts the Car, having first examined and tested the same and found same in sound and first class condition, and agrees to keep the Car insured against loss by fire and theft with insurance companies acceptable to the Seller for not less than the amount owing, and until fully paid, payable to and to protect the interest of the Seller and the Seller may place, continue and renew said insurance for the Buyer at the Buyer's expense if the Seller so elects.

Buyer agrees to pay all taxes, license fees or charges against said Car and to keep same in good condition, and that any equipment, repairs or accessories placed upon said Car shall be at Buyer's expense and become a component part thereof and included in the terms of this Agreement. Buyer further agrees not to use or permit said Car to be used for passenger hire.

Buyer further agrees that he will not use or cause or permit to be used the car, truck or tractor herein mentioned for the transportation of liquor, wines or any other beverage, for personal or commercial use, prohibited by any Federal or State statute to be transported, and it is hereby agreed that should the car, truck or tractor hereinbefore described be used for such purpose or any other unlawful purpose, it shall be considered as a default under the agreement, whether or not there shall be a default under any other terms or conditions thereof, which shall entitle the holder hereof to immediate and continued possession of the car, truck or tractor herein described.

Buyer agrees that in the event of any law or ordinance requiring the recordation of this Agreement, that it shall be recorded at the expense of the Buyer and in his name, and at any time, by the Seller, or the holder of this Agreement.

Should the Buyer fail to keep and perform any or all his agreements herein contained, and to promptly pay at maturity any and all sums hereunder, or if said Car is removed or attempted to be removed from the State in which the Buyer now resides, or to be otherwise disposed of, or if Buyer shall lend, sell or encumber, or shall attempt to sell or encumber said Car or in case of misuse or abuse thereof, or whenever the Seller or his assign shall deem the debt insecure, said Seller may without any demand or notice take possession or said Car and equipments, wherever found and without process of law, and all rights of the Buyer hereunder shall cease and terminate thereupon absolutely. Buyer does hereby expressly waive any right of action against the Seller growing out of the removal, repossession or retention of said Car or otherwise, and hereby consents that upon any default (or in the event that the Buyer for any reason gives up or loses possession of the Car), all unpaid balance of said purchase price and note representing the same shall forthwith become due and payable. Buyer agrees that all payments made shall belong to and be retained by Seller as liquidated damages for the nonfulfillment of this Agreement, for loss in value of the Car, and for the rental value thereof.

Seller may, by suit or otherwise, enforce payment of said note, and no legal proceedings with respect thereto shall be deemed any waiver of said right of Seller to take possession on default or breach as aforesaid. Upon the Seller so taking possession of the Car, Seller may sell the Car at public or private sale at any time thereafter without any notice to the Buyer, and said Seller may become the purchaser thereof, and if the proceeds thereof are insufficient to pay all sums remaining unpaid hereunder and the expense caused by such repossession, removal, reparation, storage, leins and sale, including a reasonable attorney's fee, incurred in taking possession of said Car, or in or about the sale thereof, or in collecting in any manner any sums which may be due and owing hereunder, Buyer agrees to pay any deficiency as damages for use of said property. The waiver or indulgence of any default shall not operate as a waiver of subsequent defaults.

Buyer agrees that said Seller, in case said Buyer fails to comply with any of the agreements aforesaid on Buyer's part to be performed, may cause judgment to be entered against said Buyer upon this agreement for the whole amount unpaid, or upon the said note, interest and costs, whether or not the same shall have become due and payable by reason of maturity or under the conditions of this agreement, and said Buyer hereby waives stay of execution, exemption laws, right of inquisition on real estate, errors and appeals, and further authorizes the prothonotary to take a commission of 5 per cent. as attorney's commission in case execution shall be issued thereon, and for that purpose the Buyer hereby appoints the prothonotary or any attorney of any Court of Record as his lawful attorney to appear for and confess judgment against said Buyer. Time is of the essence of this agreement.

This agreement shall apply to and bind the heirs, executors, administrators and assigns of the Buyer, and shall inure to the benefit of the Seller, Seller's heirs, executors, administrators, successors and assigns, and contains the entire agreement between the parties hereto, their agents or employees, either verbal or written.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals to this Agreement, in triplicate, the day and year first above written.

Witness Lawrence Fitzhugh — MERCER BEVERAGE DIST., INC. (Seal) (Buyer Sign Here)

Address — By Alexander Marcus (Seal) (Owner, Officer or Firm Member)

Witness Chas. Ed. Busam — (Seal) (Dealer Sign Here)

Address — By J. M. McCrane (Seal) (Owner, Officer or Firm Member)

DEALER MUST SIGN ASSIGNMENTS ON REVERSE SIDE

Exhibit P.2.

Ex. PII
3/8/34J

$ 1345 ...... At ...... Hackensack, N. J. ...... October ...... 2nd 19 26
Town or City ...... Month ...... Day ...... Year

The undersigned promises to pay to the order of ... Superior Finance Corporation
Dealer's Name

...... Thirteen hundred and forty five 00/100 ...... Dollars

In New York Exchange at the office of SUPERIOR FINANCE CORPORATION, Regent Theatre Building, 15 Hamilton St., Paterson, N. J. Value received with interest from dates of maturity only at per cent. per annum as follows:

Fill in blank spaces the amount of each payment.

$ 112.00 on One Month After Date	$ 112.00 on Ten Months After Date
$ 112.00 on Two Months After Date	$ 112.00 on Eleven Months After Date
$ 112.00 on Three Months After Date	$ 113.00 on Twelve Months After Date
$ 112.00 on Four Months After Date	$ ...... on Thirteen Months After Date
$ 112.00 on Five Months After Date	$ ...... on Fourteen Months After Date
$ 112.00 on Six Months After Date	$ ...... on Fifteen Months After Date
$ 112.00 on Seven Months After Date	$ ...... on Sixteen Months After Date
$ 112.00 on Eight Months After Date	$ ...... on Seventeen Months After Date
$ 112.00 on Nine Months After Date	$ ...... on Eighteen Months After Date

hereby waiving all exemptions and rights accrued or which may accrue by reason of entering the Military or Naval Service, or other service of the United States or any State, under any Federal or State statute now in effect, or at any time hereafter becoming effective; and upon default in the payment of any installment when due, the whole amount remaining unpaid shall become due, together with costs of collection including reasonable attorney's fee if not paid at that time.

And I (we) hereby authorize, irrevocably, any attorneys-at-law to appear for me (us) in any court of record in the United States and waive the issue and service of process and confess a judgment against me (us) in favor of the holder hereof, for such amount as may appear to be unpaid hereon, together with costs.

This note covers deferred installments under a conditional sale contract made this day between the payee and maker hereof.

MERCER BEVERAGE DIST. INC.
The buyer signs his name here

By Alexander Marcus, Pres.

Buyer's Address ......
161 Herman St.,
Hackensack, N. J.

Partnerships sign firm name by partner signing. Corporations sign corporate name by officer signing who must be authorized to sign checks.

P I

Exhibit P-1.

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State of New Jersey .... } ss:
City—County of .... }

State of New Jersey .... } ss:
City—County of .... }

Before me............ in and for said City—County and State, personally appeared ....
(Official Capacity) (Individual or Firm Member)

known to me to be the person whose name is subscribed to the within instrument of writing, who after being duly sworn acknowledged that he is the buyer named in the within instrument of writing and acknowledged to me that he executed the same as his voluntary act and that said instrument discloses a full description of the property, also the true interest of the vendor, his, its, successors or assigns in said property; that the consideration for his, their, agreement therein contained was actual and adequate, and that same was given in good faith for the purposes and consideration set forth in said instrument.

.... (L. S.)
(Buyer)

Given under my hand and the seal of my office this .... day of............, 192......

My commission expires Feb. 20 1930 Thomas F. Foley
(Acknowledging Officer Sign Here)

ACKNOWLEDGMENT OF OFFICER OF CORPORATION

State of New Jersey, } ss:
City—County of Passaic }

Before me Notary Public in and for said City—County and State, personally appeared Alexander Marcus
(Official Capacity) (Officer of Corporation)

known to me, and acknowledged that he is President of Mercer Beverage Dist. Inc. that he
(Official Position) (Name of Corporation)

executed the within instrument of writing and affixed the corporate seal of said Corporation in its behalf and under authority conferred by its Board of Directors for the purposes and considerations therein expressed, and further being by me duly sworn he stated on oath that said instrument was executed by him as a free and voluntary act of said Corporation, and that the same discloses a full description of the property and also the true interest of the mortgagee, his, its, successors or assigns in said property; that the consideration for its agreement therein contained was actual and adequate and that same was given in good faith for the purposes and considerations set forth in said agreement.

Alexander Marcus (L. S.)
(Officer of Corporation Sign Here Individually)

Given under my hand and the seal of my office this 2nd day of October, 1926

....
(Acknowledging Officer Sign Here)

My commission expires ...., 192...... ....
(Official Capacity)

DEALERS MUST FILL OUT AND SIGN THIS FORM OFFICIALLY

FOR VALUE RECEIVED, the Agreement (on the reverse side) and the note herein mentioned

Between .... and the undersigned, and the property therein described
(Buyer's Name Here)

and all the right, title, and interest therein of the undersigned are hereby sold, assigned and transferred to

SUPERIOR FINANCE CORPORATION
PATERSON, N. J.

its successors or assigns. The undersigned jointly and severally hereby guarantees full performance of said Agreement in all its terms and the prompt payment of any and all sums provided therein, together with collection expenses, costs and attorney's fees, and agrees to pay the attorney's fees and costs of enforcing this agreement. The undersigned jointly and severally hereby agrees that in the event of the non-compliance with any of the conditions of this Agreement, whether or not repossession has been made or undertaken, suit may be brought by the holder against any one or more or all of the parties hereto, whether or not suit has been commenced against the party or parties to the agreement and without waiving any rights to later repossess. The undersigned jointly and severally hereby waives any and all notice of non-payment, demand, presentment or protest, which may be required under said Agreement, or note mentioned in same, or in connection therewith, and agrees that any extensions which may be granted by the holder hereof to the parties to said Agreement shall not in any manner release the undersigned.

Dated this 2nd day of October 1926 Signed: .... (Seal)
(Dealer)

At Hackensack State of New Jersey By J. M. McGrane
(Dealer's Town) (Officer, Firm Member or Owner)

Specify New or Second Hand New Use of Car............

hereinafter called the "property" and kept at No............ Street, in Passaic

County of Passaic State of New Jersey.

For value received, we, and each and all of the endorsers hereon, jointly and severally guarantees payment of principal and interest of the within note, as and when the same shall become due, and of any extensions thereof in whole or in part, accepting all its provisions, authorizing the maker, without notice to us, or either of us, to obtain an extension or extensions in whole or in part, and waiving presentment for payment, demand protest and notice of protest and non-payment; also agreeing that in case of non-payment of principal or interest when due such arrearage may be offset by application of any amount, or amounts, whole or in part, which may be due any of us from the holder of such note and suit may be brought by the holder of this note against any one or more or all of us, at the option of said holder, whether such suit has been commenced against the maker or not, and that in any such suit, the maker may be joined with one or more or all of us, at the option of the holder, hereby waiving all exemptions and rights accrued or which may accrue by reason of entering the Military or Naval Service or other service of the United States or any State, under any Federal or State statute now in effect or at any time hereafter becoming effective.

DEALER SIGN HERE

SUPERIOR FINANCE CORPORATION

Samuel Glass, Secy.

Exhibit P-2.

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Exhibit P-3.

Affidavit of Publication of George J. Gross, bookkeeper of the Paterson Evening News, of Notice of Sale of an automobile retaken from the Mercer Beverage Distributors Inc., and purchased from the McCrane Reo Company, setting forth the day of sale on Monday, June 20th, 1927, at 11:30 A. M., at J. W. Muckenheims, 343 Main
10 Street, Hackensack, New Jersey, which said Notice of Sale bore the name of George A. Turner, Bailiff.

and

Bill of Sale dated June 20th, 1927, from George A. Turner, Bailiff, and Attorney in fact for Superior Finance Corporation to the Superior Finance Corporation for the sum of One ($1.00) Dollar for a certain 1926 Reo sedan, serial number
20 94364, motor number 97707, which said Bill of Sale signed in the presence of Samuel Slaff and Florence M. Falk; and the acknowledgment taken on said date by the said Florence M. Falk, as Notary Public.

Exhibit P-4.

Affidavit of George J. Gross identically the same
30 as the Affidavit offered in Exhibit P-2, together with a Notice of Sale of a Reo sedan, serial number 94364, motor number 97707, to be sold on June 20th, 1927, at 11:30 A. M., at J. W. Muckenheims, of 343 Main Street, Hackensack, New Jersey, which said Notice bore the name of George A. Turner, Bailiff, together with two registry return receipts, bearing date, Hackensack, New Jersey, June 9th, 1927; name of sender, Superior Finance Corporation; name of addressee, McCrane
40 Reo Company, signed by Red Dunhan, and the

other addressee Mercer Beverage Distributors, Inc., signed by Mrs. A. Marcus.

Exhibit P-5.

May 19, 1927

McCrane Reo Co.,
Passaic St.,
Hackensack, N. J.

Gentlemen:

On May 10, 1927, we mailed a letter to Mercer Beverage Dist. Inc., regarding payments due in the sum of $336.00. The letter was returned unclaimed. Will you please see that such payments be made to us, as you are responsible, under the conditional sales agreement.

Unless we hear from you by June 1, 1927, we will repossess the car and look forward to you for payment in full with all expenses.

Yours very truly,

SG/AG Secretary.

* * * * *

June 22, 1927.

McCrane Reo Co.,
Passaic St.,
Hackensack, N. J.

Gentlemen:

This is to advise you that the sale of the Reo Sedan was held on the 20th day of June, 1927. We purchased the car for One ($1.00) Dollar.

Exhibit P-5.

We will look to you for the balance due us plus interest.

Yours very truly,

SS/AG President.

* * * * *

McCrane-Reo Company, December 5, 1929.
Hackensack, N. J. Attention Mr. Joe McCrane.

10 Dear Sir:

We still have the Reo sedan in our possession. Unless you will redeem same within twenty days from the above date, we will start suit against you.

Hoping you will avoid the additional expense, we remain,

Yours very truly,

20 SUPERIOR FINANCE CORPORATION
SS/FMF President.

Exhibit D-1 for Identification.

JAMES F. WELCH & CO.
Certified Public Accountants
129 Market Street
Paterson, N. J.

June 7, 1928

30 Superior Finance Corporation,
Paterson, New Jersey.

Gentlemen:

We have completed our examination of your books of account for the three (3) months ended March 31, 1928, and submit herewith our report comprising the following Exhibits and Schedules:

Exhibit "A"—Balance Sheet as at March 31,
40 1928.

Exhibit D-1 for Identification.

Schedule "A-1"—Cash in Banks.

Schedule "A-2"—Loans Receivable, without collateral.

Schedule "A-2a"—Notes Receivable, discounted for Turner Lumber Agency.

Schedule "A-3"—Loans Receivable, Dealers and Others.

Schedule "A-4"—Mortgages Receivable. 10

Schedule "A-5"—Loans secured by Dealers' Endorsements — Repossessed Cars — Balances due on Loans.

Schedule "A-6"—Loans not secured by Dealers' Endorsements—Repossessed Cars—Market Values.

Schedule "A-7"—Notes Payable—Banks.

Exhibit "B"—Statement of Income and Expense and Surplus for the quarter ended March 31, 20 1928.

Exhibit "C"—Comparative Balance Sheets, March 31, 1928—December 31, 1927. * * *

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Schedule "A-5"

SUPERIOR FINANCE CORPORATION

Loans Secured by Dealer's Endorsement

Repossessed Cars—Balance due on Loan

Note No.	*Maker Description*	*Stored at*	*Book Value Mar. 31, 1928*
2415	Gus Avato—1922 Kissel Touring	Service Passaic	$186.00
2436	Carlos M. Avias—1922 Chandler Sedan	Muchenheims	115.56
2310	Lester J. Bonor—1922 Studebaker	Asbell	216.00
2930	Alfred Bengamin—1925 Ford Touring	Hinchman Bros.	190.00
2248	Edward Bennett—1924 Chev. Touring	Hinchman Bros.	124.00x
2338	Frank Busica—1926 Reo Canopy	McCrane	433.20x
2249	Jos. Guffalino—1926 Ford Stake	McCrane	328.00
3214	H. W. & M. C. Bignell—1926 Stude. Sedan	Simpson's	621.50x
1792	John Boonstra—1926 Reo Sedan	McCrane's	366.08
2233	John Boonstra—1926 Reo Stake	McCrane's	1,257.24
2847	Floyd Conklin—1924 Rickenbacker Sedan	Teetsel	801.60x
2539	Patsy Cuicio—1924 Olds. Touring	McCrane's	269.80
2566	Frank Conklin—1924 Ford Touring	Hinchman Bros.	105.00

2655	Vernon Coons—1925 Essex Coach	Hinchman Bros.	286.00
2744	Russell Cooper—1924 Ford Sedan	Hinchman Bros.	104.40
3225	Patrick Day—1926 Star Cpstr.	Hinchman Bros.	255.00
2305	Edward Drummond—1925 Ford Roadster	Hinchman Bros.	136.10
1400	John Earls—1925 Reo Sedan	McCrane Passaic	1,352.43
2486	Jacob Earl—1921 Dodge Sedan	Hinchman Bros.	127.40
2341	D & K Engel—1926 Reo Truck	McCrane	1,729.00
2880	John Emanuel—1920 Marion Sedan	Muckenheim's	140.00
2745	George Everett—1924 Chev. Sedan	Hinchman Bros.	122.60
3295	Wm. R. Friedhoff—1928 Gardner Sedan	Weinstein	1,650.00x
2327	Abraham Falloon—1927 Star Touring	Hinchman Bros.	77.68
2124	H. Green—1922 Paige Roadster	Cavanaugh Passaic	157.00
1987	—Wm. Ginnenthal—1924 Reo Speed Wagon	McCrane	80.77x
2105	Angelo Giordano—1924 Reo Carryall	McCrane	94.59x
2750	Harry Gray—1927 Moon Cab	Union Garage, Rutherford	437.34
2321	Peter Gould—1925 Chev. Touring	Hinchman Bros.	216.00x
2340	Rev. Luther M. Hudson—1924 W. K. Sedan	McCrane Reo	106.95
1582	Albert Hopkinson—1925 Reo Truck	McCrane	454.07
2208	Mamie & Joe Haslem—1926 Reo Sedan	McCrane	672.00
3088	Emma Hunter—1923 Dodge Coupe	Municipal Garage	159.00
2206	Walter Hughes—1926 Star Roadster	Hinchman Bros.	512.00
2570	Haledon Sup. Laundry—1924 Reo Panel	McCrane	360.00
2939	Haledon Sup. Laundry—1926 Reo Truck	McCrane	890.00

Note No.	Maker Description	Stored at	Book Value Mar. 31, 1928
2994	Jas. Henderson—1922 Stud. Spec. Rdster.	Asbell	162.00
2985	Isidor Katz—1927 Star Coach	Reichner	294.00
2733	Gustav Kitchell—1926 Ford Roadster	Hinchman Bros.	130.00
		Forward	$15,721.21

Schedule "A-5."

SUPERIOR FINANCE CORPORATION

Loans Secured by Dealer's Endorsement

Repossessed Cars—Balance due on Loan

Note No.	Maker Description	Stored at	Book Value
		Forwarded	$15,721.21
2346	M. Klynsma & Alexander—1924 Ford Trk.	Hinchman Bros.	212.00
2822	Howard Kanis—1924 Reo Touring	McCrane Paterson	154.70
2382	John Lynch—1925 Star Sedan	Asbell	120.00x
3081	Julius Lust—1926 Essex Coach	Hinchman Bros.	275.00
1662	Jas. McCornish—1924 Reo Coupe	McCrane	335.00
1454	T. J. Malmendier—1922 Packard Truck	Albanese	1,040.05
1976	Maurice Marks—1926 Chrysler Tour.	Muchenheim	425.10
2366	Wm. H. Meyers—1924 Overland Sedan	Hinchman Bros.	172.20
2457	Emil Mozzonna—1924 Stutz Roadster	Wm. James Pompton Lakes	121.00

2410	Vincent Natale—1921 Cole Sedan	I. R. Motor Sales	50.00
2282	Arthur L. O'Dell—1923 Maxwell Tour.	Hinchman Bros.	189.70
2720	Alfred T. Pinet—1922 Stude. Road.	I. R. Motor Sales	155.00
707	Isaac Paxton—1923 G. M. C. Truck	Albanese	600.11
2258	Lewis Pierce—1927 Star Coach	Hinchman Bros.	460.37
2313	A. E. Risden, Jr.—1923 Maxwell Tour.	Hinchman Bros.	266.40
2345	Clifford Rhinesmith—1923 Ford Coupe	Hinchman Bros.	176.00x
2789	Lester G. Romain—1924 Reo Truck	Kreger's Pompton Lakes	555.00
2549	Sam'l J. Ritchie—1923 Hudson Coach	Malewski	100.00x
2086	Herbert Redner—1926 Star Sedan	Hinchman Bros.	267.03
2170	Geo. Ryerson—1926 Star Coupster	Hinchman Bros.	163.35
2347	Clinton Ryerson—1925 Star Touring	Hinchman Bros.	110.50
2635	Elwood Ricker—1926 Ford Roadster	Hinchman Bros.	200.00
3012	Ernest C. Richardson—1924 Olds. Touring	Willis	109.20
2731	Peter Sisco—1922 Chalmers Tour.	Hinchman Bros.	45.58
2085	Archibold Stewart—1922 Maxwell Touring	Kreger's Passaic	116.00x
2336	Morris Slavin—1923 Dodge Truck	Kreger's Passaic	125.00x
1390	A. Schrater—1925 Reo Panel	Heitman's	195.00
1739	A. Schrater—1924 Reo Panel	Heitman's	227.50
1158	Abe Schrater—1924 Reo Truck	McCrane	464.43x
1600	Benj. Scortino—1923 Paige Touring	McCrane	578.03
2255	Jacob Sisco—1922 Buick Rdster.	Hinchman Bros.	199.40x

Note No.	Maker	Description	Stored at	Book Value Mar. 31, 1928
2683	Walter Shay	—1925 Essex Coach	Hinchman Bros.	287.40x
2598	Noah Talmadge	—1925 Essex Coach	Hinchman Bros.	127.20x
3113	C. G. & Mildred Udell	—1928 Moon Rdstr.	Union Garage E. Rutherford	940.00
1726	Mary Van Gineken	—1925 Reo Exp.	McCrane	754.54
2337	Wilham Weisman	—1923 Reo Truck	McCrane Paterson	262.36
1808	Louis Williams	—1926 Reo Dump	McCrane	1,446.36x
2953	Helen J. Warburton	—1927 Reo Brog.	McCrane Hack	906.59
1616	Vincent Zacconia	—1923 Oakland Sedan	Kregers Passaic	395.00
			TOTAL	$29,049.91

(x) Indicates cars for which no garage receiptwas seen by us.

Schedule "A-6"

SUPERIOR FINANCE CORPORATION

Repossessed Cars—Market Value—

Loans Not Secured by Dealer's Endorsement

Note Number	*Maker*	*Description*	*Market Value of Car*
2841	Sam Bohn	—1924 Jordan Brougham	$323.00
3106	Wm. J. Cruthers	—1927 Chandler Coupe	654.00
2759	John Dombal	—1924 Stude. Touring	1.00
2375	Fred Duffy	—1926 Reo Stake	598.76x
3057	Paul F. Edwards	—1927 Gardner Brougham	1,565.80
2509	John Falloto	—1926 Star Coupe	400.00
2413	Arnold Freelander	—1924 Overland Sedan	1.00
649	Frank Iozzia	—1923 G. M. C. Truck	700.00
1815	Robert Kasdin	—1925 Moon Sedan	100.00
2779	Jos. B. Lee	—1927 Star Roadster	439.00
3086	James Losciaco	—1924 Chevrolet Sedan	1.00
1839	E. H. and C. Marshall	—1926 Reo Truck	600.00
2070	Pasquale Mosca	—1926 Star Sedan	400.00
2315	Mercer Beverage Co.	—1926 Reo Sedan	500.00
1984	P. J. Nelson	—1923 Maxwell Touring	1.00
1690	Elwood S. Phillips	—1923 Hudson Coach	1.00
2012	Andrew Ried	—1927 Diana Sedan	1,260.00
2414	David C. Ross	—1926 Reo Coupe	400.00
1424	P. Sinibaldi	—1923 G. M. C. Trucks	1,000.00
2531	Anthony Segreto	—1927 Essex Coach	300.00
2226	Tony Tronia	—1926 Chrysler Coach	383.33x
2135	John Tagno	—1926 Star Sedan	400.00
2578	J. & J. Toregrosso	—1927 Moon Brougham	500.00
3109	Wm. Torriellow & John Sansone	—1926 Buick Brougham	961.00
2589	Pieter Smit	—1925 Star Touring	1.00
2619	Samuel Vigorito	—1924 Essex Coach	1.00
3111	J. M. Voroon	—1927 Star Coupe	475.00
			$11,966.89

(x) Indicates cars for which no garage receipt was seen by us.

JAMES F. WELCH & CO.
Certified Public Accountants
129 Market Street
Paterson, N. J.

March 27, 1928.

Superior Finance Corporation,
Paterson, New Jersey.

Gentlemen:

We have completed our examination of your books of account for the year ended December 31, 1927 and submit herewith our report, comprising the following Exhibits and Schedules:

Exhibit "A"—Balance Sheet as at December 31, 1927.
Schedule "A-1"—Cash in Banks.
Schedule "A-2"—Loans Receivable, without collateral.
Schedule "A-2a"—Notes Receivable, Discounted for Turneer Lumber Agency.
Schedule "A-3"—Loans Receivable, Dealers and Others.
Schedule "A-4"—Mortgages Receivable.
Schedule "A-5"—Repossessed Cars—Market Values—Loans not Secured by Dealers' Endorsements.
Schedule "A-6"—Repossessed Cars—Balance due on Loans—Loans not Secured by Dealers' Endorsements.
Schedule "A-7"—Notes Payable—Banks.
Exhibit "B"—Statement of Income and Expense for the year ended December 31, 1927, also for the three months period ended December 31, 1927.
Exhibit "C"—Comparative Balance Sheets, December 31, 1927 and December 31, 1926.
Exhibit "D"—Losses Charged against Reserves Account during 1927.

Superior Finance Corporation (2) * * *

Schedule "A-5"

SUPERIOR FINANCE CORPORATION

Repossessed Cars; Balance due on Loans—
Loans secured by Dealer's Endorsement

Note No.	*Maker* *Description*	*Stored at*	*Book Value Dec. 31, 1927*
2415	Gus Avato—Kissel Touring 1922	Service Passaic	$186.00
2310	Leslie J. Bonor—Studebaker 1922	Heitmans	216.00
2930	Alfred Benjamin—Ford Touring 1925	Hinchman Bros.	190.00
2248	Edward Bennett—Chev. Touring 1924	Hinchman Bros.	196.00
2338	Frank Busica—Reo Canopy 1926	McCrane	433.20
2249	Jos. Buffalino—Ford Stake 1926	McCrane	328.00
2847	Floyd Conklin—Rickenbacker Sedan 1924	Teetsel	801.60
2539	Patsy Cuicio—Olds Touring 1924	McCrane	269.80
2566	Frank Conklin—Ford Touring 1924	Hinchman Bros.	105.00
2655	Vernon Coons—Essex Coach 1925	Hinchman Bros.	286.00
2744	Russell Cooper—Ford Sedan 1924	Hinchman Bros.	154.40
2305	Edward Drummond—Ford Roadster 1925	Hinchman Bros.	136.10
1400	John Earls—Reo Sedan 1925	McCrane Passaic	1,352.43
2486	Jacob Earl—Dodge Sedan 1921	Hinchman Bros.	127.40

Note No.	*Maker Description*	*Stored at*	*Book Value Dec. 31, 1927*
2341	Daniel & Kath. Engel—Reo Truck 1926	McCrane	1,729.00
2880	John Emanuel—Marmon Sedan 1920	Muckenheim's	240.00
2745	George Everett—Chev. Sedan 1924	Hinchman Bros.	199.70
2215	Frank Fazick; Joe Carey—Stude. Tour	McCrane	361.00x
2327	Abraham Falloon—Star Tour 1927	Hinchman Bros.	77.68
2950	Jas. Freestone—Olds Sedan 1924	Ferero	128.00
2124	H. Green—Paige Roadster 1922	Cavanaugh Passaic	157.00
1987	Wm. Ginnenthal—Reo Speed Wagon 1924	McCrane	80.77
2105	Angelo Giordano—Reo Carryall 1924	McCrane	494.59x
2750	Harry Gray—Moon Cab 1927	Union E. Rutherford	583.12
2321	Peter Gonda—Chev. Touring 1925	Hinchman Bros.	216.00
1582	Albert Hopkinson—Reo Truck 1925	McCrane	1,049.07
2208	Mamie & Joe Haslem—Reo Sedan 1926	McCrane	672.00
3088	Emma Hunter—Dodge Coupe 1923	Municipal Garage	91.00
2206	Walter Hughes—Star Rdster 1926	Hinchman Bros.	512.00
2570	Haledon Sup. Laundry—Reo Panel 1924	McCrane	360.00
2939	Haledon Sup. Laundry—Reo Truck 1926	McCrane	890.00
2346	M. Klyman—Ford Truck 1924	Hinchman Bros.	212.00
2822	Howard Kanis—Reo Touring 1924	McCrane Paterson	154.70
2692	Jesse Krum—Chrysler Phaeton	Quackenbush	340.00x

2382	John Lynch—Star Sedan 1925	Asbell	120.00x
1662	Jas. McCornish—Reo Coupe 1924	McCrane	335.00
1454	T. J. Malmendier—Packard Truck 1922	Albanese	1,040.05
1970	Maurice Marks—Chrysler Tour 1926	Muchenheim	425.10
2366	Wm. H. Meyers—Overland Sedan 1924	Hinchman Bros.	172.20
2457	Emil Mazzonna—Stutz Roadster 1924	Wm. James, Pompton Lakes	396.00
2410	Vincent Natale—Cole Sedan 1921	L. R. Motor Sales	75.00
2282	Arthur L. O'Dell—Maxwell Tour 1923	Hinchman Bros.	189.70
2720	Alfred J. Pinet—Stude Road. 1922	L. R. Motor Sales	155.00
707	Isaac Paxton—GMC Truck 1923	Albanese	600.11
2258	Lewis Pierce—Star Coach 1927	Hinchman Bros.	460.37
2313	A. E. Risden,Jr.—Maxwell Tour 1923	Hinchman Bros.	266.40
2345	Rhinesmith—Ford Coupe 1923	Hinchman Bros.	176.00
2789	Lester G. Romain—Reo Truck 1923	Kreger's Pompton Lakes	555.00
2086	Herbert Redner—Star Sedan 1926	Hinchman Bros.	267.03
2170	Geo. Ryerson—Star Coupster 1926	Hinchman Bros.	163.35
2347	Clinton Ryerson—Star Tour 1925	Hinchman Bros.	110.50
2635	Elwood Ricker—Ford Roadster 1926	Hinchman Bros.	200.00
		Forward	$19,036.37

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New Jersey Court of Errors and Appeals

SUPERIOR FINANCE CORPORATION,
a corporation,
Plaintiff-Appellee,

vs.

JOSEPH M. MCCRANE,
Defendant-Appellant.

BRIEF ON BEHALF OF DEFENDANT-APPELLANT.

This is an appeal from a judgment entered on a directed verdict by the Honorable William B. Harley, formerly Judge of the Court of Common Pleas, in favor of the plaintiff and against the defendant in the sum of One Thousand Two Hundred and Sixty-four Dollars and Seventy-seven Cents ($1,264.77). Appellant contends that the action of the trial court in directing such verdict was erroneous, and that the case should either have been submitted to the jury for its determination, or appellant's motion for a non-suit granted.

Statement of Facts.

Plaintiff-appellee is a finance company engaged in the business of purchasing and dealing in negotiable instruments, conditional bills of sale, etc. Defendant-appellant is an automobile dealer engaged in the business of selling Reo automobiles in the City of Hackensack, New Jersey. It was

his practice to assign and transfer to appellee, the Conditional Sales Agreements and notes received by him in payment of cars sold.

On October 2nd, 1926, defendant-appellant sold to the Mercer Beverage Dist., Inc., a Reo sedan and received in addition to a down payment, the Conditional Sales Agreement marked P-1 in evidence, (Case, 74), together with the note marked P-2 in evidence, (Case, 75), both of which appellant assigned to plaintiff. It will be noted that said note did not bear appellant's endorsement. Both the Conditional Sales Agreement and the note indicated that the balance due thereon amounted to the sum of Thirteen Hundred and Forty-five ($1345.00) Dollars, payable in eleven monthly installments of One Hundred and Twelve ($112.00) Dollars each, and one installment of One Hundred and Thirteen ($113.00) Dollars, the first payment to become due November 2nd, 1926, and a like payment each and every month thereafter. The Conditional Sales Agreement contained the following provision:

> "* * * upon any default (or in the event that the buyer for any reason gives up or loses possession of the car) all unpaid balance of said purchase price and note representing the same shall forthwith become due and payable."

The note also provided that:

> "* * * upon default in the payment of any installment when due, the whole amount remaining unpaid shall become due together with costs of collection including reasonable attorney's fee if not paid at that time."

The payment due November 2nd, 1926, in fact was not paid until November 10th, 1926. The payment due December 2nd, 1926, was not paid

until January 8th, 1927. By the terms of the aforesaid Conditional Sales Agreement and note, hereinabove referred to, defaults therefore existed and the unpaid balance automatically became due and payable. Because of defaults in payments, respondent saw fit to repossess and sell said truck. Suit herein was not commenced, however, until December 6th, 1932, a period of more than six years after the above stated defaults, nor was any demand ever made upon appellant by appellee. To this action, appellant filed an Answer containing a general denial of the allegations contained in the Complaint, and set up ten separate defenses thereto, (Case, 9 to 12). Appellant at the time of the trial attempted to introduce legal evidence in support of its general denial and separate defenses, but the questions propounded for such purpose were ruled out and other testimony in support of appellant's position was stricken from the record, so that appellant was deprived of an opportunity of having the jury pass upon the factual questions presented by the issues. Appellant contended by its Answer first, that the action was barred by the Statute of Limitation in that, the operation of the Statute commenced on November 3rd, 1926, when the first default occurred by reason of the acceleration clause hereinabove set forth. This was pursuant to the eighth separate defense in the Answer. Second, that appellant had been induced to execute the alleged guarantee contained on the reverse side of Exhibit P-1 by the practice of fraud and misrepresentation as to the nature or purport of the same. Third, that he was not liable on said alleged guarantee by reason of a subsequent agreement wherein it was agreed that the transfer of the aforesaid Conditional Sales Agreement and note was to be "without recourse", notwithstanding appellant's signature to said guarantee.

In support thereof, evidence was introduced to the effect that at the inception of said deal, appellee had prepared as part of its records, a certain account card which bore the notation that said transaction was "without recourse", (Case, 54, l. 30; Case, 55, l. 19). In addition, appellant produced and offered at the trial, Exhibit D-5 for identification, (the audit prepared by appellee's own accountant), which the Court improperly refused to permit into evidence. This audit indicated that the aforesaid Conditional Sales Agreement and note, (P-1 and P-2 respectively), were not secured by appellant's endorsement. This audit contains two schedules, A-5, loans secured by endorsements; A-6, loans not secured by endorsements. In the latter class will be found the transaction involved herein, (Case, 85).

Appellant urges for a reversal, eleven grounds of appeal which will be argued under three separate points.

POINT I.

Appellant's motion for a non-suit should have been granted because Plaintiff-Appellee's action was barred by the Statute of Limitations, by virtue of the acceleration clause contained in the conditional sales agreement and note, marked Exhibits P-1 and P-2.

The Conditional Sales Agreement P-1 contained the following acceleration provision:

> "* * * Upon any default (or in the event that the buyer for any reason gives up or loses possession of the car) all unpaid balance of said purchase price and note representing the same shall forthwith become due and payable".

The note, which was in effect part of the Conditional Sales Agreement, contained a similar provision, to the following effect:

> "* * * and upon default in the payment of any installment when due, the whole amount remaining unpaid shall become due, together with cost of collection, including reasonable attorney's fees, if not paid at that time."

That the note and Conditional Sales Contract are in effect one entire Agreement, has already been decided by our Court of Errors and Appeals in a case involving the identical papers, see *Superior Finance Corporation* v. *John A. McCrane Motors Co., et als.,* 111 N. J. L. 350 at 353, wherein the Court said:

> "The note was in effect a part of the Conditional Sales Agreement, was evidential and, potentially at least, material and relevant."

The acceleration provisions contained in the Conditional Sales Agreement and note, as hereinabove indicated, are not optional in nature. They leave no room for doubt or question, but are absolute and positive. Both of these instruments were prepared by the plaintiff for its protection, and constitute its contract as they intended it to be. Appellant contends, that by reason of these facts, the plaintiff's claim was barred by the Statute of Limitations, that is, the Statute of Limitations commenced to run on November 2nd, 1926, when the first payment due from the Mercer Beverage Dist., Inc., was not made, and the failure to make such payment constituted a default which commenced the operation of the Statute of Limitations. In support of this contention, see the case of *Weiner* v. *Cullens,* 97 N. J. Eq., 523, wherein

the Court of Errors and Appeals of this State, in passing upon the legal effect of a definite acceleration clause, said:

> "The mortgage contained a provision which, *inter alia,* in substance provided that the defendants shall pay the taxes assessed * * *; and shall also pay all other taxes, municipal assessments or charges * * *, and that if, at any time, default should be made in the payment of any tax or charge as above provided for, then the principal debt and all interest *shall become due and payable immediately enforceable and recoverable.*" (Italics ours).

Justice KALISCH in this opinion further stated on page 526:

> "The basic principal appears to be, as illustrated by the cases in this Court, that it is competent for the parties to a contract to agree that the time fixed therein for the prompt payment of the sums due or to grow due affecting the property mortgaged, shall be the essence of the contract, *and to further agree that a failure to perform, at the time or times fixed therein, shall render the principal to become immediately due and payable* * * *." (Italics ours.)

Likewise, in the case of *Prudential Insurance Company* v. *Rosenthal,* 109 N. J. Eq. 386, at page 390, Vice Chancellor BUCHANAN, speaking for the Court points out the distinction as follows:

> "* * * The instrument also provides that upon a thirty day default the entire mortgage debt shall become immediately due and payable, at the option of the mortgagee. *This is very different from a definite provision that the mortgage debt shall become due and matured at the date of such default.*" (Italics ours).

In the case of *Green* v. *Frick,* 126 N. W., 579, the Court in considering a question identical with the one at bar, said:

> "No doubt exists where the contract is clearly optional on the part of the creditor. But, to hold a contract as optional, which, by its express terms, is plainly absolute, is not warranted by any known rule governing the construction of contracts."

Likewise in the case of *Snyder* v. *Miller,* 71 Kan. 410; 69 L. R. A., 250; 114 Am. St. Rep., 489, it was held:

> "But a more fundamental consideration is that the parties made the contract, and the courts cannot make another to take its place. Its language excludes the idea that the creditor may or may not 'treat the debt as due.' *It becomes due in fact.* If an election were all that the parties intended, words more appropriate to that purpose should have been used."
>
> "According to some of the authorities cited by appellant, an accelerating clause, such as the one in the case at bar, is regarded as being in the nature of a penalty or forfeiture, which may be waived by the creditor. Such a construction is contrary to the weight of authority.
>
> Mullen v. Gooding, 20 Id., 348; 118 Pac., 666; San Antonio Real Estate v. Stewart, 94 Tex. 441; 86 Am. St. Rep., 864; 61 S. W., 386; 1 Pom. Eq. Jur., 439."
>
> "In other cases it is held that an accelerating clause in a note or contract is for the benefit of the payee, and may be enforced or waived at his option. *In our opinion, to so hold, would be by construction, to read into the contract a provision not contained therein, and result in making a contract to take the place of the one made by the parties.*"

Again, in the case of *Manes* v. *Blitsch,* 239 S. W. 307, the Court held:

> "Where a contract provides that a series of notes shall all become due upon the failure to pay one or more thereof, or interest thereon when due, upon the failure to make such payment, *all of the notes ipso facto become due by virtue of the contract,* and there is no question as to option involved."

Further, in the case of *Perkin* v. *Sweeney,* 35 Id. 485; 207 Pac. 585, the Court in dealing with the following acceleration clause: "and if not so paid, the whole sum of both principal and interest to become immediately due and collectible", held:

> "The acceleration clause above quoted is not optional, but positive in its terms. The case falls within the rule announced in the case of Canadian Birkbeck Co. v. Williamson, 32 Id., 624; 186 Pac., 916, as follows: 'Where a contract contains an acceleration clause positive in its terms without any optional features in it, a default under said clause renders the entire indebtedness due, and the Statute of Limitations runs from such default.' "

This wealth of authority leaves no room for doubt as to the nature or effect of the acceleration clause contained in the note *sub judice.* We contend, that by virtue of the authorities cited, the acceleration clause in the case at bar was definite and absolute, that the Statute commenced to run immediately upon the default in the making of the first payment, and since the contract was prepared by the plaintiff finance company on their own printed forms, they are bound thereby. They could have, had they so desired, made the clause optional, but they did not, it was to their advantage under almost all circumstances that could

arise, to have the acceleration clause absolute. Were this an action by the Finance Company seeking to recover the entire amount due after default, by reason of the acceleration clause, there could be no defense that the entire amount was not due and payable, and using the language of the Supreme Court of the State of Arizona in the case of *F. M. Street* v. *Commercial Credit Co.,* decided October 7th, 1929, involving the purchase of an automobile, the Court very aptly stated:

> "As we have said, the purpose of the law undoubtedly is to protect the buyer, the seller generally being able to protect himself—through contract of sale prepared by counsel."

So, in this case, the plaintiff-appellee finance company prepared its contract, for its purpose, for its own protection, and should not be permitted to use such contract as a double-edged sword. The Statute of Limitations commenced to run on November 2nd, 1926, and the action was barred at the expiration of six years, and no suit having been instituted until December 6th, 1932, appellant's motion for a non-suit should have been granted by the trial court.

POINT II.

The trial court erred in refusing to permit appellant's witnesses to answer questions set out in grounds of appeal 4 and 9.

For the purpose of expediency and convenience, we will discuss the various grounds of appeal under different points, having, so to speak, classified them under different headings.

Under this point, we contend that the trial court under the issue as framed by the pleadings, should have permitted the witness Samuel Glass to answer the following question (Ground of Appeal number 4):

> "Q. Did you or did you not make a new instrument—a definite agreement—with Mr. McCrane subsequent to the execution of that Conditional Sales Contract", (referring to Exhibit P-1).

It will be borne in mind that Glass was the Secretary of the plaintiff-appellee corporation, and was the person in active charge and control of its affairs at the time the deal in question was made. Appellant contends, that this question was proper and legally evidential for the purpose of showing that a new and subsequent agreement had been entered into between the parties. Such contention is supported by the great weight of authority, both by the Courts of our State and our sister States.

In the case of *Troth* v. *Mullville Bottle Works*, 89 N. J. L. 219, wherein the late Justice Gummere, speaking for the Court of Errors and Appeals said:

> "That the parties to an existing contract may, by mutual consent modify or change

> it by altering or exercising certain of its provisions or by adding new provisions thereto—provided the modifications or changes do not make the contract illegal or violative of public policy—is elementary law. *And this may be done orally even though the original contract be in writing.*" (Italics ours).

To like effect, see the case of *Headley* v. *Cavileer*, 82 N. J. L. 635, at 638, wherein Justice PARKER speaking for the Court of Errors and Appeals said:

> "But the right of the parties to supplement their original agreement, no matter how solemn in form, by a later agreement, however informal, is fully recognized by such cases as Bartlett v. Stanchfield, 148 Mass. 394; 2 L. R. A. 625, where the Supreme Court of Massachusetts, speaking through Mr. Justice Holmes, said: 'Attempts of parties to tie up by contract their freedom of dealing with each other are futile. The contract is a fact to be taken into account in interpreting the subsequent conduct of the plaintiff and defendant no doubt. But it cannot be assumed as matter of law that the contract governed all that was done until it was renounced in so many words, because the parties had a right to renounce it in any way and by any mode of expression they saw fit. They could substitute a new oral contract by conduct and intimation as well as by express words.'
>
> It was said in Copeland v. Hewett, 96 Me. 525:
>
> 'Parties have a right to contract in any way they see fit, orally, by simple contract or by specialty. When the statute of frauds is not involved the one form is as binding as the other, and however evidenced the contract remains in force until it is superseded by a later one inconsistent with it and no longer. It does not stand with reason that parties can by contract preclude

themselves from contracting in any particular way; that such a contract once entered into becomes an iron bond which the will of the parties is impotent to annul or modify. When defendant has agreed that he will only contract by writing in a certain way, he does not preclude himself from making a parol bargain to change it, and there is no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing.'

In Westchester Fire Insurance Co. v. Earle, 33 Mich. 143, the court said:

'A written bargain is of no higher legal degree than a parol one, and either may vary or discharge the other; and one who has agreed that he will only contract by writing in a certain way, does not preclude himself thereby from making a parol bargain to change it.'

Similar decisions are Canal Company v. Ray, 101 U. S. 522; McFadden v. O'Donnell, 18 Cal. 160; Chicago and Eastern Illinois Railroad Co. v. Moran, 187 Ill. 316."

Also, *Tompkins* v. *Tompkins,* 21 N. J. Eq., 338, at 339, wherein the Court said:

> "It is well settled that the time of performance of a sealed contract may be changed by parol."

Also *McKinstry* v. *Runk,* 12 N. J. Eq., 60, at 61, wherein the then chancellor held:

> "Parol evidence is admissible to prove a new and distinct agreement upon a new consideration.
>
> 1 Greenleaf, paragraph 303".

Wilkinson v. *Plaket,* 5 Misc. Rep., 853, at 854, wherein on a *per curiam* opinion, the Court held:

> "Contracts of this character not being required to be in writing, the parties may by

> parol cancel them or alter or supplement them, or make a new contract.''

See also *Kolmetsky* v. *Pellicoff*, 6 Misc. Rep., 315; *Rizzolo* v. *Poyscher*, 89 N. J. L., 618; *Littieri* v. *Misteretta*, 102 N. J. Eq., 5.

In addition however, to these authorities, it was proper for the defendant to show the subsequent agreement on the basis and by virtue of his seventh Special Defense, setting up fraud in procuring the execution of the guarantee contained in Exhibit P-1. If this question had been allowed, defendant-appellant would have been able to introduce further evidence to show that the reason the subsequent contract was entered into was that he had discovered that the assignment on the reverse side of Exhibit P-1 contained a guarantee clause, which had been represented to him by plaintiff's agent to be merely an assignment; that he had signed the same based upon such misrepresentation, and that upon discovering such fraud, he immediately communicated with plaintiff and was advised by its officers that there would be no liability to him, and that the transaction was ''without recourse'', in accordance with the original agreement made at the time of the assignment and transfer of the Conditional Sales Agreement and note. This original agreement was to the effect that the assignment of the Conditional Sales Agreement and note was ''without recourse'' to defendant, and was evidenced by the fact that the note did not bear defendant's endorsement, which it customarily would have borne, as is indicated by the note itself which contains on the reverse side a line for endorsement, with the words ''dealer sign here'' underneath. That at the time of the assignment of the Conditional Sales Agreement and note, it

was represented to plaintiff that since he did not endorse the note, there could be no liability, and that in affixing his signature to the Conditional Sales Contract he was merely effectuating a legal transfer thereof. Defendant relied upon these representations made at the time of the assignment. In other words, the original and only agreement was that no liability was to attach to defendant by reason of the assignment, but by virtue of the misrepresentations made by plaintiff's agent, there was in fact a liability imposed, which is void because of the fraud practiced; and, upon discovery of such fraud, plaintiff entered into a subsequent agreement that the assignment of the Conditional Sales Agreement and note would be "without recourse".

It would therefore, from the above, seem that the defendant clearly had a right, as a matter of law, to show a subsequent oral agreement made between plaintiff company and himself, based upon a good, valid and legal consideration. That further, defendant had a right to show the subsequent agreement by reason of plaintiff's fraud in procuring the execution of the guarantee, in accordance with the seventh Separate Defense, and that the Court erred in refusing to permit this question to be answered.

Appellant advances the same arguments and authorities above cited, as to his ninth Ground of Appeal, dealing with the following question asked of the defendant on direct-examination:

> "Q. Now then, did you ever have any definite agreement between the officers of the Superior Finance Corporation or with any of the officials of the finance corporation about the agreement being a recourse or without recourse deal?"

POINT III.

The trial court erred in its rulings, as set out in grounds of appeal numbers 2, 3, 5, 6 and 8.

Ground of Appeal number 3 deals with the refusal of the Court to receive in evidence Exhibit D-1 for identification, (Case 21), which consists of two audits prepared by plaintiff-appellee's accountant, from plaintiff's own books and records, (Case 78 to 90). These audits set up by plaintiff in its books, distinguish and differentiate between accounts which they purchased as being secured by dealer's endorsements, and those unsecured by dealer's endorsements. In other words, these records show which accounts plaintiff would have recourse against the dealer, and the accounts upon which there is no recourse to the dealer. The account in question, the Mercer Beverage Dist., Inc., is set up in plaintiff's books as indicated in Exhibit D-1, (Case 85), as being an account unsecured by dealer's endorsement. This clearly substantiates and corroborates the defendant's position that the assignment of the Conditional Sales Agreement and note, (Exhibits P-1 and P-2) were "without recourse" to defendant-appellant, and was so set up in plaintiff's own books, as is evidenced by these Exhibits. It will be noted, that the Mercer Beverage Dist., Inc., the purchaser named in Exhibit P-1, does not appear in the audit as a transaction secured by the dealer's endorsement, but on the contrary is carried by plaintiff-appellee as an unsecured account upon which a reserve loss has been set up of Three Hundred and Ninety-seven ($397.00) Dollars. This is a strong indication and a corroborative

detail that the transaction was "without recourse" to the defendant-appellant, for, if this were not so plaintiff would not have anticipated any reserve loss but would have in the first instance listed the account as a secure one, and in the second instance, would have been able to recover from appellant without setting up any reserve loss.

Under Ground of Appeal number 2, defendant-appellant asked the following question: "And, is it not true, or doesn't it appear on this page as the records of your company, that the loss taken on that is $397.00?" Had the Court permitted this question to be answered, it would have served as strong, corroborative evidence of appellant's position, and appellant contends that the refusal of the Court to permit this question to be answered constitutes prejudicial error.

The 4th Ground of Appeal deals with the action of the Court in striking out certain testimony adduced on behalf of the defendant from the witness Samuel Glass, as secondary evidence. This witness was formerly the Secretary of the plaintiff-appellee finance company. Appellant had served a notice to produce upon plaintiff-appellee to produce an account card which was part of appellee's original bookkeeping system. His purpose was to show that this account card bore the notation that the transaction in question was "without recourse" to him, in accordance with his defense, as herein outlined. Upon plaintiff's failure to produce the account card, the defendant showed by plaintiff's Secretary Samuel Glass, that the account card bore the notation that the assignment of the note and Conditional Sales Contract was "without recourse" to defendant,

which testimony was the strongest kind of proof, demonstrating that the plaintiff had accepted the transaction upon the express understanding that it was "without recourse". All of this testimony was proper as secondary evidence, because of plaintiff's failure to produce the card upon a demand. Certainly had plaintiff produced the account card pursuant to the demand, it would have been evidential, and in the absence of such production, the secondary evidence produced by defendant became legally evidential, and should not have been stricken out, and it should have been left to the jury to determine whether the witness accurately portrayed the contents of this card by his testimony.

Ground of Appeal number 6 deals with the refusal of the Court to permit the witness Samuel Glass to answer the following question: "Now, any of these payments that were made on account, did they, so far as you know, bear notations indicating that they were being paid with or without recourse?" This question was properly admissible, and should have been answered since it would serve as secondary evidence in connection with the contents of the account card above referred to, and for the same reasons as urged in connection with Ground of Appeal number 4, appellant contends that the action of the trial court in refusing to permit this question to be answered, was error.

This position concerning the admissibility of the account card, or the secondary evidence to prove the same upon its non-production, is sustained by the case of *Gaddis* v. *Gaddis,* 10 N. J. Misc. Rep., 521, at 522, where in a *per curiam* opinion, the Court dealing with the admissibility

of a note as corroborative evidence said, referring to such note:

> " * * * It was what may be termed a piece of physical evidence which by examination and reading would tend to corroborate the defendant's testimony."

So, in the case *sub judice,* had the account card been produced, it would have been "a piece of physical evidence which, by examination and reading would tend to corroborate the defendant's testimony", and by the same token, the secondary evidence offered after the non-production was also evidence "which would tend to corroborate the defendant's testimony".

Appellant advances the same contention with regard to Ground of Appeal number 8, wherein the defendant was asked: "Were you ever, subsequent to that time, requested to make any payment?" This question would seem to have been clearly evidential for the purpose of enabling the jury to determine where the truth of the matter lay. Certainly, the failure to institute a suit for a period of six years, or to make a demand for payment would be a strong circumstance for the jury to consider in determining the truth of defendant's story. The jury would have the right to draw an inference from plaintiff's failure to pursue a legal remedy or right, the jury would have a right to take into consideration such failure in determining the truth or falsity of defendant's contention, and for that reason, the question should have been allowed. Would not the failure to bring an action or making demand indicate that there was no liability upon the defendant, and that the transaction had been accepted

by plaintiff "without recourse", as contended by defendant?

We respectfully submit therefore, that by reason of the undisputed evidence concerning the default in the payment of the installment due November 2nd, 1926, that the plaintiff's claim is barred by the Statute of Limitations; that the action of the trial court should be reversed, and judgment entered in favor of the defendant, or that by reason of the trial errors herein discussed, that the judgment should be reversed and a new trial awarded.

Respectfully submitted,

COHN & KOHLREITER,
Attorneys for Defendant-Appellant.

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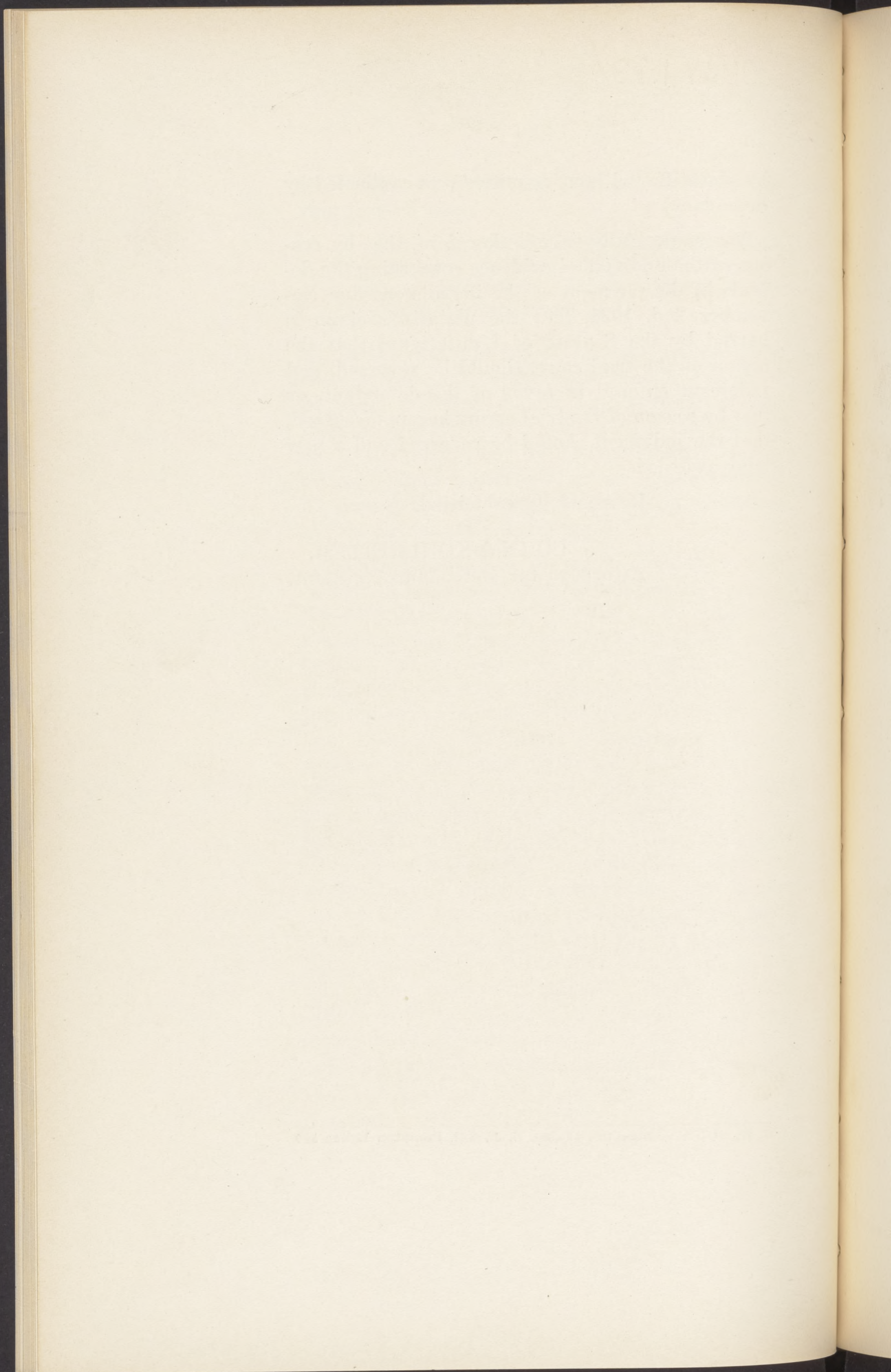

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New Jersey Court of Errors and Appeals

SUPERIOR FINANCE CORPORATION,
a corporation,
Plaintiff-Appellee,

vs.

JOSEPH M. MCCRANE,
Defendant-Appellant.

BRIEF FOR PLAINTIFF-APPELLEE.

Preliminary Statement.

The defendant appeals from a judgment entered against him in the Supreme Court on a verdict directed at the Passaic Circuit by Judge William B. Harley.

The action was based upon a contract of assignment and guarantee of a conditional sales agreement. The conditional sales agreement was entered into by and between the appellant, Joseph M. McCrane, who traded as the McCrane-Reo Co., and the Mercer Beverage Distributors, Inc., the former agreeing to sell, and the latter to purchase, an automobile. Subsequently, the appellant assigned, for a lawful and valuable consideration, all his right, title and interest in the conditional sales contract to the plaintiff, and guaranteed to the plaintiff full performance of the conditional sales agreement, in all its

terms and the prompt payment of any and all sums provided therein. The appellant also assigned to the plaintiff a note made by McCrane, payable to his (appellant's) order in the same amount as the conditional sales contract.

There was uncontradicted proof of the default in the contract of guarantee, and the action was to recover the sum of $897, representing the balance due on the guarantee of the conditional sales contract, besides interest, and a verdict was directed in favor of the plaintiff and against the defendant in said sum of $897, plus $367.77 interest, aggregating the total sum of $1,264.77.

The grounds of appeal will be argued in the order dealt with in appellant's brief.

ARGUMENT.

POINT I.

The Trial Judge did not err in denying the motion for a non-suit made at the close of the plaintiff's case.

The motion for a non-suit was grounded upon the claim that the action was barred by the statute of limitations.

(a) In the first place, the plea of statute of limitations may be raised only by way of defense.

In *Callan vs. Bodine,* 81 N. J. Law 240, our Supreme Court held:

> "In an action at law the defense of a bar of the statute of limitations is not

available unless set up by plea. 25 Cyc., p. 1396. The defendant cannot demur to a declaration even when it appears on its face that the limitation prescribed by the statute has expired, for the principal reason that thereby the plaintiff would be deprived of the opportunity of replying that the case was within some of the exceptions of the statute, or any other matter that would prevent the bar from attaching. 13 Enc. Pl. & Pr., p. 200."

In *Bentley vs. Colgate,* 10 N. J. Misc. 1222, Judge Ackerson held:

> "The last objection to the complaint which we shall notice is that it appears that the statute of limitations has run against the cause of action set forth in the complaint. It is unnecessary to consider this objection further than to say that such an infirmity cannot be raised by a motion to strike, but only by answer in the nature of a plea. *Callan vs. Bodine,* 81 N. J. Law 240, 79 A. 1057; *Wright vs. Kroydon Company,* 154 A. 195, 9 N. J. Misc. 287."

At the close of the plaintiff's case when the motion for a non-suit was made, there was not any evidence before the Court tending to show that the action was barred by the statute of limitations. *There was no evidence to show when the suit was commenced.* Such evidence was not even supplied by the defendant in his defense. In the absence of any evidence tending to show that the action was barred by the statute of limitations, a non-suit could not legally be granted on that ground.

If, at the close of the plaintiff's case, a non-suit would have been granted, "thereby the

plaintiff would be deprived of the opportunity of replying that the case was within some of the exceptions of the statute, or any other matter that would prevent the bar from attaching,'' as was declared by the Supreme Court in *Callan vs. Bodine, supra.*

On the other hand, if the defendant had offered evidence, tending to show, or if there was any evidence in the plaintiff's case, tending to show, that the limitation prescribed by the statute had expired, the plaintiff would still be entitled to the ''opportunity of replying that the case was within some of the exceptions of the statute, or any other matter that would prevent the bar from attaching.''

The state of case does not show when the suit was begun. It does not show when the summons was issued, and the summons is not even printed in the state of case, and the teste date does not even appear in the record. It does not show when the complaint was served or filed.

(b) Aside from this, as gleaned from the argument of the motion for a non-suit (Case, p. 43, ll. 25-35), counsel for the appellant is of the impression that the six-year period began to run on October 2nd, 1926, because that is the date of the conditional sales contract. In this, he is in error. In the first place, it does not appear from the record when the contract of guarantee was signed by the appellant. Insofar as the appellant is concerned, the date of the conditional sales agreement is not material in computing the six-year period. We are concerned with the date when the appellant assigned his contract, guaranteeing performance of the conditional sales contract.

Moreover, even under the conditional sales contract there was no debt due on October 2nd, 1926. An examination of the conditional sales agreement reveals that the appellant thereby agreed to pay to Mercer Beverage Distributors, Inc., the sum of $1,345 in certain stated installments, to wit, in eleven monthly installments of $112 each, the first installment payable one month after the date of the conditional sales agreement, and a like installment payable monthly thereafter, and a final installment payable twelve months after the date of the agreement. The result is, that even under the conditional sales agreement there was no debt due until one month after October 2nd, 1926 (the date of the conditional sales agreement). In other words, there was no debt owing, even under the conditional sales agreement, until November 2nd, 1926, when $112 grew due. On December 2nd, 1926, another sum of $112 grew due, etc. Insofar as the first installment of $112 is concerned, the six-year period could not begin to run until the date when it grew due, namely, November 2nd, 1926; and as to each of the other installments, monthly thereafter.

In *Smith vs. Dowden*, 92 N. J. Law 317, our Supreme Court, in dealing with this subject, held:

> "Taking up the next question, whether the same rule applies to the contract of guaranty, we start with the settled rule of law that the statute of limitations begins to run the moment that a right of action accrues (*Holt v. Hadley*, 2 A. & E. 758); * * *."

Controlled by that rule of law, no right of

action accrued to the plaintiff in the case at bar until one month after the date of the conditional sales agreement, when the first installment grew due, and no right of action accrued on the other installments until those installments became due.

Appellant, however, contends that default in the payment of a single installment of the conditional sales agreement automatically accelerated the date of maturity of the whole principal sum of the contract, without regard to whether or not the plaintiff elected that this should be so. We contend, however, that this is not so.

True, the conditional sales contract provides that upon any default all unpaid balance of the purchase price therein mentioned shall forthwith become due and payable. But that is of no consequence, because (a) there is no such provision contained in the contract, whereby the appellant assigned to the plaintiff and guaranteed the payment of the sums therein mentioned; and (b) the plaintiff did not elect to avail itself of the benefits of that provisions, and it is not self-automatic in operation.

As to our first reason, a reading of the contract of assignment and guarantee demonstrates that it does not contain any acceleration clause.

As to our second reason, it is true that there is a diversity of opinion in some jurisdictions as to the effect of such clause, but *the great weight of authority is that such a clause is not self-operative, and only takes effect in the event that the party for whose benefit it is made elects to avail himself of the benefit thereof.* Appellant contends that the acceleration clause is

only optional with the party for whose benefit it is made where the provision so declares, and argues that where the clause contains no such option it is absolute, and in its brief cites *Perkins vs. Swain* (Idaho), 207 Pac. 585, which is also reported in 34 A. L. R. 894, but neglects to refer to the A. L. R. citation.

The reference to A. L. R., however, is important because there the editor, in his annotations, shows the diversity of opinion, and declares the great weight of authority to be as above indicated, namely, that without regard to what language is used in the acceleration clause, it is not absolute or self-operative, but is optional, and does not take effect unless the party for whose benefit it is made (the creditor) elects to avail himself of the benefit thereof. For example, in 34 A. L. R., at p. 896, it will be seen that even *Perkins vs. Swain* recognizes the diversity of opinion, for the Court there said:

> "We are referred to the following cases as holding that the accelerating clause contained in the note was for the benefit of the creditor, and that, while not therein so expressed, it is purely optional to declare the whole amount due, both principal and interest, and bring suit to collect the same" (here the Court cites approximately twenty cases from various jurisdictions).

Again the Court said in that case:

> "In other cases it is held that an accelerating clause in a note or contract is for the benefit of the payee, and may be enforced or waived at his option."

Among the cases cited by the Court in *Perkins vs. Swain*, under the excerpt above quoted, is

Keene Five Cent Sav. Bank vs. Reid (1903), 59 C. C. A. 225, 123 Fed. 221, certiorari denied in (1903) 191 U. S. 567, 48 L. ed. 305, 24 Sup. Ct. Rep. 841, and cited in the editor's annotations in 34 A. L. R., at page 904. In that case, the United States Circuit Court of Appeals held:

> " 'The effect of such clauses as the one in question has frequently been a subject for judicial consideration, and, while the decisions are not entirely harmonious, *yet the decided weight of reason and authority is in favor of the view that such provisions are not self-operative; that they are for the benefit of the creditor, and intended to give him, on grounds of convenience, the right to treat the entire debt as matured if an instalment of interest is not paid as and when it should be, or if the taxes on the mortgaged premises are not paid pursuant to agreement. The great majority of the cases treat such provisions, when contained in mortgages, as designed to further constrain and stimulate the debtor to meet his engagements promptly, and to arm the creditor with a right in the nature of a right to declare a forfeiture or to exact a penalty, which he may or may not exercise, and as a right which the Courts will never regard as having been exercised by the creditor, or as having any effect upon the period of maturity specified in a note or bond, without some affirmative action on his part, such as a notification to the debtor, by a suit or otherwise, that on account of the default he elects to treat the entire indebtedness as due. Attention has also been called to the fact that to hold such provisions as the one in question to be self-operative would be to confer on the debtor the right to take advantage of his own wrong; that is, to mature an indebt-*

edness which was intended as an investment for a given period, in advance of the time specified on the face of his note or bond, by failing to keep his engagements. * * * *We are constrained, by the reasons stated in the foregoing decisions, to hold that such a provision as the one now in question is not self-operative; that it did not render the principal note, secured by the mortgage, due and payable in advance of the time specified on its face, unless the creditor or holder elected in some way to treat it as due at an earlier period, in consequence of a default in the interest payments or in the payment of taxes. We are of opinion that this view of the case is altogether the most reasonable, the one which is most in accord with the presumed intention of the parties, and the one that is the best supported by authority.*' " (Our italics.)

That decision by the United States Circuit Court of Appeals is significant, because certiorari was denied by the Supreme Court of the United States.

In 34 A. L. R., at page 903, the editor says:

> "*According to another line of cases, the statute of limitations does not begin to run upon default, even in case of an absolute provision in the note or mortgage securing it that it shall become due upon some default. This is held where the acceleration provision is in the note* itself. *Belloc vs. Davis* (1869), 38 Cal. 242; *Watts vs. Hoffman* (1898), 77 Ill. App. 411 (see *infra,* for facts); *Blakeslee vs. Hoit* (1904), 115 Ill. App. 83 (see *infra,* for facts); *Wall vs. Marsh* (1877), 9 Baxt. (Tenn.) 438." (Our italics.)

In *Belloc vs. Davis,* 38 Cal. 242, the Court said:

> "If the cause of action accrued, in the sense of the statute, on the first default in the payment of interest, and the plaintiff's right of action then assumed a character so fixed and definite that it was not in his power to waive it, as is claimed by the defendants, this strange result would follow, to wit: That if the plaintiff, on the next day after the default, had accepted payment of the interest due, he could nevertheless, immediately after, have maintained his action to compel payment of the whole debt on the ground that the credit had been irrevocably terminated by a default in the payment of interest for a single day, notwithstanding it had been paid and accepted on the following day."

Richardson vs. Warner, 28 Fed. 343, also holds that such a provision is permissive only.

In *Watts vs. Creighton,* 85 Iowa 154, it was held:

> "It is not incumbent on the mortgagee to take advantage of this provision; he may waive it."

In *First Nat. Bank vs. Parker,* 28 Wash. 234, 92 Am. St. Rep. 828, 68 Pac. 756, it was held that the benefit of the provision must be claimed, or it is waived.

The Court in *Core vs. Smith,* 23 Okla. 909, 102 Pac. 114, says that *such a provision is solely for the benefit of the creditor, who may enforce it or not at his option or election, whether it is so expressly stated or not, and that the default is not one of which the debtor can take advantage to start the running of the statute.* This Court says, further, with reference to a case such as the one at bar, in which the provision was in the mortgage:

> "It would seem anomalous to hold that the owner of a negotiable promissory note secured by a mortgage on real estate containing a clause similar to the one under consideration could not implicitly rely upon the face of his note to inform him when his right of action thereon accrued, but must exercise continual care to see that the mortgagor—perhaps in a distant state—did not, by failing to pay taxes on the premises, start the running of the statute against him, and thereby bar his note by the statute, which, perhaps, was not yet due on its face. It goes without saying that to so hold, in effect, would have a tendency to destroy materially the value of negotiable paper of this kind."

In *Batey vs. Walter,* 46 S. W. 1024, it is stated that such a provision is intended for the benefit of the mortgagee, and not for the mortgagor, and the latter cannot take advantage of it.

In *Belloc vs. Davis, supra,* and in *Mason vs. Luce,* 116 Cal. 232, the creditor accepted the interest after the default, and this is treated as a waiver. In the latter case, such was the decision, notwithstanding the acceleration clause was as follows:

> "And the mortgagor hereby covenants with the mortgagee that if default be made in the payment of the interest, or any part thereof, according to the tenor of said note, then the whole sum of principal and interest *shall* become immediately due, and the mortgagee may proceed with suit of foreclosure, and sell the mortgaged premises in the manner provided by law."

In *Standard Dry-Kiln Co. vs. Ellington,* 172

N. C. 481, 90 S. E. 564, it was held that the right of the vendor to rescind the contract of sale on account of the failure of the purchaser to perform his agreement is for the benefit of the vendor, and cannot be taken advantage of by the purchaser, or by one claiming under him, to put the statute of limitations in motion.

None of the cases cited in appellant's brief are applicable, as we shall presently show, viz: *Weiner vs. Cullens,* 97 N. J. Eq. 523. In that case, the effect of an acceleration clause upon the running of the statute of limitations was not involved at all. That case merely is authority for the proposition that

> "it is competent for the parties to a contract to agree that the time fixed therein for the prompt payment of sums due or to grow due affecting the property mortgaged, shall be the essence of the contract and to further agree that a failure to perform, at the time or times fixed therein, shall render the principal to become immediately due and payable. Thus it becomes at once apparent that it is of no material significance whether the default is made in the prompt payment of interest due on the mortgage or in the payment of taxes or assessments levied upon the property mortgaged, if the time or times for their prompt payment is or are made the essence of the contract."

In other words, that case merely holds that where the contract contains such a provision, the creditor has the *right* to avail himself of the benefit thereof "whether the default is made in the prompt payment of interest due on the mortgage or in the payment of taxes or assessments levied upon the property mortgaged."

But that case does not hold that in such event it is the *duty* of the creditor to avail himself of such a clause, nor does that case hold that if a contract contains an acceleration clause that it is absolute and self-operative, whether or not the creditor elects to exercise his right under the contract to take the benefit thereof.

Prudential Insurance Company vs. Rosenthal, 109 N. J. Eq. 386, by Vice Chancellor Buchanan, does not deal with the subject here under consideration. That case did not involve a provision such as the one contained in the conditional sales agreement guaranteed by the appellant in the case at bar. On the contrary, in that case the agreement provided:

> "that upon a thirty day default the entire mortgage debt shall become immediately due and payable, *at the option of the mortgagee.*"

The Vice Chancellor, in dealing with that type of clause only, held:

> "the acceleration of maturity only occurs if the mortgagee exercises his option."

If the Vice Chancellor undertook, by innuendo, to distinguish between the clause involved in that case and a clause such as is contained in the conditional sales contract here involved, then it is *obiter dicta* only. Actually, however, the Vice Chancellor does not even say what the law would be if the clause were different than the one actually under consideration and involved in that case. Of course, if a contract contains a provision which expressly confers upon the creditor the option to take the benefit of acceleration, then no decision of a court is necessary upon the subject.

In *Snyder vs. Miller,* 69 L. R. A. 250, the Court recognizes the diversity of opinion, and says:

> "In other cases it is held that an accelerating clause in a note or contract is for the benefit of the payee, and may be enforced or waived at his option" (Case, p. 46, bottom).

The weight of authority is based on sounder reason and better authority than the minority view and it should, therefore, be adopted by this Court.

POINT II.

The Trial Court did not err in refusing to permit appellant's witnesses to answer certain questions concerning an alleged new oral agreement.

Appellant's witness, Glass, was asked the following question:

> "Q. Did *you* or did *you* not make a new agreement, a definite agreement, with Mr. McCrane subsequent to the execution of that conditional sales contract?"

This question was properly overruled for several reasons.

FIRST. The witness was not asked whether the plaintiff—the Superior Finance Corporation entered into a new agreement with McCrane, but he was asked, "Did *you* or did *you* not make a new agreement * * *." Of course, it is clear that a new agreement made by Glass as an individual would not be the agreement of the

Superior Finance Corporation—it would not be binding upon the corporation.

SECOND. There was no evidence that Glass had any authority to make any agreement binding upon the Superior Finance Corporation. There was no corporate action. He was not authorized by the corporation to make a new agreement, vitiating the old, or changing it from a recourse to a non-recourse transaction, and there was no claim that the corporation ratified any alleged act of Glass.

The latest case on the subject appears to be *Lloyd W. Casner, Inc., vs. Raleigh Fitkin-Paul Morgan Memorial Hospital,* 112 N. J. Law 252, where this Court, in an opinion by Mr. Justice Perskie, said:

> "It should also be observed that during the course of the trial the complaint was amended to include a further count. This count was based on an alleged oral promise made by respondent, through its agents or representatives, to pay this item of $10,464.82 in consideration of appellant's completion of the agreed undertaking. The authority for the making of this alleged oral agreement was challenged. The actual making thereof was denied. The Trial Judge held that the two contracts embodied the arrangements made between the parties, and that the supplementary count, setting up the oral agreement, was not sustained by proofs. He felt controlled by the case of *Naumberg vs. Young,* 44 N. J. Law, 331, 43 Am. Rep. 380, and directed a non-suit. The propriety of that disposition of the case is now before us.
>
> "We think the Trial Judge was right. Mr. Lloyd W. Casner, president of appel-

lant corporation, himself testified that he regarded the two contracts (Exhibits P-1 and P-2) embodied the arrangements made between his concern and respondent.

"*The proofs are barren of any corporate action on the part of the respondent for the making of any parol agreement, or the authorization for anyone to make such an agreement in its behalf, or the ratification thereof. It is fundamental that an agreement to bind the corporation must be its act, either (1) by its corporate action, or (2) because made by its authorized agent, or (3) by its ratification. Thompson vs. Central Passenger R. Co.,* 80 N. J. Law, 328, 78 A. 152; *Beach vs. Palisade Realty & Amusement Co.,* 86 N. J. Law 238, see page 241, 90 A. 1118. *The Trial Judge properly disposed of this point.*" (Our italics.)

Now, in the case at bar there was no evidence that Glass had any authority from the corporation to make any such agreement, or to enter into any new agreement at all, or a new agreement so radical as to completely change the written contract from a recourse to a non-recourse document. There was no evidence indicating that Glass had any authority to exonerate the appellant from the liability which was absolute under its contract of guarantee. The only evidence in the case is that he was at that time secretary of the company and general manager (Case, p. 45, ll. 1-20), but what his duties were does not appear.

In *Titus & Scudder vs. Cairo and Fulton R. R. Co.,* 37 N. J. Law, 98, the Supreme Court held:

> "The act of a president or other officer, unless it is shown to pertain to his official duty, or to be within the scope of his employment, cannot be regarded as the act of the corporation, and is not binding upon it."

If this is true as to the act of a president of a corporation, it is certainly true, with greater force, to the act of a secretary.

This is well demonstrated by the decision in *Harris vs. Congress Hall Hotel Co.*, 76 N. J. Law, 367, affirmed by this Court in 77 N. J. Law, 800, on the opinion of the Supreme Court, where it was held:

> "The law does not ordinarily imply in the secretary of a business corporation the power *ex officio* to bind the company by his act, though, of course, the corporation may become subsequently bound by ratification. He cannot, in the absence of a special authorization, accept a surrender of a lease given by the corporation to its tenant and bind the corporation to pay the wages of the employes of the lessee. He may, of course, have larger powers by special appointment from the directors, and evidence of such powers may be found in the circumstances of the particular case" (Syllabus by the Court).

If in the *Harris* case the secretary had no power in the absence of a special authorization, to accept a surrender of a lease given by the corporation to its tenant and bind the corporation, then in the case at bar the secretary had no right to exonerate a party to a contract from liability, whose liability was absolute and unconditional under the terms of the contract. To tolerate any such situation would enable a

secretary to absolutely destroy a whole corporation, without the slightest semblance of any authority.

In *Scott vs. New York Filling Co.,* 79 N. J. Law 231, the Supreme Court, in an opinion by the late Chief Justice Gummere, held:

> "It is claimed on behalf of the plaintiffs that their original proposition was superseded by the verbal arrangement afterward entered into between them and the defendant company's secretary. We think this contention cannot be supported. The secretary had no authority by virtue of his office to alter the terms of the contract made by his company. So far as the proofs show no special authority was conferred upon him by the company for this purpose. Nor do the proofs show any knowledge on the part of the company, or its board of directors, that the secretary had attempted to make any alteration, and, consequently, no ratification by the company of this action on the part of their secretary can be implied."

The same is true in the case at bar.

Even the president of a corporation, although its executive head, is not empowered to bind the corporation in all of its business affairs.

> *Economy Auto Supply Co., Inc., vs. Fidelity Union Trust Co.,* 105 N. J. Law, 206.

The precise question was involved in *Interstate Chemical Co. vs. James Leo Co.,* 94 N. J. Law, 513, decided by our Court of Errors and Appeals, where the Court, in dealing with the authority of a sales manager to bind a corporation, said:

"The first question is whether Ribakoff, the sales manager, had any authority to alter the terms of a written contract made by his principal. The mere fact that he was the sales manager gave him no such authority; and there was no attempt to prove an express authorization.

"The second question is whether there was any testimony justifying the conclusion reached by the Court that Ribakoff was held out by the plaintiff company, as authorized to make this change in the original contract. There is an utter absence of proof in support of such a conclusion. It does not appear that he ever before attempted to change any original contract.

"Lastly, as to the finding of the Trial Court that there was a ratification of the contract, as modified by Ribakoff, by the plaintiff, we have been unable to find any testimony or circumstance which will permit an inference that the plaintiff had any knowledge that the original contract had been altered, until an attempt was made by the defendant to deliver the boxes to the plaintiff all in one color." (Our italics.)

The same is true even as to a superintendent. In *Hall vs. Passaic Water Co.*, 83 N. J. Law, 771, this Court held:

> "A corporation is not bound by the agreement of a superintendent which is not shown to be within the scope of his express or implied authority, which is not in the course of the ordinary business of the company, and which it has not ratified, acquiesced in or knowingly profited by" (Syllabus by the Court).

THIRD. *The question calls for a conclusion*

and not for facts upon which the jury might find whether an agreement was actually entered into between the plaintiff and the defendant. Whether or not an agreement was made is a conclusion depending upon facts which must form the basis for such conclusion. Glass was not asked to state what conversation, if any, was had between McCrane and some authorized representative of the Superior Finance Corporation, subsequent to the execution of the guarantee, from which the jury would be permitted to decide whether a subsequent agreement had been entered into. He was asked whether *"a new agreement"* was subsequently entered into. Counsel for appellant attempted to have the witness decide a matter which was within the jury's sole province to determine.

In *Sutro vs. Jacobson,* 96 N. J. Law, 555, our Supreme Court, whose opinion was adopted by this Court on appeal, declared:

> "The first point argued by the appellant is that the Trial Judge illegally excluded testimony offered by the defendant on the cross-examination of one of the plaintiffs. The purpose of this evidence, as the defendant contends, was to show that the plaintiffs were acting as agents for a syndicate which was endeavoring to dispose of the bonds. This evidence was overruled upon the ground that *the plaintiff could not establish or disavow the agency as a conclusion of law, but that the testimony should be limited to the facts by which the alleged agency was established. This we think was correct, because the agency depended upon the legal conclusion to be drawn from facts, and not from the assertion or conclusion of the witness."* (Our italics.)

So here, the witness Glass could not establish the making of a new agreement "as a conclusion of law." His testimony had to be limited to the facts by which the alleged new agreement was sought to be established, just as in the cited case the testimony of the witness had to be limited to the facts by which the alleged agency was established. The making of a new agreement "depended upon the legal conclusion to be drawn from facts, and not from the assertion or conclusion of the witness."

FOURTH. *The question was leading.* It was discretionary with the Trial Judge to reject it as such. The allowance or rejection of a leading question is within the Trial Judge's discretion.

In *Casey vs. Atlantic City & S. R. Co.,* 100 N. J. Law 376, this Court held:

> "The objection was that the question was leading and not the proper form of question. The question is leading, but it is in the discretion of the Trial Judge to permit or deny the use of such questions, and it is not error, unless there is a clear abuse of discretion and we find none here."

In the case at bar, there is no claim made now, and there was none made at the trial, that there was an abuse of the Trial Court's discretion in ruling on this question.

So, in *Reilly vs. Lobdell,* 103 N. J. Law 200, this Court, in dealing with the admission or rejection of a leading question, held:

> "* * * its admission or rejection was a matter resting in the discretion

> of the Trial Court and affords no ground for disturbing the judgment under review, * * *."

Where a leading question was allowed to be put to a witness in *Re McCraven*, 87 N. J. Eq. 28, the late Chancellor Walker held:

> "The gravamen of a complaint may not be proved by an omnibus question, which would, in and of itself, permit a witness to establish the case; that may only be done by questions calling for facts, which should not be leading questions or call for conclusions." (Syllabus by the Court).

FIFTH. *There was no consideration for the alleged agreement, and it was not even contended that there was consideration.* Obviously, where parties to a written contract are each bound to do certain things, a promise or agreement to modify or entirely nullify the agreement must be based upon a lawful and valuable consideration. By the question as framed, there was no attempt to show that the alleged new agreement was founded upon a lawful and valuable consideration, or any consideration, and no attempt to inquire of the witness whether there was such consideration.

In *Titus & Scudder vs. Cairo and Fulton R. R. Co., supra,* it was held:

> "An agreement to engraft new terms upon an existing contract not binding, if without consideration" (Syllabus by the Court).

And the opinion by the Court in that case reads:

> "No consideration being shown for

> such new undertaking, it will not be binding upon the plaintiffs, and they may recover on the original contract."

To the same effect is *Sommers vs. Myers*, 69 N. J. Law 24, decided by our Supreme Court:

> "The same is true with regard to the statement made by him to the effect that the promise to remit royalties, if made, was without consideration to support it. These two matters being the only ones set up by the defendants, at the trial, either in bar of the action or in reduction of the plaintiffs' claim, there was no error in the direction of a verdict for the full amount sued for by the plaintiffs."

In *Moneyweight Scale Co. vs. Vansciver*, 76 N. J. Law 215, on the trial of an appeal where, after a writen contract providing for the delivery to the purchaser of a chattel "as soon as possible" by the vendor had been executed by the parties and delivered, the agent of the vendor verbally promised to deliver such chattel within 10 days from the date of the contract, the Supreme Court said:

> "We think that there was error in allowing this testimony, as the promise was not supported by any consideration. *Titus vs. Cairo & Fulton R. R. Co.*, 37 N. J. Law 98."

SIXTH. *It was established by the same witness, Glass, by his answer to another question that there was not a new agreement subsequently entered into, and, therefore, the ruling on the question now under consideration becomes immaterial.* When Glass was asked a question which was not leading, he could and

would have said that there was a new agreement subsequently entered into, if in fact there had been one, but there being none, he made no mention of it, viz:

> "Q. After you executed this agreement in writing what did you do then? A. Why, we issued a check to the McCrane-Reo Company" (Case, p. 48 bottom and 49 top).

The same occurred with regard to another question put to the witness, Glass, on direct-examination, and in answer to this question, he replied, viz:

> "Q. Now, then, were you ever present when there was a conversation between Mr. McCrane, Mr. Slaff, and yourself subsequent to the execution of the original agreement? A. I don't remember any particular conversation. We had many."

So that if there was any error in ruling on the question under consideration, it was cured by the questions that followed and the answers given by the same witness.

SEVENTH. *The question was properly rejected in any event, because it was not within the issues—it was not set up as a defense in the answer that the original agreement was substituted by a subsequent agreement, changing the transaction from a recourse to a non-recourse transaction.* In the answer (Third and Fourth Defenses), it is claimed that a custom arose and existed between the parties, that where the note is made payable direct to the plaintiff without any endorsement by the defendant, it was understood that the defendant was absolved and released from any further

claim arising out of the transaction, and that this note was made direct to the plaintiff, and was not endorsed by the defendant. This is far from saying that subsequent to the making of the original contract, a new agreement was made, vitiating and changing the original agreement.

The sixth defense of the answer was that *at the time* of the assignment of the contract mentioned in the complaint and notwithstanding the terms of said contract, there was an express agreement between the plaintiff and the defendant, that the transaction was without recourse to or liability against the defendant. Now, if at the time of such assignment there was a written agreement, it was not produced at the trial, and is not in the printed record. It was not produced because there wasn't any. It was not claimed at the trial that there was any other written agreement.

If, when the assignment and guarantee was executed, there was a verbal agreement in existence (there was no claim made at the trial that there was such an agreement in existence), then it was not admissible because under the parol evidence rule, all prior negotiations are merged into the written contract, and are extinguished thereby, the rule being that a written contract may not be altered, modified or added to, by parol.

> *Naumberg vs. Young,* 44 N. J. Law 331 (Court of Errors and Appeals).

In any event, by the question put to the witness, counsel for the appellant inquired whether there was any new agreement *subsequently en-*

tered into, whereas by the sixth defense of the answer, it was not alleged that there was any new agreement subsequently entered into, but that *at the time of the assignment of the contract* mentioned in the complaint, there was an express agreement. So that it is clear that there was no defense set up by the answer to the effect that subsequent to the execution of the original contract of assignment and guarantee of the conditional sales agreement, there was any new agreement, vitiating the original agreement, or even modifying it to any extent. It was not alleged in the answer that there was any new agreement subsequently entered into to the effect that the transaction should be changed from a recourse to a non-recourse transaction.

EIGHTH. Lastly, we add that it is well to keep in mind that a correct decision or ruling will not be disturbed even where the Trial Judge gave a wrong or insufficient reason, one of the latest decisions on the subject being *Security Trust Co. of Pottstown, Pa., vs. Anderson,* 110 N. J. Law 503, opinion by Mr. Justice Parker, where this Court held:

> "A judgment brought up for review will be affirmed, if correct on any legal ground, though another reason was assigned in the court below."

To the same effect is *McMichael vs. Horay,* 90 N. J. Law 142 (Court of Errors and Appeals), where it was held:

> "A court of appeals may affirm a judgment, on ground other than that upon which the decision was rested in the court below, if the decision be correct" (Syllabus by the Court).

And in *McCarty vs. Town of West Hoboken*, 93 N. J. Law 247, this Court held:

> "When on appeal it is found that the court below reached a right result, even if upon a wrong reason, the judgment should not be disturbed; therefore errors may be assigned upon matters in the record only, and not upon the reasoning which induced the rendering of the judgment under review" (Syllabus by the Court).

What we have already said applies with full force to the following question asked of the appellant, Joseph M. McCrane:

> "Q. Now, then, did you ever have any definite agreement between the officers of the Superior Finance Corporation or with any of the officials of the Finance Corporation about this agreement being a recourse or without recourse deal" (Case, p. 60, ll. 10-15).

Nothing more need be said about this question because counsel for appellant in their brief say that their argument advanced on the first question is likewise directed to this one. They say nothing more about it. What we have already said concerning the other question, should, we believe, be a sufficient answer to this one.

POINT III.

The Trial Court did not err in certain rulings.

THIRD GROUND OF APPEAL.

There was no error in the refusal to admit in evidence Exhibit D-1 for identification, consist-

ing of two "audits." Appellant endeavors to convey the impression that these audits indicate which transactions were with recourse and which were without recourse. This is not so, however.

James F. Welch, a witness for the appellant, and who prepared the audits, testified that they portrayed the condition of the plaintiff's business at the time of the making of them. "Q. And, in your opinion, they portray the true portrayal of the condition at the time of these audits—the condition of this business at the time of your audit? A. They do" (Case, p. 21, ll. 12-15). In other words, they show the result of an inventory taken of the company's business—its assets as well as its liabilities.

An examination of the audits shows that they contain a report to the company of the amount of the cash in banks, loans receivable, notes receivable, mortgages receivable, loans secured by dealers' endorsements on notes, as well as loans not so secured, repossessed cars, and the correct estimated market value thereof, notes payable and statement of income and expense and surplus for stated periods, comparative balance sheets (Exhibits D-1 for identification [Case, p. 79] and Exhibit D-2 for identification [Case, p. 86]).

It is important to observe, however, that these audits do not show which conditional sales contracts were guaranteed and which were not. In other words, these audits were made in an endeavor to ascertain as nearly as possible the net worth of the company, taking into consideration the estimated assets and estimated lia-

bilities, and in order to arrive at such an estimated net worth of the company, estimated book values were placed on repossessed cars (Case, pp. 80 to 84, pp. 87 to 90).

Aside from this, the rights and liabilities of the parties to a written contract depend upon the terms of that contract. The contract of assignment and guarantee of the conditional sales agreement upon which the plaintiff's action is based is clear, explicit and unambiguous, and a construction thereof as to the rights and liabilities of the parties does not depend upon any extrinsic evidence, and none need be or can legally be supplied.

Appellant says that in these audits, a reserve loss was set up of $397 on this car, but that is only for the purpose of ascertaining the net value of the company's assets, and is arrived at by estimating the market value of the car at the time.

There was no dispute of the true balance due the plaintiff on this guarantee. This was conceded by the appellant's witness, Glass, in whose handwriting the company's books were kept. He admitted that these books show that the only payments made are those testified to by Slaff, the president of the company, and that the only credits to which the appellant are entitled are those given him by Slaff, and that according to the books, the true balance due is as claimed by the plaintiff (Case, p. 57).

Actually, although an estimated market value was placed on this car at the time when the audits were made, the car has never been resold and nothing was ever realized on it (Case, p. 24, ll. 20 to 40; p. 41, ll. 1-30).

SECOND GROUND OF APPEAL.

Appellant's counsel asked the witness, Slaff, whether in the audits that were made, it was indicated that the company had taken a loss of $397 (case, p. 38, ll. 25-30). In the first place, as already indicated, that sum was arrived at by estimating the market value of the car at the time when the audits were made. And in the second place, the audits were not in evidence. It was improper, therefore, to read into the record something claimed to appear in these audits, when the audits themselves were not admitted in evidence, and when at the time when the question was asked, no offer had yet been made to admit these audits in evidence.

Aside from this, after this question was overruled, counsel for appellant again asked the same witness substantially the same question, and it was answered. The question objected to reads:

> "Q. And is it not true or doesn't it appear on this page as the records of your company that the loss taken on that is $397? (case, p. 38, ll. 25-30).

The same witness answered the following questions:

> "Q. Mr. Slaff, where it says here that the balance due on the loan is $897 and the loss taken is $397 and the market value of the car $500, what do you call this $397, a cash loss taken or what? A. This audit is not made for the purpose of—
>
> "Q. Now, will you answer the question, please? Do you call this loss of $397 that you have here in your books, making the

market value of that car as $500—do you call that a cash loss or what kind of a loss?

(Colloquy between Court and counsel.)

"Q. What does the $397 show, a cash loss taken on this car? A. No, this $397 shows just by the audit our assets. We bought the car for one dollar.

"Q. Yes. A. The car has no value even today.

"Q. I am not talking about today; I am talking about 1928 when this audit was made. Did you consider it worth a dollar or five hundred?

"Mr. Rinzler: I object to that. That doesn't make any difference at all.

"Q. Was it worth a dollar or five hundred?

"The Court: What they did, not what they did not.

"Q. So this was just a book loss; it wasn't a cash loss? A. That was an audit that we are making every time for ourselves, to establish some assets about our company.

"Q. All right. Then, when we refer to the other one a month or so later, that was established the same way as the other one? A. Yes" (case, p. 39, ll. 10-40; p. 40, ll. 1-20).

So, not alone is the question objected to not material, but it was later asked again and answered several times, and as a result, if there was any harm or error in the rejection of the question in the first instance, it was cured by the allowance of similar questions later put to the same witness and answered by him, apparently to the satisfaction of the examining counsel.

FIFTH GROUND OF APPEAL.

In striking out certain testimony, the Trial Court did not err. In the first place, under this ground of appeal, appellant cites a considerable portion of the testimony as being stricken out (case, pp. 2 to 5), yet the only testimony that was stricken out was what was shown or appears on the account card, viz:

> "Mr. Rinzler: I respectfully move, your Honor, that this testimony be stricken out, as to what he testified was shown or appeared on the card.
>
> "The Court: It will be stricken out, except with regard to payments.
>
> "Mr. Rinzler: That is right" (case, p. 55, ll. 29-38).

No other testimony was stricken out, and no motion was made to strike out any other testimony. Surely, whether the card contained a notation as to whether this transaction was marked with or without recourse was not material or evidential because it was not part of the contract, and the contract being unambiguous, clear and explicit, it is the only document from which the Court might determine whether or not this was a with or without recourse transaction. The contract of assignment contained a contract of guarantee which could not be altered by what might appear to be noted on an account card. The account card was not a part of the contract or even referred to therein; it was merely a record of the payments made and the dates when these payments were made. The witness, Glass, admitted that the account card did not contain anyone's signature (case, p. 56, ll. 18-20).

SIXTH GROUND OF APPEAL.

What we have already said with regard to the second and fifth grounds of appeal, seems to be in our judgment a satisfactory answer here. The contract controls. The account card could not alter the rights and liabilities of the parties as determined by the written contract of guarantee. *Gaddis vs. Gaddis,* 105 N. J. Misc. 521, cited in appellant's brief, is not applicable. If the account card was a piece of physical evidence, it was evidence only of a bookkeeping record of payments. But the contract of guarantee which the appellant signed and upon which this action is based is "the piece of physical evidence" which controls, and from which the rights and liabilities of the parties are determined.

EIGHTH GROUND OF APPEAL.

Whether the appellant was requested to make payments is immaterial. He knew what his obligation was under the contract of guaranty and when the payments were due. Moreover, the uncontradicted written evidence is that payments were requested. For example, on May 19, 1927, the plaintiff wrote the appellant a letter, Exhibit P-5 (case, p. 77), which concluded as follows: "Unless we hear from you by June 1, 1927, we will repossess the car and look forward to you for payment in full with all expenses"; and a letter, Exhibit P-6 (case, p. 77), written on June 22nd, 1927, concludes as follows: "we will look to you for the balance due us plus interest"; and a letter, Exhibit P-7 (case, p. 78):

"We still have the Reo sedan in our possession. Unless you will redeeem same within twenty days from the above date, we will start suit against you.

"Hoping you will avoid the additional expense, we remain."

Conclusion.

We respectfully submit that there was no error requiring a reversal, and that the judgment of the Supreme Court should be affirmed, with costs to be taxed in favor of the plaintiff-appellee and against the defendant-appellant.

Respectfully submitted,

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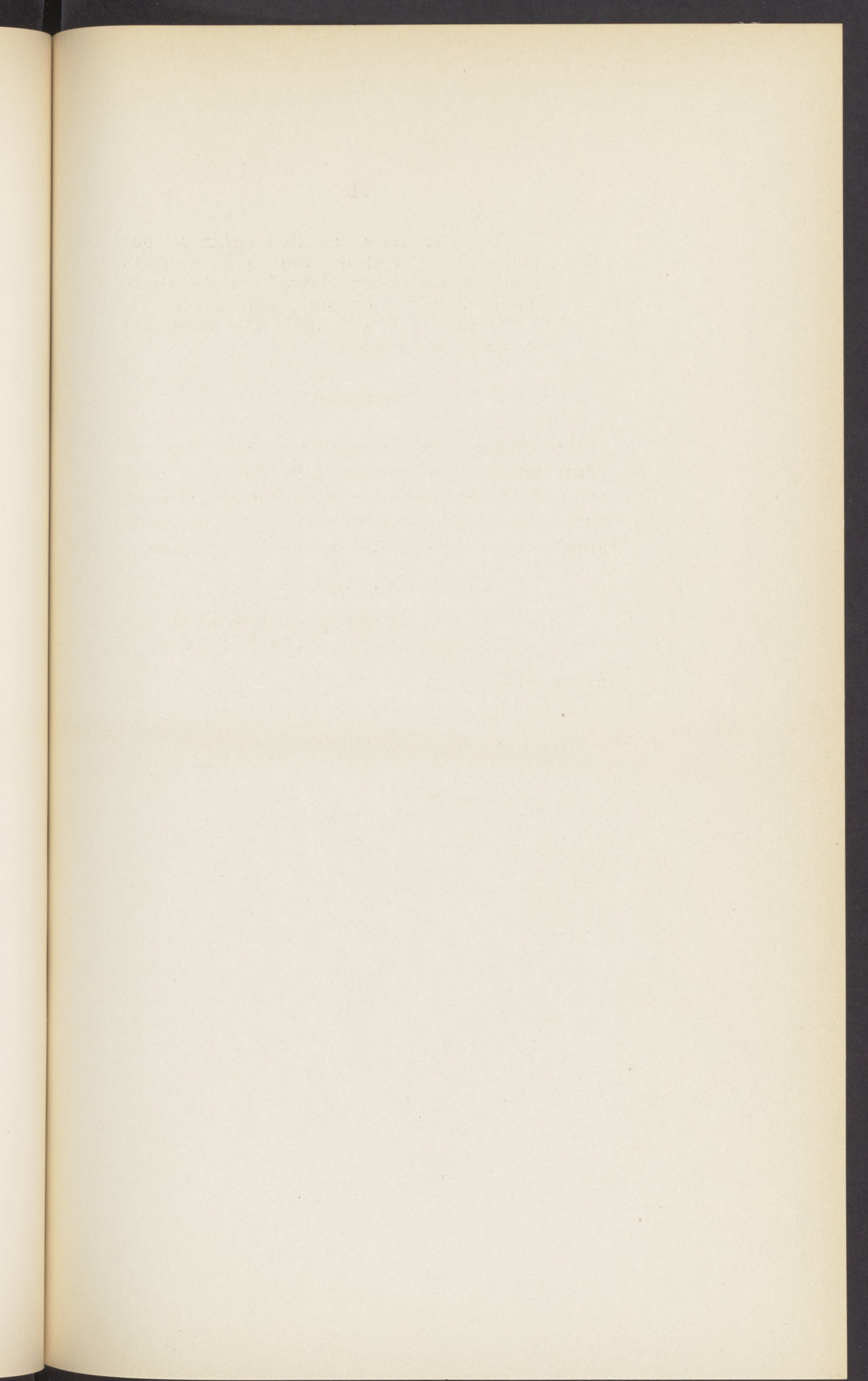

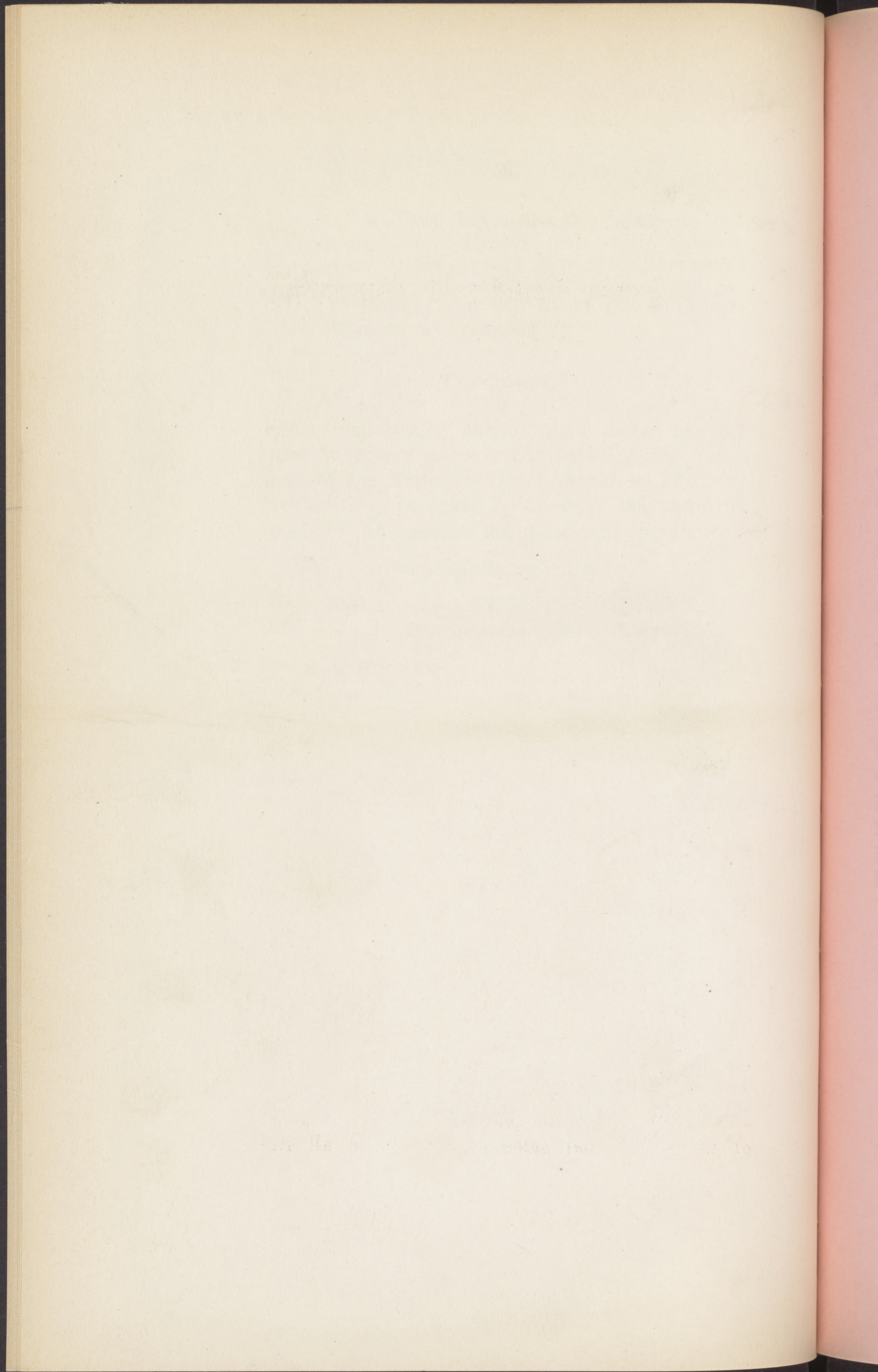

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